UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

LIBERTY UNIVERSITY, Inc., a Virginia Nonprofit corporation, MICHELE G. WADDELL, DAVID STEIN, M.D., JOANNE V. MERRILL, DELEGATE KATHY BYRON, and JEFF HELGESON

Plaintiffs

v.

TIMOTHY GEITHNER, Secretary of the Treasury of the United States, *in his official capacity,* KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in *her official capacity,* HILDA L. SOLIS, Secretary of the United States Department of Labor, *in her official capacity,* and ERIC HOLDER, Attorney General of the United States, *in his official capacity,*

Defendants

Case No.: 6:10-cv-00015-nkm

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF FACTS

Liberty University and five individuals from throughout the nation are asking this Court for declaratory and injunctive relief to remedy the substantial constitutional injuries they have and will incur as a result of Congress' unprecedented reach into the private health care decisions of American citizens under the Patient Protection and Affordable Care Act of 2009 (the "Act") and the Health Care and Education Reconciliation Act of 2010 (the "Reconciliation Act"). (Second Am. Cpt. ¶ 1). Promoting an unparalleled expansion of the Commerce Clause, the Act requires that, with few exceptions, all individuals obtain and maintain what is termed (but not defined) "minimum essential coverage" for themselves and their families (the "Individual Mandate"), and employers of 50 or more people must provide "minimum essential coverage" for their employees ("Employer Mandate") or face significant monetary penalties. (Second Am. Cpt. ¶¶ 42-61). The question of what will qualify as "minimum essential coverage" under these mandates is left to the discretion of Defendant Health and Human Services Secretary Kathleen Sebelius, but must at least include ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services, including behavioral health treatment, prescription drug coverage, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services, chronic disease management and pediatric services, including oral and vision care. (Second Am. Cpt. ¶ 43). The Act further establishes caps for out of pocket costs and certain levels of coverage denominated as "bronze," "silver," "gold," and "platinum." (Second Am. Cpt. ¶¶ 44, 45).

Individuals who do not qualify for one of the four exceptions and do not have "minimum essential coverage" in place by January 1, 2014, will be subject to a graduated penalty payable as part of their income tax return. (Second Am. Cpt. ¶¶47-48). The only exceptions to the Individual Mandate are those who are incarcerated, those who are not legally present in the

country, and those who qualify under two very limited "religious exemptions." (Second Am. Cpt. ¶ 53). Those "religious exemptions" are for (1) members of religious sects which have been in existence continually since December 31, 1950 and have conscientious objection to acceptance of public or private health insurance or retirement benefits and (2) members of "healthcare sharing ministries," defined as 501(c)(3) organizations in existence since December 31, 1999, which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs. (Second Am. Cpt. ¶¶ 54, 56).

Under the "Employer Mandate," effective January 1, 2014, an employer which does not offer "minimum essential coverage" to its employees will pay a penalty equal to $2,000 per employee per year if *any* employee purchases alternative coverage and receives a federal tax subsidy. (Second Am. Cpt. ¶ 60). Furthermore, if an employer offers at least "minimum essential coverage" to its employees, but it is deemed to not be "affordable" (also subject to later definition) under the Act so that *any* employee receives a federal subsidy, then the employer will be assessed a penalty in the amount of $3,000 per employee per year. (Second Am. Cpt. ¶ 61).

Liberty University is a private Christian university which presently enrolls approximately 12,000 residential students and more than 50,000 students through on-line programs. (Second Am. Cpt. ¶¶ 22, 27). Liberty University employs approximately 3,900 full-time and 1,242 part-time workers. (Second Am. Cpt. ¶ 28). Liberty University is self-insured and makes various healthcare reimbursement options available to qualified employees under a salary reduction program in which 1,879 employees have chosen to participate for themselves and/or their dependents. (Second Am. Cpt. ¶ 29). As a result, approximately 4,340 people are covered by the various healthcare reimbursement options. (Second Am. Cpt., ¶ 29). Liberty University has chosen healthcare reimbursement options that provide the type and level of health care services

that are appropriate to its employees' personal and financial situations and are consistent with the University's core Christian values. (Second Am. Cpt. ¶¶ 31-33). Under the Employer Mandate Liberty University will be required by January 1, 2014 to have in place health care insurance that the federal government defines as "minimum essential coverage" regardless of whether the health care services contained within that definition are necessary or desirable for the University's employees, affordable to the University or its employees or comport with the University's and employees' Christian values. (Second Am. Cpt. ¶¶ 31-33). The University offers healthcare coverage to its full-time employees, but nevertheless assuredly faces significant penalties, depending upon how the federal government defines "minimum essential coverage" and the affordability index, in that the University's coverage will almost certainly be determined insufficient to satisfy the federal definition of "minimum essential coverage" or unaffordable under the Act. (Second Am. Cpt. ¶ 62). Because the services to be included in "minimum essential coverage" will be defined by the government, not consumers, and will be mandatory, the University and its employees cannot prevent their rights from being infringed by having to contribute to and/or associate with those who contribute to medical procedures, including abortion, that violate their deeply held religious beliefs. (Second Am. Cpt. ¶¶ 70-76). The University also faces significant financial hardship from having to either adjust its health care benefits or pay significant penalties if adjustments are not made or are inadequate. (Second Am. Cpt. ¶ 62).

Plaintiffs Michele G. Waddell and Joanne V. Merrill have chosen not to purchase health insurance and do not desire health insurance coverage, but instead take care of health care costs as they arise. (Second Am. Cpt. ¶¶ 34, 38). They are Christians who believe in living out their sincerely held religious beliefs in everyday life, including in the lifestyle choices they make.

(Second Am. Cpt. ¶¶ 71-76). Ms. Waddell and Mrs. Merrill have sincerely held religious beliefs that abortions, except where necessary to save the life of the pregnant mother, are murder and morally repugnant, that they should play no part in facilitating, subsidizing, easing, funding, or supporting such abortions because to do so is evil and morally repugnant complicity, and that they should not formally associate with those who would facilitate, subsidize, ease, fund or support such abortions. (Second Am. Cpt. ¶¶ 71-76). Under the Individual Mandate Ms. Waddell and Mrs. Merrill are faced with either paying for "minimum essential coverage" that is unnecessary and undesirable or paying significant penalties. (Second Am. Cpt. ¶¶ 71-76). The Individual Mandate requires that Plaintiffs purchase insurance that qualify as "minimum essential coverage" as defined by the government with no ability to opt out of procedures which violate their sincerely held religious beliefs, leaving them in the position of having to either pay a penalty or pay for something that does not comport with their religious beliefs. (Second Am. Cpt. ¶¶ 71-76).

Plaintiff Dr. David Stein is a physician who has to comply with additional, as yet un-enumerated, regulations as a condition of receiving reimbursement for treating his patients who have health coverage through Medicaid and Medicare. (Second Am. Cpt. ¶ 37). With no standards to guide the government's determination of appropriate quality of care to cost ratios, Dr. Stein is uncertain about his ability to provide appropriate care to his patients at a reimbursement rate that will permit him to continue his medical practice. (Second Am. Cpt. ¶ 37).

Plaintiff Kathy Byron is a member of the House of Delegates of the Commonwealth of Virginia who voted for Bill H.10, which became effective July 1, 2010 and amended the Code of Virginia to provide that no resident of Virginia would be compelled to purchase insurance.

(Second Am. Cpt. ¶ 39). Plaintiff Jeff Helgeson is a city councilman representing the district where Liberty University is located who is self-employed and subject to the Act's requirement that he purchase what the federal government defines as minimum essential health insurance coverage or pay penalties. (Second Am. Cpt. ¶ 41). None of the Plaintiffs qualifies for the limited religious exemptions under the Act nor falls within the other exceptions to mandated insurance coverage or civil penalties. (Second Am. Cpt. ¶¶ 55-57). They are asking this Court to declare the Act unconstitutional and to enjoin its implementation.

LEGAL ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS WHO SATISFY THE STANDING CRITERIA UNDER *LUJAN* AND ASSERT RIPE CLAIMS THAT ARE NOT BARRED BY THE ANTI-INJUNCTION ACT.

Plaintiffs meet Article III standing requirements and have stated claims that are ripe for judicial review. Plaintiffs' constitutional challenge to a comprehensive health insurance law that imposes penalties for noncompliance is not barred by the Anti-Injunction Act's (26 U.S.C. §7421(a)) prohibition against challenges to tax assessments. Notably, when faced with similar arguments from Secretary Sebelius in the Commonwealth of Virginia's challenge to the Act, Judge Hudson of the Eastern District of Virginia denied the motion. *Virginia ex. rel. Cuccinelli v. Sebelius*, 2010 WL 2991385 (E.D. Va. 2010). Defendants attempt to distinguish Judge Hudson's ruling on the basis that it involved a public entity, the Commonwealth of Virginia, while this case involves private plaintiffs. (Memorandum in Support of Motion to Dismiss, p. 6 n.1). While Judge Hudson's analysis of the standing issue might be distinguishable on that basis, his analysis of the ripeness issue and the Anti-Injunction Act are equally applicable to this case and provide instructive guidance for this Court's analysis.

A. The Act's Effects On Plaintiffs Readily Satisfy The Ripeness Test.

The fact that the Act's mandatory compliance provisions become effective on January 1, 2014 does not mean that Plaintiffs' claims are unripe. As Judge Hudson said in *Cuccinelli*:

> While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements. More importantly, the Commonwealth must revamp its health care program to ensure compliance with the enactment's provisions, particularly with respect to Medicaid. This process will entail more than simple fine tuning. Unquestionably, this regulation radically changes the landscape of health insurance coverage in America.

Cuccinelli, 2010 WL 2991385 at *8. Just because the Individual and Employer mandates do not go into effect until January 1, 2014, does not mean that Plaintiffs have not already and will not feel the effects of this new regulatory regime now. Plaintiffs cannot maintain the status quo until December 31, 2013 and then suddenly comply with the Act. Instead, they have to re-arrange their financial affairs to either provide for "minimum essential coverage" (whatever that means) or to pay hundreds or thousands of dollars a year in penalties for themselves and their dependents, or in the case of Liberty University, pay hundreds of thousands of dollars a year for its employees. For example, if even one of the University's 3,900 employees has to seek federal tax subsidies, the University will face a $1,170,000 penalty. Budgeting for such an expense for a nonprofit educational institution cannot be postponed until the day that the law's provisions become effective.

In such situations, the Supreme Court has recognized that pre-enforcement challenges are appropriate and satisfy both aspects of the ripeness doctrine – the issues are fit for judicial

review, and withholding court consideration will cause hardship to the parties. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (describing standard); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (approving pre-enforcement challenge to obscenity statute). In *American Booksellers*, as here, the government argued that the plaintiffs' case was premature because the challenged statute had not yet become effective. *Id.* at 392. The Court disagreed, noting that if plaintiffs' interpretation of the statute was correct, then they would have to take significant and costly measures or risk criminal prosecution. *Id.* "We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise." *Id.* at 393. "We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." *Id.* In addition, as is true here, the plaintiffs in *American Booksellers* were alleging constitutional, not merely economic, injury. *Id.* Similarly, the Court found that private schools' pre-enforcement challenge of a compulsory public education bill was not premature in *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925).

> The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.

Id. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (citing *Pierce*, 268 U.S. at 536). "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Id.* (citing *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). A critical factor

in the Court's finding that the pre-enforcement challenge was ripe was the fact that "decisions to be made now or in the short future may be affected by whether or not the conveyance taking issues are now decided." *Id.* at 143-144. The Court has held that a case (such as this one) which presents purely legal questions is more fit for immediate review than is one with unresolved factual issues. *Abbott Labs*, 387 U.S. at 149.

The second aspect of ripeness, harm to the plaintiffs, is satisfied when the challenged law places plaintiffs in a very real dilemma, has a direct effect on the plaintiffs' day to day business or requires an immediate and significant change in the plaintiffs' conduct of their affairs. *Id.* at 152-153. When a statute poses an imminent, unwelcome dilemma for the plaintiffs, then it poses a hardship, even when enforcement of the provision will be delayed. *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Dev. Comm'n,* 461 U.S. 190, 201-202 (1983) ("*PG&E*"). In *PG&E*, the Court held that requiring the utility industry to continue operations without knowing whether the state's waste disposal moratorium was valid "would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California." *Id.* In a case such as this one seeking a declaratory judgment on the validity of legislation, the question is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Lake Carriers' Ass'n v. Macmullan*, 406 U.S. 498, 506 (1972). "Immediacy" and "reality" do not relate to when a law becomes effective, but to whether it creates a present obligation to cease certain conduct, re-arrange financial or other affairs or make other significant changes to comply with a challenged law. *Id.* at 506-507. The conflict between the required conduct and possible invalidity of the law is what creates a ripe, justiciable controversy. *Id.* at 507.

That is precisely the scenario presented in this case. The Act was signed into law on March 23, 2010. It has instituted sweeping changes in the health care industry, including placing mandates upon employers such as Liberty University state officials such as Kathy Byron, physicians such as Dr. Stein and individuals such as Michele Waddell, Joanne Merrill and Jeff Helgeson. Complying with those mandates will require significant and costly changes in the day to day business operations of employers and physicians and in the day to day financial planning for individuals. Passage of the Act has placed Plaintiffs on the horns of a dilemma–they must either begin extensive reorganization of their personal and financial affairs or risk being liable for thousands of dollars in penalties beginning in 2014. Plaintiffs also face the additional dilemma posed by the conflict with their deeply held religious beliefs and the Act's mandates regarding the type and amount of healthcare coverage they must carry and type of procedures they must pay for. Defendants' arguments that "any injury here is far from inevitable" and involves "contingent future events that may not occur as anticipated, or indeed may not occur at all," improperly focus solely upon the date that penalties will begin being assessed. (Memo in Support, p. 20). Defendants give no consideration to the significant lifestyle and occupational changes that will have to be made in order to meet the January 1, 2014 deadline. Defendants also do not explain how a law passed by both houses of Congress and signed by the President of the United States is a "contingent future event" that might not occur at all. As was true in *American Booksellers*, Defendants here do not allege that the Act will not be enforced as written, and this court has "no reason to assume otherwise." *American Booksellers*, 484 U.S. at 393.

Plaintiffs have alleged a very real and present fear that the Act will be enforced against them in a way that will cause constitutional injury. *See id.* They do not have to await the consummation of threatened injury on January 1, 2014 to obtain preventive relief. *Reg'l Rail*

Reorg. Cases, 419 U.S. at 143. That controversy is live and justiciable and Plaintiffs' claims are ripe for review.

B. Plaintiffs Meet The Tripartite Standing Requirements Under *Lujan.*

As is true in the ripeness context, the fact that the mandates will not be enforced until 2014 does not mean that they will not affect the Plaintiffs in the meantime. As Judge Hudson said, the Act radically changes the landscape of health care in the United States. *Cuccinelli*, 2010 WL 2991385. Such radical changes do not occur overnight, but require years of preparation, study and planning on the part of individuals, and particularly on the part of large employers such as Liberty University. Defendants assert that "the issue is not whether the provisions will affect someone. It is whether it will cause injury to *these plaintiffs*." (Memo in Support, p. 14 (emphasis in original)). Defendants are absolutely correct – the issue *is* whether the mandates will cause injury to these plaintiffs – and the answer is that they have and they will. The mandates have infringed upon Plaintiffs' individual liberty interests in choosing how they will pay for medical care, what kind of care they will seek and the types of benefits they will pay for. (Second Am. Cpt. ¶¶ 34, 38, 71-76). The right of Plaintiffs to live out their sincerely held religious beliefs in everyday life, including making choices in ordering their daily affairs has been infringed by passage of the Act and its mandates. (Second Am. Cpt., ¶ 71). That infringement occurred as soon as the Act was signed into law. January 1, 2014 represents the final realization of the extent of the infringement, when the government will exact penalties for failure to comply. It does not represent the starting point for some conjectural future injury.

In that way, Plaintiffs' allegations of injuries caused by the Individual and Employer mandates and other provisions in the Act are unlike the allegations found wanting in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Steel Co. v. Citizens for a Better Environment*, 523

U.S. 83 (1998) and *McConnell v. FEC*, 540 U.S. 93 (2003) *overruled in part on other grounds*, *Citizens United v. FEC*, 130 S.Ct. 876 (2010). In *Lujan*, the Supreme Court set forth the three-part test that has become the standard for analysis of Article III standing:

> The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"–an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.

Lujan, 504 U.S. at 560-561(citations omitted). "Particularized" means affecting the plaintiff in a personal and individual way. *Id.* at 560 n.1. "Imminent" harm is not precisely defined, but means at least that it is certainly impending. *Id.* at 564 n.2. An allegation of an injury at some indefinite future time, contingent upon acts that are at least partly within the plaintiff's own control does meet the definition of "imminent harm." *Id.* "In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* The *Lujan* Plaintiffs' claims that they had visited endangered species' habitats that were threatened by proposed development projects, intended to visit those sites again some day, and that the challenged projects would harm their ability to observe endangered species did not suffice to show "imminent harm." *Id.* at 564. "Such "some day" intentions–without any description of concrete plans, or indeed even any specification of when the some day will be–do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* By contrast, Plaintiffs' allegations here–that they have directed their financial and personal affairs in a way that lives out their faith and provides for their health care needs, and that the mandates prevent them from continuing (among others)–*do* describe

concrete rights and a concrete, date-specific threat to those rights that satisfies the *Lujan* standard.

Plaintiffs' claims are also unlike the claims found wanting in *Steel Company*. In that case, the Court did not reach a conclusion regarding whether the plaintiffs satisfied the injury in fact requirement because the plaintiffs could not satisfy the redressability requirement. *Steel Co.*, 523 U.S. at 105. The plaintiffs claimed that they were injured by the defendants' failure to provide environmental reports in a timely fashion. *Id.* "We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA[Emergency Planning and Community Right-To-Know Act of 1986]–or at least being deprived of it when one has a particular plan for its use–is a concrete injury in fact that satisfies Article III. And we need not reach that question in the present case because, assuming injury in fact, the complaint fails the third test of standing, redressability." *Id.* The plaintiffs sought a declaratory judgment that defendants violated the law, orders permitting inspections by plaintiffs and requiring timely reports provided to plaintiffs, payment of civil penalties and payment of attorneys' fees. *Id.* "None of the specific items of relief sought, and none that we can envision as "appropriate" under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting…." *Id.* at 105-106. While the request for civil penalties might be viewed as a type of compensation for plaintiffs, it was not. *Id.* at 106. "These penalties–the only damages authorized by EPCRA–are payable to the United States Treasury." *Id.* "In requesting them, therefore, respondent seeks not remediation of its own injury–reimbursement for the costs it incurred as a result of the late filing–but vindication of the rule of law–the 'undifferentiated public interest' in faithful execution of EPCRA. This does not suffice." *Id.* "Although a suitor may derive great comfort and joy from the fact that the United

States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* By contrast, in this case, Plaintiffs seek a declaratory judgment that the Act violates the United States Constitution and Religious Freedom Restoration Act so that it is null and void. (Second Am. Cpt, ¶ 38). Plaintiffs also seek an injunction against implementation of the Act. (Second Am. Cpt., ¶¶ 35-38). These remedies, if granted, would overturn the Act, and in particular the mandates that are the provisions that are causing Plaintiffs' injuries. Invalidating the law that has caused the constitutional violations will necessarily end the constitutional violations, and thereby redress the injuries.

Contrary to Defendants' assertions, Plaintiffs' claims are also unlike those found insufficient in *McConnell*. In that case, a senator challenged campaign regulations that might have affected him in five years, if he chose to run for re-election and if he made certain decisions immediately prior to the next election. *McConnell*, 540 U.S. at 224-26. The contingent nature of a claim that a regulation might affect future decisions that might be made if other decisions are made is a far cry from Plaintiffs' claims that a law is affecting their rights now and compelling them to change their conduct before January 1, 2014. Senator McConnell might have never sought re-election nor made other decisions necessary to trigger the campaign regulations and therefore never suffered an injury. *Id.* By contrast, Plaintiffs need not take any actions or make any decisions to have the Act's provisions apply. The Act is in effect now, and will be fully enforced on January 1, 2014. There are no uncertainties about the Act being applicable to Plaintiffs. Plaintiffs' rights have been affected and will continue to be affected unless the Act is enjoined and invalidated.

Plaintiffs have alleged actual and imminent, concrete, particularized invasions of their constitutional rights caused by enactment of the Act. A judgment declaring the Act null and void as violative of the Constitution and enjoining its implementation will redress Plaintiffs' injuries. Consequently, Plaintiffs have satisfied the three-part test in *Lujan* and have standing to pursue their claims.

C. The Anti-Injunction Act Does Not Bar Plaintiffs' Claims.

A plain reading of the Anti-Injunction Act reveals that it is inapplicable to Plaintiffs' claims. "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C.§ 7421(a). Most importantly, the payment for failing to obtain minimum essential coverage is not a tax, but a penalty, making the Anti-Injunction Act wholly inapplicable. "[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (internal citations omitted). On the other hand, a penalty imports the notion of a punishment for an unlawful act or omission. *Id.* "The two words [tax vs. penalty] are not interchangeable ... and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. LaFranca*, 282 U.S. 568, 572 (1931). Therefore, even if Congress places the payment in the Internal Revenue Code and Defendants refer to it as a "tax," it is not a tax if, as is true here, it exists to punish people for doing or failing to do something. The penalties at issue are triggered only if individuals and employers fail to comply with the law's mandate to obtain and maintain "minimum essential coverage." Consequently, they are punitive penalties, not revenue generating taxes subject to the Anti-Injunction Act.

Also, Plaintiffs are challenging the constitutionality of a comprehensive healthcare reform law, not attempting to halt the Internal Revenue Service's collection of taxes. As Judge Hudson noted when he rejected the same argument, "This Court can also not ignore the fact that the Commonwealth's Complaint does not challenge the penalty provision of the Patient Protection and Affordable Care Act, though the two undeniably act in tandem. Instead, the Complaint exclusively attacks the constitutionality of the mandate to purchase health care insurance." *Cuccinelli v. Sebelius*, 2010 WL 2991385 at *5 n.3. The same is true in this case. Plaintiffs are attacking the constitutionality of individual and employer mandates and associated provisions within the Act as ultra vires enactments which exceed Congress' enumerated powers and as acts which violate the First, Fifth and Tenth Amendments to the Constitution and the Religious Freedom Restoration Act. The eventual potential assessment of a penalty if Plaintiffs fail to obtain "minimum essential coverage" or to provide "affordable" "minimum essential coverage" to their employees by January 1, 2014 is only one, and not the most significant, of the injuries caused by the Act. Far more significant are the constitutional infringements already being experienced and yet to occur as various provisions in the Act are implemented over the next several years. (Second Am. Cpt., ¶¶ 81, 84, 85, 88, 105, 106, 114-119, 129, 142, 151, 159, 167-170, 175, 181). Plaintiffs are seeking redress for violations of fundamental constitutional rights, which the Supreme Court has found constitute irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). The loss of personal liberty, free expression, free association and other freedoms cannot be regained by receipt of a refund check.

Consequently, waiting for the penalty to become effective and then suing for a refund, as Defendants suggest, will not provide an adequate remedy for Plaintiffs' injuries. Therefore, as

Judge Hudson found in *Cuccinelli*, the Anti-Injunction Act does not apply. *Cuccinelli*, 2010 WL 2991385 at *5 (citing *South Carolina v. Regan*, 465 U.S. 367, 378 (1984)). The Anti-Injunction Act was "intended to protect tax revenues from judicial interference and to require that the legal right to the disputed sums be determined in a suit for a refund." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). Expanding upon the *Enochs* holding, the Supreme Court in *Regan* held that the Anti-Injunction Act was not intended to bar actions brought by aggrieved parties for whom Congress has not provided an alternative remedy, *i.e.*, a suit for a refund. *Regan*, 465 U.S. at 378. A suit for a refund is not an adequate remedy since Plaintiffs are challenging the constitutionality of the Act, not merely trying to halt collection of a tax. The penalties imposed under the Act are contingent upon failing to obtain and maintain "minimum essential coverage," so they might never be collected from Plaintiffs and never afford Plaintiffs the opportunity to sue for a refund. Plaintiffs' injuries do not arise from the potential assessment of a tax, but from the enactment of an Act that "radically changes the landscape of health insurance coverage in America," *Cuccinelli*, 2010 WL 2991385 at *8, in an unprecedented and, Plaintiffs assert, unconstitutional manner. Redressing those injuries will require more than suing for a tax refund. Therefore, even if the penalties could be regarded as taxes, Plaintiffs' claims would not be barred by the Anti-Injunction Act.

Plaintiffs have alleged concrete, particularized injuries which can be redressed by the declaratory and injunctive relief sought in this action. They meet the three-part test for standing under *Lujan*. The Anti-Injunction Act does not apply to Plaintiffs' claims. Consequently, Plaintiffs have standing and their claims are ripe for review. Defendants' motion to dismiss for lack of subject matter jurisdiction should be denied.

II. PLAINTIFFS HAVE MORE THAN SATISFIED THE PLEADINGS STANDARDS OF *IQBAL* AND *TWOMBLY* AS TO ALL OF THE CAUSES OF ACTION.

Plaintiffs' complaint exceeds the standards necessary to survive a Rule 12(b)(6) motion, even under the more stringent pleading standards of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). While *Iqbal* and *Twombly* called for more factual specificity in pleading, they did not change the underlying requirements for surviving a Rule 12(b)(6) motion. Plaintiffs need not provide detailed factual allegations, but must provide sufficient factual matter, accepted as true, to state a plausible claim for relief. *Twombly*, 550 U.S. at 570. Once a claim has been stated adequately, it may be supported by showing any state of facts consistent with the allegations in the complaint. *Id.* at 563. The Complaint must be construed in the light most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

As Judge Hudson said in *Cuccinelli*, "it is important to keep in mind that the Court's mission at this stage is narrow. To survive a Rule 12(b)(6) challenge, a complaint need only state a legally viable cause of action." *Cuccinelli*, 2010 WL 2991385 at *9. "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (1990)." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992), *cert. denied* 510 U.S. 828 (1993). With those concepts in mind, it is clear that Plaintiffs' allegations amply satisfy even *Twombly* and *Iqbal*, and that Defendants' Rule 12(b)(6) motion should be denied.

A. Plaintiffs' Claims Meet the Pleading Standards of Federal Rule of Civil Procedure 8 As Interpreted By The Supreme Court In *Iqbal* and *Twombly*.

Underlying Defendants' arguments regarding the merits of Plaintiffs' complaint is an assertion that the factual allegations are merely "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" which do not meet the standard established in *Twombly*. *See Iqbal*, 129 S.Ct. at 1949 (describing the *Twombly* standard). However, a review of Plaintiffs' allegations in the context of the allegations found insufficient in *Twombly* and *Iqbal* reveals the fallacy in Defendants' arguments.

Under F.R.Civ. P. 8, a plaintiff must provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). In *Twombly*, the Court explained that factual allegations cannot be merely labels, conclusions, or a formulaic recitation of the elements of a cause of action. *Id.* Instead, they must "nudge" a plaintiff's claims over the line from being merely possible to plausible. *Id.* at 570. A claim has facial plausibility when the plaintiff pleads factual content that permits the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. The Court said that the plausibility standard is not akin to a probability requirement, but asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* The *Twombly* plaintiffs failed this test when they alleged that defendants engaged in parallel conduct but failed to allege any actual agreements between the competitors that could support a conspiracy claim. *Id.* at 564. Plaintiffs did nothing more than state that the competitors' parallel conduct was "strongly suggestive of conspiracy." *Id.* at 567. That was not sufficient to "nudge their claims across the line from conceivable to plausible." *Id.* at 570.

Similarly, in *Iqbal*, the Court found that "respondent's complaint has not nudged [his] claims of invidious discrimination across the line from conceivable to plausible." *Iqbal*, 129 S.Ct. at 1951. The plaintiff in *Iqbal* alleged that the defendants adopted a policy approving restrictive conditions of confinement for post-September 11 detainees until the FBI cleared them of terrorism charges and attempted to show that that conduct amounted to impermissible discrimination on the basis of race, religion or national origin. *Id.* at 1952. Even if the allegations were accepted as true, they would not show or even intimate that the defendants purposefully housed detainees under restrictive conditions due to their race, religion or national origin. *Id.* All the allegations would plausibly suggest is that the nation's top law enforcement officers, in the aftermath of the September 11 attacks sought to keep suspected terrorist in the most secure conditions available until they could be cleared of terrorist activity, and that would not amount to impermissible discrimination. *Id.* Therefore, plaintiff's allegations did not cross the line from conceivable to plausible. *Id.*

That is not the case here. Plaintiffs do not merely allege disagreement with some of the provisions of the Act, but provide concrete examples of how the Act exceeds Congress' enumerated powers under the Constitution, infringe upon Plaintiffs' fundamental rights and violate the Religious Freedom Restoration Act. Plaintiffs allege that the Act, and specifically, the individual and employer mandates, exceeds Congress' authority to regulate interstate commerce in that it compels Plaintiffs to engage in involuntary commercial activity instead of regulating existing economic activity. (Second Am. Cpt., ¶¶ 96-100). Plaintiffs specifically allege the harm that they have suffered and will suffer as a result of the Act in that their liberty interests have been infringed by enactment of an intrusive and sweeping change in health care regulations under which they are compelled to choose between living out their faith in their daily lives by

directing their personal finances, including their health care costs, in accordance with their religious beliefs, and paying civil penalties for refusing to compromise their faith. (Second Am. Cpt. ¶¶ 71-76, 142, 143, 151). Plaintiffs do not merely conclude that the Act violates equal protection, but specifically allege that it treats Plaintiffs differently from other similarly situated individuals on the basis of their religious beliefs in that the Act exempts members of certain religious sects or certain healthcare sharing ministries from insurance mandates while requiring that Plaintiffs, who do not belong to those sects or ministries, comply. (Second Am. Cpt., ¶¶ 55-57, 157-159). Plaintiffs also specifically allege that the mandates violate Plaintiffs' rights of free speech and free association by compelling them to either formally associate with persons and ideas that violate their religious beliefs or pay a punitive penalty. (Second Am. Cpt., ¶¶ 166-169). Unlike the allegations in *Iqbal* and *Twombly*, Plaintiffs' allegations here stepped over the line of possibility and into the realm of plausibility. Consequently, the Complaint meets the threshold standards enumerated in *Iqbal* and *Twombly*.

B. Plaintiffs State Viable Claims That The Law Is An Ultra Vires Act Exceeding Congress' Enumerated Powers.

This Court should not, as Defendants ask, adopt expansive, almost limitless definitions of congressional power under the Commerce Clause, General Welfare Clause, Necessary and Power Clause and the Taxing and Spending Clause in order to justify Congress' unprecedented reach into the private financial and familial affairs of American citizens. Reaching outside the four corners of the Complaint, Defendants quote extensively from Congressional Budget Office studies, committee hearings and letters to representatives in order to embellish the factual record and prop up a façade of constitutional validity. Defendants do not make the showing necessary for this Court to consider matters outside of the Complaint. "Generally, consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the complaint itself."

Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006). Consideration of materials outside of the complaint is not entirely foreclosed in a 12(b)(6) motion, but certain conditions must be met before the materials can be used as a basis for dismissal. *Id.* "Even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document," and must also be clear that there exist no material disputed issues of fact regarding the relevance of the document. *Id.* Defendants have not satisfied these criteria. There is no agreement on the record that the materials are authentic and accurate, and Plaintiffs dispute that the documents are relevant. Consequently, the outside materials are not properly before this Court and should not be considered.

Even if the materials were considered, however, they would still not support Defendants' expansive view of the power available to Congress under its enumerated powers in the Constitution so as to defeat Plaintiffs' challenges. As was true with the Commonwealth of Virginia's claims in *Cuccinelli*, Plaintiffs' claims here advance a plausible claim with an arguable legal basis. *Cuccinelli*, 2010 WL 2991385 at *12. Therefore, Defendants' Rule 12(b)(6) motion should be denied.

1. The Mandates Exceed Congress' Commerce Clause Authority.

When confronted with nearly identical arguments from Secretary Sebelius in *Cuccinelli*, Judge Hudson denied the motion to dismiss and found that allegations stated a viable claim for relief. *Cuccinelli*, 2010 WL 2991385 at *12. As Judge Hudson noted, "[n]ever before has the Commerce Clause and associated Necessary and Proper Clause been extended this far." *Id.* Indeed, the unprecedented, intrusive provisions in the Act far exceed even the expansive boundaries of Commerce Clause power set by the Supreme Court in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) and *Gonzales v. Raich*, 545 U.S. 1 (2005). While *Wickard* and *Raich*

expanded the definition of interstate commerce to include regulation of products used for personal consumption, they upheld the foundational proposition that the Commerce Clause can only be used to regulate economic activity. *See Raich*, 545 U.S. at 17 (Congress has the power to regulate purely local **activities** that are part of an economic "class of **activities**" that have a substantial effect on interstate commerce (emphasis added)); *Wickard*, 317 U.S. at 125 (a party's local **activity** may still be reached by Congress if it exerts a substantial economic effect on interstate commerce. (emphasis added)).

By contrast, two criminal statutes that had nothing to do with commerce or any sort of economic enterprise could not be justified as within Congress' power to regulate under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000). In *Lopez*, the government used the same aggregation and cost-shifting arguments that Defendants use in this case and that Secretary Sebelius used in *Cuccinelli*. The Supreme Court roundly rejected those arguments. *Lopez*, 514 U.S. at 561. The Gun Free School Zones Act challenged in *Lopez* had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," and was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* To uphold the criminal statute under the Commerce Clause, the Court would have to "pile inference upon inference" in a manner that would convert Congress' authority under the Commerce Clause to a general police power and all but nullify the Constitution's clear distinction between state power and national power. *Id.* at 567-568. The Court specifically rejected "costs of crime" and "national productivity" arguments similar to the cost of healthcare arguments raised by Congress in the Act, because such arguments would permit Congress to regulate all activities that could possibly lead to violent crime. *Id.* at 564. In

an analysis that could have been written about Defendants' arguments regarding the Act in this case, the *Lopez* Court said that following the logic advanced by Congress to support the Gun Free Schools Zone Act would mean that:

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id.

That conclusion is even more true in this case, in which Congress is trying to use the Commerce Clause to justify compelling citizens into involuntarily engaging in commerce. Congress is mandating that people who are not engaged in the economic activity of purchasing health insurance must now engage in that activity or be assessed a civil penalty. Instead of regulating people such as the farmer in *Wickard* or the marijuana grower in *Raich* who are engaged in an activity, Congress here is regulating people who not engaged in any activity. Even in *Lopez* the individual had to have done something–possessed a handgun near a school – in order to be regulated. Here, people are regulated for simply existing. According to Defendants, Congress can compel Plaintiffs to not only purchase health insurance, but purchase a certain level of health insurance, "minimum essential coverage," because Congress assumes they will eventually become ill or injured and require medical care. Because they will at some point in their lifetimes require medical care, so the argument goes, they will at some point have to "procure health care-related goods and services to deal with health problems." (Memo in Support, p. 26). Defendants then leap to the conclusion that Plaintiffs can be compelled to purchase a certain product in order to pay for those "procurements." Defendants operate under

the assumption that anyone who does not purchase health insurance does not pay for his health care costs and therefore is a drain on the economy as he saddles others with his costs. Not only does Defendants' logic contradict the allegations of the Complaint – that Plaintiffs pay for their health care costs regardless of whether they have insurance – it also defies common sense. More importantly, it does not create the necessary nexus between an individual's economic activity and interstate commerce. This socialist mentality would allow Congress to nationalize anything on the assumption that all must pay in order to make the object of regulation affordable to all. If Congress could not establish that possessing a handgun near a school affects interstate commerce, *Lopez*, then it certainly cannot establish that simply being alive and perhaps someday needing medical care affects interstate commerce.

The fact that Congress enacted a laundry list of provisions regarding how healthcare expenses affect the economy does not establish that decisions not to purchase health insurance can somehow be regulated under the Commerce Clause. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' *Morrison*, 528 U.S. at 614. In *Morrison*, Congress adopted findings, as they did here, to attempt to tie the criminal statute to interstate commerce. *Id.* Congress tried to say that the effects of gender-motivated crimes on victims and their families justified the law calling for increased penalties for such crimes. *Id.* The Court disagreed and held that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. "Thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* The Supreme Court emphasized, as they had in *Lopez*, that even under the recent more expansive interpretation of the Commerce Clause "Congress' regulatory authority is not without effective bounds." *Id.* at 608. The Violence

Against Women Act, like the Gun-Free Schools Zone Act in *Lopez* was out of bounds. *Id.* at 614. So too is the Act here.

The fact that Congress can and does regulate the health insurance industry does not change the conclusion. The Act does not merely impose additional regulations on existing health insurance policies, but actually compels individuals and employers to purchase a certain type of health insurance, "minimum essential coverage," in a certain price range regardless of whether the insurance is necessary, desirable or in keeping with the buyers' financial and personal interests. It is analogous to Congress compelling every person in America to purchase a Chevrolet because Congress has the authority to regulate the automotive industry and purchasing or not purchasing a Chevrolet will have an eventual effect on the industry. As the Supreme Court said in *Lopez* and *Morrison*, the Commerce Clause has never been extended that far. Similarly, the fact that Congress has established requirements for health insurance plans that are offered by employers and regulates wages and hours of employment under the Fair Labor Standards Act does not mean that Congress has the authority to mandate that employers provide certain additional benefits to all employees. Defendants claim that *United States v. Darby*, 312 U.S. 100 (1941) "settled" the question of Congress' authority to compel employers to provide health insurance to employees. *Darby* does not support Defendants' proposition. In *Darby*, the Court upheld a statute which required that employers conform to wage and hour standards for employees who produced goods for interstate commerce. *Id.* at 117. The Court held that the wage and hour provisions furthered the public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions. *Id.* at 115. Subsequent cases cited by Defendants upholding regulation of minimum wage and overtime laws and the terms and conditions of employment further this

policy of ensuring that companies do not adversely affect interstate commerce by failing to pay employees appropriately for their efforts. *See e.g., Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 537 (1985) (upholding Congress' authority to enforce minimum wage and overtime standards). The Employer Mandate under the Act goes much further. Instead of merely providing that employees receive fair compensation for their efforts or that their workplace is safe, the Employer Mandate requires that employers provide certain benefits to their employees or face civil penalties. As is true under the Individual Mandate, under the Employer Mandate companies are required to purchase a particular product at a particular price regardless of whether the product is necessary, desirable, or in keeping with the company's and employees' core values. Carried to its logical conclusion, the theory underlying the Employer Mandate could be used to compel employers to provide all employees with company cars, expense accounts, corner offices or other perks. This extends far beyond even the broadest interpretation of the Commerce Clause. *Morrison*, 528 U.S. at 608.

Try as they might, Defendants cannot fit the square peg of the Act into the round hole of the Commerce Clause. Consequently, they cannot meet their burden of showing that Plaintiffs fail to state a viable claim. Therefore, the Rule 12(b)(6) motion to dismiss must be denied.

2. The Act Is Not Authorized Under The Necessary and Proper Clause.

Since the Act is not a proper exercise of Congress' authority under the Interstate Commerce Clause, it cannot be a valid exercise of Congress' broad power to enact legislation in furtherance of its constitutionally enumerated powers. The Supreme Court has long held that the Necessary and Proper Clause grants Congress broad power "to enact laws that are 'convenient, or useful' or 'conducive'" to the beneficial exercise of its enumerated powers. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). However, "[t]he Necessary and Proper Clause does not give

Congress *carte blanche*." *United States v. Comstock*, 130 S.Ct. 1949, 1970 (2010) (Alito, J., concurring). Instead, "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 1956. The Court looked at five considerations to determine that the challenged civil commitment statute met that test: (1) the breadth of the Necessary and Proper Clause, (2) the history of federal involvement in the arena, (3) the soundness of the reasons for the statute's enactment in light of the government's interest, (4) the challenged statute's accommodation of state interests, and (5) the challenged statute's scope. *Id.* at 1956-1965. The civil commitment statute at issue was merely a "modest addition" to a long-standing federal prison mental-health system, did not invade state interests and was sufficiently narrow in scope and connected to an Article I power to fall within Congress' authority under the Necessary and Proper Clause. *Id.*

Evaluating the Individual and Employer mandates under *Comstock*'s five criteria lead to the opposite conclusion. The mandates are not merely a "modest addition" to an existing federal regulatory scheme, but a sweeping and unprecedented intrusion into private decision-making. There are well-established federal regulations over the health insurance industry, but no precedent for mandating participation in the health insurance market, nor any other market for that matter. The Individual and Employer mandates trample upon state interests in regulating insurance and other markets that direct affect state residents. States will no longer be permitted to decide for themselves whether and to what extent their citizens will be required to participate in the health insurance market. Section 1311 of the Act mandates that each state create an American Health Benefit Exchange, which must be a governmental agency or nonprofit entity created by

the state that must make available "qualified health plans" to "qualified individuals" and "qualified employers." (Second Am. Cpt., ¶ 68). States have no discretion to refuse to create such an exchange if it is not necessary or desirable for their citizens, and have no discretion to deviate from federal determinations regarding "qualified health plans" if such determinations conflict with state interests. (Second Am. Cpt., ¶ 69). This is not a narrowly drawn statute designed to supplement an existing system, as was the statute in *Comstock*. Instead, it is, as Judge Hudson described, a radical change to the landscape of health insurance coverage in America. *Cuccinelli*, 2010 WL 2991385 at *8.

Consequently, Defendants have not demonstrated that the Individual and Employer mandates fall within Congress' authority under the Necessary and Proper Clause. Therefore, Defendants' motion to dismiss must be denied and Plaintiffs permitted to pursue their challenge.

3. The Act Exceeds Congress' General Welfare Clause Authority.

As Judge Hudson said in *Cuccinelli*, the General Welfare clause does not, as Defendants contend, invest Congress with virtually limitless power to exact penalties and levy taxes on the American people so as to preclude Plaintiffs' challenge of the Individual and Employer mandates. Even the cases relied upon by Defendants show, Congress' enumerated power under the General Welfare Clause do not reach far enough to encompass the mandates at issue in this case. Defendants rely upon vague out of context references to Congress' extensive taxing power in cases such as *License Tax Cases*, 72 U.S. 462, 471 (1867) and *United States v. Sanchez*, 340 U.S. 42, 44 (1950) to claim that the mandates and their concomitant penalties somehow fall within the sphere of permissible congressional enactments. However, the Supreme Court has specifically refused to expand Congress' power under the General Welfare Clause in the way

Defendants suggest. *See Child Labor Tax Case*, 259 U.S. 30, 37 (1922); and *U.S. v. Butler*, 297 U.S. 1, 72 (1936).

In the *Child Labor Tax Case*, Congress enacted what it called an "excise tax" on companies that employed children who were compelled to work more than eight hours a day, more than six days a week, before 6 a.m. or after 7 p.m. *Child Labor Tax Case*, 259 U.S. at 35. As the Act does here, the tax statute imposed numerous regulations upon employers under threat of civil penalty. *Id.* Noting the broad discretion that it has given to tax statutes, the Court nevertheless struck down the tax as an improper attempt to penalize conduct. *Id.* at 38. Taxes do not lose their character as taxes simply because of an incidental motive of regulating conduct. *Id.* "But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us." *Id.* In a statement that could have been written about this case, the Court said:

> Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

Id.

With a similarly prescient statement, the *Butler court* struck down an agricultural adjustment act as an impermissible expansion of Congress' power under the General Welfare Clause. *Butler*, 297 U.S. at 74-75.

> Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The

> Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.
>
> If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business.

Id. at 74-75. In this case, the danger is even more serious, as the threat of civil penalties under the Act will induce the surrender of rights and compliance with federal regulation as the price of simply living in the United States.

As was true in the *Child Labor Tax Case* and *Butler*, in this case Congress is attempting to use its taxing power to penalize those who do not conform to government regulations, *i.e.*, obtain government-approved "minimum essential coverage" for health care costs. The complexity of the regulations and restrictions in the Act (over 2,000 pages) demonstrate that Congress' intent is not to generate revenue, but to take over the health care industry and regulate individual decision-making by "taxing" those who depart from acceptable practices. It is worth noting that even the conclusion that the penalties imposed by the Act generate revenue is itself illusory, in that there is no guarantee that any money will ever be collected. Individuals and employers will pay the penalties only if they fail to obtain and maintain "minimum essential coverage," and in the case of employers, they will only pay penalties if the health insurance

coverage they provide does not meet certain affordability indexes. If all individuals and employers acquire the necessary coverage by January 1, 2014, then no penalties would be paid and no revenue realized. Consequently, the penalties cannot be said to even satisfy the standard set forth in *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937), that it be "productive of some revenue." Therefore, they cannot be regarded as authorized extensions of Congress' power under the General Welfare Clause so as to defeat Plaintiffs' challenges.

Plaintiffs have stated viable claims against the Act as an ultra vires enactment that exceeds Congress' power under the General Welfare Clause. Defendants cannot prove that Plaintiffs' claims fail as a matter of law, and therefore their motion to dismiss must be denied.

4. Plaintiffs State A Viable Tenth Amendment Claim.

Since the Act cannot be upheld as a valid exercise of Congress' power under either the Commerce Clause or General Welfare Clause, Defendants' challenge to Plaintiffs' Tenth Amendment claim must fail. Furthermore, even if the Act were to be found to fall within Congress' enumerated powers, then it would still violate the Tenth Amendment because it impermissibly intrudes on state sovereignty. *United States v. Johnson* 114 F.3d 476, 480 (4th Cir. (1997); *New York v. United States*, 505 U.S. 144, 159, 188 (1992).

"Under the Supreme Court's interpretation of the amendment, we ask two questions to determine whether a statute violates it: First, whether the regulation it embodies is within Congress' raw power as being within those enumerated in the constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty." *Johnson,* 114 F.3d at 480 (citing *New York v. United States*, 505 U.S. at 159, 188). The first question reflects the obvious fact that an exercise of a constitutionally-enumerated power cannot involve a "power not delegated to the United States," and therefore is not within a realm of

power reserved by the Tenth Amendment to the states. *Id.* Defendants assert that the Act falls within the powers granted to Congress under the Commerce Clause and General Welfare Clause. However, as the discussion above illustrates, that assertion is questionable at best, and certainly cannot be answered in the affirmative at this stage in the litigation. Even if the question could be answered in the affirmative, the Act's unprecedented intrusion into state sovereignty means that it cannot be upheld under the Tenth Amendment. Unlike the child support statute upheld in *Johnson,* the Act undercuts and displaces state authority by mandating that state citizens obtain "minimum essential coverage" and mandating that states create "Health Benefit Exchanges" or have such exchanges established for them. (Second Am. Cpt., ¶ 68). *See Johnson*, 114 F.3d at 481.

The Supreme Court has further explained the limits placed upon Congress in its attempt to turn its enumerated powers into a general police power, as Congress has tried to do here. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. at 162. "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* 452 U.S. 264, 288 (1981)). Instead, "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166. The Supreme Court emphasized the critical distinction between legislation that conditions receipt of federal funds on adopting certain regulations, which is within Congress' power, and compelling states to

take certain action, which violates the Tenth Amendment. *Id.* at 175-176. The Court utilized that distinction to uphold two and strike down one of the challenged provisions in the Low Level Radioactive Waste Policy Act. *Id.* The Court found that a set of incentives in which Congress conditioned grants to states upon the states' attainment of certain milestones and a set of incentives in which Congress offered states a choice between regulating radioactive waste produced in its borders or subjecting in-state producers to federal regulation were within Congress' authority under the Commerce Clause. *Id.* at 173-174. However a third provision that directed states to take title to and possession of low level radioactive waste and assume liability for damages suffered by waste generators "crossed the line distinguishing encouragement from coercion." *Id.* at 175. "Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution." *Id.* at 176. "No other federal statute has been cited which offers a state government no option than that of implementing legislation enacted by Congress." *Id.* at 177. That mandate was fatal in that it rendered the provision inconsistent with the federal structure of the United States government as established by the Constitution. *Id.* Similarly, the Act's mandates that states establish "Health Benefit Exchanges" and that all individuals and employers within the state obtain and maintain "minimum essential coverage" are inconsistent with the bedrock constitutional principle of co-equal dual sovereignty between the state and federal governments and the limited enumerated powers which may be exercised by the federal government.

Plaintiffs state a viable claim that the Act is an ultra vires enactment that violates the fundamental precepts of the Tenth Amendment. Defendants cannot disprove Plaintiffs' claims as a matter of law, so their Motion to Dismiss must be denied.

5. The Act Violates Plaintiffs' Rights Under the Guarantee Clause.

The dangers to the Republican form of government posed by the Act's sweeping provisions, and the genesis of Plaintiffs' challenges, were summed up centuries ago: "[T]he Constitution created a form of government under which '**The people, not the government, possess the absolute sovereignty.**'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting James Madison's report opposing the Alien and Sedition Act, cited in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION, 569-570 (1876)). Madison further said, "'[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.* (citing 4 ANNALS OF CONGRESS, 934 (1794)).

The Act turns that idea on its head by giving government the absolute sovereignty over the people. Under the Act, the government has censorial power over the people in that the government can veto individuals' private choices regarding management of their health care if the decisions do not comport with what the government believes is an appropriate choice. Similarly, government can veto the choices that employers and employees make in their employment agreements and the choices that the people's elected representatives in state legislatures make regarding the availability of health care coverage options.

Plaintiffs' claims are unlike the claims found non-justiciable in *Largess v. Supreme Judicial Court for the State of Mass.*, 373 F.3d 219 (1st Cir. 2004) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Contrary to Defendants' representations, *Largess* and *Gregory* did not limit Guarantee Clause claims to provisions that "abolish the legislature" or "establish a monarchy." (Memo in Support, p. 40). Instead, the courts held that the Guarantee Clause does not grant authority to challenge states' internal governmental policies and procedures, including, in

Gregory, the determination of qualifications of government officials. Plaintiffs here are not asserting the Guarantee Clause as a means of trying to second-guess state decision-making. Instead, Plaintiffs are challenging Congress' attempt to reverse the foundational precepts of the republican form of government by granting itself the ability to veto the private choices made by individuals, employers and states regarding health care coverage, and directing that state governments manage health care according to federal government mandates or lose their sovereignty.

Plaintiffs claim that the Act threatens the foundational principles of the Constitution by attempting to divest the people of their absolute sovereignty and confer upon Congress the censorial power that belongs to the people. Defendants have not disproven the viability of these claims, so their motion to dismiss should be denied.

C. Plaintiffs Have Stated Viable First Amendment Claims.

The true nature of Plaintiffs' claims (as opposed to Defendants' misrepresentations), the burdens posed by the Act and the extent of the First Amendment protections afforded Plaintiffs under prevailing authority show that Plaintiffs have stated viable claims for violation of their rights to free exercise of religion and free association and for violation of the Establishment Clause.

1. Plaintiffs State A Viable Free Exercise Claim.

Plaintiffs' religious free exercise claim is not only an objection to being compelled to fund abortion services, as Defendants argue. Neither is the Act a neutral law of general applicability that only incidentally burdens Plaintiffs' religious practice. While Plaintiffs' objection to compelled funding of abortions is a substantial part of their free exercise claim, it is not the sole basis for the challenge. Plaintiffs state that they conduct their daily lives in

accordance with their sincerely held religious beliefs, which includes making healthy lifestyle choices, paying only for health care procedures that are necessary and in keeping with their religious beliefs and paying for their health care services as they need them. (Second Am. Cpt., ¶¶ 34, 38, 71). In Liberty University's case, that includes providing health care choices for employees that do not conflict with the mission of the University and the core Christian values under which it and its employees order their day to day lives. (Second Am. Cpt., ¶¶ 31, 71). Opposing abortion and any contribution toward abortion are certainly core tenets of Plaintiffs' sincerely held religious beliefs and part of their challenge to the Act, (Second Am. Cpt., ¶¶ 131-149), but they do not represent the entirety of Plaintiffs' challenge. Viewed in that context, it is apparent that Plaintiffs have asserted viable claims for relief under the Free Exercise Clause under *Employment Div. v. Smith,* 494 U.S. 872 (1990), and subsequent cases.

In *Smith*, the Supreme Court set a new standard for analysis of Free Exercise claims when it held that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Smith,* 424 U.S. at 878. Cases since *Smith* have emphasized that neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993). If a law fails the neutrality and general applicability tests, then it must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Id.* at 531-532. Neutrality involves more than mere facial neutrality, for the "Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* With regard to general applicability, the Court

must look carefully at the exemptions permitted to "protect religious observers against unequal treatment." *Id.* at 542. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* Individualized exemptions generally mean that a law is not a neutral law of general applicability so that it will not survive a free exercise challenge unless the government can establish that it is justified by a compelling state interest and narrowly tailored. *Id.* at 537, *Smith*, 494 U.S. at 884.

As Defendants admit, the Act contains "numerous exceptions" to the Individual and Employer mandates. That admission puts to rest any contention that it is a neutral law of general applicability. "[T]he Act requires that all Americans, *with specified exceptions*, maintain a minimum level of health insurance coverage, or pay a penalty." (Memo in Support, p. 9) (emphasis added). "Plaintiffs might qualify for one of the Act's exemptions covering, for example, those who "cannot afford coverage," or who would suffer financial hardship if required to purchase insurance.' Pub. L. No. 11-148, §1501(adding 26 U.S.C. § 5000A(e)(1)and (5)." (Memo in Support, p. 16). Of particular importance to Plaintiffs' claims are two "religious exemptions" which not only demonstrate that the Act is not a neutral law of general applicability, but also that the exemptions are *per se* violations of the Establishment Clause. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The two "religious exemptions" clearly prefer certain religious sects or organizations over others. The first of the "religious exemptions" exempts individuals who are members of certain religious sects that are conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care, provided that the religious sect makes

provision for its dependent members and has been in existence at all times since December 31, 1950. (Second Am. Cpt., ¶ 54). The second religious exemption exempts individuals who are members of a "healthcare sharing ministry," defined as a 501(c)(3) organization, members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs, retain membership even after developing a medical condition, and which have been in existence at all times since December 31, 1999. (Second Am. Cpt., ¶ 56).

The individualized exemptions mean that Plaintiffs, who face religious hardships if they are forced to comply with the mandates, will nevertheless have to comply although parties who demonstrate financial hardship will not. In addition Plaintiffs, who have religious objections to the mandates and other provisions of the Act, are unable to seek exemption from the mandates while other parties who have religious objections are able to obtain exemptions because they belong to a particular religious sect. (Second Am. Cpt., ¶ 55). Furthermore Plaintiffs, who share common ethical beliefs and would like to share medical expenses and be exempt from the mandates, are unable to do so because they did not form an organization before December 31, 1999. (Second Am. Cpt., ¶ 57). These allegations, if proven true, would establish that the Act is not a neutral law of general applicability and therefore could only be constitutional if Defendants can prove that it is justified by a compelling state interest and is narrowly tailored. *Smith*, 494 U.S. at 884.

Defendants have not met that burden and therefore are not entitled to have the free exercise claim dismissed. Defendants offer unsubstantiated platitudes about the effects of health care spending on the economy and the need for change, but do not demonstrate how requiring some but not all Americans with religious objections to obtain "minimum essential coverage" by

January 1, 2014 or pay a penalty meets the need for change. The most glaring problems with Defendants' assertions regarding the Individual and Employer mandates is that, even if they are fully implemented, they will not provide the increased insurance coverage that Defendants say is their *raison d'etre*. The Individual and Employer mandates do not actually compel anyone to purchase insurance. Instead, they require that affected individuals and employers purchase insurance before January 1, 2014 or pay a penalty. An individual or employer could pay the penalty and never acquire health insurance and be in full compliance with the Act. Under those circumstances, the mandates would do nothing to significantly reduce the number of uninsured Americans or lower health insurance premiums, as Congress claims to have intended by enacting the Act. (Memo in Support, p. 9). Consequently, even if Defendants could establish a compelling state interest in mandating health insurance coverage, the Act is not narrowly tailored to meet any such interest. Therefore, it is vulnerable to a First Amendment challenge.

Plaintiffs have alleged sufficient facts to state a plausible claim that the Individual and Employer mandates violate their right to free exercise of their religion. Plaintiffs state that compelling them to purchase "minimum essential coverage" conflicts with their sincerely held religious beliefs regarding living out their faith in their daily lives and opposing abortion. Defendants have admitted that the Act does not qualify as a neutral law of general applicability and cannot establish that it is narrowly tailored to meet a compelling state interest. Therefore, Plaintiffs should be permitted to pursue their free exercise challenge and Defendants' motion to dismiss should be denied.

2. The Act Violates Plaintiffs' Free Speech And Association Rights.

Congress' unprecedented act of mandating that individuals and employers involuntarily participate in economic activity, regardless of its effect on their religious beliefs, or face civil

penalties makes the Act unlike the other provisions which the Supreme Court found did not infringe First Amendment free association rights. *See e.g., Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984) (Voluntary participation in service organization), *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (voluntary enrollment in or employment with a public university) *Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550 (2005) (voluntary participation in marketing association). Consequently, those authorities relied upon by Defendants do not support dismissal of Plaintiffs' First Amendment free association claims.

The Court's discussion in *United States v. Lee,* 455 U.S. 252, 261 (1982), cogently explains how Plaintiffs' claims under the Act differ from the examples offered by Defendants, and illustrates why Plaintiffs should be permitted to pursue their claims. In *Lee,* Amish business owners challenged a ruling which required that they pay social security taxes for their employees when self-employed Amish were exempt from the taxes on religious grounds. *Id.* The Court explained that the rule was justified by the difference between those who remain wholly within the Amish community and its "welfare" system and those who voluntarily enter into commercial activity. *Id.* "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* In other words, if members of the Amish community did not voluntarily enter into commercial activity and hire other people, then they did not have to pay social security taxes in light of their religious objection to the taxes, but if they did voluntarily enter into commercial activity, then they could be compelled to pay the taxes for their employees. The critical detail, and the one absent in this case, is voluntary participation in commercial activity.

In this case, the Act compels those who have decided to not engage in commercial activity to purchase a government-defined product and as part of that compelled activity to associate with ideas and values to which they religiously object or abandon religious beliefs that prompted their decision to not engage in commercial activity. (Second Am. Cpt. ¶¶ 71-76, 166-169). The Act directs not only that Plaintiffs purchase a product, but that they purchase a product that meets certain government-imposed specifications places further restrictions on Liberty University and others who presently have health insurance coverage that comports with their religious beliefs. Second Am. Cpt. ¶¶ 71-76, 166-169). Plaintiffs have alleged that their health care payment decisions are an expression of their deeply held religious beliefs, including beliefs about not being yoked with those who support or engage in abortions and other procedures which violate Plaintiffs' beliefs. (Second Am. Cpt. ¶¶ 71-76, 166-169).

The Act's unprecedented command that Plaintiffs involuntarily enter into commercial transactions regardless of the effect of the transactions on Plaintiffs' religious beliefs place an unprecedented burden on Plaintiffs' rights to associate, or choose not to associate, with others who have antithetical ideas. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"). Defendants' reliance upon inapposite precedents does not diminish the viability of Plaintiffs' claims. Their motion to dismiss should be denied.

3. Plaintiffs State A Viable Establishment Clause Claim.

Even though the Act provides for the kind of intrusive monitoring of religious belief that the Supreme Court has found constitutes "excessive entanglement" in violation of the Establishment Clause, Defendants insist that there is no Establishment Clause violation. (Memo in Support, pp. 48-51). Defendants ignore the language calling for government investigation and

monitoring of the tenets of certain religious sects and sincerity of adherents' beliefs and instead focus on the government's right to accommodate religious beliefs and the soundness of the Internal Revenue Code section cited within the religious exemption. (Memo in Support, pp. 48-51). Defendants miss the point of the Establishment Clause challenge. Plaintiffs are not alleging that the government is prohibited from accommodating religious beliefs or that the tax code section cited within the Act violates the Establishment Clause. Instead, Plaintiffs are alleging that the religious exemption violates the Establishment Clause because it gives Defendants discretion to determine which religion is to be "recognized" for an exemption and demonstrates a preference for one denomination over another. (Second Am. Cpt., ¶ 122). Plaintiffs also allege that the religious exemption violates the Establishment Clause because it vests Defendants with the right to determine what is a recognized religious sect entitled to exemption under the Act and thereby discriminates between and among religions by preferring a recognized religion over one deemed not recognized. (Second Am. Cpt., ¶ 123). Furthermore, Plaintiffs specifically allege that the religious exemption excessively entangles the government with religion by requiring that the government make doctrinal decisions concerns what is a recognized religion and granting government the power to determine what is orthodox in religion and to distinguish between and favor certain religions. (Second Am. Cpt., ¶¶ 126-127). In short, Plaintiffs are alleging that the Act impermissibly entangles the government with religious doctrine in a way that favors one religion over another, in violation of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and subsequent precedents.

In *Lemon*, the Court built upon a concept developed in *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970) in which the Court held that an Establishment Clause analysis should look at the effect of statutes that affect religion to ensure that they did not involve "an excessive government

entanglement with religion." In *Lemon*, the court explained that excessive entanglement occurs when a statute involves the state impermissibly in monitoring and overseeing religious affairs or has the potential of fostering religiously based political division. *Lemon*, 403 U.S. at 614-622. The *Lemon* court found excessive entanglement in the fact that the challenged statutes required that the states examine religious schools' records to determine how much of their expenditures were attributable to "religious activity" versus secular education. *Id.* at 620. Since *Lemon*, the Court has clarified that impermissible entanglement occurs when the goes beyond exercising its customary oversight functions such as fire inspections, zoning regulations and maintaining employment records to surveying, monitoring and/or analyzing an organization's religious activities. *See e.g., Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-306 (1985) (Fair Labor Standards Act recordkeeping requirements did not cross the line into excessive entanglement); *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 253 (1990) (finding that granting equal access to religious student clubs did not create excessive entanglement). When the government has to make a determination regarding whether and to what extent something is "religious" or the nature of adherents' religious beliefs before determining whether an organization qualifies for a particular program or has to comply with a statute, then it crosses the line into excessive entanglement in violation of the Establishment Clause. *See Lemon*, 405 U.S. at 620; *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).

That is what Plaintiffs allege is occurring under the Act's religious exemptions. In order to determine whether a party will be exempt from obtaining "minimum essential coverage" or paying a penalty, the government must review an individual's religious beliefs and affiliations and review the tenets of the affiliated church to determine whether 1) the individual is an adherent to the tenets of the faith and 2) whether the tenets of the faith provide that adherents

conscientiously object to receiving public or private insurance benefits and that members make "reasonable" provisions for their dependent members. (Second Am. Cpt. ¶ 54). Making those determinations will necessarily involve the kind of intrusive surveillance, monitoring and analysis of religious activities that the Supreme Court has found constitutes impermissible entanglement in violation of the Establishment Clause.

Consequently, Plaintiffs have stated a plausible claim for violation of the Establishment Clause. Defendants' motion to dismiss should be denied.

D. Plaintiffs State A Viable Equal Protection Claim.

Plaintiffs allege that the Act, and in particular, the religious exemptions, violate Equal Protection because they treat Plaintiffs differently than they treat other similarly situated individuals and organizations who have religious objections to obtaining "minimum essential coverage," but, unlike Plaintiffs, are granted exemptions from the requirement. (Second Am. Cpt., ¶¶ 157-164). Defendants argue that the exemptions do not single out a particular religious sect and serve a valid secular purpose of alleviating significant governmental interference with religious exercise, so that they should be evaluated under the rational basis test. (Memo in Support, p. 53 (citing *Corporation of Presiding Bishop v. Amos*, 483 US. 327 (1987)). Defendants then claim that the exemptions satisfy the rational basis test based upon suppositions and facts not contained within the Complaint, nor even within the extra-pleading materials that Defendants attempt to introduce as evidence. In particular, Defendants argue that "Congress was confident that members of health care sharing ministries would not incur uncompensated care, and therefore would not shift the costs of that care onto third parties. And Congress limited the exemption to groups formed before December 31, 1999, in order to cover other health care sharing ministries with an established record of providing medical care for their members and

not relying upon uncompensated care." (Memo in Support, p. 54). Defendants provide no reference to their speculative observations about Congress' motives and understandings, but apparently expect that this Court will take their word for it and determine that the religious exemptions provide rationally based differentiations between Plaintiffs and other people of faith who happen to belong to certain sects or ministries.

This Court should decline to do so. While the rational basis test is deferential, it is not "toothless." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (citing *Matthews v. Lucas*, 427 U.S. 465, 510 (1976)). The pertinent inquiry is whether the classification advances legitimate legislative goals in a rational fashion. *Id.*[1] "As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Id.* Defendants' arguments notwithstanding, the "religious" exemptions under the Act do not rationally advance a legitimate state interest, even the unsubstantiated statements of state interests propounded by Defendants.

Most notably, Defendants claim that the exemptions alleviate significant governmental interference with religious exercise, but do not explain how they can do so when they exclude Plaintiffs, whose religious exercise is being subjected to significant governmental interference. (Second Am. Cpt. ¶¶ 54-57). Plaintiffs allege that they are Christians who have conscientious and religious objections to obtaining and maintaining "minimum essential coverage," but are not permitted to exempt themselves from the requirement as are other religious adherents who

[1] Plaintiffs do not concede that the rational basis test is the proper standard for analyzing their Equal Protection claim since the statutes obviously make distinctions based upon religion, *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). However, since Defendants have not even proven that the exemptions satisfy rational basis, Plaintiffs will confine their argument at this stage to that standard.

happen to belong to particular denominations. (Second Am. Cpt. ¶¶ 54-57). If the exemption for certain religious sects is supposed to alleviate governmental interference with religious practice, then it is not rationally advancing that goal. If the exemption for religious sects is designed to exempt individuals who will very likely not incur uncompensated care and lead to cost-shifting, then it is not rationally advancing that goal by excluding Plaintiffs, particularly Plaintiffs Waddell and Merrill who take responsibility for their own health care, or members of other denominations who might agree to take responsibility for their members' welfare. Similarly, if exempting members of "health care sharing ministries" from the insurance mandates was designed to meet Congress' goal of exempting people who would not incur uncompensated care or contribute to cost-shifting, then prohibiting Plaintiffs from utilizing that exemption by requiring that such ministries be at least 10 years old does not rationally advance that goal. This Court is to assume that the objectives stated by Congress are the actual purposes for the regulation and examine whether the challenged provisions are rationally related to achieving those goals. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981). Making that assumption in this case, it is clear that granting exemptions to only certain religious sects or ministries at least 10 years old do not relate to fostering health care sharing or preventing governmental interference with religious practice.

Plaintiffs have alleged that the Act treats Plaintiffs differently from similarly situated individuals and organizations. Defendants have not demonstrated that there is even a rational basis for the differential treatment.

E. Plaintiffs State A Viable RFRA Claim.

When the allegations of the Complaint are reviewed in light of prevailing authority it is clear that Plaintiffs have stated a viable cause of action under the Religious Freedom Restoration

Act ("RFRA"), and that Defendants cannot meet their burden of showing that the burdens imposed by the Act are narrowly tailored to further a compelling state interest. *Gonzales v. O. Centro Espirita Beneficiente Uniao de Vegetal*, 546 U.S. 418 423-424, 439 (2006).

In order to state a viable claim under RFRA, Plaintiffs need to allege that the Act explicitly or incidentally imposes a substantial burden upon their exercise of religion. *Id.* at 423. Notably, RFRA provides that the government cannot substantially burden religious exercise, "even if the burden results from a rule of general applicability." *Id.* at 424 (citing 42 U.S.C. § 2000bb-1(a)). Plaintiffs have alleged that the Act compels them to either compromise their religious beliefs by purchasing insurance with government mandated provisions that do not comport with their religious beliefs or pay civil penalties. (Second Am. Cpt. ¶¶ 31, 34, 38, 71-76). Plaintiffs also allege that they share a set of common beliefs and want to provide health care cost sharing in a way that does not compel them to participate in a government-defined system that would violate their core religious beliefs, but that they are prevented from doing so by the date restrictions placed upon health care sharing ministries under the Act. (Second Am. Cpt., ¶ 57). Consequently, Plaintiffs are faced with having to violate their core religious beliefs by a mandate to purchase health insurance. Assuming that these allegations are true, as is required in Rule 12(b)(6) motion, Plaintiffs have shown that the Act substantially burdens their religious exercise. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless

substantial." *Id.* Plaintiffs have satisfied their burden of showing that the Act places a substantial burden on their religious exercise in violation of RFRA.

Defendants cannot defeat Plaintiffs' RFRA challenge by merely stating that the Act "serves a compelling purpose and simply admits of no exceptions." *Gonzales,* 546 U.S. at 430. Instead, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'–the particular claimant whose sincere exercise of religion is being substantially burdened. *Id.* at 430-431. As is true with the Act here, the Controlled Substances Act under consideration in *Gonzales* already contained a religious exemption. *Id.* at 434. The Court reasoned that if the use of a controlled substance was permitted for hundreds of thousands of Native Americans under the existing religious exemption, then the government could not preclude a similar exception for the 130 or so church members who wanted to similarly use a controlled substance to practice their faith. *Id.* at 433. The same is true in this case. If exemption from the "minimum essential coverage" mandate is permitted for adherents of certain religious sects who conscientiously object to the mandate and who provide care for themselves and other church members, then Defendants cannot justify precluding followers of other religious traditions who conscientiously object to the mandate and provide care for themselves and other church members from obtaining an exemption. Similarly, if exemption from the "minimum essential coverage" mandate is permitted for members of health care sharing ministries established before January 1, 2000, then Defendants cannot preclude others who form similar ministries from obtaining an exemption.

Plaintiffs have stated a plausible claim that the Act violates their rights under RFRA. Defendants have not met their burden of showing that the Act is narrowly tailored to further a compelling state interest. Therefore, Defendants' motion to dismiss should be denied.

F. The Act's Penalties Are Unconstitutional Direct Or Capitation Taxes.

The Act imposes penalties, payable as part of income tax returns, upon all individuals and employers (with few exceptions) who are legally present in the United States who do not obtain what the government defines as "minimum essential coverage" on or before January 1, 2014. (Second Am. Cpt., ¶¶ 47, 59-61). The penalties are not assessed because of the amount of income a person has earned, and so are not income taxes enacted under the Sixteenth Amendment. The penalties are not assessed as the result of a commercial transaction, activity, privilege or use of property, which would qualify them as excise taxes under Article I § 8. *See Murphy v. IRS*, 493 F.3d 170, 180-181 (D.C. Cir. 2007) (defining excise taxes). Actually, the penalties are the antithesis of an excise tax in that they are assessed to punish *inactivity, i.e.*, the failure to purchase "minimum essential coverage." (Second Am. Cpt., ¶¶ 47, 59-61). If the penalties are not income taxes or excise taxes, and Defendants insist that they are taxes instead of penalties, then they must be capitation or direct taxes, under Article I §§ 2, 9 and are constitutional only if they are apportioned among the states. *See id.* They are not apportioned according to population, and so are unconstitutional.

Defendants claim that the penalties are not direct taxes because they are not property taxes. (Memo in Support, p. 58). Defendants further claim that the penalties are not capitation taxes, but then cite to the definition of a capitation tax which demonstrates that they are. (Memo in Support, p. 58). In a statement that could have been written about the penalties here, the Supreme Court defined capitation taxes as taxes imposed "simply, without regard to property, profession or any other circumstances." *Hylton v. United States*, 3 U.S. 171, 175 (1796). Nevertheless, Defendants claim that the penalties are not capitation taxes because they are not flat taxes imposed without regard to the individual's circumstances, but contain exemptions for

people with low incomes. (Memo in Support, pp. 58-59). That non sequitur does not change the language of the Act, which clearly provides that the penalties are imposed upon individuals and employers without regard to property, profession, or any other circumstance except for being legally present in the United States and not purchasing "minimum essential coverage," and therefore are impermissible unapportioned capitation taxes. *See id.*

Defendants also claim that the penalties are not impermissible unapportioned direct or capitation taxes because they are enacted in aid of Congress' Commerce Clause powers. (Memo in Support, p. 55). As discussed more fully above, the Act far exceeds Congress' authority under the Commerce Clause, so the penalties are not proper exercises of that congressional power. Defendants cannot disprove Plaintiffs' claim that the penalties are impermissible unapportioned direct or capitation taxes, so their motion to dismiss should be denied.

CONCLUSION

Plaintiffs have standing and have stated viable claims for relief. Defendants cannot disprove those claims. For these reasons, the motion to dismiss should be denied.

Dated this 3rd day of September, 2010.

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CERTIFICATE OF SERVICE

On September 3, 2010, I electronically filed this document through the ECF system, which will send a notice of electronic filing to the following:

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