No. 11-1973

In the

United States Court of Appeals for the Eighth Circuit

PETER KINDER, MISSOURI LIEUTENANT GOVERNOR; DALE MORRIS; SAMANTHA HILL; JULIE KEATHLEY; M.K.,

Plaintiffs-Appellants,

v.

TIMOTHY F. GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY; HOLDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL; KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri- Cape Girardeau in No. 1:10-CV-00101-RWS (Hon. Rodney W. Sippel, U.S. District Judge)

BRIEF OF APPELLANTS

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SUMMARY OF THE CASE

This appeal arises because the district court wrongly dismissed two Missouri citizens' constitutional challenge to the "Individual Mandate" provision in the recently-passed federal healthcare law. The Individual Mandate forces individuals to buy federally-defined health insurance policies. If individuals do not do so, the government imposes a monthly financial penalty on them.

Samantha Hill said she does not currently have health insurance and does not want to comply with the requirement that she buy insurance coverage she does not want or need. Plaintiff Peter Kinder – who is Missouri's Lieutenant Governor – qualifies for insurance coverage through the state employee's plan. But, Lieutenant Governor Kinder's existing insurance coverage ceases when his current term ends in 2013. Thus, when the Individual Mandate becomes enforceable in 2014 it would require Peter Kinder to buy a federally-defined insurance policy.

This appeal concerns: (1) whether these Missouri citizens have standing to challenge this federal mandate that requires they buy an insurance policy; and, (2) whether our Constitution grants Congress the power to force individuals to buy medical insurance.

To adequately address these important and pressing legal issues, Plaintiffs request thirty minutes of oral argument.

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JURISDICTIONAL STATEMENT

The trial court's jurisdiction over Plaintiffs' claims, (Joint Appendix ("JA") 82-137), was based on (1) officers of the United States being the defendants, and (2) this action arising under the Constitution and laws of the United States, 28 U.S.C. § 1331. Plaintiffs challenged the constitutionality of the Patient Protection and Affordable Care Act ("PPACA") by suing those of the Executive Branch responsible for PPACA's administration and enforcement.

Following briefing, the district court issued a memorandum and order on April 26, 2011, concluding Plaintiffs did not have standing to challenge the federal law, and granting Defendants' motion to dismiss under 12(b)(1). (JA 459-79). The court also entered an order of dismissal that day, disposing of all of Plaintiffs' claims. (JA 481).

Plaintiffs timely filed their notice of appeal three days later, on April 29, 2011. (JA 482-83). Of the original seven Plaintiffs, this appeal involves only the claims of two Plaintiffs: Samantha Hill and Peter Kinder. This Court's jurisdiction is based on 28 U.S.C. § 1291, which provides for jurisdiction over a final decision of a U.S. District Court. This appeal is from a final order that disposes of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal concerns those provisions of PPACA that compel individuals to purchase a federally defined minimum health insurance policy or face financial penalties.

1. **Standing.** Plaintiff Samantha Hill is a Missouri citizen without a medical insurance policy and she does not want to be forced to buy the health insurance coverage required by the Individual Mandate. Plaintiff Peter Kinder is a Missouri citizen and his current eligibility for the state-run health insurance plan lasts only as long as his term as Missouri's Lieutenant Governor, which ends January 2013. The Individual Mandate becomes enforceable in 2014, and would apply to both Lieutenant Governor Kinder and Samantha Hill. If Hill and Kinder do not buy the mandated insurance policies, PPACA imposes a financial penalty upon them. Do these Missouri citizens have standing to challenge the constitutionality of the Individual Mandate?

- *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009); *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006).
- Sections 1302 and 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 163-68, 242-49 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010); Missouri Health Care Freedom Act, Mo. Rev. Stat. § 1.330 (2010).

2. **Constitutionality of the Individual Mandate**. Does Congress have the power to make individuals buy healthcare insurance or fine them for failing to do so? More specifically,

(a) Does the Individual Mandate exceed Congress's constitutional authority under the Commerce Clause?

(b) Are the "shared responsibility penalties" imposed on those who refuse to comply with the Individual Mandate a constitutional exercise of Congress's tax power?

(c) Does the Individual Mandate violate the Due Process Clause by infringing the right granted Missouri citizens under the Health Care Freedom Act not to be forced to buy healthcare insurance?

- *Gonzalez v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Wickard v. Filburn*, 317 U.S. 111 (1942).
- U.S. CONST., art I, § 8, cls. 1, 3, 18; § 9; amend. XIV, § 1. Missouri Health Care Freedom Act, MO. REV. STAT. § 1.330 (2010).

STATEMENT OF THE CASE

Congress passed a sweeping overhaul of how healthcare is paid for and provided. Under this law, the federal government assumed much of the role states traditionally held regulating healthcare. The centerpiece of this expansion of federal authority over healthcare is a provision known as the "Individual Mandate." This provision compels individuals to purchase certain federally-defined health insurance policies or face financial penalties.

Peter Kinder and Samantha Hill are subject to this mandate. They filed their constitutional challenge in the United States District Court for the Eastern District of Missouri on July 7, 2010, (JA 6-55), and filed an amended complaint on August 18, 2010, (JA 82-137). Defendants were sued in their official capacities as heads of those federal executive agencies charged with the administration and enforcement of PPACA.

Defendants moved to dismiss arguing the court lacked jurisdiction (Fed. R. Civ. P. 12(b)(1)) and for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)) on January 18, 2011. (JA 138-163). The government also claimed the Individual Mandate was constitutional. (JA 157-58). Plaintiffs filed their opposition on January 25, 2011. (JA 164-312). Defendants replied on February 4, 2011. (JA 313-32).

The district court issued a memorandum and order on April 26, 2011, concluding it lacked subject-matter jurisdiction over Plaintiffs' amended complaint, and granting Defendants' motion to dismiss under Rule 12(b)(1). (JA 459-79). As to the Individual Mandate, the court ruled that Plaintiffs did not have standing because they were not injured by this provision of PPACA. (JA 467-71). The court entered an order of dismissal that day. (JA 481).

Plaintiffs timely filed this appeal three days later, on April 29, 2011. (JA 482-83). This appeal concerns whether two of the Plaintiffs, Samantha Hill and Peter Kinder, have standing to challenge the constitutionality of the Individual Mandate. And, it concerns whether the Individual Mandate is unconstitutional as applied to Samantha Hill and Peter Kinder.

STATEMENT OF FACTS RELEVANT TO ISSSUE PRESENTED FOR REVIEW

On Christmas Eve 2009, the United States Senate passed H.R. 3590. Sixty Senators cast a vote in favor of H.R 3590, thirty-nine Senators voted against H.R. 3590. H.R. 3590 was referred to the United States House of Representatives.

On Easter Week, March 21, 2010, the United States House of Representatives passed H.R. 3590 by a vote of 219 in favor and 212 opposed. No Republican member of Congress voted in favor of H.R. 3590, and 34 Democrat members of Congress (including Missouri Congressman Ike Skelton) joined them voting against the bill. On March 23, 2010, President Obama signed H.R. 3590, the Patient Protection and Affordable Care Act ("PPACA").[1]

On March 21, 2010, the United States House of Representatives adopted H.R. 4872, the Health Care and Education Reconciliation Act of 2010 ("HCERA"), in a parliamentary process called budget reconciliation. HCERA contained revisions and additional corrections to H.R. 3590. The House passed this HCERA Reconciliation Bill with a vote of 220 in favor and 211 opposed. No Republican member of Congress voted in favor of H.R. 3590 and 33 Democrat

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010).

members of Congress joined them in voting against the bill. President Obama signed HCERA into law on March 30, 2010.[2]

PPACA includes the "Individual Mandate" that requires individuals to obtain or buy "minimum essential" healthcare coverage. 124 Stat. at 244 (26 U.S.C. § 5000A(a)). This mandate applies to every person except those: with a religious objection, not lawfully in the country, and those who are incarcerated. 124 Stat. at 246 (26 U.S.C. § 5000A(d)). Anyone who fails to obtain a healthcare policy providing "minimum essential benefits" must pay monthly monetary penalties beginning 2014. 124 Stat. at 244-46 (26 U.S.C. § 5000A(b), (c)).

The Individual Mandate requires individuals to purchase an insurance policy with one of four levels of benefits: "Platinum," "Gold," "Silver," and "Bronze." 124 Stat. at 167 (§ 1302(d)(1)). Certain individuals younger than 30 may satisfy the Individual Mandate by buying a "catastrophic" insurance policy. This "catastrophic plan" must also include "essential health benefits determined under subsection (b)" and must also provide "coverage for at least three primary care visits." Id. at 168 (§ 1302(e)(1)(B)(i) and (ii)). The "essential health benefits," in addition to emergency services and hospitalization, must include:

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[2] Pub. L. No. 111-152, 124 Stat. 1029 (2010).

- "Maternity and newborn care;"
- "Mental health and substance use disorder services, including behavioral health treatment;"
- "Prescription drugs;"
- "Laboratory services;" and
- "Pediatric services, including oral and vision care."

See 124 Stat. at 163-64 (§1302(b)(1)).

After enactment of the Individual Mandate, the Missouri Health Care Freedom Act ("Freedom Act") was passed by the state legislature and approved by the Missouri electorate at a popular referendum.[3] The Freedom Act provides "No law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system." Mo. Rev. Stat. § 1.330.1 (2010). "Health care system" is defined as:

> [A]ny public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for or payment for, in full or in part, health

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[3] The Freedom Act, put to the Missouri voters as Proposition C, was overwhelmingly approved by a 71.1% to 28.9% margin. *Official Election Returns, August 3, 2010 primary election*, Missouri Secretary of State, http://www.sos.mo.gov/Enrweb/allresults.asp?arc=1&eid=283 (last visited June 12, 2011).

> care services or health care data or health care information for its participants[.]

Id. § 1.330.5(3).

Plaintiffs Samantha Hill and Peter Kinder, are Missouri citizens who do not want to be forced to buy a federally mandated "platinum," "gold," silver," "bronze," or "catastrophic" insurance policy required by the Individual Mandate. Hill and Kinder challenge the constitutionality of the Individual Mandate and its penalty provision as: (1) exceeding power granted Congress under the Commerce Clause; (2) not being a valid exercise of Congress's "taxing" power; and, (3) abrogating their rights as Missouri citizens under the Freedom Act.

SUMMARY OF ARGUMENT

Congress does not possess the power under the Commerce Clause to pass a law forcing individuals against their will to buy a specific healthcare insurance policy. Individuals electing to not buy a product are not engaged in commerce. Congress does not possess the power under the Commerce Clause to "regulate" inactivity.

Congress does not have the power under its taxing authority to impose a monetary penalty on those individuals who do not obey its mandate to buy insurance. A "penalty" for not doing something Congress compels is not a "tax." And, to the extent it is claimed this "penalty" is a "tax," it is a direct tax in violation of the Constitution.

Yet, Congress passed such a law forcing individuals to buy specific insurance policies. And, the monetary penalty for failing to do so will be assessed beginning January 2014. Peter Kinder and Samantha Hill are both subject to this mandate and both have said they do not want to buy the platinum, gold, silver, bronze or catastrophic insurance plans this law mandates. The Freedom Act declares Missouri citizens cannot be forced to buy medical insurance against their will. Both Peter Kinder and Samantha Hill are Missouri citizens protected by this law.

Forcing these Missouri citizens to buy this unwanted insurance or pay a penalty has caused each of them to suffer an "injury in fact." They, thus, have standing to challenge the constitutionality of this law in federal court.

ARGUMENT

I. Samantha Hill and Peter Kinder have standing to challenge the constitutionality of a law that forces them to buy unwanted insurance under threat of monetary penalties.

> *The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.*
>
> ....
>
> *The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.*
>
> ***Marbury v. Madison***, 5 U.S. 137, 163 (1803)

A. Standard of review is *de novo*.

This Court reviews *de novo* the district court's standing determination. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 484 (8th Cir. 2006).

B. Legal standard.

In ruling on a motion to dismiss for lack of standing, the reviewing court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Gardner v. First Am. Title Ins. Co.*, 294 F.3d 991, 993 (8th Cir. 2002) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). All inferences must be drawn in plaintiff's favor when making a

determination on standing. *Gray v. City of Valley Park*, 567 F.3d 976, 983 (8th Cir. 2009).

In a facial challenge to jurisdiction, the court presumes all of the factual allegations concerning jurisdiction to be true and will grant the motion only if plaintiff does not allege an element necessary for subject matter jurisdiction. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993).

Standing is shown "with the manner and degree of evidence required at the successive stages of the litigation." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Where jurisdiction is challenged in a motion to dismiss rather than a motion for summary judgment, the party asserting jurisdiction should be held to a "relatively modest" standard of asserting jurisdiction in its pleadings. *See Bennett v. Spear*, 520 U.S. 154, 170-71 (1997).

> "[G]eneral factual allegations of injury resulting from the defendant's conduct" will suffice to establish Article III standing at the pleading stage, "for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support [a contested] claim."

Constitution Party of South Dakota v. Nelson, 639 F.3d 417, 420-21 (8th Cir. 2011) (citing *Lujan*, 504 U.S. at 561).

C. The foundation of Article III standing is "injury in fact."

The heart of standing is the principle that in order to invoke the power of a federal court, a plaintiff must present a "case" or "controversy" within the meaning of Article III of the Constitution. *Braden*, 588 F.3d at 591. "This 'irreducible constitutional minimum of standing' requires a showing of 'injury in fact' to the plaintiff that is 'fairly traceable to the challenged action of the defendant,' and 'likely [to] be redressed by a favorable decision.'" *Id.* (citing *Lujan*, 504 U.S. at 560-61).

"Injury in fact" is an invasion of a legally cognizable right. *Id.* The invasion of a legally protected interest must be both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560. A party challenging a statute in federal court satisfies the Article III requirement of an "injury in fact" by showing "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *St. Paul Area Chamber of Commerce*, 439 F.3d at 485 (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

When a statute is challenged by a party who is a target or object of the statute's prohibitions, there is ordinarily little question that the statute has caused him injury and that a judgment preventing enforcement of the statute will redress

the injury. *Id.*; *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997).

Thus, the initial question in this appeal is whether Hill and Kinder have sufficiently alleged an "injury in fact" by being subject to the Individual Mandate. If so—because their injury would be "fairly traceable" to the Individual Mandate, and a judgment invalidating the Individual Mandate would redress their injury—they have standing and the trial court's dismissal should be reversed.

D. Samantha Hill alleged an "injury in fact" because the Individual Mandate forces her to buy unwanted insurance coverage.

"I do not want to purchase any health insurance policy mandated by PPACA."

Samantha Hill, (JA 196)

"[Samantha Hill] is instead compelled to purchase a more expensive health-care plan she does not need and does not want."

Amended Complaint, ¶ 144 (JA 117).

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1. Hill clearly and unequivocally alleged an "injury in fact" in the amended complaint.

Hill is subject to the Individual Mandate. When the Individual Mandate takes effect on January 1, 2014, she will be forced to comply with the Individual Mandate by purchasing a medical insurance policy against her will. If she does not buy the mandated insurance policy she is subject to significant monetary penalties for every month she does not comply with the mandate. She thus has standing to challenge this federal law which says she must buy such an insurance policy. Samantha Hill specifically raised this constitutional challenge in Count Five of the amended complaint. (JA 113-18).

The trial court erroneously ruled that Hill has no standing because she "will be able to satisfy the essential benefits requirement by maintaining a catastrophic plan . . . ." (JA 469). The trial court claimed that, because the Individual Mandate

permits her to purchase a "catastrophic plan"—as such plan is defined by the Individual Mandate—Hill is denied standing to challenge this mandate. The trial court thus erroneously conflated the type of "major medical" insurance policy Hill said she was willing to buy (one providing only major medical coverage which does not include the "essential minimum benefits" PPACA says must be part of a PPACA "catastrophic plan") with the insurance policy PPACA says Hill must buy.[4] The district court simply ignored Hill's allegation that the Individual Mandate forces her to buy insurance coverage for services and benefits she does not want. *See* Am. Compl. ¶¶ 139, 141, 144. (JA 116-17). In other words, Hill alleged she did not want to buy any insurance plan that would satisfy the Individual Mandate.

The district court's ruling would be analogous to claiming that a person who said she was willing to buy only an economy car like a Ford Fiesta has no standing to challenge a law that forces her to buy a Chevrolet Suburban instead. It is wrong to ignore the fundamental point — the law forces Samantha Hill to buy something she does not want to buy.

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[4] The trial court took Hill's allegation that she "desires to obtain only high-deductible 'major medical' or 'catastrophic' health insurance coverage" out of context. Am. Compl. ¶ 138. (JA 116).

Samantha Hill said flat-out, "I do not want to purchase any health insurance policy mandated by PPACA." (JA 196). Purchasing only that insurance coverage she is willing to buy will cause her to violate the PPACA's minimum requirement. Thus, she violates the Individual Mandate and is subject to the financial sanction. And, for this reason, she has alleged an "injury in fact."

Hill alleged she would only buy high-deductible health insurance coverage because these plans are inexpensive, and more expensive health-care plans provide coverage she will not use and does not need. Am. Compl. ¶ 139. (JA 116). Yet, the Individual Mandate requires Hill "to purchase a health-insurance policy that includes, *inter alia*, coverage in the following categories:

- maternity and newborn care,
- mental health and substance use disorders services…,
- prescription drugs,
- laboratory services, and
- pediatric services including oral and vision care."

Am. Compl. ¶ 141 (JA 116).

"Should Samantha Hill not purchase this mandated health-care coverage, PPACA imposes a financial penalty upon her, and others similarly situated." Am. Compl. ¶ 142 (JA 116). "Samantha Hill is denied the option of purchasing high-deductible, major medical, health insurance policy and is instead compelled to

purchase a more expensive health-care plan she does not need and does not want." Am. Compl. ¶ 144 (JA 117).

These allegations satisfy long-standing precedent in this Circuit on standing. In particular, this Court has "entertained constitutional challenges where the statute clearly applies to the plaintiff, and the plaintiff has stated a desire not to comply with its mandate." *Gray*, 567 F.3d at 987 (citing *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988), *Pursley v. City of Fayetteville*, 820 F.2d 951, 953 (8th Cir. 1987), and *Blatnik Co. v. Ketola*, 587 F.2d 379, 381 (8th Cir. 1978)).

These material allegations as to standing are also presumed true. *Gardner*, 294 F.3d at 993. Moreover, the general allegations are presumed to "embrace those specific facts that are necessary to support [a contested] claim." *Constitution Party*, 639 F.3d at 420-21. The trial court disregarded these presumptions and flatly ignored Hill's explicit statement to the contrary; namely that she will not purchase a medical insurance policy with the benefits mandated by PPACA. The assumption upon which the trial court premised its dismissal is directly contrary to Hill's explicit allegation that she is "compelled to purchase a more expensive health-care plan she does not need and does not want."

Section 1302(e) of the Individual Mandate requires that, even under a "catastrophic plan exception," Hill must still purchase a health insurance policy that includes certain "essential health benefits," which Hill does not want to buy. 124 Stat. at 168. These "essential health benefits" that must be covered include:

- Maternity and newborn care;
- Mental health and substance use disorder services, including behavioral health treatment;
- Prescription drugs;
- Laboratory services; and
- Pediatric services, including oral and vision care.

See 124 Stat. at 163-64 (§1302(b)(1) (A), (D), (E), (F), (H), (J)).

These are the very services Hill alleges she does not want to be forced to pay for through a catastrophic plan. *See* Am. Compl. ¶ 141 (JA 116); ¶ 23 (JA 88) (Hill "has no need or desire to purchase or pay for insurance coverage containing infant and child care and, *inter alia*, lactation consulting and over 200 other preventative services"). She does not want to buy a medical insurance policy providing coverage for treatments she does not need.

> Rather than pay premiums for routine health care and treatments she does not want or need, Samantha Hill desires to personally pay for any routine medical expenses that would not be covered by a major medical health-insurance plan, with the money she saves by not having to purchase the more expensive federally-

> mandated health care coverage used to pay her other bills and living expenses.

Am. Compl. ¶ 21 (JA 87-88).

Hill alleged an "injury in fact" in the amended complaint when she claimed the Individual Mandate forces her to buy expensive medical insurance covering unwanted services. Moreover, because she is subject to the Individual Mandate's impositions, there is no doubt that the injury is "fairly traceable" to the Individual Mandate and that a judgment declaring the Individual Mandate unconstitutional would redress her injury. *See St. Paul Area Chamber of Commerce*, 439 F.3d at 485. Hill thus has standing to challenge the constitutionality of the Individual Mandate in Count Five and the district court was wrong to dismiss her claim for lack of standing.

2. Hill's affidavit further establishes her standing.

Hill's allegations in the amended complaint, standing alone, satisfy the pleading requirements to establish standing. Even so, Hill far surpassed what was necessary by submitting an affidavit sufficient to establish standing at even the summary judgment phase. (JA 194-98).

While the trial court chose not to consider the affidavit, (JA 461 n.2)[5], this Court—in its appellate position—should consider them, as there is ample authority allowing them to be considered on appeal. *Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.*, 901 F.2d 673, 675, 677 (8th Cir. 1990) (analyzing ***appellants' affidavits*** on injury and then reversing trial court's dismissal for lack of standing); *Goos v. I.C.C.*, 911 F.2d 1283, 1290 (8th Cir. 1990) (examining ***appellant's affidavit*** to conclude that appellant had a "sufficient personal stake in the outcome to meet the injury in fact requirement").

Indeed, the Supreme Court has "strongly suggest[ed]" that parties "take pains to supplement the record in any manner necessary to enable us to address with as much precision as possible any question of standing that may be raised." *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988). Hill did just that with her affidavit, which facilitates appellate review of her standing and of this Court's jurisdiction. While her allegations in just the amended complaint are sufficient, her affidavit further cements her showing of injury.

Hill reiterates in her affidavit that she does not want to buy <u>any</u> medical insurance policy providing those benefits required by the Individual Mandate. Hill

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[5] Plaintiffs do not premise their appeal on the trial court restricting its review to the amended complaint. Rather, Plaintiffs challenge the trial court's conclusion that the amended complaint was insufficient to confer standing.

supported her claim with a level of specificity that should have been understood by the district court when it considered the motion to dismiss:

- The Individual Mandate requires coverage for "'substance abuse disorder services,' 'preventative and wellness services and chronic disease management,' 'pediatric services,' and 'maternity and newborn care.'" Hill Aff. ¶ 9 (JA 195).

- "I am not pregnant; I do not need 'pediatric services;' I do not suffer from 'chronic disease;' nor do I have a 'substance abuse disorder.'" Hill Aff. ¶ 10 (JA 195).

- "I do not want to purchase any health insurance policy mandated by the PPACA." Hill Aff. ¶ 14 (JA 196).

- The Individual Mandate "mandates that I purchase a certain health insurance policy which includes coverage I do not want to purchase." Hill Aff. ¶ 16 (JA 197).

- "I wish to exercise my legally protected right . . . to not purchase the health insurance policy mandated by [the Individual Mandate] . . . ." Hill Aff. ¶ 17 (JA 197).

The Individual Mandate causes Samantha Hill an "injury in fact." She thus has standing to challenge the constitutionality of the Individual Mandate.

E. Samantha Hill alleged an "injury in fact" from a law that will penalize her financially for not buying an unwanted medical insurance policy.

"Should Samantha Hill not purchase this federally-mandated health insurance policy, PPACA imposes a financial penalty upon her."

Amended Complaint, ¶ 153 (JA 120).

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1. Hill alleged an "injury in fact" in the amended complaint.

Hill has also sufficiently alleged an "injury in fact" in Count Six that challenges the Individual Mandate because it imposes an unconstitutional penalty. Am. Compl. ¶¶ 148-57. (JA 118-21).

Hill sufficiently alleged that a penalty will be imposed on her if she fails to comply with the statute that she challenges as unconstitutional. *See* Am. Compl. ¶ 153 (JA 120) ("Should Samantha Hill not purchase this federally-mandated health insurance policy, PPACA imposes a financial penalty upon her.") *See also* Am. Compl. ¶ 142 (JA 116) ("Should Samantha Hill not purchase this mandated health-care coverage, the PPACA imposes a financial penalty upon her, and others similarly situated."). The penalty is designed to "force individuals to purchase health insurance from private companies and fund the federal government's health care regulatory scheme through coerced payments to private companies offering a

product regulated, defined, controlled, and mandated by the federal government." Am. Compl. ¶ 153 (JA 120).

Again, not only should these allegations be taken as true, *Gardner*, 294 F.3d at 993, they are in fact true. Hill alleges the Individual Mandate imposes "shared responsibility penalties" on those, such as herself, who do not purchase the federally mandated health insurance policy. Am. Compl. ¶ 153-57 (JA 120-21). And under the text of the Individual Mandate: "If an individual fails to meet the requirement [to maintain minimum essential coverage] . . . there is imposed a penalty with respect to the individual . . . ." *See* Section 1501, 124 Stat. at 244-49 (26 U.S.C. § 5000A).

The trial court was also wrong when it concluded Hill should be dismissed because she did not definitively plead she would flout the law:

> Hill does not assert that she will not purchase a qualifying policy in 2014 and, as a result, it is unclear whether a financial penalty will be imposed upon her. Because it is unclear whether a financial penalty will be imposed upon her, Hill has failed to allege that she will sustain an injury.

(JA 470).

The trial court erred because Hill did allege (as discussed above) that she clearly and unequivocally does not want to comply with this mandate – and thereby would be subject to this unconstitutional penalty.

This Court has "entertained constitutional challenges where the statute clearly applies to the plaintiff, and the plaintiff has stated a desire not to comply with its mandate." *Gray*, 567 F.3d at 987 (citing additional cases). Hill's allegations that she does not want to purchase the minimum coverage imposed on her by the Individual Mandate are sufficient to confer standing—and for good reason – because any other rule would promote law-breaking.

The well-settled rule in this Circuit provides that a plaintiff challenging the constitutionality of a statute need not first violate the statute for there to be standing. Rather, in line with "good public policy by breeding respect for the law," a person aggrieved by a law she considers unconstitutional is encouraged to seek a declaratory judgment, all the while complying with the challenged law. *St. Paul Area Chamber of Commerce*, 439 F.3d at 488.

> [W]e observe that it would turn respect for the law on its head for us to conclude that [plaintiff] lacks standing to challenge the provision merely because [plaintiff] chose to comply with the statute and challenge its constitutionality, rather than to violate the law and await an enforcement action.

Id. (citing *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003)).

Hill's allegation in the amended complaint (that a penalty will be imposed upon her for non-compliance with the Individual Mandate) is sufficient to allege an "injury in fact." Under the trial court's erroneous view, Hill would not have

standing to challenge the Individual Mandate and its penalty until the IRS was taking action to collect this mandatory penalty after she failed to buy the mandated policy.

2. Hill's affidavit further establishes her standing.

Hill's sworn affidavit further establishes that she is subject to the Individual Mandate's penalty provisions:

- "I am, therefore, an 'applicable individual,' subject to the Individual Mandate provision of PPACA, which provides that if I fail to meet the individual mandate requirement for more than a month, a penalty is imposed that must be included in my tax return." Hill Aff. ¶ 8 (JA 195).
- "I do not want to participate in the 'health care system' as established and defined by PPACA." Hill Aff. ¶ 15 (JA 196).
- "PPACA mandates that I purchase a certain health care insurance policy which includes coverage I do not want to purchase." Hill Aff. ¶ 16 (JA 197).
- "Should I fail to purchase the mandated health insurance coverage, I understand PPACA will impose a penalty which I must pay for every month . . . ." Hill Aff. ¶ 18 (JA 197).

Hill also details how the threat of the penalty impacts her ability to plan for her financial obligations. Hill Aff. ¶¶ 19-21 (JA 197).

Hill thus affirms that she does not want to purchase any insurance policy providing those benefits required under the Individual Mandate, and that a penalty will be imposed upon her for non-compliance. She need not swear that she will violate, or has in fact violated the Individual Mandate as a precondition to challenging it.

The trial court erred by expecting Hill to allege that she would definitely break the law before she could have standing to challenge the constitutionality of the law. Hill need not—and indeed should not—break, or threaten to break, the law in order to establish standing. Her allegations in Count Six, that she does not want to purchase the required insurance policy and that (under the challenged law) a penalty will be imposed for her non-compliance, sufficiently allege an "injury in fact" that confirms her standing.

F. Hill alleged an "injury in fact" from a law that usurps her rights under the Missouri Healthcare Freedom Act to be free from being forced to buy unwanted insurance coverage.

> *"No law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system."*
>
> **Missouri Health Care Freedom Act**, MO. REV. STAT. § 1.330.1 (2010)

Hill has also sufficiently alleged an "injury in fact" in Count Nine that challenges the Individual Mandate because it infringes her rights under the Missouri Health Care Freedom Act, now codified in Missouri Revised Statutes, Section 1.330 (2010) ("Freedom Act").

Under the Freedom Act,

> Missouri citizens enjoy the protection of Missouri state law which guarantees Missouri citizens the right to make their own decisions concerning health care insurance – including the right that "[n]o law or rule" – federal, state, or otherwise – "shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system."

Am. Compl. ¶ 207 (JA 134) (emphasis supplied).

"[T]he Supremacy Clause does not grant the federal government with sufficient authority to mandate Missouri citizens purchase a specific medical insurance policy, when under Missouri state law, these citizens – such as Samantha Hill – are guaranteed the right to define for themselves what healthcare insurance

coverage is appropriate." Am. Compl. ¶ 210 (JA 135). The Individual Mandate "mandates Missouri citizens to buy a particular type and nature of health care insurance policy." Am. Compl. ¶ 211 (JA 136). The Individual Mandate "abrogates the rights Samantha Hill, and similarly situated Missouri citizens, enjoy [under] the Missouri Health Care Freedom Act." Am. Compl. ¶ 212 (JA 136). The Individual Mandate "violates these Missouri citizens' right to determine their own appropriate health care, a right they have under Missouri's Health Care Freedom Act." Am. Compl. ¶ 213 (JA 136). These allegations sufficiently allege Hill's "injury in fact" caused by the Individual Mandate.

Far surpassing the "relatively modest" standard at the pleading stage, *Bennett*, 520 U.S. at 170-71, Hill's affidavit further establishes her standing to assert this claim. Hill affirms,

> I wish to exercise my legally protected right pursuant to the Missouri Health Care Freedom Act to not purchase the health insurance policy mandated by PPACA or otherwise participate in the "health care system" established by PPACA.

Hill Aff. ¶ 17 (JA 197).

The trial court erred in two respects. First, the trial court ruled that Hill can comply by buying the mandated "catastrophic plan." (JA 470). But, as discussed above, Hill said she would <u>not</u> buy this PPACA "catastrophic" plan and the trial court reached its conclusion by flatly ignoring Hill's repeated allegations. (See pp.

16-23, supra.) Thus, there is a direct conflict between Hill's right under the Freedom Act and the Individual Mandate of PPACA.

Second, the trial court side-stepped this issue by misreading the Freedom Act. The court stated, "Hill does not allege that she currently does not participate in a health care system, only that she does not have health insurance." (JA 470). But health insurance is the fundamental feature of the Freedom Act's definition of the "health care system":

> [A]ny public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for ***or payment for, in full or in part, health care services*** or health care data or health care information for its participants.

MO. REV. STAT. § 1.330.5(3) (2010) (emphasis added).

Indeed, protecting Missouri citizens' right to refuse to purchase a health insurance policy was the Freedom Act's ***primary purpose***.[6] The Freedom Act enshrines the right of Missouri citizens to be free from being coerced or forced to purchase a health insurance policy.

Missouri Attorney General Koster wrote,

> On August 3, 2010, the people of the state of Missouri overwhelmingly passed, by referendum, "Proposition C." Mo. Rev. Stat. § 1.330. Proposition C was passed in response to the ACA, and prohibits compelling "any person, employer, or health care provider to participate in any health care system." *Id*. § 1.330.1. The ACA and Proposition C are in conflict.

(JA 432) (emphasis supplied).

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[6] *See* H.B. 1764, Bill text as truly agreed to and finally passed, 95th Gen. Assemb., 2nd Reg. Sess. (Mo. 2010), http://www.house.mo.gov/billtracking/bills101/billpdf/truly/HB1764T.PDF, p. 1, (last visited June 12, 2011) ("AN ACT To repeal section 375.1175, RSMo, and to enact in lieu thereof two new sections ***relating to insurance***, with a referendum clause.") (emphasis added); *id.*, p. 3 ("[T]he official ballot title of this act shall be as follows: 'Shall the Missouri Statutes be amended to: Deny the government authority to penalize citizens for ***refusing to purchase private health insurance*** . . . .") (emphasis added); *2010 Ballot Measures*, MISSOURI SECRETARY OF STATE, Proposition C, http://www.sos.mo.gov/elections/2010ballot/ (last visited June 12, 2011) ("Fair Ballot Language: A 'yes' vote will amend Missouri law to deny the government authority to penalize citizens for ***refusing to purchase private health insurance*** . . . .") (initial emphasis omitted, subsequent emphasis added).

By forcing Hill to purchase a health insurance policy she does not want, the Individual Mandate is a direct violation of her rights under the Missouri Freedom Act. Hill has alleged in Count Nine, an "injury in fact" by the Individual Mandate infringing her rights under the Freedom Act.

G. Peter Kinder alleged an "injury in fact" such that he has standing to challenge the Individual Mandate.

"Kinder . . . and the Plaintiffs as citizens of Missouri and Missouri taxpayers, enjoy the protections afforded them by the United States and Missouri Constitutions, including the right to be free from unwarranted federal intrusion and interference."

Amended Complaint. ¶ 69. (JA 98-99).

Because Hill has standing, this Court has jurisdiction over this case. Where one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial to jurisdiction. *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006). Thus, because Hill has standing, the Court need not reach the question of whether Kinder has standing.

In any event, Kinder also has standing to challenge the constitutionality of the Individual Mandate.

The allegations of the amended complaint establish Kinder's standing. In particular (in addition to the quote noted above) the amended complaint provides:

- The Individual Mandate "limits the options and choices of health-care coverage available to Lieutenant Governor Kinder and other Missouri state employees and its elected officials." Am. Compl. ¶ 82 (JA 102).

- Under Count Five, the earlier allegations are incorporated by reference. Am. Compl. ¶ 127 (JA 113).[7]

- The Individual mandate imposes a financial penalty upon Hill "and others similarly situated." Am. Compl. ¶ 142 (JA 116).

- The Individual Mandate is unconstitutional as to Hill "and other similarly situated Missouri citizens and must be invalidated." Am. Compl. ¶ 147 (JA 118).

- Under Count Six, the earlier allegations are incorporated by reference. Am. Compl. ¶ 148 (JA 118).

- The penalties under Section 1501 of the Individual Mandate are an unconstitutional imposition of a direct tax "as to Samantha Hill and other similarly situated Missouri citizens, and thus, must be invalidated." Am. Compl. ¶ 157 (JA 121).

- Under Count Nine, the federal government does not have "sufficient authority to mandate Missouri citizens purchase a specific health care insurance policy." Am. Compl. ¶ 210 (JA 135).

- The Individual Mandate "mandates Missouri citizens to buy a particular type and nature of health care insurance policy." Am. Compl. ¶ 211 (JA 136).

- The Individual Mandate "abrogates the rights Samantha Hill, and similarly situated Missouri citizens, enjoy [under] the Missouri Health Care Freedom Act." Am. Compl. ¶ 212 (JA 136).

- "Because it violates constitutionally-protected liberty interests belonging to Samantha Hill and other Missouri citizens, without due process of law, [the Individual Mandate] violates these Missouri citizens' right to determine their own appropriate health care, a right they have under Missouri's Health Care Freedom Act." Am. Compl. ¶ 213 (JA 136).

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[7] See Fed. R. Civ. P. 10(c), which permits the pleader to incorporate by reference prior allegations to encourage short, concise pleadings that are free of unwarranted repetition and to promote convenience in pleading.

- "Peter D. Kinder is a Missouri citizen . . . ." Am. Compl. ¶ 1 (JA 84).

The trial court erred by ignoring these allegations establishing that Kinder has standing. The trial court simply ruled that it will "not consider the merits of Kinder's claims that are not included in the Amended Complaint." (JA 469).

But the district court did not even consider the allegations that were made in the amended complaint. The district court also ignored the presumptions that (1) all inferences are to be construed in favor of plaintiff and that (2) the general allegations are presumed to embrace the specific facts necessary to support jurisdiction. *See Constitution Party*, 639 F.3d at 420-21; *Gray*, 567 F.3d at 976. Kinder's allegations in the amended complaint sufficiently establish his standing to assert these claims. The trial court simply chose – for whatever reason – to ignore the plain language of the amended complaint in order to dismiss Lt. Governor Kinder's claim on the pretext that he lacked standing.

H. Kinder sufficiently alleged an "injury in fact" in his affidavit.

Following the Supreme Court's strong suggestion that parties "take pains to supplement the record in any manner necessary to enable us to address with as much precision as possible any question of standing that may be raised," *Pennell*, 485 U.S. at 8, Kinder's affidavit further cements his standing to assert these claims.

Kinder affirms he is an "applicable person" subject to the Individual Mandate. Kinder Aff. ¶ 13 (JA 187). While he is currently eligible for the state employee health insurance plan, his eligibility depends on his position as Lieutenant Governor, and such eligibility does not extend beyond his current term of office – which ends January 2013. Kinder Aff. ¶¶ 15-16 (JA 187).

So, when the Individual Mandate and its penalty provisions become enforceable in January 2014, there is—at a minimum—a realistic danger that Kinder would be subject to their full force. A conclusion that Kinder will—with absolute certainty—be subject to the Individual Mandate in 2014 is not required. All that is required is a showing of "realistic danger" that his eligibility for the state health plan will be over and that he would then be subject to the Individual Mandate. *See St. Paul Area Chamber of Commerce*, 439 F.3d at 485. He has shown just that.

While the trial court did not address the allegations of injury Kinder made in the amended complaint, choosing rather to ignore the facts provided in his affidavit, these statements unequivocally establish that Kinder has sufficiently alleged an "injury in fact" due to the Individual Mandate. He thus has standing to challenge the Individual Mandate.

II. This Court can and should proceed to determine whether the Individual Mandate is unconstitutional.

"Nothing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the constitutionality" of the law.

Thomas v. Union Carbide Agric. Prods. Co.
473 U.S. 568, 581 (1985)

The Supreme Court has held that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). There is no general rule, but "[c]ertainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where 'injustice might otherwise result.'" *Id.* (internal citation omitted).

This is one of those circumstances. Indeed, the need for this Court to reach the merits is even more compelling and proper in this case. No further factual

development is necessary. And, on those facts before the trial court (and in the record before this court), the substantive issue is fully developed.[8]

Where issues of law exist and the parties have briefed and argued the issue on appeal; and, where refusing to determine the issue might result in injustice, courts of appeals uniformly exercise their discretion to entertain the issue on appeal. *In re Modern Textile, Inc.*, 900 F.2d 1184, 1191 (8th Cir. 1990) (citing *Cleland v. United States*, 874 F.2d 517, 522 n.6 (8th Cir. 1989)).

This Court is empowered to proceed to the merits where the trial court did not reach the issue because it wrongly dismissed the case on standing. Doing so here would follow a well-trodden path in this Circuit. *See, e.g.*, *U.S. Dept. of Labor v. Rapid Robert's Inc.*, 130 F.3d 345, 348 (8th Cir. 1997) (deciding issue of statutory basis for penalties because record was "well-developed and amenable to our review," party briefed and argued its position on appeal, and opposing party "had the opportunity to respond"); *Seniority Research Grp. v. Chrysler Motor Corp.*, 976 F.2d 1185, 1188 (8th Cir. 1992) (determining issue relating to

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[8] The district court dismissed the claims of all seven Missouri plaintiffs. This appeal involves only the challenges to the Individual Mandate. The district court was wrong to dismiss these other claims. But, because (unlike the Individual Mandate) these other claims would require a remand and because a remand would delay resolution of this case, only the challenge to the Individual Mandate has been appealed.

collective-bargaining agreement not decided by trial court); *Warren v. City of Lincoln*, 864 F.2d 1436 (8th Cir. 1989) (opting to exercise discretion to determine whether there was probable cause even where that issue was not raised in trial court); *Pfoutz v. State Farm Mut. Auto. Ins. Co.*, 861 F.2d 527, 530 n.3 (8th Cir. 1988) (deciding issue under a state motor vehicle statute that the trial court made no reference to and parties did not raise until appellate oral argument because the "new theory relied on by this court addresses a legal matter rather than a factual matter" and "the parties had a chance to respond to the statutory argument, both at oral argument and by supplementary letter brief."). *But cf. Sanders v. Clemco Indus.*, 823 F.2d 214, 217-18 (8th Cir. 1987) (recognizing authority to decide an issue not passed upon by trial court, but ultimately remanding statute of limitations issue because there was an insufficient factual record on whether a party acted with due diligence in obtaining service of process).

Here, this Court can and should reach the merits of whether the Individual Mandate is unconstitutional. Plaintiffs explain why the Individual Mandate is unconstitutional in this brief. Defendants have a full opportunity to respond through briefing and oral argument. The parties deserve an expeditious determination of this issue, and remand would only serve to delay an inevitable return to this Court. This delay would impose a considerable hardship on the parties, and also on the citizens and governments of other states in this Circuit,

because the constitutionality of the Individual Mandate and its penalty provisions would continue to remain in limbo. As the Missouri Attorney General Koster noted in his brief to the Eleventh Circuit, "[T]he State of Missouri has an interest in the application of the ACA and in this Court's determination of the validity of its provisions under the United States Constitution." (JA 432).

While there is no dispute that the Individual Mandate is justiciable on ripeness grounds,[9] the case law on ripeness is instructive. For example, in *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568 (1985), the Court determined that the question of the validity of a pesticide regulatory scheme was purely legal, that the issue would not be clarified by further factual development, and that it was thus ripe for review. *Id.* at 581. "Nothing would be gained by postponing a decision, and the public interest would be well served by a prompt

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[9] *See, e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("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."); *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (a regulation "sets a standard of conduct for all to whom its terms apply" and it "operates as such in advance of the imposition of sanctions upon any particular individual."); *S. Dakota Min. Ass'n, Inc. v. Lawrence Cnty.*, 155 F.3d 1005, 1008 (8th Cir. 1998) (a plaintiff need not await consummation of threatened injury before bringing a declaratory judgment action;an action is ripe for adjudication if the plaintiff faces an injury that is "certainly impending.").

resolution of the constitutionality" of the law. *Id.* In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), the Supreme Court held that the issue of whether a state law regulating construction of nuclear power plants was preempted was ripe for review because it was "predominantly legal" and "postponement of decision would likely work substantial hardship on the utilities" and "may ultimately work harm on the citizens of California." *Id.* at 201-02.

Even where, as here, a claim is unquestionably ripe, these cases support this Court determining sooner rather than later whether the Individual Mandate is unconstitutional. The Individual Mandate hangs over the heads of Hill and Kinder, and over the millions of others subject to its provisions, "like the sword over Damocles, creating a 'here-and-now-subservience.'" *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991).

They must take steps now to prepare for the Individual Mandate's enforcement. Hill Aff. ¶¶ 19-21 (JA 197) (discussing how Hill must make financial arrangements now and forego spending because of the Individual Mandate and that planning for the future "requires that I know whether I will be assessed a penalty for not buying the insurance mandated" by the PPACA).

Moreover, Missouri and other states in this Circuit would be seriously harmed by further delay in the determination of whether the Individual Mandate is unconstitutional. Moreover, these states are forced to prepare now by enacting legislation for the administration of a massive overhaul of the healthcare system and regulation of insurance—thereby causing enormous expenditure of resources—for what could be a waste if the Individual Mandate is struck down.

As this Court is aware, PPACA and the Individual Mandate have already been held unconstitutional by two district courts. *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *appeal docketed*, No. 11-1057 (4th Cir. Jan. 20, 2011); *Florida v. U.S. Dept. of Health & Human Servs.*, __ F. Supp. 2d. __, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), *appeal docketed*, No. 11-11021 (11th Cir. Mar. 9, 2011). Those cases are now on appeal in the Eleventh and Fourth Circuits; but this is the only challenge now pending before this Circuit.

The federal government too would benefit from knowing (sooner rather than later) whether this key provision of the PPACA is unconstitutional. From all perspectives, an early and expedited determination on the merits is warranted and wise.

Remanding this issue to the district court makes no sense. If the issue were remanded to the trial court – no matter what the court ruled – it would inevitably and eventually find its way back to this Court on appeal. And, there would be no

deference given to the trial court's ruling on this purely legal issue. Questions involving the constitutionality of a federal statute are reviewed *de novo*. *United States v. McMasters*, 90 F.3d 1394, 1397 (8th Cir. 1996). By deciding this issue now, there is no concern about disturbing any lower court ruling that should be afforded deference. There is also no factual record to further develop. The provisions of the Individual Mandate are settled, and there is no dispute as to what they say.

This Court can and should now decide whether the Individual Mandate is unconstitutional. Because the parties have a full opportunity to brief and argue the merits of the claims before this Court, it is entirely proper for this Court to proceed to the merits. *See United States v. Grace*, 461 U.S. 171, 174-75 n.4 (1983) (The Supreme Court assumed that it was proper for the Court of Appeals—after reversing the trial court on jurisdictional grounds, and after noting that a case presented a pure question of law that had been briefed and argued by the parties—to then proceed to determine the constitutionality of a flag display law.)

III. The Individual Mandate is unconstitutional.

> *"The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written.*
>
> *To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?*
>
> *The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.*
>
> *It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it . . . ."*
>
> ***Marbury v. Madison***,
> 5 U.S. 137, 176-77 (1803)

A. Standard of review is *de novo*.

Questions involving the constitutionality of a federal statute are reviewed *de novo*. *United States v. McMasters*, 90 F.3d 1394, 1397 (8th Cir. 1996).

B. The Individual Mandate compels individuals to enter commerce and buy a specific product mandated by Congress.

The Individual Mandate requires that every American (including Hill and Kinder) obtain an insurance policy providing "minimum essential coverage" — as Congress has defined such coverage. Compliance with the mandate is enforced by a monetary penalty imposed monthly upon every individual who has not bought

the mandated health insurance policy. 26 U.S.C. § 5000A. Exceptions (irrelevant to Hill or Kinder) are for those individuals with a religious objection, those not lawfully in the country, and those who are incarcerated. 26 U.S.C. § 5000A(d).

C. The Individual Mandate exceeds Congress's power under even the outer limits of the Commerce Clause.

1. In order to protect individual liberty, those powers granted Congress under the Constitution are few and defined.

Congress may not pass any law it wants. Congress's authority is constitutionally limited to only acting on those enumerated powers that "we the people" have granted Congress in our Constitution. And, when Congress passes a law that exceeds it constitutional authority, the law is invalid.

As John Marshall noted, "… a legislative act contrary to the Constitution is not law; if [not] then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable." *Marbury*, 5 U.S. at 177. Congress's power is "defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (*citing Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marhsall, C.J.)). *See also id.* at 616 n.7 (emphasizing that the Constitutional system was crafted so that the "people's rights would be secured by the division of power"). A federal government that possessed an unlimited general police power could run roughshod over the states and citizens alike. Vesting such power in a

centralized federal government is a threat to all free people and is contrary to the foundational principles upon which our Republic is established.

The Supreme Court described this as a constitutional "first principle." The powers granted the federal government are "few and defined," while those that remain in the states are numerous and indefinite. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing The Federalist No. 45, pp. 292-93). This constitutional framework secures the protection of fundamental liberties of citizens, for "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). The Tenth Amendment likewise declares this central constitutional principle.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, ***are reserved to the States respectively, or to the people***.

U.S. CONST., amend. X (emphasis added).

2. When the Constitution was written, Congress's authority under the Commerce Clause was understood to concern only regulation of economic trade between states.

The Commerce Clause granted Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3.

The Supreme Court has "*always* [] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618-19 (emphasis in original) (citing *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)). See Amicus Brief of Missouri Attorney General (JA 438-47).

The Commerce Clause was originally considered in the context of state-imposed barriers to commerce. In the landmark case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall held that the Commerce Clause stood for the principle of granting open commerce among the states. *Id.* at 190. "Commerce" as the term was understood when our Constitution was drafted and originally interpreted was defined by Chief Justice Marshall as:

> Commerce undoubtedly is traffic, but it is something more: it is intercourse. It described the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rulings for carrying that intercourse.

Id. at 193.

"Commerce," at the time the Constitution was drafted, "consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez* at 585. (Thomas, J. concurring). *See also* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 863 (2002) ("'[C]ommerce' does not seem to have been

used during the founding era to refer to those acts that precede the act of trade.") (emphasis in original).

3. Modern Commerce Clause cases have all limited Congress's authority to regulation of specific economic activity.

Following the New Deal and the expansion of federal government under the Roosevelt Administration, Commerce Clause jurisprudence shifted to cases considering the outer limits of Congress's authority to regulate economic activity.

This "modern" Commerce Clause jurisprudence considered three broad categories of activity which Congress could regulate under the power it was granted in the Commerce Clause: (1) the channels of interstate commerce; (2) the instrumentalities; and (3) those activities that substantially affect interstate commerce. *See Morrison*, 529 U.S. at 608-09 (citing *Lopez*, 514 U.S. at 558-59).

Modern Supreme Court Commerce Clause jurisprudence is bounded by two bookends. *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzalez v. Raich*, 545 U.S. 1 (2005), are on one end, upholding federal laws that regulated activity that substantially affected interstate commerce. *United States v. Lopez* and *United States v. Morrison* are on the other end, striking down federal laws that sought to regulate noneconomic activity. But, all these cases – even *Lopez* and *Morrison* where Congress exceeded its constitutional authority – involve federal law regulating some "activity."

(a) *Wickard v. Filburn*

Wickard v. Filburn, 317 U.S. 111, is recognized as the farthest reach of the Commerce Clause.

An Ohio farmer "raise[d] a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding." *Id.* at 114. The federal Agricultural Adjustment Act of 1938 controlled the volume of wheat in interstate and foreign commerce. Under this Act, farmer Filburn was allocated a "wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. … He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels. [For violating this Act, Filburn was] subject to a penalty of 49 cents a bushel, or $117.11 in all." *Id.* at 114-15. (emphasis supplied.)

Filburn challenged the law saying, "this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most 'indirect.'" *Id.* at 119 (emphasis supplied).

The Court upheld the law as a valid regulation of activity substantially affecting interstate commerce. *Id.* at 125. The amount of wheat Filburn grew, while small, when aggregated with wheat grown by other wheat farmers, had a substantial effect upon the price of wheat. On this basis, the Court held Congress could regulate Filburn growing and marketing wheat – including wheat grown for consumption on the farm. The activity reached by the Commerce Clause in *Wickard* was Filburns's activity of "growing wheat." The Court uses the word "activity" at least eleven times in its discussion of what Congress regulated under the Commerce Clause.

(b) *Gonzalez v. Raich*

In *Raich*, patients grew and consumed marijuana for treatment of medical conditions. 545 U.S. 1. Their activities were legal under California state law, but violated federal drug laws. The marijuana growers challenged the federal drug law as exceeding Congress's power under the Commerce Clause.

The Supreme Court held that Congress's power to regulate interstate markets for medicinal substances included the segment of those markets that were supplied with drugs produced and consumed locally. The individuals challenging the law "are cultivating, for home consumption, a fungible commodity for which

there is an established, albeit illegal, interstate market." 545 U.S. at 18 (emphasis added).

The Court concluded that the California marijuana growers' ***activities***—i.e., their growing and using marijuana—could satisfy the requirement that an activity substantially affect interstate commerce. *See id.* at 22, 26. While the individuals were growing the marijuana for their personal use – not for sale to others – the restriction was necessary for the implementation of a regulatory scheme (the federal narcotics law) aimed at controlling interstate commercial transactions in marijuana. Congress could thus regulate the individuals' growing and using marijuana—quintessential ***activities***.[10]

The individuals in *Raich* were already growing and using the marijuana. They were actively engaged in the activity Congress sought to regulate.

There is no case in the history of our Republic that holds the Commerce Clause grants Congress the power to force and inactive person to enter the stream

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[10] All Supreme Court cases in the modern era have analyzed laws that sought to regulate those who were already engaged in some activity. *See Lopez*, 514 U.S. at 559-60, identifying *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants using substantial interstate supplies); and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (hotels catering to interstate guests).

of commerce and purchase a specific good or source. *Wickard* did not involve a law that forced a property owner to grow wheat; it involved a law that regulated an active farmer. *Raich* did not involve a law that compelled someone to grow or use marijuana; it involved a law that prohibited those who already did.

The government can reasonably argue the Commerce Clause allows Congress to regulate insurance companies in the sale and marketing of insurance policies or even the type of policies insurance companies may sell. But, this is entirely different from the Individual Mandate which does not involve telling insurance companies what type of medical policies they may sell. Rather, the Individual Mandate compels uninsured individuals (who, by definition, have not purchased insurance coverage) to buy a specific insurance policy they would otherwise not buy.

On the other end of the spectrum from *Wickard* and *Raich*—but equally undermining the government's purported justification for the Individual Mandate—are *Lopez* and *Morrison*. These cases struck down federal regulation focused on non-economic, local activity.

(c) *United States v. Lopez*

In *Lopez*, the Court considered whether Congress had the power under the Commerce Clause to enact a law which prohibited carrying a gun at school. 514 U.S. 549. The government argued it could because, "the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population." *Id.* at 563-64.

The Court rejected this argument and held, "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. To sustain this law the Supreme Court said, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.*

Also central to the *Lopez* court's conclusion was its rejection of the dissent. Specifically, the point that, should the law be upheld as a valid exercise of Congress's power under the Commerce Clause, it would no longer be possible "to identify any activity that the States may regulate but Congress may not." *Id*. at 564. Thus, positing a construction of the Commerce Clause which – if accepted – leaves no meaningful limits on the commerce power of Congress, is rightly rejected for that very reason.

(d) *United States v. Morrison*

In *Morrison*, the Court held that a federal statute providing a civil remedy for victims of gender-motivated violence exceeded Congress's power under the Commerce Clause. 529 U.S. 598. "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. Regulation of intrastate activity is upheld under the Commerce Clause "only where that activity is economic in nature." *Id.* The Court emphasized again that Congress might use the Commerce Clause to "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615. The Court found this concern "well-founded," even considering Congress's "findings" trying to justify the law under the Commerce Clause. *Id.*[11]

The common thread is that all of these cases focus on some *activity* in which the person or entity was already engaged. There is no case which has ever held that Congress has the power under the Commerce Clause to compel an individual who does not desire to participate in commerce to do so or be punished.

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[11] The Court reiterated too that a finding by Congress that the law regulates an activity that substantially affects interstate commerce does not make it so. *Id.* at 614 (citing *Lopez*, 514 U.S. at 557 n.2). Similarly here, a finding by Congress that the Individual Mandate or the PPACA regulates an activity affecting interstate commerce does not carry the day.

4. The Individual Mandate is entirely unlike any prior law passed by Congress under the Commerce Clause.

The Commerce Clause has never been stretched so far as to grant Congress the power to compel a person to purchase a product—regardless of its ultimate effect on interstate commerce. Forcing an otherwise unwilling individual to purchase a good or service in the private marketplace is well beyond even the outermost boundaries of Congress's Commerce Clause power. And, if held to be constitutional, it would practically end the concept of a limited federal government of enumerated powers.

Any attempt by the federal government to claim these constitutional principles do not apply because the health care industry is somehow "unique," has no support in any Supreme Court precedent or in fact. It is absurd to suggest that by simply labeling a particular market "unique" Congress is free to act in matters relating to that market free of constitutional limitation. Further, the market for healthcare is no more or less "unique" than the market for automobiles, banking, housing, or food.

If the government can force individuals to buy a medical insurance policy today because that person may one day need medical care, this same rationale would allow Congress to require every American to buy a coffin or buy a pre-paid funeral policy because, after all, we will all die one day.

If Congress can regulate *inactivity* under the guise that the inactivity substantially affects interstate commerce there is no longer any limit to Congressional power. The federalist system of enumerated powers would become meaningless. Congress could transform any decision to not act into "activity" subject to Congress's Commerce Clause power.

To hold the Individual Mandate to be a legitimate exercise of Congress's Commerce Clause power would, as noted by the Missouri Attorney General in his brief, turn the Commerce Clause into a "generalized police power." (JA 434).

> Could Congress assert, under a newly expanded *Wickard v. Filburn*, not only the authority to limit the acres of wheat a farmer in Northwest Missouri may plant, but also the power to penalize his decision to leave his land fallow, or not to plant, based on the federal authority that resting his acreage negatively impacts the price of food?
>
> * * *
>
> Can the United States Congress employ an enhanced Commerce Clause authority to mandate expectant mothers undergo amniocentesis testing in order to identify and treat individuals, yet unborn, whose extraordinary medical expenses may someday be cost-shifted onto the society-at-large?
>
> * * *
>
> To each of these questions, the state of Missouri answers "No."

Id.

Allowing Congress to compel an individual not wanting to participate in commerce to, nonetheless, enter commerce and buy a specific product would anoint Congress with the power to compel any citizen to engage in any commercial activity. Congress could force individuals to buy a Chevrolet Volt to help the auto

industry; it could force individuals to open accounts at banks receiving bailout funds; it could force individuals to buy a home with a government-backed mortgage rather than renting an apartment.

Further, the status of being uninsured is not an economic activity. The government may attempt to distort its target as regulating the "practice of consuming health care services without insurance." But the Individual Mandate does not regulate consumption or health care services; rather it imposes on virtually all uninsured individuals the requirement to buy insurance—whether or not they consume health care services; and whether or not they have the personal financial means to pay for healthcare without insurance.

Mandating that people buy health insurance is also a far cry from encouraging such activity. Congress could conceivably devise a constitutionally viable way to encourage uninsured individuals to buy health insurance; but they have not done so here.

What Congress has done is to order every American to buy a federally defined product. Should an individual not comply, Congress granted the IRS authority to impose a monthly penalty and collect this penalty.

This is not regulation of activity impacting interstate commerce. This is the "nanny-state" using the iron fist of the federal government to coerce citizens to buy a product which a bare-majority of Congress happens to think they should buy.

This is precisely the type of government tyranny the founders sought to prevent by creating a national government with only "few and defined" powers.

Congress coercing citizens in this manner is repugnant to our constitutional system of ordered liberty.

> Our definition of liberty depends upon the meaning of the concept of coercion. … By 'coercion' we mean such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another. … [H]e is unable either to use his own intelligence or knowledge or to follow his own aims and beliefs. Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another.

HAYEK, FRIEDRICH A., THE CONSTITUTION OF LIBERTY 20-21 (Univ. of Chicago Press 1960).

Congress exceeded its constitutional bounds when it enacted the Individual Mandate. The Individual Mandate is thus invalid.

D. The Necessary & Proper Clause does not inject validity into an otherwise unconstitutional act of Congress.

The Necessary and Proper Clause is not a stand-alone grant of power. *See Kinsella v. Singleton*, 361 U.S. 234, 247 (1960). Rather, it gives Congress authority to enact legislation that carries into execution *enumerated* powers granted the federal government by the Constitution. U.S. CONST., art. I, § 8, cl. 18.[12] Any statute relying on the Necessary and Proper Clause "must itself be legitimately predicated on an enumerated power." *United States v. Comstock*, 560 U.S. __, 130 S. Ct. 1949, 1964 (2010).

Moreover, even if a statute is enacted pursuant to an enumerated power, such as the Commerce Clause, it still may not be allowed under the Necessary and Proper Clause. Its scope and corresponding restraints were famously defined in *McCulloch v. Maryland*:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

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[12] "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Id. at 1956 (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). A statute can thus be invalidated where it is not consistent with the "letter and spirit of the constitution" or where it is not "appropriate."

The Necessary and Proper Clause allows Congress to regulate activities that would obstruct it from "carrying into execution" an effective regulation of interstate commerce. As already noted, an individual's decision to not purchase insurance is not an activity. Further, the uninsured – those not buying medical insurance – do not undercut Congress's regulation of participants in the insurance market. Thus, the Individual Mandate – compelling someone who is not in the insurance market to enter that market against their will – is neither "necessary" nor "proper" to regulation of medical insurance markets.

Here, the majority of the factors considered by the Court in *Comstock* undermine any purported justification of the Individual Mandate under the Necessary and Proper Clause. First, the Individual Mandate is not narrow in scope. Rather, it imposes this mandate on persons as a condition of being legally present in this country. This excessively broad scope stands in stark contrast to the narrow scope of the statute in *Comstock* that applied to a "small fraction of federal prisoners" – just 105 individuals out of over 188,000 federal inmates. *See id.* at 1964.

Second, the Individual Mandate does not accommodate state interests, but rather collides head-on with them. The Individual Mandate conflicts directly with the Freedom Act (along with many other similar state laws) protecting the rights of Missouri citizens to be free from government coercion in buying health insurance. The conflict between PPACA and Missouri's state interest contrasts greatly with the statute in *Comstock*, which expressly required accommodation of state interests. *See id.* at 1962-63.

Third, the Individual Mandate is unsupported by a long history of federal involvement in individual health insurance matters. The long-standing prohibition against congressional regulation in insurance in general was not lifted until 1944. *See United States v. S.E. Underwriters Ass'n*, 322 U.S. 533. Prior to PPACA, states were the primary regulator of insurance markets and terms of medical insurance in their respective state as an exercise of their police power. This contrasts greatly with the Court's reliance in *Comstock* on the 155-year history of federal involvement in the field related to federal prisoners. 130 S. Ct. at 1958-59.

The Individual Mandate's substantial intrusion upon individual liberties and invasion of states' health and police powers, thereby disrupting the state-federal balance, violate the "letter and spirit of the constitution." The Individual Mandate is thus an inappropriate and improper congressional enactment under the Necessary and Proper Clause.

E. The "shared responsibility penalty" for violating the Individual Mandate is not a lawful exercise of Congress's "taxing" power.

1. If the "shared responsibility penalties" are a "tax," they are an unlawful exercise of the taxing power because they are an un-apportioned, direct tax.

By its own terms, the "shared responsibility penalties" are not a tax. They are a penalty adopted as a means – and with the purpose – of forcing individuals to comply with the Individual Mandate. Thus, on its face, this penalty cannot be justified as a "tax" adopted by Congress under its taxing power in order to raise revenue.

To the extent the penalties under the Individual Mandate are considered a "tax", they are unconstitutional as an un-apportioned direct tax. Congress has the "power to lay and collect taxes, duties, imposts and excises . . . ." U.S. CONST., art. I, § 8, cl. 1. The Constitution limits this power, however, as "[n]o capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." U.S. CONST., art. I, § 9. The Sixteenth Amendment carves out income taxes as valid, even though un-apportioned. But there is no valid basis for Congress to impose a direct, un-apportioned tax on individuals on the grounds that they lack health insurance.

The Supreme Court has warned that the Sixteenth Amendment,

> shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an

> apportionment according to population for direct taxes upon property, real and person. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

Eisner v. Macomber, 252 U.S. 189, 206 (1920).

The federal government does not have the power to impose a direct tax upon a person nor to impose a direct tax that is not apportioned among the states. The Individual Mandate violates these constitutional provisions, as it creates a taxable event based on a person's failure to maintain "minimum essential coverage." It is thus levied directly on the person, not on the person's income.

Moreover, it is not apportioned among the states, as each state would have a different percentage of its citizens on whom the penalty would be imposed. Proper apportionment might include different amounts of tax based on factors like each state's age distribution or general health status, or the extent of each state's provision of healthcare to its citizens. But the Individual Mandate's penalty is un-apportioned and is thus an unconstitutional direct tax.

2. If the "shared responsibility penalties" are not a tax, they necessarily cannot be a lawful exercise of Congress's "taxing" power.

The penalties for an individual violating the Individual Mandate are not a tax. These penalty provisions thus, by definition, cannot fall under Congress's "power to lay and collect taxes." "[T]here 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." *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)). The Supreme Court has reaffirmed the distinction between a "tax" as "an enforced contribution to provide for the support of government," and a "penalty" as "an exaction imposed by statute as punishment for an unlawful act." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (citing *United States v. La Franca*, 282 U.S. 568, 572 (1931)).

The Individual Mandate's punitive enforcement features, i.e., its "shared responsibility penalties"—as their name suggests—punish an individual's failure or refusal to purchase the mandated level of health insurance. To the extent they are not a tax, they would thus not be a valid exercise of Congress's "taxing" power.

F. The Individual Mandate violates the rights Plaintiffs as citizens of Missouri are guaranteed under the Freedom Act.

The Supreme Court has consistently rejected a generalized federal police power and affirmed this general power is held only by the states. *Morrison*, 529 U.S. at 618-19.

> With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.

Id. at 618 n.8. *See also Raich*, 545 U.S. at 50 (O'Connor, J., dissenting).

Missouri voters overwhelmingly passed the Freedom Act. (See, discussion supra I.F.) This law guarantees to Samantha Hill and Peter Kinder a right to decide – free from governmental coercion – whether to buy medical insurance. The Freedom Act provides, "[n]o law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system."

We recognize, of course, under the Supremacy Clause, U.S. Const. Art. VI, cl 2, federal law displaces contrary state law. But, federal preemption can occur only when the federal law is constitutional in the first place. As we show above, the Individual Mandate is not.

Further, the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230 (1947). Moreover, preemption provisions must be construed narrowly, "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

The Freedom Act was adopted pursuant to traditional police powers reserved to the state of Missouri. The Individual Mandate disregards the state-federal balance enshrined in the Constitution; and it deprives without due process of law the constitutionally protected liberty interests the Freedom Act guarantees Missouri citizens (including Kinder and Hill) to determine their own appropriate health care.

CONCLUSION

Samantha Hill and Peter Kinder each has standing to challenge the constitutionality of the Individual Mandate. The trial court's dismissal of their constitutional challenge to the Individual Mandate is without merit and should be reversed.

Moreover, this Court can, and should, reach the merits of whether the Individual Mandate is unconstitutional. And, this Court should declare this law to be unconstitutional as applied to Samantha Hill and Peter Kinder.

To do otherwise would be to ignore Chief Justice Marshall's foundational admonition: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." *Marbury*, 5 U.S. at 176-77.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and Circuit Rule 25A(a), I hereby certify that on the 13th day of June 2011, I caused the foregoing brief, along with the accompanying addendum, to be filed with the Clerk of the Court through the Court's CM/ECF system, which will serve electronic copies on all registered counsel.

/s/ Mark F. ("Thor") Hearne, II
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Counsel for Appellants

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The textual portion of the foregoing brief (exclusive of the tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 13,798 words as determined by the word counting feature of Microsoft Word. The font used is Times New Roman at 14-point type.

Under 8th Circuit Rule 28A(h), I also certify that the Brief and accompanying Addendum have been scanned for viruses and are virus-free.

Dated: June 13, 2011

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