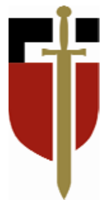

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May 23, 2011

Clerk of the Court
United States Court of Appeals for the Sixth Circuit
100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988

Re: ***Thomas More Law Center, et al. v. Barack Hussein Obama, et al.*, Sixth Circuit Case No. 10-2388**

Dear Clerk:

Pursuant to this court's letter of May 12, 2011, Plaintiffs/Appellants ("Plaintiffs") respond to the court's questions as follows:

1. Standing/Ripeness.

Plaintiffs challenge the constitutionality of the Patient Protection and Affordable Care Act ("Act"), which became federal law on March 23, 2010. More specifically, Plaintiffs challenge the provision of the Act that requires all private citizens, including Plaintiffs, to purchase "minimum essential" healthcare coverage under penalty of federal law (hereinafter "Individual Mandate"). Plaintiffs have alleged an injury in fact sufficient to confer standing and to invoke this court's jurisdiction under Article III and the Declaratory Judgment Act. And Plaintiffs' challenge, which presents a purely legal question, is ripe for review even though the penalty provision of the Individual Mandate does not take effect until 2014.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. In an effort to give meaning to Article III's requirement, the courts have developed several "justiciability doctrines," including "standing" and "ripeness." *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 279-80 (6th Cir. 1997). Standing focuses on *who* may bring the action, and ripeness is concerned with *when* an action may be brought. *See id.* at 280. The existence of an "actual controversy" in a constitutional sense is necessary to sustain jurisdiction in this court. As stated by the Supreme Court:

> A *justiciable controversy* is . . . distinguished from a difference or dispute of a *hypothetical* or *abstract* character; from one that is *academic* or *moot*. The controversy must be definite and concrete, touching the legal relations of parties having *adverse legal interests*. It must be a *real and substantial controversy* admitting of specific relief *through a decree of a conclusive character*, as distinguished from *an opinion advising what the law would be upon a hypothetical state of facts*. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, *the judicial function may be appropriately exercised* . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted) (emphasis added). Here, there is nothing "hypothetical," "abstract," "academic," or "moot" about the constitutional claims advanced. This case presents "a real and substantial controversy" between parties with "adverse legal interests," and this controversy can be resolved "through a decree of a conclusive character." *Id*. It will not require the court to render "an opinion advising what the law would be upon a hypothetical state of facts." *Id*. In sum, it presents a "justiciable controversy" in which "the judicial function may be appropriately exercised." *Id.*

a. Plaintiffs Have Standing to Challenge the Act.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). For a plaintiff to have standing to seek declaratory and injunctive relief he "must show actual *present harm* or a *significant possibility of future harm*. . . ." *Nat'l Rifle Assoc. of Am.,* 132 F.3d at 279 (emphasis added). Here, Plaintiffs have standing because they can demonstrate *both* present harm and a significant possibility of future harm that are unquestionably traced to the challenged Act and can be redressed by the requested relief.[1] *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding it sufficient that at least one plaintiff had standing). While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751; *cf. Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 104 (1983); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a *personal* and *individual* way," as in this case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added).

The courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (holding that consumers who suffer economic injury from a regulation prohibited under the Commerce Clause satisfy the standing requirement); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (stating that there was "no question in the present case that petitioners have sufficient standing" to challenge a regulation that would require "changes in their everyday business practices"); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 281-84 (finding standing for the plaintiffs who alleged that the passage of the challenged regulation impacted the way they conducted their daily business

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[1] As an employer, the Thomas More Law Center ("TMLC") is subject to the provisions of the Act such that it has standing to sue. TMLC also has associational standing because (1) its members, which include Plaintiffs, have standing in their own right to sue, (2) the ultimate interest TMLC seeks to protect is the constitutional rights of its members, which is germane to its purpose, and (3) neither the claim asserted nor the relief requested requires participation of individual members because this action seeks only declaratory and injunctive relief. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 684-85 (D.C. Cir. 2004) (finding that an organization had standing to sue where members would be exposed to increased noise as a result of the FAA's order approving a construction project).

and that compliance would cause them economic harm); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury-in-fact to confer standing). The courts have also recognized that an official government act that causes a plaintiff to change his behavior creates an injury sufficient to confer standing. *See Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003). Moreover, "courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute," as in this case. *See Nat'l Rifle Assoc. of Am.*, 132 F.3d at 282; *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394-95 (6th Cir. 1987).

Here, Plaintiffs allege a personal injury—they are subject to regulation by an unconstitutional statute that is causing present economic injury and a change in behavior with a "significant possibility" of future harm—that is unquestionably traceable to the passage of the Act and likely to be redressed by the relief requested in this lawsuit (declaratory and injunctive relief).[2] And short of judicial relief or Congress repealing the Act—the latter option being "most unlikely"—the Individual Mandate and its penalty provisions hang over Plaintiffs' heads "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991). Indeed, the inevitable action causing harm—the passage of the Act—has arrived.[3] *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985).

On March 23, 2010, the Act was signed into law by the President. The Act regulates *all* American citizens, including Plaintiffs, in an *individual* and *personal* way, with few exceptions—and it regulates them now by coercing behavior and compliance. The Individual Mandate *is* federal law—there is no condition precedent necessary, nor is there any subsequent regulation required to make it so. *See Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that a regulation "sets a standard of conduct for all to whom its terms apply, [and i]t operates as such in advance of the imposition of sanctions upon any particular individual"). Because the penalty applies in the future does not alter the fact that Plaintiffs must now consider, plan for, and take actions to fulfill their "shared responsibility" as mandated by the Act. Those who do not have the "minimum essential coverage" are considered "irresponsible" citizens, who can avoid the present social opprobrium and the financial penalty in 2014 only so long as they change their behavior and comply with the Act. In sum, Plaintiffs are compelled

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[2] An individual who is forced by the challenged regulation to arrange his private affairs to ensure that he has sufficient finances to pay for private healthcare coverage that meets the requirements of the Act—or change jobs to one that provides such healthcare coverage—has sustained "a concrete economic injury" that is *directly* (not just "fairly") traceable to the Act. (R-28: Order at 5-8). In fact, even *if* Plaintiffs obtained healthcare coverage in the intervening period of time, they will still be subject to the Act, which mandates "minimum essential coverage" and requires that this coverage be indefinitely maintained under penalty of law.

[3] The Act has a reporting requirement enabling the government to keep a record of the offenders. *See* 26 U.S.C. § 6055. Indeed, employers, including TMLC, are required to report the value of employer-provided coverage on each employee's W-2 form. *See* 26 U.S.C. § 6051. As a result, government record keeping is beginning immediately.

now to incur costs and burdens in order to comply with this federal law—costs and burdens that they would otherwise not incur. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."). And it is *inevitable* that they will be regulated by the Individual Mandate in the future. Plaintiffs need not wait for the imposition of a penalty to seek relief from this court. *Thomas*, 473 U.S. at 581 ("One does not have to await the consummation of threatened injury to obtain preventive relief."); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925). As the district court concluded below:

> Plaintiffs' decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring standing. There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today. . . . . In fact, the proposition that the Individual Mandate leads uninsured individuals to feel pressure to start saving money today to pay more than $8,000 for insurance, per year, starting in 2014, is entirely reasonable. . . . Parents wishing to send their child to college often start saving money for that purpose as soon as the child is born, even though the expense will not be incurred for eighteen years. And while such parents may be diligent in their saving, making many sacrifices along the way, their child might earn a scholarship to college, or decide to forego higher education, thus rendering the parents' sacrifices unnecessary. Such outcomes, however, do not diminish the real financial burden felt by the parents in earlier years. . . . This court finds that the injury-in-fact in this case is the present financial pressure experienced by plaintiffs due to the requirements of the Individual Mandate. [Consequently,] the individual named plaintiffs do have standing to bring their constitutional challenge to the Individual Mandate provision of the Health Care Reform Act and TMLC has standing to advance its challenge on behalf of its members.

(R-28: Order at 7-8).

Indeed, in *Village of Bensenville v. FAA*, 376 F.3d 1114 (D.C. Cir. 2004), the court held that the plaintiffs had standing to challenge a fee that would not go into effect *for 13 years*. The court stated, "The FAA's order is final and, absent action by us, come 2017 Chicago will begin collecting the passenger facility fee; accordingly, the impending threat of injury to the municipalities is sufficiently real to constitute injury-in-fact and afford constitutional standing." *Id*. at 1119 (internal quotations and punctuation omitted). The same is true here.

In sum, Plaintiffs have standing because they have alleged a "personal injury" that is "fairly traceable" to the Act and is "likely to be redressed by the requested relief." *See Allen*, 468 U.S. at 751.

b. Plaintiffs' Constitutional Claims Are Also Ripe for Review.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas*, 473 U.S. at 580 (quoting *Abbott Labs.*, 387 U.S. at 148). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the

parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. This Circuit *weighs* several factors to determine whether the issues presented are ripe for review, including, (1) "the hardship to the parties if judicial relief is denied"; (2) "the likelihood that the harm alleged by plaintiffs will ever come to pass"; and (3) "whether the case is fit for judicial resolution," which requires "a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims." *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 284 (internal quotations and citations omitted).

(1) There Is Hardship to the *Parties* if Judicial Review Is Denied.

The hardship factor weighs in favor of finding the case ripe for review. In fact, it is also in the government's interest to know sooner, rather than later, whether the "essential part" of its multi-billion (if not trillion) dollar program regulating the national healthcare market is constitutional, particularly in light of the fact that the program is going to cost taxpayers an additional $115 billion to simply implement. (*See* R-18; CBO Ltr. at Ex. 2). "To require the [healthcare] industry[, the federal government, every State, and every American citizen] to proceed without knowing whether the [Individual Mandate] is valid would impose a palpable and considerable hardship." *See Thomas*, 473 U.S. 581. And as demonstrated previously, the Individual Mandate is causing a present economic injury to Plaintiffs in order to comply with the government's unconstitutional demand. *See Abbott Labs.*, 387 U.S. at 152-53; *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 284; *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1172 (6th Cir. 1983) (requiring a company to wait to challenge proposed changes in the testing of cigarettes constituted hardship); *see also Columbia Broad. Sys., Inc.*, 316 U.S. at 417-19 (finding challenge ripe prior to the imposition of sanctions and noting that when regulations are promulgated "and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack"). Indeed, the enforcement of the unconstitutional Individual Mandate is inevitable, if not presently effective in fact. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972). Thus, there are no advantages to the parties or this court to be gained from withholding judicial review.

(2) The Alleged Harm Is Inevitable.

As the Supreme Court stated in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1942), "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 provision will come into effect." And in this Circuit, "inevitability" is not required; rather, the court has held that a claim is ripe when it is "highly probable" that the alleged harm or injury will occur. *Kardules v. City of Columbus*, 95 F.3d 1335, 1344 (6th Cir. 1996). Here, the imposition of the Individual Mandate is "highly probable," if not "inevitable." The same is true of the penalty provision, which operates automatically against anyone who does not comply with the mandate. This court can make a firm prediction that the challenged mandate to purchase *and* maintain "minimum essential" coverage under penalty of law will apply to Plaintiffs.

(3) The Case Is Fit for Judicial Resolution.

"In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard." *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290. A case that presents a purely legal issue, such as the challenge at issue here, is unquestionably a case fit for judicial resolution. *See Thomas*, 473 U.S. at 581 (holding challenge ripe where the issue presented was "purely legal, and will not be clarified by further factual development"); *Abbot Labs.*, 387 U.S. at 149 (same); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290-91 (same); *Brown & Williamson Tobacco Corp.,* 710 F.2d at 1171 (same); *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3d Cir. 1996) (finding Commerce Clause challenge ripe for review because it presented a purely legal issue); *Village of Bensenville*, 376 F.3d at 1120 ("The FAA's decision[, which imposes a fee that would not go into effect for 13 years,] is plainly 'fit' for our consideration now as the municipalities challenge a final FAA order on purely legal grounds.").

In sum, Plaintiffs have standing, and their constitutional challenge is ripe for review.[4]

Penalty Enforcement Mechanisms Available to the IRS.

In conjunction with its standing/ripeness inquiry, this court asked, "If the plaintiffs do not purchase minimum essential coverage and do not pay the penalty, what available enforcement mechanisms are available to the IRS?" and "What role, if any, do IRS enforcement mechanisms play in the injury and hardship requirements?"

As an initial matter, Plaintiffs, as law-abiding citizens, will choose compliance with the law, which requires them to purchase minimum essential healthcare coverage, over disobedience. (R-18: DeMars Suppl. Decl. at ¶¶ 2-8 at Ex. 1). Indeed, even without the imposition of a penalty, the Act currently "sets a standard of conduct for all to whom its terms apply," and thus it "operates as such in advance of the imposition of sanctions upon any particular individual."

[4] Courts have also identified a number of other, and in some respects related, factors that demonstrate the ripeness of Plaintiffs' claims. For example, courts find ripeness where the plaintiff's contemplated course of action falls within the scope of a statute and the statute affects the plaintiff's current actions. *See Metro. Wash. Airports Auth.*, 501 U.S. at 265 n.13; *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989). Another reason courts entertain pre-enforcement challenges is fundamental fairness—the notion that a plaintiff should not be forced to choose between compliance with a statute and the legal penalties. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (holding challenge ripe given that a contrary finding "may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding challenge ripe where respondents were "faced with a Hobson's choice" of compliance or penalty); *Navegar, Inc. v. United States*, 103 F.3d 994, 998-99 (D.C. Cir. 1997) (holding challenge ripe because a threat of prosecution can put the threatened party "between a rock and a hard place"). Some courts, including this one, have also recognized that allowing such pre-enforcement challenges promotes the rule of law. *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 530 (6th Cir. 1998) ("We believe a citizen should be allowed to prefer 'official adjudication to public disobedience.'"); *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (stating that the decision to obey the law and bring a declaratory action "demonstrates a commendable respect for the rule of law").

Columbia Broad. Sys., Inc., 316 U.S. at 418. Consequently, Plaintiffs have standing to make this ripe challenge to the Act with or without the actual enforcement of the penalty. Nevertheless, under the current statutory regime, the Individual Mandate may be enforced by three distinct mechanisms: (1) tax refund offset; (2) automatic tax lien foreclosure; and (3) reprioritization of tax payments. *See* Daniel L. Mellor, *The Individual Mandate Tax: Healthcare's Toothless Watchdog*, Tax Notes, Jan. 3, 2011, at 109-11 (discussing the possible enforcement mechanisms).[5]

Background.

The Individual Mandate penalty is payable on notice and demand of the Treasury Secretary, 26 U.S.C. § 5000A(g)(1), and automatically attaches to Plaintiffs' property, 26 U.S.C. § 6321. However, a failure to pay may not result in a criminal prosecution or the filing of a tax lien. 26 U.S.C. §§ 5000(g)(2)(A) & (B). The proscription in the Act against the filing of a tax lien precludes the IRS from collecting against, or asserting a priority over, a tax payer's creditors or transferees. 26 U.S.C. §§ 6323 (a) & (f). Notwithstanding these limitations, the IRS has the authority to assess interest and other penalties on any unpaid amounts, 26 U.S.C. §§ 6601 & 6672(a), and will have other quite effective means to collect the penalty from Plaintiffs as set forth below.

(1) Tax Refund Offset.

The IRS has the statutory authority to offset all tax liabilities, including accrued interest and penalties, against refunds otherwise due in a current year. 18 U.S.C. § 2602(a). Approximately 65% of the taxpayers in the United States receive a refund. Consequently, "IRS Commissioner Douglas Shulman believes that this ability to reduce or confiscate tax refunds will be sufficient to enforce compliance." Mellor, *supra*, at 110.

(2) Automatic Tax Lien Foreclosure.

A second method for collecting the unpaid Individual Mandate penalty employs an automatic tax lien and judicial foreclosure suit. 26 U.S.C. § 7403. Thus, while § 5000A(g) prohibits the filing of a notice of lien, the lien itself arises automatically if the tax is unpaid after notice and demand. I.R.S. Pub. 1468 at 3. The lien is perpetual and may attach to all property owned or subsequently acquired by the taxpayer. Once the lien automatically attaches, the IRS may levy against it by seizing the property or suing to foreclose the lien, depending upon the type of property at issue. 26 U.S.C. § 7403.

(3) Reprioritize Tax Payments.

Yet a third approach to collecting any unpaid Individual Mandate penalties might include a regulatory ruling to reprioritize Plaintiffs' tax payments. This approach is explained as follows:

> There is a third approach—neither allowed nor prohibited under the code—that may actually be the most appropriate and effective method. The Service could

[5] To further assist this court, a copy of this article is attached.

> simply establish a superpriority for the IMT [Individual Mandate penalty] in applying tax payments. Thus, for example, the first dollar of tax withheld from an individual's paycheck, or remitted in estimated payments, would go toward paying the IMT, and if there were any deficiency, it would be considered an income tax deficiency, which could then be assessed and collected by the usual methods.
>
> This approach is currently not used by the Service. In the case of underpayments, the IRS will apply the payment first to tax, then to penalty, then to interest owed. However, its use in the collection of IMT would do much to mitigate the collection problems created by the restrictions in section 5000A(g).
>
> First, it would restore to the IRS all of the force and effect of subtitle F. Second, it would cut down on the delay in collecting the tax because once the IMT determination is made through the matching program, the amount would be collected immediately from future paychecks. The resort to judicial process would be mostly eliminated. Third, unlike a refund offset, which will probably not be sufficient to cover the IMT, the average income tax liability is $10,406. This amount would more than satisfy any outstanding IMT. Fourth, the IMT would then share in all the economic and logistical advantages of source payment, that is, employer withholding.
>
> Also, there is little a taxpayer could do to frustrate that maneuver. No rational individual would seek to earn less income merely to prevent the IRS from being able to recover a full IMT payment. Employer withholding is automatic. Even if taxpayers reduced the amount withheld from their paychecks, it would still likely be sufficient to offset the IMT. This approach would also be effective against those most likely to incur IMT, that is, lower-income taxpayers who are ineligible for Medicaid, because they are mostly working individuals. Even if they ultimately have no tax liability, tax will still be withheld from their paychecks. The economic incentives and disincentives created by reprioritization are minimal because they are subsumed in the already existing incentives of the income tax withholding system.

Mellor, *supra*, at 111 (citations omitted).

As is clear from the statutory and regulatory regimes available to the IRS set out above, Plaintiffs are subject to an array of enforcements mechanisms beyond Plaintiffs' civic responsibility to be participating and law abiding citizens.

2. Facial/As-applied.

Plaintiffs challenge the *authority* of Congress to enact the Individual Mandate provision of the Act. Certainly, as the standing argument above illustrates, Plaintiffs challenge Congress' authority to force *them*—private citizens who are not by any measure engaged in any relevant commerce—to purchase minimum essential healthcare coverage as a matter of federal law.

Consequently, this case could properly be viewed as an "as-applied" challenge. However, by their very nature, almost all challenges to the specific exercise of an enumerated power, such as the Commerce Clause, are facial challenges. Thus, if Congress lacked the authority to enact certain legislation, such as the Individual Mandate, that legislation adversely affects everyone in every application. In light of this reality, it does not appear that the "no set of circumstances" language of *United States v. Salerno*, 481 U.S. 739, 745 (1987), has any practical impact on the resolution of this case. As the Court stated in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court stated,

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

As *Salerno* itself suggests, if Congress lacked enumerated authority to pass legislation at its inception, as in this case, then there would be "no set of circumstances . . . under which the Act would be valid." Thus, there would be no "conceivable set of circumstances" under which the Act could be enforced because there was no authority to enact the legislation in the first instance—the law is "legally stillborn." *See Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 773-74 (E.D. Va. 2010).

Indeed, the Court did not cite *Salerno*, let alone apply it, in either *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison,* 529 U.S. 598 (2000), cases in which the Court held that Congress exceeded its Commerce Clause authority by enacting certain legislation. Nor did the Court cite to *Salerno* in the more recent Commerce Clause case of *Gonzales v. Raich*, 545 U.S. 1 (2005).

In sum, whether this court construes the present challenge to be "facial" or "as-applied" is of little moment. This case presents a purely legal question addressing Congress' authority to enact the challenged legislation (*i.e.,* Individual Mandate) at its inception. Consequently, *Salerno* has no legal—nor practical—application.

Thank you for your consideration.

Sincerely,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.

Enclosure: Daniel L. Mellor, *The Individual Mandate Tax: Healthcare's Toothless Watchdog*, Tax Notes, Jan. 3, 2011

cc w/enclosure: Opposing Counsel (via ECF)

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The Individual Mandate Tax: Healthcare's Toothless Watchdog

By Daniel L. Mellor

Daniel L. Mellor is an associate at Kulzer & DiPadova PA in Haddonfield, N.J.

Mellor examines the necessity of the individual mandate tax to healthcare reform and the tax's exclusion from the traditional IRS enforcement regime. He explores possible alternatives and their likely impact on taxpayer behavior.

In ancient Rome, painted on the walls of many homes were mosaics and signs that read ''Cave Canem,'' a phrase the translation of which has survived to the present day as ''Beware of Dog.'' Today, that sign would be taken as a warning of the presence of a large, perhaps dangerous, certainly inhospitable canine against which the reader should be ready to defend himself. However, its original purpose was actually to protect the dogs. The favored breed of the time, the Italian greyhound, was a small, delicate dog that was often injured underfoot of unwary visitors.

The individual mandate tax (IMT) provided by section 5000A of the Patient Protection and Affordable Care Act[1] (PPACA) invokes a similar dichotomy. While it has been portrayed as the fierce sentinel of universal healthcare, in reality, the penalty is an essentially toothless guardian against those who wish to escape the system.

In a generally unpopular bill,[2] section 5000A stood out as perhaps its least popular provision. Since the passage of the PPACA, 21 state governments, as well as several private organizations and citizens, have filed lawsuits challenging the constitutionality of the mandate.[3] In an August 3 primary, the citizens of Missouri overwhelmingly voted for Proposition C, which permits residents to opt out of mandatory health insurance.[4] Senate Finance Committee member Orrin G. Hatch, R-Utah, has introduced a bill in the Senate — the American Liberty Restoration Act (S. 3502) — that would repeal the individual mandate.[5]

Recently, a federal district court judge declared that the minimum essential coverage provision ''exceeds the constitutional boundaries of congressional power.''[6]

The constitutional arguments for and against the mandate could fill a law journal, but they will not occupy any additional space in this article. Suffice it to say that the outer limits of congressional power to tax and regulate under the commerce clause have yet to be reached, despite *United States v. Lopez*,[7] and the mandate seems destined to survive judicial scrutiny.

A. The Individual Mandate Tax

1. Imposition of the tax. Beginning in the year 2014, ''applicable individuals'' — that is, nonexempt U.S. citizens and legal residents — must ensure that they and all of their dependents who are applicable

[1]P.L. 111-148 (Mar. 23, 2010).

[2]A March 19-21, 2010, CNN/Opinion Research Corp. poll of 1,030 adult Americans found that 59 percent of those surveyed opposed the bill and 39 percent favored it.

[3]Ryan Lirette, ''The Health Insurance Mandate: If It Must Be, Let It Be a Tax,'' *Tax Notes*, July 26, 2010, p. 415, *Doc 2010-14305*, *2010 TNT 144-10*. *See, e.g.*, *Florida v. HHS*, No. 3:10-cv-00091-RV-EMT (N.D. Fla., filed May 14, 2010) (including as plaintiffs the National Federation of Independent Businesses and the attorneys general of Alabama, Alaska, Arizona, Colorado, Florida, **(Footnote continued in next column.)** Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington); *Virginia v. Sebelius*, No. 3:2010-cv-00188 (E.D. Va., filed Mar. 23, 2010); *Thomas More Law Center v. Obama*, No. 2:10-cv-11156-GCS-RSW (E.D. Mich., filed Mar. 23, 2010). *See also* http://www.thomasmoresociety.org/docs/2010/Health_Care_Lawsuits.pdf for an analysis of the pending lawsuits.

[4]''Primary Results for Missouri, Kansas, and Michigan,'' *CNN Political Ticker*, Aug. 4, 2010. For more reading on the subject, see Steven J. Willis and Nakku Chung, ''Constitutional Decapitation and Healthcare,'' *Tax Notes*, July 12, 2010, p. 169, *Doc 2010-11669*, or *2010 TNT 133-6*; Jack M. Balkin, ''The Constitutionality of the Individual Mandate for Health Insurance,'' *New England Journal of Medicine*, 10.1056/NEJMp1000087; Randy Barnett, Nathaniel Stewart, and Todd Gaziano, ''Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional,'' *Heritage Foundation Legal Memorandum #49* (Dec. 9, 2009). *Cf.* Calvin H. Johnson, ''Healthcare Penalty Need Not Be Apportioned Among the States,'' *Tax Notes*, July 19, 2010, p. 335, *Doc 2010-15557*, or *2010 TNT 137-7*.

[5]*Doc 2010-18919*, *2010 TNT 166-17*.

[6]*Virginia v. Sebelius*, No. 3-10CV188-HEH (E.D. Va., decided Dec. 13, 2010); *Doc 2010-26522*, *2010 TNT 239-8*.

[7]514 U.S. 549 (1995).

individuals maintain "minimum essential coverage" for each month of the tax year.[8] Failure to maintain that coverage for any month by an individual or her dependents triggers the imposition of a penalty that is payable and includable in the individual's tax return covering that period.[9]

2. Minimum essential coverage. What qualifies as minimum essential coverage will likely be addressed in future regulations. In its current form, the statute includes government-sponsored programs, eligible employer-sponsored plans, plans in the individual market, grandfathered group health plans, and other coverage as recognized by the Secretary of the Department of Health and Human Services and the Treasury Department.[10] Based on the regulations to be imposed on employers and the criteria established for the state insurance exchanges, it is reasonable to assume that minimum essential coverage will include any government-sponsored plan, such as Medicare or Medicaid; any employer-sponsored plan, because employers are required under PPACA to carry an essential health benefits package[11]; and individual plans purchased through the state exchanges.

3. Amount of the penalty. The penalty is imposed on a monthly basis and is equal to the lesser of the sum of the monthly penalty amounts determined under section 5000A(c)(2) or the national average premium for a bronze-level health plan offered though the local exchange.[12] The penalty is assessed as the lesser of a flat dollar amount or a percentage of household income.[13] Taxpayers are liable for payments of their dependents.[14] Spouses who file joint returns are jointly liable for each other's penalty payments.[15]

The amount is set to increase for tax years after 2014. The flat dollar monthly amount is scheduled to increase from $95 per adult for 2014 to $325 for 2015 and $695 for 2016, after which the amount is indexed to inflation.[16] The percentage of income amount is scheduled to increase from 1 percent in 2014 to 2 percent in 2015, with a maximum of 2.5 percent for tax years after 2015.[17]

4. Exceptions. The following groups are not considered applicable individuals for purposes of section 5000A:

- noncitizens[18];
- nonresident aliens[19];
- incarcerated individuals[20]; and
- individuals with a religious exemption.[21]

Those who are excepted for religious reasons must be members of a recognized religious sect exempting them from self-employment taxes and adhere to tenets of the sect.[22]

5. Exemptions. There are several exemptions from the penalty provisions of the act. A hardship exemption is available to individuals who cannot afford coverage because their required contribution for employer-sponsored coverage or the lowest cost bronze plan in the local exchange exceeds 8 percent of their annual household income.[23] There is also a poverty exemption for taxpayers whose household income falls below the income tax filing threshold established under section 6012(a)(1).[24] Members of Indian tribes are also exempt.[25]

B. 'Third Leg of the Stool'

Going back to the Clinton administration, the individual mandate was always considered by proponents of healthcare reform to be the "third leg of the stool."[26] An insurance regime can only be sustained if there are enough participants who pay premiums in excess of their benefits received to offset those participants who will receive benefits in excess of premiums paid.[27] In terms of health insurance, this basically means that healthy people subsidize the sick.

1. Insurance death spiral. Under the pre-PPACA regime, healthy individuals were brought into the system mainly through the prevailing employer-based insurance model. Outside that model, such as in the soon-to-be-created local exchanges, individuals need to be incentivized to participate even when the premiums exceed their expected costs. Without those incentives, the ultimate result would be an "insurance death spiral."

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[8]Section 5000A(a).

[9]Section 5000A(b).

[10]Section 5000A(f).

[11]42 U.S.C.S. section 18022(a) and (b). For a complete list of what must be offered, see H.R. 3590, section 1302(b).

[12]Section 5000A(c)(1). Bronze-level coverage is designed to provide actuarial benefits equal to at least 60 percent of medical costs under the plan. H.R. 3590, section 1302(d)(1)(A).

[13]Section 5000A(c)(2).

[14]Section 5000A(b)(3)(A).

[15]Section 5000A(b)(3)(B).

[16]Section 5000A(c)(3).

[17]Section 5000A(c)(2)(B).

[18]Section 5000A(d)(3).

[19]*Id.*

[20]Section 5000A(d)(4).

[21]Section 5000A(d)(2).

[22]Section 5000A(d)(2)(A) and (B).

[23]Section 5000A(e)(1).

[24]Section 5000A(e)(2).

[25]Section 5000A(e)(3).

[26]*The Lancet*, vol. 371, issue 9616, pp. 885-888, Mar. 15, 2008.

[27]*See* Kenneth Arrow, "Uncertainty and the Welfare Economics of Medical Care," *The Am. Econ. Rev.*, 53:941-73 (1963); "Kenneth Arrow and the Changing Economics of Healthcare," *J. of Health Politics, Policy and Law*, 26:823-1214 (2001).

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Borrowing an example from Ezra Klein,[28] imagine a group plan with only five people who participate — a triathlete, a diabetic, and three other people. The triathlete's expected medical cost for a year is $200 and the diabetic's cost is $16,000. The other people are normal risks and their expected annual costs are $7,500 each. Even a nonprofit insurance company would need to charge a group rate of $7,740. In a free market with informed consumers, the triathlete would drop out of the plan. This causes the premium that the insurer must charge to rise to $9,625. Now it is not efficient for the normal risk individuals to maintain their policies, so they would also exit. This leaves the diabetic to essentially self-insure.

The entire problem could have been avoided if the triathlete were compelled to stay in the system. This is one objective that the individual mandate is designed to accomplish.[29] The triathlete must pay a penalty if he does not purchase insurance. If the penalty is high enough to exceed the difference between his expected cost and the insurance premium, he will participate in the plan.

2. Adverse selection. The second objective of the mandate is to discourage adverse selection. A primary reason why even healthy individuals purchased insurance before PPACA was the concern that one may need treatment or coverage and be unable to afford it.[30] The ability of insurers to deny coverage or payment based on preexisting conditions eliminated the possibility of people waiting until they became ill to purchase a policy. Also, the ability of insurers to discriminate by price among new participants allowed them to limit their exposure to eventual payouts.

However, between PPACA and the Health Care and Education Reconciliation Act of 2010, insurers no longer have the ability to price-discriminate or deny coverage based on preexisting conditions, creating a major adverse selection problem.[31] To go back to the above example, imagine a world evenly populated with triathletes, diabetics, and normal risks and a single insurance company. If the insurer sets the rate at $7,500 and is required to accept all applicants, only the normal risk individuals and diabetics would buy policies. After the first year, the insurer's average costs would be $9,625, so it would have to raise premiums, which would leave only diabetics in the system.

In 2006 California experimented with a universal coverage plan called PacAdvantage that offered 116,000 employees at more than 6,000 small businesses the opportunity to participate in a health insurance "purchasing pool."[32] The program accepted all applicants regardless of medical history.[33] Within a year, PacAdvantage was forced to close down because only individuals who expected to incur costs in excess of the premium bought into the plan.[34]

Adverse selection has consistently plagued attempts at even limited universal health insurance initiatives. The passage of a healthcare reform measure in Massachusetts that pooled the individual market with the small-business market led to the quadrupling of short-term insurance buyers who purchased and then quickly dropped coverage, leaving only high-cost individuals in the pool.[35] This dramatically increased the premium payments of those left in the pool.[36] A similar problem afflicted Empire Blue Cross/Blue Shield when the insurer unilaterally offered coverage to all commercial applicants.[37]

3. The IMT avoids market failures. PacAdvantage could have survived if every employee was required to participate in the plan. The Massachusetts program's runaway costs may not have occurred if citizens were limited in their ability to exit the plan. An individual mandate gives people an incentive to enter the insurance pool before they become ill and prevents them from exiting once they are in. Because the maximum penalty is set at the amount of the bronze-level premium, individuals are economically ambivalent regarding whether to purchase a policy since their expenditure is the same either way.[38]

Keeping premium costs low is absolutely vital to one of the PPACAs overarching goals, that is, the expansion of access. A study by the Centers for Disease Control and Prevention's National Center for Health Statistics estimated the number of

[28]Ezra Klein, ''The Importance of the Individual Mandate,'' *The Washington Post*, Dec. 16, 2009.

[29]Bryan Caplan, ''A Closer Look at Adverse Selection and Mandatory Insurance,'' *Lib. of Econ. and Liberty* (July 1, 2009).

[30]Milton Friedman and L.J. Savage, ''The Utility Analysis of Choices Involving Risk,'' *J. of Political Econ.*, vol. 56, no. 4, pp. 279-304 (Aug. 1948). For a counter-theory, see John A. Nyman, *The Theory of Demand for Health Insurance*, Stanford University Press (2003) (consumers purchase health insurance to obtain an income transfer from healthy people if they become sick).

[31]42 U.S.C.S. section 300gg-3(a). *See* David M. Cutler and Richard Zeckhauser, ''Adverse Selection in Health Insurance,'' *Nat'l Bureau of Econ. Res.* (1997).

[32]Paul Krugman and Robin Wells, *Economics*, 2d ed., Worth Publishers, p. 495 (2009).

[33]*Id.*

[34]*Id.*

[35]Kay Lazar, ''Short-Term Insurance Buyers Drive Up Cost in Massachusetts,'' *Boston Globe*, June 30, 2010.

[36]*Id.*

[37]''Private Health Insurance in OECD Countries,'' The OECD Health Project, p. 174 (2004).

[38]Section 5000A(c)(1).

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Americans without health insurance to be 46.3 million.[39] The vast majority of uninsured are working individuals and children of working individuals who earn less than 200 percent of the federal poverty level.[40] This is a result of making too much to qualify for Medicaid, but too little to afford employer-offered or individual coverage.

The PPACA solution to close the gap is to offer an advanceable, refundable tax credit to families and individuals with incomes of up to 400 percent of the federal poverty limit.[41] This credit will be advanced directly to insurers in the local exchanges through a program to be set up by the Secretary of HHS.[42] To make the credit effective at providing the level of care Congress intended without becoming a massive cost overrun, it is critical that premium costs remain low. This requires full participation to create a diverse risk pool, which is what the individual mandate is calculated to create.

C. Prohibited Enforcement Mechanisms

1. Subtitle F. Based on the above problems faced by a health insurance regime and the necessity of a vigorous individual mandate to guard against those problems, one would expect the penalty for failure to participate to be fairly stiff with a sturdy enforcement mechanism to back it up. The level of the penalty seems appropriate. On its face, it ensures that individuals whose household incomes can support that premium will have an incentive to purchase minimum coverage if they do not receive it otherwise.

However, the enforcement of the penalty is strangely lacking. The IMT is to be assessed and collected as an ''assessable penalty'' in the same manner as a tax.[43] The IRS has several methods by which it can collect a tax, which appear in subtitle F of the Internal Revenue Code.

2. Traditional enforcement.

a. Notice and demand. A taxpayer's obligation of payment arises on ''notice and demand'' from the Treasury secretary.[44] Within 60 days of an assessment for unpaid taxes, the government must issue a notice of the amount of the assessment and demand payment.[45] The Service's issuance of the notice of deficiency is a jurisdictional prerequisite to the filing by the taxpayer of the petition that institutes a Tax Court proceeding.[46]

b. Interest. The IRS will add interest to any payment not paid by the prescribed deadline.[47] The rate is the federal short-term rate plus 3 percent.[48]

c. Liens. If any taxpayer neglects or refuses to pay any tax due after demand, the amount assessed becomes a lien in favor of the government on all property and rights to property, whether real or personal, tangible or intangible, belonging to the taxpayer.[49] The lien is perpetual.[50] The IRS may sue to enforce it.[51] However, the lien is not binding on creditors until a notice of federal tax lien (NFTL) is filed.[52] Thus, the filing of the NFTL is of greater concern to a taxpayer.[53]

d. Levy. If a tax is not paid after demand, the IRS district director may levy on a taxpayer's wages or other property, either by seizure or by service of a notice of levy on any person who is in possession of the taxpayer's property or who is obligated to the taxpayer.[54] Levy may be made also on property subject to a tax lien, even though the taxpayer no longer has an interest in the property.[55] All funds in a bank account available for withdrawal on the date of the lien may be taken.[56] The levy may attach to a taxpayer's wages, also known as wage garnishment, or other after-acquired property, including Social Security payments,[57] as a ''continuing levy.''[58]

The enforcement procedure is somewhat Byzantine; the district director first issues a notice and demand for the tax.[59] He then serves a notice of

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[39]R.A. Cohen et al., ''Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey 2009,'' NCHS Brief 2010.

[40]''Overview of the Uninsured in the United States: An Analysis of the 2005 Current Population Survey,'' HHS, ASPE Issue Brief (Sept. 22, 2005).

[41]Section 36B.

[42]42 U.S.C.S. section 18082.

[43]Section 6671(a). This roundabout language may be by design. Penalties lie outside Congress's taxing authority and must be justified under a different enumerated power (such as the commerce clause). *See* Lirette, *supra* note 3. *See Bailey v. Drexel*, 259 U.S. 20, 36 (1922) (Supreme Court overturned a levy on businesses engaging in child labor as a regulation outside Congress's authority because the measure was actually a prohibitive penalty, not a tax; ''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.'').

[44]Section 6155(a).

[45]Section 6303(a).

[46]*Id.*

[47]Section 6601(a).

[48]Section 6621(a)(1).

[49]Section 6321.

[50]Section 6322.

[51]*Id.*

[52]Robert Schriebman, *IRS Tax Collection Procedures*, CCH Inc., section 413.05 (2005).

[53]*Id.*

[54]Section 6330(a).

[55]*Id.*

[56]Carol A. Pettit and Edward C. Liu, ''The PPACA Penalty Provision and the Internal Revenue Service,'' *Congressional Research Service Memorandum*, at 7, Apr. 30, 2010.

[57]Section 6331(h).

[58]Section 6331(e).

[59]Id.

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levy, informing the taxpayer of the right to a hearing, and may seize the taxpayer's property for public sale; or he may file a notice of tax lien and proceed under the lien.[60] However, there is no need to apply to a court to effect a seizure under a section 6331 levy.[61]

e. Seizure and sale. Once a levy has attached to a taxpayer's property, the secretary may demand, and the taxpayer must surrender, the property.[62] If the taxpayer does not redeem the property by payment of the deficiency,[63] the IRS may sell the property by public auction or by public sale under sealed bids.[64] Actual notice must be provided to the taxpayer before the sale unless the Service can show that the taxpayer cannot be located.[65] The sale price cannot be less than a minimum price established by the IRS before the sale, which cannot exceed the tax liability plus the expenses of sale.[66] The government may purchase the property if it is in the government's best interests; otherwise, the property is released back to the owner subject to lien.[67]

f. Criminal prosecution. Subchapter A describes a litany of criminal offenses that may be charged against a taxpayer for several tax-related offenses, such as attempt to evade or defeat tax,[68] willful failure to collect or pay over tax,[69] fraud and false statements,[70] and failure to obey summons.[71] The punishments for those crimes include fines ranging from $1,000 to $100,000 and imprisonment of six months to five years, per offense.

3. Enforcement of the PPACA. Like all taxes, the IMT is payable on notice and demand of the secretary.[72] However, any failure to timely pay (or pay at all) may not be subject to criminal prosecution or penalty.[73] The original House version of the reform bill provided for the possibility of criminal punishment for failure to pay the mandate; however, that section was removed by the Senate Finance Committee.[74] This waiver was likely inspired by the public outcry against the prospect of being sent to jail for not buying health insurance.

Also, the Treasury secretary is prohibited from filing a notice of lien against the taxpayer.[75] A tax lien will automatically attach to the taxpayer's property.[76] However, the proscription of the filing prevents the IRS from collecting against a creditor of the taxpayer or transferee of taxpayer's property,[77] or asserting priority over other creditors, even those whose interests arise after the tax lien attaches.[78] Also, without notice, the taxpayer's credit report would not be affected.[79] The Service will be required to obtain judicial foreclosure to collect on its lien.

Subchapter D on the seizure of property for the collection of taxes is similarly thwarted. The secretary is prohibited from levying on any of taxpayer's property for failure to pay the IMT.[80] This prohibition on levies will necessarily preclude wage garnishment, seizures, and sales as well.

The Service could still charge interest on the underpayment[81] or assess additional penalties,[82] although collection of the interest and penalties would be hampered by the same limitations as the underlying tax. The IRS has even stated that no audits will be conducted to ensure that taxpayers remitted the IMT.[83] Thus, the Service's quiver is basically empty without the two arrows of subchapters C and D.

D. Possible Enforcement Mechanisms

There are three avenues of enforcement left to the IRS. Each of those approaches presents problems and is likely to expose the PPACA to the law of unintended consequences because they will encourage a range of negative behaviors unrelated to the goals of healthcare reform.

1. Refund offset. The IRS has the ability to set off against an outstanding penalty any credits awarded or any overpayment of tax that would normally be

[60] *Id*.

[61] *United States v. Rodgers*, 461 U.S. 677 (1983). *See also Brian v. Gugin*, 853 F. Supp. 358 (D. Idaho 1994), *aff'd*, 95-1 U.S. Tax Cas. (CCH) (9th Cir. 1995).

[62] Section 6332(a).

[63] Section 6337(a).

[64] Section 6335(e).

[65] *Powelson v. United States*, 963 F.2d 1156 (9th Cir. 1992).

[66] Section 6335(e)(1)(C).

[67] Section 6335(e)(1)(D).

[68] Section 7201.

[69] Section 7202.

[70] Section 7206.

[71] Section 7210.

[72] Section 5000A(g)(1).

[73] Section 5000A(g)(2)(A).

[74] S. 1796, America's Healthy Future Act of 2009, p. 207, s. 10-19 (Oct. 19, 2009).

[75] Section 5000A(g)(2)(B).

[76] Section 6321.

[77] Section 6323(a).

[78] Section 6323(f).

[79] *Available at* http://www.irs.gov/businesses/small/article/0,,id=108339,00.html.

[80] Section 5000A(g)(2)(B)(ii).

[81] Section 6601.

[82] Section 6672(a).

[83] Martin Vaughan, ''IRS May Withhold Tax Refunds to Enforce Health-Care Law,'' *The Wall Street Journal*, Apr. 15, 2010.

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refunded.[84] More than 65 percent of taxpayers in the United States receive a tax refund.[85] IRS Commissioner Douglas Shulman believes that this ability to reduce or confiscate tax refunds will be sufficient to enforce compliance.[86]

This confidence is based on two dubious assumptions. First, it presupposes that a taxpayer's refund is larger than a basic policy. This notion is demonstrably wrong. The Congressional Budget Office has projected the cost of a bronze-level plan in 2016 for an individual to be $4,500-$5,000.[87] In 2010 the average taxpayer refund was $3,300 per filer.[88] So a cursory look at the numbers would still show that individuals could reap an economic benefit from forgoing health insurance and allowing the penalty to be assessed against their tax refund. The benefit is greater for those receiving a smaller refund, who are generally lower-income taxpayers, and as indicated above, lower-income taxpayers are more likely to be uninsured.

Second, refund offset enforcement assumes that Americans who have chosen not to obtain health insurance will relent and purchase a policy from their local exchange if they receive a smaller refund or none at all. However, that situation may instead motivate taxpayers to reduce their withholding or underpay tax. The tax refund has become somewhat of an institution in mainstream American economics. Many households count on receiving a refund and make annual budget plans around it. As a result, most workers in this country routinely overpay their taxes, knowing that any excess will be returned to them. With electronic filing and direct deposit widely available, taxpayers today do not even need to wait to see if they are receiving a refund or its amount.

This system has created two valuable benefits for the government. First, the knowledge that filing their return will trigger payment of the refund encourages timely and often early filing of Forms 1040. This compliance benefit saves the government the cost of enforcement, which currently exceeds $5 billion.[89] Second, the pervasive overpayment is the equivalent of a huge, interest-free loan to the government. Based on last year's figures, the IRS receives a monthly payment from taxpayers of nearly $27 billion.[90] Invested in an S&P 500 index fund, the government could have earned an additional $43 billion merely from early filing.[91]

The government is probably not investing in index funds, but it is almost certainly earning a substantial financial benefit from the float provided by taxpayer overpayment. By levying against taxpayer refunds, the IRS may provoke a rash of underpayment. Even if the number of taxpayers actually affected by this measure is small, the publicity that would likely be focused on those measures could cause a damaging multiplier effect.

2. Automatic tax lien foreclosure. Another enforcement method involves an automatic tax lien and subsequent foreclosure suit. Even though section 5000A(g) prohibits the filing of a notice of lien, the lien itself arises automatically if the tax is not timely paid after notice and demand.[92] The inability of the IRS to file an NFTL estops the Service from making an administrative seizure or enforcing the lien against some creditors.[93] However, the lien itself still exists, it is perpetual, and it can attach to all property possessed or thereafter acquired by the taxpayer.[94] Once the lien has attached, the IRS may then levy against it, that is, seize the property, or sue to foreclose the lien.[95]

While the waiver of criminal penalties seems to have had a firm political, if not moral, justification, it is unclear why the Service was prevented from issuing a notice of lien to enforce the IMT. The primary and immediate effect of that filing is merely to place the IRS at the head of the line of creditors and to put those who transact future business with the taxpayer on notice of a potential liability. Other than a negative impact on credit, there is little difference between the perfected lien and the "silent lien."

Against this lack of justification, the IRS is faced with major difficulties in collecting the IMT from uncooperative taxpayers. First and foremost is the lengthy delay between the filing of a tax return and the IRS issuance of a letter proposing adjustments.[96] The system proposed under the PPACA involves a matching of individual returns to the reports required from insurers.[97] The lag inherent in the

[84]Section 6402(a).

[85]Michael Deane, "How Much Is the Government Making Off You?" *Forbes*, May 3, 2010. Leslie Bonacum, "Days of Splurging Tax Refunds Are Over," *CCH Complete Tax Refund Survey 2010*, Feb. 16, 2010.

[86]Gautham Nagesh, "IRS Chief: Buy Health Insurance or Lose Your Refund," *The Daily Caller*, Apr. 5, 2010.

[87]CBO, "An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act" (Nov. 30, 2009).

[88]Deane, *supra* note 86.

[89]"Obama Seeks to Double Tax Law Enforcement Budget," *Reuters*, May 7, 2009. Martin Vaughan, "White House Seeks 8% Funding Boost for IRS Enforcement," *The Wall Street Journal*, May 7, 2009.

[90]Deane, *supra* note 86.

[91]*Id.*

[92]Section 6321(a).

[93]IRS Publication 1468, at 3.

[94]*Id.*

[95]Section 7403.

[96]Pettit and Liu, *supra* note 57 at 5.

[97]Section 6055.

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matching program is estimated to be in the range of 10 to 18 months.[98] Also, because the IRS must now go through the judicial process before it can levy against property, foreclose liens, or seize property, the cost of enforcement should skyrocket. It is therefore not surprising that President Obama has proposed immediate increases in the IRS enforcement budget, aiming to quadruple funding within five years.[99] This does not include the number of new agents that would also be required.[100]

On the positive side, a taxpayer would find it difficult to take advantage of the government's handicap. For instance, by mortgaging and taking out loans against his most valuable property, a taxpayer subject to the IMT becomes indebted to a line of creditors that would have priority over the IRS. Although the individual would get good rates on those loans because of an unimpaired credit report, there is little economic benefit to be gained and much to lose without greatly inconveniencing the government.

An individual could take advantage of the delay by using the "float" to invest the funds that otherwise should have gone toward the IMT. However, when the IRS is ultimately able to collect the tax, the additional penalties and interest would likely cancel out any return the taxpayer could have earned.

Therefore, the inability to file a notice of lien, although a costly burden to the government, at least should not provide an incentive for any further misbehavior by taxpayers.

3. Reprioritize tax payments. There is a third approach — neither allowed nor prohibited under the code — that may actually be the most appropriate and effective method.[101] The Service could simply establish a superpriority for the IMT in applying tax payments. Thus, for example, the first dollar of tax withheld from an individual's paycheck, or remitted in estimated payments, would go toward paying the IMT, and if there were any deficiency, it would be considered an income tax deficiency, which could then be assessed and collected by the usual methods.

This approach is currently not used by the Service. In the case of underpayments, the IRS will apply the payment first to tax, then to penalty, then to interest owed.[102] However, its use in the collection of IMT would do much to mitigate the collection problems created by the restrictions in section 5000A(g).

First, it would restore to the IRS all of the force and effect of subtitle F. Second, it would cut down on the delay in collecting the tax because once the IMT determination is made through the matching program, the amount would be collected immediately from future paychecks. The resort to judicial process would be mostly eliminated. Third, unlike a refund offset, which will probably not be sufficient to cover the IMT, the average income tax liability is $10,406.[103] This amount would more than satisfy any outstanding IMT. Fourth, the IMT would then share in all the economic and logistical advantages of source payment, that is, employer withholding.

Also, there is little a taxpayer could do to frustrate that maneuver. No rational individual would seek to earn less income merely to prevent the IRS from being able to recover a full IMT payment. Employer withholding is automatic.[104] Even if taxpayers reduced the amount withheld from their paychecks, it would still likely be sufficient to offset the IMT. This approach would also be effective against those most likely to incur IMT, that is, lower-income taxpayers who are ineligible for Medicaid, because they are mostly working individuals. Even if they ultimately have no tax liability, tax will still be withheld from their paychecks. The economic incentives and disincentives created by reprioritization are minimal because they are subsumed in the already existing incentives of the income tax withholding system.

Taxpayers and critics could claim that such an approach would unfairly circumvent the limitations contained in the PPACA. However, the government can legitimately respond that: (1) the IMT is clearly defined as a penalty; (2) a penalty will automatically give rise to a lien; (3) section 5000A(g) only prohibits the filing of a notice of lien, not the lien itself; (4) a taxpayer's wages are subject to the lien; and (5) remittance of withholding taxes is merely being treated as satisfaction of the lien under section 6325(a)(1).

Whether or not that argument would appease the public, it is at least colorable and no more distasteful to an average taxpayer than a refund offset. Moreover, it would not require congressional modification of the PPACA, as would any other attempt to invigorate the mandate.

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[98] Pettit and Liu, *supra* note 57 at 5.

[99] *See Reuters* article, *supra* note 90.

[100] Ways and Means Committee Republican Report (Mar. 18, 2010) (estimates the number of new agents required to enforce the PPACA at 16,500).

[101] Megan McArdle, "Can the Individual Mandate Be Enforced?" *The Atlantic*, Mar. 29, 2010.

[102] *See* Notice 746 (Apr. 1, 2010), *Doc 2010-8682*, *2010 TNT 77-38*.

[103] *Available at* http://www.incometaxlist.com/.

[104] Section 3402(a).

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E. Conclusion

Most of the above issues would arise in the individual market, where health insurance is purchased with after-tax dollars. However, only 9 percent of the U.S. population currently purchases health insurance directly.[105] Of that fraction, it is believed as much as 37 percent is purchased as supplemental insurance by Medicare recipients.[106] The PPACA is also expected to expand the scope of Medicaid.[107]

This leaves only about 15 million people who are insured through the individual market, many of whom may become eligible for Medicaid. The potential for prohibitively costly abuse by such a relatively small group is minor. However, the PPACA also provides for a penalty, in the form of a tax, for qualifying employers that fail to provide minimum essential coverage.[108] Unlike the individual mandate tax, the ability of the IRS to enforce the employer penalty is fully intact. On the other hand, the amount of the penalty is strangely low — $2,000 for employers that fail to offer coverage, $3,000 for employers that offer nonqualifying coverage.[109] In 2007 the average cost of family coverage for an employee was $12,106, of which $3,281 was paid by the employee.[110] Even the most optimistic supporter of the PPACA would not venture that health insurance premiums will drop below $3,000. Therefore, basic economics would predict that employers will choose to terminate their health insurance plans and simply pay the penalty.[111]

This situation will result in millions more Americans in the individual market, each with a motive to cheat the system. A healthy individual earning just above the federal poverty limit who knows that he can purchase health insurance at the same rate as soon as he actually needs it can save $4,000 to $5,000 per year by simply forgoing the purchase of a policy. It will take the IRS about two years to discover the failure and another substantial period to collect against the taxpayer if forced to go through the judicial process.

The individual mandate tax has the ability to act as an effective deterrent to would-be players. However, without sufficient enforcement strength, it becomes itself open to being gamed. Just as thousands of individuals in Massachusetts found ways to take advantage of that system, the Congressional Research Service predicts that millions of Americans will work their way around the individual mandate.[112] Without future legislative action, the IRS will need to be creative in its enforcement because the vitality of the IMT is essential to the survival of healthcare reform.

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[105]ASPE Issue Brief, *supra* note 41.

[106]*Id.*

[107]John Dunn, "Obamacare and Medicaid," *Health Care News*, July 28, 2010.

[108]*See* section 4980H.

[109]42 U.S.C.S. section 18022(c). *See* Hinda Chaikind and Chris Peterson, "Summary of Potential Employer Penalties Under the Patient Protection and Affordable Care Act," Congressional Research Service, 7-5700 (May 14, 2010).

[110]Christopher Lee, "Rise in Cost of Employer-Paid Health Insurance Slows," *The Washington Post*, Sept. 12, 2007.

[111]Jerry Geisel, "Employers Weigh Costs of Keeping, Dropping Health Coverage," *Workforce Management*, Apr. 5, 2010.

[112]Ben Domenech, "Congressional Research Service Confirms: Many Americans Will Game Individual Mandate," *The New Ledger*, May 6, 2010.

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