M E M O R A N D U M

Sept. 13, 2011

TO: File 3-1375

FROM: Timothy Sandefur

SUBJECT: Current status of Obamacare cases

=Pending cases=

[1] *Thomas More Law Center, et al. v. Barack Hussein Obama, et al.*, No. 10-2388 (6th Cir.)
Judges: Boyce F. Martin, Jr., Jeffrey S. Sutton, James L. Graham
(Origin: E.D. Mich., No. 2:10-cv-11156, Judge: George Steeh, Filed: 3/23/10)

Status: Petition for certiorari pending. In a 2-1 decision on June 29, 2011, the Sixth Circuit upheld constitutionality of Individual Mandate under the Commerce and Necessary and Proper Clauses. Judge Sutton wrote a long separate concurrence expressing discomfort with the Mandate but concluding that existing Commerce Clause precedent did not authorize him to conclude that the Mandate was unconstitutional. Judge Graham dissented, holding that the Mandate was unconstitutional under the Commerce, Necessary and Proper, and Taxing powers.

Allegations and arguments:

(1) Challenges individual mandate under commerce clause,

(2) Challenges individual mandate as an unapportioned direct tax,

(3) Challenges individual mandate as exceeding the Tenth Amendment,

(4) Challenges individual mandate as violating the Free Exercise Clause by forcing people to provide funding for abortions,

(5) Challenges individual mandate as violating the Equal Protection Clause by granting religious waivers to the individual mandate in some instances but not granting exemptions to those who object to funding abortions, and also because it extends tax exemptions to certain groups on the basis of their political viewpoints

(6) Challenges individual mandate as violation of due process clause, but does not explain how.

Note: The plaintiffs have now petitioned the U.S. Supreme Court to hear the case.

[2] *State of Florida, et al. v. United States Department of Health and Human Services, et al.*,
11th Cir. Nos. 11-11021, 11-11067
Judges: Joel F. Dubina, Frank M. Hull, Stanley Marcus
(Origin: N.D. Fla.., Pensacola Division, No. 3:10-cv-91, Judge: Roger Vinson, Filed: 3/23/10)
(The Florida case joined by several states[1])

Status: Statute held unconstitutional by Court of Appeals Aug. 12, 2011. Court of Appeals affirmed summary judgment that district court granted for plaintiffs on Jan. 31, 2011.

Allegations and arguments: Alleges state sovereignty and individual rights claims. District court rejected some state sovereignty claims, but ruled for plaintiffs on individual rights claims. Court of Appeal affirmed in a decision by Judges Dubina and Hull, with Judge Marcus dissenting.

The plaintiffs argued

(1) that the commerce clause does not authorize control over inactivity.

(2) that the necessary and proper clause does not support the requirement; *Comstock* allows only a modest or narrow addition to a legitimate federal program, and because the individual mandate is the central feature of PPACA, not a means to a different, legitimate end. Citing *New York v. United States* and *Printz*, the plaintiffs contend that the necessary and proper clause was not sufficient to uphold the violations of state sovereignty in those cases, and use this not only as an argument in support of their state sovereignty allegations, but also as an analogy to support their individual mandate allegations. The necessary and proper clause does not sustain an unprecedented expansion of federal power which overturns the federalist structure, and the mandate is not necessary because the increased costs to insurers could have been made up by a tax and direct subsidy rather than mandate to purchase.

(3) the law violates the *Dole* spending clause standard by reaching the level of compulsion suggested in dicta in that case. The all-or-nothing approach taken by the Medicaid expansion clauses are much more extreme than the moderate diminishment of funds at issue in *Dole*. Also, there is no legal procedure in place for a state to withdraw participation in Medicaid, and the addition of extensive new Medicaid liabilities for states constitutes a rewriting of the terms on which the state agreed to participate in the Medicaid program.

(4) the law coerces the states by requiring them to fund an expanded Medicaid program and barring them from reducing costs.

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[1] After the mid-term elections, several more states joined as plaintiffs. The 26 plaintiff-appellee / cross-appellant states are now: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

The Eleventh Circuit Court of Appeals rejected the spending clause and coercion arguments, but agreed with the district court that the Individual Mandate exceeds Congress' power under the Commerce and Necessary and Proper Clauses.

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[3] *Commonwealth of Virginia v. Kathleen Sebelius*, Nos. 11-1057, 11-1058 (4th Cir.)
Judges: Diana Gibbon Motz, Andre M. Davis, James A. Wyan
(Origin: E.D. Va., No. 3:10-cv-00188, Judge: Henry Hudson, Filed: 3/23/10)

Status: On Sept. 8, 2011, the Court of Appeal reversed and ordered dismissal on the grounds that Virginia lacked standing to sue. This reversed the District Court's grant of summary judgment in favor of plaintiffs, which occurred on Dec. 13, 2010.

Allegations and arguments: The complaint alleges that PPACA intrudes on state sovereignty because Virginia has enacted a statute that declares that no individual may be compelled to purchase health insurance. The complaint alleges that the individual mandate exceeds the commerce clause authority, thereby infringing on the state's sovereign interest in enforcing its own state law. The court ruled that the individual mandate exceeds Congress' Commerce Clause power, and is not supported by the Necessary and Proper Clause. It also concluded that the mandate is not an exercise of the General Welfare Clause power, because it is not a tax.

The 4th Circuit Court of Appeals panel—the same judges who heard *Liberty University et al. v. Geithner et al.*—heard oral arguments on May 10. On May 23, the panel ordered the parties to file supplemental briefs on the questions of whether the Anti-Tax Injunction Act deprived the court of subject-matter jurisdiction, whether a court could determine that an exaction is a "tax" for purposes of the Anti-Injunction Act without reaching the question of whether the exaction is as a "tax" under the Constitution, and whether, if the Anti-Injunction Act bars the suit, a plaintiff could challenge the exaction in a refund suit or otherwise.

On Sept. 8, the Court of Appeals dismissed the case in a unanimous opinion, written by Judge Motz, on the grounds that Virginia lacked standing to sue. Virginia could not assert the rights of citizens against the federal government, and although states can defend their authority to enact and enforce a legal code, that did not apply because the Virginia Health Care Freedom Act was merely declaratory and did not seek to enforce, regulate, or implement a state program.

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[4] *Liberty University, et al. v. Timothy Geithner, et al.*, No. 10-2347 (4th Cir.)
Judges: Diana Gibbon Motz, Andre M. Davis, James A. Wynn
(Origin: W.D. Va., No. 6:10-cv-00015, Judge: Norman Moon, Filed: 3/23/10)

Status: On Sept. 8, 2011, the Court of Appeals affirmed in a 2-1 decision the district court's order dismissing the case. The decision, by Judge Motz and joined by Judge Davis, held that the

court lacked jurisdiction under the Anti-Tax Injunction Act, because the penalty for failure to purchase health insurance is a tax for purposes of that Act. Judge Wynn wrote a separate concurring opinion stating that, were he to reach the merits, he would hold the Individual Mandate constitutional under the taxing power. Judge Davis dissented on the jurisdictional question but wrote that he would hold the Individual Mandate to be constitutional under the Commerce Clause.

Allegations and arguments:

(1) Challenges the individual mandate on commerce clause, general welfare, or tax and spending powers—these are all combined in a single "ultra vires" cause of action.

(2) Argues that the mandates exceed the Tenth Amendment. Unusually, the complaint alleges that Liberty University and the individual plaintiffs have "exercised their individual rights reserved under the Tenth Amendment," and that a state official plaintiff has exercised rights of their constituents under the Tenth Amendment by voting for the Virginia health care freedom act, and that these rights are violated by PPACA.

(3) Establishment Clause—PPACA allows federal officials to determine what religions will qualify for exemptions from the mandate, thereby giving preferences to recognized religions.

(4) Free Exercise Clause—PPACA does not provide sufficient religious exemptions for individual plaintiffs' religious beliefs because it requires them to purchase insurance in a manner that facilitates, funds, eases, or supports abortion.

(5) Violation of the Religious Freedom Restoration Act—the mandate burdens plaintiffs' religious beliefs without advancing a compelling government interest as required by RFRA. This allegation is very cursory.

(6) Violates the Equal Protection Clause because it establishes a series of religious exemptions for some religions but not others.

(7) Argues that the individual mandate violates First Amendment speech and association rights by forcing a person to "formally associate privately with others who are complicit in elective abortion" against their conscience, and to subsidize insurance programs that fund abortion.

(8) Concedes that the penalty is a tax, and alleges that it is an unapportioned direct tax.

(9) Alleges that PPACA violates the Republican Guaranty Clause because it exceeds Congress' constitutional authority (thus redundant of the Tenth Amendment arguments).

Note: The District Court found that plaintiffs had standing and the case was ripe; also that the case was not barred by the Tax Anti-Injunction Act. However, the court dismissed on the grounds that PPACA is constitutional under the commerce clause, because the decision to refrain from buying insurance is an economic choice which, via supply and demand, has an effect on the market for health care. Congress may therefore regulate it. The court found no need to address the Necessary and Proper Clause. It also found that the penalties for non-compliance are not taxes, but penalties that are constitutional under the commerce clause—therefore, there was no

need to discuss whether it constituted a direct, unapportioned tax. The court also rejected the freedom of association argument, finding that the Constitution only protects the freedom of expressive association, and that the connection between the purchase of insurance and the provision of abortions is too remote to intrude on expressive association or speech. The court rejected the religious arguments, finding first that the Free Exercise Clause does not require exemptions for religious observers, and that there was no evidence of hostility in the granting of exemptions; second, that there was no plausibility to the claim that PPACA burdens religious exercise, thus defeating the Free Exercise and RFRA arguments. It also upheld the exemptions under rational basis scrutiny, which applied because the exemptions served a secular purpose of accommodating religious practices. There was no problem with allowing the government to "recognize" certain faiths for exemption purposes because this was necessary to the fair operation of an exemption, and did not contemplate "excessive" entanglement with religion.

Because the Court of Appeals dismissed on jurisdictional grounds, it did not reach any of these issues. Judge Davis' separate opinion, which upheld the Mandate constitutional under the Commerce Clause, rejected all of the other allegations.

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[5] *Seven-Sky et al. v. Holder, et al.*, No. 11-5047 (D.C. Circuit)
Judges: Brett Kavanaugh, Harry T. Edwards, Laurence H. Silberman
(Origin: No. 1:10-cv-00950 (D.D.C.), Judge: Gladys Kessler, Filed: 6/9/10 (ACLJ's case) (formerly Mead v. Holder))

Status: Oral argument before the D.C. Circuit set for September 23, 2011. On Feb. 22, 2011, the District Court upheld the constitutionality of the Individual Mandate as a constitutional exercise of the Commerce Clause power.

Allegations and arguments: (1) challenges individual mandate on commerce clause grounds; and (2) individual mandate violates Religious Freedom Restoration Act because it burdens rights of religious plaintiffs without being least restrictive means or advancing compelling interest. Clients do not qualify for religious exemptions because they are not members of recognized religious group, but believe in faith healing.

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[6] *Peter Kinder, et al. v. U.S. Department of the Treasury*, (8th Cir.) No. 11-1973
(Origin: No. 1:2010-cv-00101 (E.D. Mo., Southern Division), Judge: Rodney Sippel, Filed: 7/7/10, amended complaint filed 8/18/10))

Status: Briefing completed on Sep. 1, 2011.

Allegations and arguments: Plaintiffs include the lieutenant governor and individual plaintiffs, but is not brought on behalf of the State of Missouri or any agency. Plaintiffs include elderly Medicare recipients, a young person with only catastrophic coverage, and a mother of an autistic child. This latter point is relevant because Missouri recently enacted a law requiring private health insurance companies to cover behavior therapy for children with autism. The complaint alleged (see *note* below; only counts 5, 6, and 9 are being argued on appeal):

(1) commandeering of state employees in violation of state sovereignty, because section 1341 requires states to adopt and maintain a reinsurance program, and section 1513 requires states to provide a qualified health benefit plan to pay penalties to the Treasury Department. This may present a standing problem, since the state is not a party and the complaint makes clear that the lieutenant governor does not appear on behalf of the state.

(2) commandeering on the grounds that section 1513 mandates how the state may compensate its officers. This allegation relies heavily on *Gregory v. Ashcroft*, and appears to be unique among the cases.

(3) a tax on governments: the state alleges that sections 1311(d)(3)(B)(ii) and 10104(e)(1) of PPACA directly tax the State of Missouri in violation of immunity described in *South Carolina v. Baker* (1988). It allegedly does so because it requires the state to pay the IRS on behalf of any individual who is eligible for a state tax credit that defrays costs or benefits over and above those provided by PPACA. Because Missouri requires insurers to provide benefits for, e.g., autistic children, which are not provided under PPACA, the state is required to pay to the IRS the difference between the PPACA mandated benefits and the higher benefits that the individual receives that would otherwise be taxable. This is a unique allegation.

(4) in what appears to be a recharacterization of allegation number 3, the state argues that PPACA violates the Guaranty Clause because under state law (the "Hancock Amendment"), the state may not tax Missouri citizens' income above a certain percentage of the state GDP, and is required to provide a balanced budget; PPACA requires states to accept into the Medicaid program about 465,000 persons who were previously excluded under state law.[2] This allegedly requires taxpayers of Missouri to provide coverage for a much larger class of citizens. Although a federal subsidy defrays these costs, this subsidy expires in 2020, and covers only benefits, not administrative costs. This mandate violates state law under the Hancock and balanced budget requirements, and therefore violates the Guaranty Clause.

(5) Commerce clause challenge. Although plaintiff Samantha Hill has catastrophic coverage, the complaint alleges that section 1302(e) only allows persons to satisfy the mandate on this basis if that person is under 30 and if her premium payment is more than 8% of household

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[2] State law previously allowed only persons who received 19% of the federal poverty line to participate in Medicaid, and did not allow it for childless adults. PPACA requires that states admit into Medicaid all childless adults whose income is below 133% of the federal poverty line and requires states to disregard 5% of a person's income.

income. All other persons are required to have minimum essential coverage. Thus PPACA requires her to buy insurance that covers ambulatory patient services, maternity and newborn care, mental health and substance use disorder services, prescription drugs, laboratory services, and pediatric care.

(6) Direct tax. The complaint concedes that the penalties for failing to maintain coverage are taxes, and alleges that they are unapportioned direct taxes.

(7) Equal protection, due process, and privileges or immunities clauses of the fourteenth amendment. Plaintiffs who are participating in Medicare Advantage allege that section 3201 of PPACA reduces Medicare Advantage coverage by freezing payments at 2010 levels, and then reducing reimbursements for Medicare supplemental coverage reimbursements at too low a rate. Certain counties in Florida are specifically exempted from this process. This is alleged to violate the due process and equal protection clauses because it draws distinctions between citizens without a rational basis, and because it burdens persons who would otherwise move out of those Florida counties (along the lines of *Saenz v. Roe*).

(8) Due process and free speech rights. The complaint alleges that doctors are permitted or required to resolve questions of medical care within the boundaries of appropriate treatment as determined by federal officials under section 4003 of PPACA, and individuals are required to certify that they have obtained the legally mandated insurance coverage. The complaint alleges that this intrudes on doctor-patient confidentiality.

(9) Due process. The complaint alleges that PPACA violates the due process clause because the newly enacted Missouri Healthcare Freedom Act provides that no person shall be compelled by law to participate in any healthcare system.

***Note*:** The court dismissed count 7 for mootness and the other counts for lack of standing. The court additionally found that counts 3 and 4 were not ripe. Plaintiffs Samantha Hill and Peter Kinder (the lieutenant governor) appealed, abandoning the causes of action that did not relate to the individual mandate and arguing that they had standing on counts 5, 6, and 9.

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[7] *Matt Sissel v. United States Department of Health and Human Services, et al.*, No. 1:10-cv-01263 (D.D.C.), Judge: Richard Leon, Filed: 7/26/10 (Pacific Legal Foundation's case)

Status: Motion to dismiss pending; case stayed pending resolution of *Seven-Sky v. Holder.*

Allegations and arguments: Challenges individual mandate as exceeding the commerce clause.

[8] *Coons, et al. v. Geithner, et al.,* No. 2:10-cv-01714 (D. Ariz., Phoenix Division), Judge: Murray Snow, Filed: 8/12/10 (The Goldwater Institute's case)

Status: Cross motions for summary judgment fully briefed.

Allegations and arguments:

(1) Challenges the individual mandate on fifth amendment and ninth amendment grounds, because it interferes with the individual's right to medical autonomy that is recognized also by state law. It does so by forcing individuals to create an intimate relationship concerning health and medical care with non-physician intermediaries employed by health insurers.

(2) Challenges the mandate on privacy grounds under the Fourth, Fifth, and Ninth Amendments.

(3) State officials named as clients allege that PPACA restricts their autonomy. Arizona law recently expanded eligibility for the state's program providing health care to the poor. This proved too expensive, but because PPACA sets a baseline for care based on the state's previous level of provision—i.e., it requires states to freeze in place their criteria for eligibility into state health programs—deprives the legislators of their "quasi-sovereign legislative voting power over state legislation and appropriations concerning the cost, nature, and structure of Arizona state government, compelling them to vote in the manner preferred by the federal government in the controversial area of health care policy." In addition, PPACA requires states to establish insurance exchanges, and if the state does not do so, it allegedly displaces the state's sovereign powers to regulate the insurance industry.

(4) The complaint also names federal legislators as clients, and alleges that PPACA creates an agency called the Independent Payment Advisory Board ("IPAB") which makes policy with regard to Medicare spending; such policies are implemented unless Congress amends them by August 15 of each legislative session. Due to the structure of the PPACA statute, these policies will reduce reimbursements to states. PPACA's procedural restrictions make it impracticable for future Congresses to amend IPAB's policies or to repeal IPAB's enabling authority. Thus PPACA restricts Congressmen's right to vote.

(5) Challenges the individual mandate on commerce clause grounds.

(6) The individual mandate penalty is not a tax, but if it were, it would be an unapportioned direct tax.

(7) Exceeds the spending power by changing the terms of Medicaid participation and offering so much money as to make it no real choice—i.e., *Dole* arm-twisting.

(8) The establishment of IPAB violates separation of powers because it is an executive agency which exercises legislative powers over which there is no meaningful congressional review.

(9) The act violates the necessary and proper clause by depriving states of autonomy, consolidating powers in the federal government, violating separation of powers, and attempting to create an unrepealable act.

(10) Exceeds the Tenth Amendment by intruding on state autonomy.

(11) Alleges "non-preemption"—that the Act fails to make clear whether it was intended to supercede state's health care freedom act declaring that individuals cannot be forced to participate in an insurance program.

Note: The plaintiffs filed a motion for a preliminary injunction on the grounds of count 4, the non-repealability element, but withdrew it in accordance with a stipulation in which defendants agreed that Congress could repeal the law by ordinary means. This is the only case to challenge the constitutionality of the Independent Payment Advisory Board on separation of powers and non-delegation doctrine grounds.

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[9] *U.S. Citizen's Association, et al. v. Sebelius, et al.*, No. 5:10-cv-01065 (N.D. Ohio), Judge: David Dowd, Filed: 5/12/10
(On appeal: 6th Cir. No. 11-3327)

Status: Briefing completed July 18, 2011. The case seeks review of the second, third, and fourth counts described below, and later dismissed the first count on the basis of the Sixth Circuit's decision in *Thomas More Law Center*.

Allegations and arguments:

(1) individual mandate exceeds commerce clause authority,

(2) violates freedom of association because it requires persons to associate with and finance insurance providers against their will and requires plaintiffs to associate with doctors who cover or provide medical procedures plaintiffs disagree with,

(3) violates due process clause because it requires plaintiffs to provide medical information to private insurers and to pay insurers for coverage for types of medical treatment they may not believe in, and

(4) violates the right to privacy because it requires disclosure of private medical information to private insurance companies.

Note: Relying heavily on the Florida decision, the district court denied the defendants' motions to dismiss on standing, ripeness, and Anti-Tax Injunction Act grounds. It also denied the motion to dismiss on the merits of the commerce clause, finding that the court needed time for further consideration. The court certified counts 2, 3, and 4 for review on appeal, but retained jurisdiction over the first count, which it later dismissed when the Sixth Circuit upheld the Individual Mandate in the *Thomas More* decision.

[10] *Ryan Walters, et al. v. Eric Holder Jr., et al.*, No. 2:10-cv-00076 (S.D. Miss.), Judge: Keith Starrett, Filed: 4/2/10, amended complaint filed 4/9/10, third amended complaint filed 3/4/10

Status: Motion to dismiss and to seek jurisdictional discovery was filed on Apr. 12. After numerous delays, the court granted

Allegations and arguments: Plaintiffs are individuals as well as the lieutenant governor, who sues only in his individual capacity. The complaint is a purported class action challenging individual mandate under the commerce clause and the due process clause, the latter on the grounds that it intrudes on personal decisions. It also alleges that the mandate is an unapportioned capitation tax. The amended complaint added causes of action that the mandate regulates the state's own compensation of its employees in violation of state sovereignty, and the third amended complaint addresses the issue of standing; the plaintiffs aver that they have already begun deviating from their financial plans in anticipation of the mandate taking effect.

On Aug. 29, the Court dismissed Bryant's allegations for lack of standing, because he is not currently or imminently injured by the Mandate. But it refused to dismiss the allegation that the Mandate violates the plaintiffs' right to medical privacy. The court also rejected the government's attempt to obtain jurisdictional discovery.

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[11] *Association of American Physicians and Surgeons Inc. v. Sebelius, et al.*, No. 1:10-cv-00499, (D.D.C), Judge: Amy Berman Jackson, Filed: 3/26/10, amended complaint filed 9/13/10

Status: Motion to dismiss was filed Nov. 22, and final papers opposing that motion were filed February 14, 2011. Judge Jackson was assigned to the case on March 30, 2011, but no further action has been taken on the case.

Allegations and arguments: This is an unusual case combining a constitutional challenge to PPACA with various administrative challenges to newly enacted regulations. Putting aside the administrative matters, the complaint alleges that the employer and individual mandates exceed Congress' commerce clause authority and constitute a regulatory taking without just compensation (by raising the cost of insurance premiums). In response, the government argues that the takings claim is barred by the Tucker Act, and makes a strong argument against the allegation that the penalty is a direct or capitation tax.

[12] *Physician Hospitals of America, et al. v. Sebelius*, (5th Circuit, No. 11-40631), (Originated as E.D. Tex. No. 6:10-cv-00277, Judge: Michael Schneider, Filed: 6/3/10)

Status: Summary judgment granted for defendants, Mar. 31, 2011; appellant's opening brief filed in the Fifth Circuit on Aug. 18, 2011.

Allegations and arguments: An unusual case that alleges that a specific provision of PPACA violates rights of physician-owned hospitals. The law restricts the ownership of hospitals by physicians, and the expansion of hospitals owned by physicians, unless they meet certain new legal requirements. These requirements are vague and challenged as violations of the due process and takings clauses. This case does not challenge the individual or employer mandates.

***Note*:** The court issued summary judgment for defendants on the merits, finding that the law withstands a rational basis test and that it does not effect a taking of their real property. The case is now on appeal before the 5th Circuit.

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[13] *Calvey, et al. v. Obama, et al.*, No. 5:10-cv-00353 (W.D. Okla.), Judge: David L. Russell, Filed: 4/7/10

Status: Briefing underway; motion to dismiss granted in part and denied in part; Apr. 26, 2011. Scheduling order was filed setting discovery and summary judgment dates for late 2011.

Allegations and arguments:

(1) individual mandate exceeds commerce clause authority;

(2) penalty constitutes unapportioned direct tax;

(3) individual mandate violates Tenth Amendment;

(4) by forcing people to contributing to the funding of abortion, PPACA violates Free Exercise Clause;

(5) by exempting some religious believers from the mandate, but forcing others to contribute to funding abortions despite their religious objections, PPACA violates the Equal Protection Clause; also violates the Equal Protection Clause because it funds certain groups, including labor unions, instead of others;

(6) individual mandate violates due process clause; and

(7) violation of right to privacy because it requires disclosure of confidential medical information to private parties.

Note: The court dismissed counts 4, 5, and 7 for lack of standing. It also dismissed counts 1, 2, 3, and 6 for the plaintiffs who already had health insurance for lack of standing; but did not dismiss those counts for the three plaintiffs who did not have health insurance.

[14] *New Jersey Physicians Inc., et al, v. Obama, et al.*, No. 10-4600 (3rd Circuit) (Origin: No. 2:10-cv-01489 (D.N.J.) Judge: Susan D. Wigenton, Filed: 3/24/10)

Status: Court of Appeals affirmed dismissal in a decision on August 3, 2011, on the grounds that none of the plaintiffs had asserted a judicially cognizable injury.

Allegations and arguments:

(1) Individual mandate violates commerce clause;

(2) is an unapportioned direct tax; and

(3) creates a system of socialized medicine that is not necessary and proper, and undermines and compromises state sovereignty.

The court dismissed the case on standing grounds, finding that the individual plaintiff had not alleged a present injury, but a speculative future injury. It distinguished the *Virginia* and *Florida* cases on the grounds that individual plaintiffs in those cases alleged a present injury, while plaintiffs in this case alleged speculative future harm. The court also dismissed the employer-plaintiff on similar grounds, and rejected the New Jersey Physicians Association's standing because no individual member of the Association was shown to have standing. Plaintiffs appealed and the Third Circuit affirmed. It held that the Individual Mandate will not deprive individuals of the right to choose whom who obtain health care from, or what health care to obtain; that it will not interfere with a doctor's ability to choose patients, and will not harm the organizational plaintiff. Thus the case was dismissed for lack of standing.

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[15] *Goudy-Bachman, et al. v. United States Department of Health and Human Services, et al.*, No. 1:10-cv-00763 (M.D. Penn.), Judge: Christopher C. Conner, Filed: 4/9/10

Status: Summary judgment granted for plaintiffs, Sept. 13, 2011.

Allegations and arguments: Individual mandate exceeds commerce clause authority. On Jan. 24, the court issued an opinion rejecting the government's procedural arguments for dismissal, finding that individual plaintiffs had stated sufficient present injuries to proceed, that the case was ripe, and that the Tax Anti-Injunction Act did not apply because the mandate is not a tax. The court did not address the merits of the plaintiffs' commerce clause arguments. On Sept. 13, the court held the Individual Mandate unconstitutional under the Commerce Clause on the grounds that Congress may regulate only those things that are at present affecting interstate commerce, and not matters that only potentially may affect interstate commerce.

[16] Purpura, et al. v. Sebelius, et al., (3rd Circuit, No. 11-2303)
(Origin: D. N.J. No. 3:10-cv-04814, Judge: Freda L. Wolfson, Filed: 9/20/10

Status: Dismissed Apr. 21; Appeal fully briefed; Request for oral argument before en banc court rejected on Aug. 18; case calendared for Sep. 15, 2011.

Allegations and arguments: This is a frivolous pro se case making a large number of allegations, including that President Obama was not born in the United States.

Note: The court dismissed for lack of standing; the case is now on appeal before the 3rd Circuit.

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[17] Pruitt v. Sebelius, et al., No. 6:11-cv-00030, (E.D. Okla.), Judge: Ronald A. White, Filed: 1/21/11

Status: Motion to dismiss pending; reply to response to motion filed Apr. 26.

Allegations and Arguments: Plaintiff is the attorney general of Oklahoma, acting in his official capacity and claiming that standing derives from his duty to defend Oklahoma constitutional amendment that contradicts the act. Argues that the act exceeds commerce clause authority.

Note: Defendants, in their motion to dismiss, argue that plaintiffs lack standing because no actual case or controversy.

=Cases no longer live=

[18] Peterson v. USA, et al., No. 1:10-cv-00170 (D.N.H.), Judge: Joseph N. Laplante, Filed: 5/6/10, second amended complaint filed Dec. 20, 2010.

Status: Dismissed Mar. 30 for lack of standing.

Allegations and arguments: Pro se complaint basically argues that PPACA exceeds the commerce clause and necessary and proper clause, as well as the takings clause, the privileges and immunities clause of Article IV, and various other provisions

[19] *Burlsworth, et al. v. United States Department of Justice, et al.*, No. 4:10-cv-00258 (E.D. Ark.), Judge: Susan Webber Wright, Filed: 4/27/10

Status: Voluntarily dismissed without prejudice (9/8/10)

Challenge to individual mandate on commerce clause and 10th amendment grounds. Attempted class action lawsuit, but was voluntarily dismissed by plaintiffs.

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[20] *Anthony Shreeve, et al. v. Barack Obama, et al.*, No. 1:10-cv-00071 (E.D. Tenn.), Judge: Curtis Collier, Filed: 4/8/10, amended complaint filed July 27, 2010

Status: Dismissed Nov. 4, 2010.

This absurd lawsuit names some *278 pages worth* of persons as plaintiffs. Filed by Tea Party Christians member and patent attorney Van Irion, the complaint makes other absurd arguments: e.g., alleging that President Obama, Rep. Pelosi, and others had "abused their authority" in unspecified ways, had violated the Tenth Amendment—on the unelaborated theory that "nothing in the Constitution grants the Federal Government authority to regulate health care"—and had violated their oaths of office to defend the Constitution. Noting that the plaintiffs had not even alleged that they would be compelled to buy insurance, the District Court dismissed.

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[21] *Judicial Watch Inc. v. United States Department of Health and Human Services*, No. 1:10-cv-00443 (D.D.C.), Judge: Ellen Huvelle, Filed: 3/17/10

Status: Dismissed with prejudice by stipulation (7/14/10).

Argued violations of Freedom of Information Act on the grounds that the government failed to provide documents about alleged secret negotiations with unions and other private lobbyists prior to the enactment of PPACA. Did not challenge any substantive provision of PPACA. The government answered by saying that it found no documents responsive to the plaintiffs' request. The case was dismissed by stipulation.

[22] *Fountain Hills Tea Party Patriots L.L.C. v. Sebelius, et al.*, No. 2:10-cv-00893 (D. Ariz., Phoenix Division), Judge: David K. Duncan, Filed: 4/22/10

Status: Voluntarily dismissed, 6/16/10.

Allegations and arguments: Frivolous argument that PPACA exceeded Congress' power under the preamble "as there are no 'liberties' in the Act."

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[23] *Independent American Party of Nevada, et al. v. Obama, et al.*, No. 2:10-cv-01477 (D. Nev., Las Vegas), Judge: Robert Johnston, Filed: 8/31/10

Status: Dismissed on Mar. 7 for failure to provide proof of service of process.

Allegations and arguments: Combines unorthordox arguments—*e.g.*, that Marxism is a religion, and since PPACA imposes Marxism, it violates the Establishment Clause—with challenges to individual mandate on commerce clause, privacy, due process, freedom of association, Tenth Amendment, and capitation tax grounds; challenges to exemptions on equal protection grounds, and free exercise and RFRA grounds, which appear to be based on the Marxism-as-religion argument. Also that the mandate violates the Thirteenth Amendment because it compels people to work to pay for insurance.

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[24] *Bellow v. United States Department of Health and Human Services, et al.*, No. 1:10-cv-00165 (E.D. Tex.), Judge: Ron Clark, Filed: 3/24/10

Status: Dismissal granted June 20, 2011 for lack of subject matter jurisdiction.

Allegations and arguments: Pro se case challenging individual mandate as exceeding commerce clause and Tenth Amendment authority, and violating Fourth Amendment right to privacy because it requires disclosure of private medical information. On the same day that the defendants filed their reply to the opposition to the motion to dismiss, plaintiff filed a three-page motion for summary judgment, simply citing to the *Virginia* decision. Defendants have asked the court to stay summary judgment proceedings pending ruling on the motion to dismiss.

***Note*:** Case was referred to magistrate judge Keith Giblin, who recommended that the motion to dismiss be granted for lack of standing, relying on previously decided cases and the fact that plaintiff did not allege that he did not have health insurance or any other relevant facts about his financial situation. On June 20, 2011, the court adopted the recommendation.

[25] *Baldwin, et al. v. Sebelius, et al.*, (9th Cir. No. 10-56374)
(Originated as S.D. Cal. No. 3:10-cv-01033, Judge: Dana M. Sabraw, Filed: 5/14/10 (Pacific Justice Institute's case))

Status: On August 12, 2011, the Ninth Circuit affirmed dismissal for lack of standing.

Allegations and arguments:

(1) the individual mandate exceeds the commerce clause.

(2) the penalty provision makes it a bill for raising revenue and therefore that PPACA violates the "originate in the house" clause.

(3) by passing the act, "Congress effectively expanded the Enumerated Powers" and therefore PPACA "constitutes an amendment to the Constitution made in direct contravention of the proper amendment procedure set forth in Article V."

(4) The penalty is an unapportioned capitation tax.

(5) Section 1552 of PPACA requires the Secretary of Health and Human Services to list on the internet all authorities provided to the Secretary under the Act. This was not complied with.

(6) Violation of privacy rights because individuals are deprived of the right to be sole decision-maker about health insurance needs.

(7) Violation of physician-patient privilege because it requires individuals to disclose a broad range of private medical information to government and private entities.

(8) Violation of the equal protection clause because PPACA creates various Offices of Women's Health, but no Offices of Men's Health

(9) Asserts that PPACA provides public funding for abortion, but does not identify what law or constitutional provision is thereby violated.

Note: The trial court dismissed on standing grounds, finding that (a) PJI—which sued in its own name—did not employ enough people to be subject to the employer mandate, and (b) the individual mandate would come into effect only in 2014, and it was impossible to know if the individual plaintiff would be subject to the mandate at that time. The court also dismissed several causes of action as simply airing generalized political grievances or failing to state specific injuries.

After dismissal, plaintiffs appealed to the Ninth Circuit (No. 10-56374). But immediately after receiving the briefing schedule from the Court of Appeals, the plaintiffs filed a petition for certiorari directly to the Supreme Court. It is unclear why this petition was filed, but it was

denied as moot on Nov. 8. The case was therefore returned to the Ninth Circuit which dismissed on the ground that both PJI and Baldwin had failed to demonstrate an injury.

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P.S.: This memo was updated on Sept. 8, 2011 by Timothy Sandefur.