No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL., RESPONDENTS

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION OF DAVID BOYLE FOR LEAVE TO INTERVENE AS RESPONDENT OR OTHERWISE, AND TO ADD QUESTIONS PRESENTED

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QUESTIONS PRESENTED

1. Does a government-imposed "individual mandate" that Americans purchase health insurance violate the Due Process Clause, or the Takings Clause, of the Fifth Amendment, especially since, e.g., *Nebbia v. New York* (291 U. S. 502 (1934)) upholds the right to escape regulation by simply not entering the regulable market?

2. Does a government-imposed "individual mandate" that Americans purchase health insurance violate the Sherman Act (ch. 647, 26 Stat. 209 (1890)) or other antitrust laws, especially since *United States v. South-Eastern Underwriters Ass'n* (322 U.S. 533 (1944)) evokes that Act to condemn coerced purchase of insurance?

3. Does a government-imposed "individual mandate" that Americans purchase health insurance violate the freedom of association, or of speech or expression, protected by the Free Speech Clause, or other parts, of the First Amendment?

4. Does a government-imposed "individual mandate" that Americans purchase health insurance violate the anti-servitude or free-labor provisions of the Thirteenth Amendment, or of 18 U.S.C. § 1589?

5. Does a government-imposed "individual mandate" that Americans purchase health insurance violate [the Ninth Amendment, Tenth Amendment, or other laws or provisions, discussed below or in the attached Complaint in Intervention]?

6. Whether the government had the power under Article I of the Constitution to enact the minimum coverage provision. (Current "Question Presented" in 11-398)

PARTIES TO THE PROCEEDINGS

Movant, David Boyle, is an American citizen opposed to the compelled-health-insurance-purchase "individual mandate" in the health care act mentioned *infra* at 3.

Three federal officers and their three respective Departments are Petitioners in 11-398, and were defendants-appellants/cross-appellees below: Kathleen Sebelius, Timothy F. Geithner, and Hilda L. Solis, in their respective official capacities as Secretary of Health and Human Services, Secretary of the Treasury, and Secretary of Labor; and the three aforementioned United States Departments.

Four individuals, one organization, and twenty-six States are Respondents in 11-398, and were plaintiffs-appellees/cross-appellants below: the individuals are Kaj Ahlburg, Mary Brown, Dana Grimes, and David Klemencic; the organization is National Federation of Independent Business ("NFIB"); and the States, by and through their Attorneys General or Governors, are 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.

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INTRODUCTION

"[M]an is by no means for the State. The State is for Man."[1] "Congress could replace the mandate with a rule forbidding people from purchasing health care or even food (which, after all, is necessary to human health) without first either obtaining health insurance or paying a penalty."[2] The present movant, David Boyle (hereinafter, "Movant"), an American citizen, respectfully filing this *pro se* Motion for Leave to Intervene as Respondent or Otherwise,[3] and to Add Questions Presented ("this Motion") in the matter of Case 11-398 ("*HHS v. Florida*")—or later related matter—on this Court's docket, presents the two grossly contrasting views *supra* of what the State can and should do to people; and Movant is on the side of Man (and Woman), not the Mandate. Professor Dorf's "modest proposal", *supra*, in support of the notion that the State can effectively starve you to death, *see id.*, unless you buy health insurance or pay the penalty for nonpurchase, is the kind of attitude and threat that Movant is trying to defeat by intervention in 11-398 through this Motion. The idea that any level of American government can coerce

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[1] Jacques Maritain, *Man and the State* (1951), *in* Richard W. Garnett, *Jacques Maritain, Man and the State* (1951), 1 Journal of Christian Legal Thought 13 (Spring 2011).

[2] Michael C. Dorf, *How Much Is Truly at Stake in the Legal Battle Over Obamacare?* Sept. 26, 2011, "Verdict" weblog ("blog") of Justia.com, http://verdict.justia.com/2011/09/26/how-much-is-truly-at-stake-in-the-legal-battle-over-obamacare. *See also* Seth McLaughlin, *N.H. primary pranks: Paul ambushed by 'Vermin Supreme'*, Jan. 9, 2012, 10:10 a.m., Wash. Times, Inside Politics blog, at http://www.washingtontimes.com/blog/inside-politics/2012/jan/9/primary-pranks-paul-ambushed-vermin-supreme/: "'My name is Vermin Supreme; I'm running of [sic] the president of America. I stand for mandatory toothbrushing laws,' [U.S. presidential candidate and satirist "Vermin Supreme"] said, delivering his on-the-fly stump speech. 'I'm a friendly fascist, a tyrant you can trust because I know what is best for you.'" *Id.* What is striking is that Mr. Supreme's satirical forced-dental-hygiene proposal, *see id.*, may actually be *de facto* less threatening to human life and freedom than law professor Dorf's real-life proposal is, *see How Much Is Truly at Stake*, *supra*.

[3] If one can be an intervenor "for neither side", Movant would not mind, especially since neither Petitioners nor Respondents are upholding full severability of the Mandate, as Movant is doing.

Americans, government's masters, into contracts and purchases in the way the Mandate (or a Kafkaesque "alternative"[4]) does, is beyond government power and violates individual rights, not to mention human decency and common sense.

OPINIONS BELOW

The District Court opinion was reported at 780 F. Supp. 2d 1256. The Court of Appeals opinion was reported at 648 F.3d 1235.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 2011. The petition for a writ of certiorari was filed on September 28, 2011, and was granted on November 14, 2011. Jurisdiction of this Court lies under 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS

Manifold provisions are discussed *passim*, and are in the Table of Authorities.

SUMMARY OF ARGUMENT

Movant has standing to intervene and should be given leave to do so, since Respondents: are not presenting optimal Article I arguments; have needlessly abandoned formal Bill-of-Rights or statutory (as opposed to federalism-based) individual-rights claims, which should now be added to 11-398 or elsewhere as formal Questions Presented; and fail to mention crucial issues such as expressive harm or overbreadth/forced-speech matters. Respondents' stance thus seriously

[4] Dorf is doubtlessly a fine person, by the way, though his "forbid food" idea may be problematic.

weakens the case against the Mandate, and also fails to implicate various States' Mandates, which should be implicated and overturned. Also, the Government, a.k.a. "Petitioners", has omitted mention of vital issues, e.g., antitrust issues, upon which Movant will focus (among other foci) in written and oral argument before the Court.

STATEMENT OF THE CASE

Without rehearsing all the well-known history of the cases at hand or opinions below (and this Motion may be succinct in other ways, seeing the page limits herein, and since some material may be fleshed out in the attached Complaint in Intervention ("Attached Complaint")[5]): 11-398 concerns the Government's appeal of the portion of *Florida ex rel. Attorney General v. United States Department of Health and Human Services*, 648 F.3d 1235 (11th Cir., Aug. 12, 2011), that did not overturn the Patient Protection and Affordable Care Act or "PPACA" (Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("Act" or "the Act")), but overturned the Act's "individual mandate" ("Mandate", a.k.a. Section 1501, or 26 U.S.C. (or 26 U.S.C.A.) § 5000A) to buy health insurance. And the present Question Presented in 11-398 is whether Article I of the Constitution gives the Government power to impose the Mandate ("minimum coverage provision"). Movant supports Respondents, at least as far as opposing the Mandate.

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[5] The format of this Motion relies to a degree on someone else's apparently-allowed format, *see* Mot. of Ass'n of Am. Physicians & Surgeons, Inc. & Alliance for Nat. Health USA for Leave to Intervene as Resp'ts in 11-398 ("AAPS Motion"), Dec. 6, 2011, *mot. denied* Jan.12, 2012, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-398-Mot-to-Intervene-AAPS-ANH-USA.pdf (courtesy of SCOTUSblog). Movant is also presently sending the Clerk's office a note re format issues.

Movant, for his part, had noticed early in 2011 that other Mandate/Act lawsuits across the Nation: (a) had largely ignored or abandoned rights-based defenses (such as a Fifth Amendment defense) against the Mandate, and (b) had almost without exception demanded the end of the entire Act; and Judge Roger Vinson indeed overturned the Act (including the Mandate) on January 31, 2011, *see Florida ex rel. Bondi v. U.S. Dep't. of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla.), the district-court iteration of 11-398 (-393, -400). Movant then felt obliged to file his own suit, *Boyle v. Sebelius*[6] (CV-11-07868-GW(AJWx)), in the federal judicial Central District of California where he resides, in order to express detailed rights-based defenses against the Mandate, and to sever the Mandate from the Act so that the Act might survive. Movant felt that if that the Act did not survive, then fewer Americans would survive or thrive, as a result of inferior health care opportunities resulting from the death of the Act. Movant filed suit *pro se* on September 22.

Coincidentally, a few days later, on September 28, 2011, the Government declined to ask for, re its defeat on the Mandate issue, *en banc* review of 648 F.3d 1235: a rather surprising decision which sped up the process of Supreme Court review. And the Court granted certiorari in that case, as: *NFIB v. Sebelius* (11-393), about severability of the Mandate from the Act; *HHS v. Florida* (11-398), about the Mandate; and *Florida v. HHS* (11-400), including Medicaid-related and severability issues, all on November 14, 2011. Thus, Movant is filing this request to intervene

[6] Currently *dismissed for lack of jurisdiction without ruling on the merits* (Feb. 3, 2012); Movant presents somewhat different arguments for standing here than in *Boyle v. Sebelius*. Movant respectfully disagrees with the District Court and plans to appeal the ruling in some manner, though this present Motion takes precedence in Movant's efforts right now.

and add Questions Presented to 11-398, largely about individual rights, lest many of the considerations brought up in his district-court suit (and, to some extent, in other Mandate/Act plaintiffs' suits) be effectively ignored or otherwise mooted, which would cause the People to be deprived of their inalienable rights and suffer.

ARGUMENT

I. STANDING, DIGNITARY HARM, AND FORCED SPEECH

If Movant needs to assert his own Article III standing to sue, instead of relying on the standing of Respondents[7] as he is ready to do: while plaintiffs in other Mandate/Act cases have tended to plead financial injury as a basis for standing, Movant will take a different tack and pleads, among other things, dignitary injury or expressive harm.[8] A fuller account of standing is in the Attached Complaint, but for now: even the legal academy has recognized such injury, *see* Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties* (hereinafter, "*Safeguards*"), Aug. 29, 2011, posted Aug. 31, 2011, last revised Oct. 28, 2011, 64 Fla. L. Rev. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1950612_code784767.pdf?abstractid=1919272 (courtesy of Social Science Research Network). Moncrieff, a law professor, notes, "[T]he ACA mandate has been accompanied by an extensive rhetoric of obligation, including the 'mandate' moniker

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[7] *See, e.g.*, *Trbovich v. United Mine Workers*, 404 U.S. 528, 536-37 (1972) (allowing intervenor to utilize standing of other party already in litigation).

[8] Since Movant has a right to privacy, and is offended by the Mandate's presuming to know whether he has health insurance, he will not say here whether he has insurance or not. But he at least notes that he is an adult American, Californian citizen and taxpayer. Also, he does not fall within any exception to the Mandate, or its penalty, in 26 U.S.C.A. § 5000A(d)-(e) (e.g., being Amish).

as well as state-interest justifications related to free-rider and collective action problems", *id.* at 25-26, and explicitly calls the "rhetoric of obligation" elements "'expressive' harms", *id.* at 26.[9] (Actually, the worst "free riders" here are the insurers being paid for products that consumers, coerced by the Mandate, don't want—and the politicians to whom those companies donate in search of favors like the Mandate.) Moreover, Professor Moncrieff is a *supporter* of the Mandate, *see Safeguards*, *supra*, *passim*, making her acknowledgement of the Mandate's stigmatic harm—even in the label "Mandate" itself—all the more credible, since she does not help support the Mandate's cause by admitting the harm it causes.

Indeed, the whole Mandate case or cases may hinge, at least in part, on the idea of the insult or stigmatic harm done by the Mandate and its accompanying penalty for noncompliance, the "Shared Responsibility Payment", 26 U.S.C.A. § 5000A(b). (*Pace* the Orwellian-tinged name of that penalty: it is not anyone's "responsibility", "shared" or otherwise, to buy, sans any consent, a private product like health insurance at governmental whim.[10]) After all, if the Mandate had been phrased as a

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[9] Interestingly, in the 11-398 brief which has Moncrieff's name on it, "Brief of *Amici Curiae* Jewish Alliance for Law & Social Action [*et al.*] and Professor Abigail R. Moncrieff in Support of Petitioners on the Individual Liberty Implications of the Minimum Coverage Provision" (undated), there is no mention of dignitary or expressive harm, *see id.* In that Brief, there is the quote, "The mandate is . . . . indistinguishable from an ordinary tax in terms of its imposition on liberty." *Id.* at 39. But an ordinary tax may not have the charge of expressive harm which the Mandate has, a social stigmatization which wields a chilling effect on a consumer's liberty (and an assault on her dignity). So, *pace* Moncrieff, the Mandate *does* injure American liberty.

[10] The nomenclature of the so-called "Shared Responsibility Payment" has an eerie resemblance to an incident in "The Scouring of the Shire", chapter 8, Book VI, of J.R.R. Tolkien's *The Return of the King* (1955), the final book of the *Lord of the Rings* trilogy (1954-55). In that chapter, *supra*, Hob Hayward, a denizen of the Shire, which is under the alien occupation of a "Chief" (the nefarious Saruman), notes: "'We grows a lot of food, but we don't rightly know what becomes of it. It's all these "gatherers" and "sharers", I reckon, going around . . . . They do more gathering than sharing, and we never see most of the stuff again.'" *Id.* The real-life Mandate may be stranger than Tolkien's fiction.

tax credit for health insurance purchase, rather than a penalty for non-purchase, nearly the exact same amount of money might accrue to the Government from non-purchasers in either case. So, critics might claim, "Whither the problem?" if the amount of "financial injury" were practically identical as either a "tax" (foregone tax credit) or a "penalty".[11] But the problem, or much of it, is in the Mandate's dignitary harm to Americans. "[E]ven a dog distinguishes between being stumbled over and being kicked." (Justice Oliver Wendell Holmes, Jr., *The Common Law*, Lecture 1 (1881)) And *see, e.g.*, the Dec. 8-11, 2011 AP-GfK poll at http://ap-gfkpoll.com/main/wp-content/uploads/2011/12/AP-GfK-Poll-December-2011-Topline_Obama.pdf, in which an overwhelming 84% of respondents said the Government should not have the power to enact a Mandate and to fine noncompliants, *see* AP-GfK Poll, *supra*, at 42. The Mandate is truly not loved by most Americans,[12] unless the preceding poll is seriously in error. And their reasons may well be dignitary, not just legalistic.

While the Mandate's dignitary harm may fall on many people, this may make it a fairly generalized *injury* (redressable by elimination of the Mandate causing the

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[11] In *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Circuit Nov. 8, 2011), *petition for cert. pending* (U.S. Nov. 30, 2011) (No. 11-679), Judge Brett Kavanaugh offers, *see id.* at 49-50, in his dissent as to jurisdiction, some putative solutions to Taxing and Spending Clause-related issues re the Mandate, solutions such as turning the Mandate penalty into a "mere tax" on being uninsured. Kavanaugh does seem to grasp that the penalty, as a penalty, may have expressive harm (or other shaming, coercive quality); but so might a tax, even if it were not called a "penalty". A tax on, say, gender or skin color, would be wildly offensive, whether explicitly called a "penalty" or not. Also, would a tax on having functional eyesight be appropriate (or escape charges of arbitrariness, expressive harm, or plain stupidity), instead of a tax credit for being blind? Or how about a tax on institutions for not being *per se* religious, instead of a tax credit for being a religious institution? Or a "Youth Tax" instead of tax credits for the elderly? Etc. Judge Kavanaugh creates a slippery slope through his well-meant attempt to avoid the "penalty problem" by the alchemy of making the penalty into "just a tax".

[12] Bertolt Brecht once wrote, in the poem *Die Lösung* ("The Solution") (c. 1953), something to the effect of, "If the government doesn't trust the people…why don't they just dissolve the people?" *See id.* Dissolving people's ancient rights and dignities comes uncomfortably close to that.

injury, in this ripe case, 11-398), but that does not equal a mere "generalized grievance". (And some "generalized grievances" cause concrete injury-in-fact,[13] instead of just ruffling feathers with abstract nuisances.) Moreover, a specifically *individual* Mandate evoking "individual responsibility"[14] is hard to call *generalized*.

Finally: while the Mandate causes non-economic harm such as dignitary injury, it may also do other damage, e.g., it serves as a chilling effect, a sort of prior restraint or false imprisonment preventing Americans from exiting any (and all) health insurance plans, since they would be penalized. This is not liberty.

Movant may also have standing to intervene re the Mandate's interference with his or others' First Amendment rights. Health insurers lobby: *see, e.g.*, Jim Spencer, *Reform fight leaves insurers in a delicate position*, Minnesota Star Tribune, updated Feb. 12, 2011, 9:52 p.m., at http://www.startribune.com/business/115950604.html: "Wendell Potter, an ex-Cigna insurance executive . . . , says his former colleagues spent millions of dollars lobbying for the individual mandate to replace a public option . . . because it gave private companies a giant new revenue stream that was in some cases subsidized by taxpayers", *id.*; and Chris McGreal, *Revealed: millions spent by lobby firms fighting Obama health reforms: Six lobbyists for every member of Congress as healthcare industry heaps cash on politicians to water down legislation*, The Guardian (London), Oct. 1, 2009, 11:55 a.m., at http://www.guardian.co.uk/world/2009/oct/01/lobbyists-millions-obama-healthcare-reform,

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[13] *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-25 (1998) (noting that large number of injurees does not preclude standing for injurees, and effectively allowing concrete "generalized grievances").
[14] *See* Tit. I, Subtit. F of the Act, "Shared Responsibility for Health Care", including Pt. I of Subtit. F, "Individual Responsibility" (where § 1501 is placed).

> The industry and interest groups have spent $380m (£238m) in recent months influencing healthcare legislation through lobbying [and] advertising . . . . [C]lose to $1.5m, has gone to the chairman of the senate committee drafting the new law. . . . The pharmaceutical companies . . . are now putting $120m into advertising supporting the emerging legislation.

Revealed: millions spent by lobby firms, *supra*. Even if, say, Movant has health insurance, and thus tacitly agrees that part of his insurance fees go to funding political lobbying, or to commercial advertising, by an insurer: he is entitled, under the First Amendment "overbreadth doctrine", *see, e.g.*, *Broadrick v. Oklahoma,* 413 U.S. 601, 612-13 (1973), to assert the speech rights of those who don't have insurance and don't want it, and who are thus commandeered into forced insurance-purchase, and thus forced speech, by the Mandate.[15] (*But see Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)) (declining to apply overbreadth doctrine to the form of commercial speech which is professional advertising); however, the *Bates* Court, *see id.*, was not considering a forced-speech-by-consumers situation as in the Mandate, so that in this instance, overbreadth should perhaps cover the commercial speech which unwilling consumers subsidize.)

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[15] As for possible *prima facie* "contrary authority", if anyone tries to assert such: while *Virginia v. Hicks*, 539 U.S. 113 (2003), notes that an overbreadth claim is more difficult when the relevant statute is more about conduct than expression, *see id.* at 124, as the Mandate is more about conduct than expression; the statute in *Hicks* was meant to deter trespassers, *see id.* at, e.g., 115, and such deterrence is a legitimate form of harm prevention. Also, there was no real First Amendment issue, *see id.* at 123. With the Mandate, though, there is no harm prevention; although someone not buying insurance arguably is not doing as much social *good* as he could, since he is not paying into the pool which may help lower insurance costs, he certainly does not *hurt* anyone by abstaining from insurance. Moreover, the Mandate does force a substantial amount of unwanted expression, including all the money of unwilling consumers going to lobbying and advertising by insurers.

Although the Mandate may not at first seem to fall within *per se* "First Amendment overbreadth" doctrine, e.g., it does not specifically forbid consumers' speech, it does *de facto* restrict and canalize their speech by making them use their money to fund the lobbying of insurance companies, *see, e.g.*, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (disallowing compulsory funding of political speech), and by thus preventing them from using that money to fund other speech or other items.[16] Or, if one considers that: (a) while the Mandate may not be forcing speech from people who comply with the Mandate and *willfully* purchase health insurance—and who thus tacitly consent to the speech of insurers—, (b) the Mandate illicitly forces speech every time it forces speech from an *unwilling consumer*; that constitutes at least *de facto* overbreadth (the Mandate goes beyond bounds and causes a First Amendment violation by millions of people, i.e., "substantial overbreadth"), and allows Movant to complain, through a reasonable extension of existing law if necessary.[17] —Additionally, *see Ariz. Free Enter. Club's Freedom Club PAC v. Bennett* ("*Freedom Club*"), 564 U. S. ____, 131 S. Ct. 2806, 2814-15 (2011) (forbidding government-forced speech, e.g., Arizona legal requirement that an election candidate's speech trigger funding for one's opponents, so that a message would then trigger an opposing message). And as the *Freedom*

[16] One imagines a Congressional law that some Justices of the Supreme Court—not all—must at times vote as another Justice demands, and in a way the first Justice strongly opposes. While this would still allow the first Justice to vote as he or she would *most* of the time: diluting that Justice's voice, at all, with the "forced speech/vote" requirement, would hardly be appreciated, one weens …

[17] While overbreadth tends to be about otherwise-licit statutes which have an illicit ("overbroad") component: perhaps utterly illicit statutes like the Mandate, statutes causing a chilling effect, should also be attackable by a reasonable extension of overbreadth law. Otherwise, there might be a perverse incentive for lawmakers to make statutes go utterly out of bounds, so that those *fully*-illicit laws will be *less* vulnerable to overbreadth attacks than partially-licit statutes would be.

Club Court notes, the Ninth Circuit appeals court upheld the Arizona measure in question, saying that it did not bar anyone from speaking, *see Freedom Club*, *supra*, 131 S. Ct. at 2816, before the Supreme Court overturned it. Similarly, the Mandate does not explicitly censor any kind of speech, but it is a burden on speaking as one wants.[18] The Mandate's chilling effect on health insurance choices, and what kind of lobbying, advertising, or other messages people may want to fund, is unacceptable. People should not have to forego their constitutionally protected activity of choosing to buy insurance or not, out of fear of fines, prosecution, or humiliation.

The argument for overbreadth may not be as easily apparent as some other arguments against the Mandate, but Movant is making this claim on others' behalf in defense against their denial of freedom. —In sum, there are multiple grounds for Movant's Article III and prudential standing to protect himself or others.

II. INTERVENTION IN 11-398, UNDER APPOSITE FEDERAL GUIDELINES

Moving from "standing" to broader issues: Rule 24 of the Federal Rules of Civil Procedure, "Intervention" ("Rule 24"), has valuable guides for when and how a person may intervene in a case, though this Court is not bound by Rule 24.

Intervention is to be "[o]n timely motion", *id.* (a) and (b)(1). Movant would have liked to file this Motion earlier,[19] though in context, it may be considered timely,

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[18] *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), *citing* forced-speech case *Wooley v. Maynard*, 430 U. S. 705 (1977), for the proposition that forced speech has a chilling effect on speech.

[19] Various unexpected, unavoidable events and duties, which delayed Movant greatly, occurred from several months back until recently. Additionally, Movant is working solo with no staff or helpers, nor any outside source of financing for this action, and has not had the experience of submitting any

see, e.g., *NAACP v. New York*, 413 U. S. 345, 365-66 (1973): "Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive." (Blackmun, J.) One useful guide is the case of *Vermont Agency of Natural Resources v. United States ex rel. Stevens* ("*Vermont Agency*"), 529 U.S. 765 (2000), where, *see id.* at, e.g., 768, the Court considered in oral argument (November 29, 1999) an question to which they granted certiorari only *ten days* before, *see Vt. Agency*, *supra*, 528 U.S. 1015 (November 19, 1999). And the original grant of certiorari had been five months before, *see Vt. Agency*, 527 U.S. 1034 (June 24, 1999). By comparison, this Motion is presenting new questions near two weeks before oral argument—*see* the ten-day period referred to *supra* re 528 U.S. 1015 (1999)—, and about four months after the initial grant of certiorari, quicker than the five-month delay referred to *supra* re 527 U.S. 1034 (1999). (Not to mention how much more momentous 11-398 is, in its implications, than *Vermont Agency*, *supra*, thus necessitating thorough care that 11-398 not omit important questions.[20])

Rule 24 includes two forms of intervention, under parts (a) and (b), "Intervention of Right" and "Permissive Intervention", respectively. Under Rule 24(a)(2), Movant has a right to intervene ("the court must permit anyone to intervene", *id.*) if he "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter

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substantive document to this Court before,. However, there is the "silver lining" that because of the delay, Movant has been able to note recent briefs, and news events, and comment on them here.

[20] *See also Norfolk S. Ry. Co. v. James N. Kirby Pty Ltd.* ("*Norfolk*"), 542 U.S. 963 (Sept. 24, 2004), in which the Court, *see id.*, asked the parties to brief an additional legal question only *twelve days* before the oral argument on October 6, *see Norfolk*, 543 U.S. 14 (2004), and to send the briefs to the Court by October 4, i.e., only *two days* before the hearing date, *see* 542 U.S. 963, *supra*.

impair or impede the movant's ability to protect [his] interest, unless existing parties adequately represent that interest." *Id.* This Motion's Introduction, Statement of the Case, and section on Standing, *supra* at 1-11, establish Movant's "interest[s] relating to the . . . transaction [etc.]", R. 24(a)(2). And much of the rest of this Motion will focus on how Movant's interests are not adequately represented and protected by Respondents, so that Movant's ability to protect his interests will be seriously "impair[ed] or impede[d]", R. 24(a)(2), if he is not allowed to intervene. In the event that somehow Movant is not granted intervention by right, *see* R. 24(a), he seeks permissive intervention under Rule 24(b)(1)(B), since he "has a claim or defense that shares with the main action a common question of law or fact", *id.* I.e., Movant is not only trying to add new Questions Presented, he is also making Article I claims which "share[ ] with the main action a common question of law or fact", R. 24(b)(1)(B), since the "main action" concerns Article I power to inflict the Mandate.

While Rule 24(b)(3), "Delay or Prejudice", mentions the need not to "unduly delay or prejudice the adjudication of the original parties' rights", *id.*, this Motion is largely bringing rights-based defenses against the Mandate to the table; which cannot prejudice Respondents, since any factor that help overturn the Mandate will *aid* the Respondents: the opposite of "prejudice". As for the Petitioners: while they might not want rights-based defenses added to the case, the Government will not be substantially prejudiced by such addition, since, in his *Boyle v. Sebelius* Complaint, *see id.*, Movant brought up all the claims (and more) he is seeking to add as Questions Presented here. Thus, the Government has had months of warning about

Movant's ideas, and they can use that "lead time" in quickly preparing any response. (Movant has added some new arguments here; but still, the claims here are quite similar to those in *Boyle v. Sebelius*.) Finally, various NFIB briefs, *infra* at 20-22, and the AAPS Motion, *supra* 3 n.5, also mentioned due-process and similar "rights-based" issues, so the Government has had additional warning that those issues might be considered. (Since Petitioners have submitted merits briefs on Article I power: if necessary, the Court could ask Movant not to mention Article I issues in an intervenor's brief, if it is felt that could prejudice the Government.)

Adding Movant as an intervenor, and adding new Questions, will, of course, cause some degree of delay or inconvenience to the Court and various parties; but balancing that factor against benefits such as, e.g., the far more thorough adjudication of the case that will occur because people's rights are actually being considered, not ignored, should weigh heavily in favor of Movant's intervention.

III. RESPONDENTS' "ARTICLE I" ARGUMENTS ARE LARGELY MERITORIOUS BUT NEED SERIOUS ELABORATION OR EMENDATION

Movant salutes the courageous plaintiffs and brilliant lawyers on Respondents' side, and all their superb work. Nevertheless, he is not obliged to endorse all of their litigation strategy, so he is intervening in order to protect his and Americans' interest better. —Movant has little problem with Respondents' Taxing and Spending Clause arguments, or with most of their Commerce Clause arguments, either. (There is, of course, no "Coerced Commerce Clause" in the Constitution.)

However, Movant sees at least two huge holes in Respondents' Commerce Clause defense against the Mandate. First, he is not sure Respondents have argued with enough specificity about the "regulating inactivity" issue. Judge Boyce Martin, in his Sixth Circuit *Thomas More Law Center v. Obama* opinion[21] upholding the Mandate, observed that his Circuit had not overturned, under the Commerce Clause, child-support recovery legislation simply because of the "inactivity" of those who failed to pay support, *see* 651 F.3d at 549. However, one should differentiate "guilty inactivity" from "innocent inactivity". Failing to pay child support is clearly morally repulsive. Also, police can "regulate" the "inactivity" of a bank robber who refuses to drop his gun. But commercial inactivity, by an innocent citizen who doesn't want insurance, seems much more outrageous to "regulate" than the inactivity of a child-support evader or bank robber. (Inactivity that lets evil happen is one thing; inactivity that just means refusing to do every possible good thing—and buying health insurance can, admittedly, be good—, is another.) Moreover, a child-support evader has *consented* to have children, or to be in a child-making relationship; a bank robber has *voluntarily* robbed a bank.[22] Thus, they willfully make their (in)activities regulable by the State. Everything considered, then, inactivity is a factor which may be considered judiciously in blocking state action (like the Mandate), though is not always an automatic, 100% block to state action.

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[21] 651 F.3d 529 (6th Cir., June 29, 2011), *pet. for cert. pending* (U.S. July 26, 2011) (No. 11-117)

[22] *Cf.* Daniel Arkin, *Judge Orders Florida Man To Take His Wife on a Date*, NBC 6 Miami, Feb. 8, 2012, updated 9:41 a.m., at http://www.nbcmiami.com/news/weird/Judge-Orders-Florida-Man-To-Take-His-Wife-on-a-Date-138920574.html (court mandates abusive husband to take spouse to Red Lobster and bowling alley, and buy her flowers). There is some "coerced commerce", *see id.* (order to go to seafood restaurant, etc.); but one assumes the man *voluntarily* married—and abused—his wife.

Second, Respondents have conceded "regulability", i.e., forcing, of insurance purchase at the point of consumption, *see, e.g.*, the Eleventh Circuit opinion, 648 F.3d at 1295. This is a gigantic concession, which Movant would not have made without serious disclaimers, if at all. That needless concession might allow a Court to claim that if insurance purchase can be forced at the hospital, it is acceptable to move the point of forced purchase back to a calmer time when someone is not at the hospital yet. But the forcing of people to buy health insurance at or after medical treatment should, if allowed at all (which it shouldn't be, since it is coerced commerce), be "congruent and proportional": e.g., getting a mere $100 worth of free care, maybe a few iodine-swipes worth, should not allow government to force you to buy *$100,000 or more* of health insurance for the rest of your life. But if your hangnail treatment is $100, maybe the Government could ask you for exactly $100 and then apply it to health insurance, —unless you don't want it. (Not to mention that the forced insurance contract would tend to be invalid since it was under duress, in a possibly life-or-death medical situation; a situation also giving rise to suspicion of diminished capacity, another bar to formation of valid contract.)

As for the Necessary and Proper Clause, Movant has few objections to Respondents' reading of *United States v. Comstock*, 560 U. S. ____ (2010), and that case's restrictions on government action. But the Clause's "Proper" part, dealing with the need to avoid constitutional violations, *see, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819), has not been fully used by Respondents.

IV. ABSENCE OF NEEDED, EXPLICIT STATUTORY RIGHTS-BASED DEFENSES AGAINST THE MANDATE IN RESPONDENTS' CASE

That is, there are plenty of constitutional individual rights violated by the Mandate, including those in the Bill of Rights, which are absent among the Questions Presented. Not that such rights were always ignored; *pace* an assertion by Professor Moncrieff, "[L]itigants have challenged the individual mandate only on the ground that it exceeds Congress's Article I powers, rather than arguing that the mandate violates substantive due process norms", *Safeguards* at 1 (footnotes omitted), the amended *Florida v. HHS* complaint of May 14, 2010—to cite one example among many Mandate/Act complaints—mentions, as defenses against the Mandate, Fifth Amendment due process three separate times, *see id.* at 4, 24, and the Ninth and Tenth Amendments seven separate times, *see id.* at 4, 22, 23, 25, 29.

But it is dangerous to abandon valuable claims. Therefore, this Motion is trying to add several Questions Presented because rights claims are viable here.[23] In extreme brief (and the Attached Complaint gives much fuller details): Fifth Amendment due process (and takings, equal protection, void-for-vagueness, and possibly other) issues are still viable, *see, e.g.*, *Nebbia v. New York*, 291 U. S. 502, 533 (1934) (upholding a precursor of "rational basis regulation", but defending the right *not to enter a regulable market at all*), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 396 (1937) (weakening "freedom of contract", but *opposing* compelled

[23] As for the "canon of constitutional avoidance": the Court is already questioning the constitutionality of the Mandate ("Article I powers"), so it may as well do so thoroughly, by considering "individual rights", constitutional or otherwise, not just "government powers".

payments). Anyone who thinks the previous two New Deal cases allow government-forced entry of a consumer into a market should read the cases more closely.

Second, the Government's core case cited to allow the Mandate, *United States v. South-Eastern Underwriters Ass'n* ("*Underwriters*") (322 U.S. 533 (1944)), *see* the Act, § 1501(a)(3) (*citing Underwriters*, *supra*, to activate Commerce Clause and "regulate" (force) health insurance purchase), has some surprises. *Underwriters* is largely about letting the Commerce Clause empower the antitrust provisions of the Sherman Act (ch. 647, 26 Stat. 209 (1890)) to prevent abuses like *coerced purchase of insurance by consumers*, *see* 322 U.S. at 535-36, 562. In other words, the Government cites *Underwriters* to support the Mandate, when the case stands in 180-degree opposition to coerced purchase such as the Mandate forces. It is astounding that the Government has not mentioned this contrary authority to the Court or public, so that some *pro se* filer like Movant has to do so. The Government's gross material omission continues even in its 11-398 Brief on the Merits (Jan. 6, 2012), where, *see id.* at 27, 30, and 41-42, *Underwriters* is mentioned three times, and in its 11-398 Reply Brief (March 2012), where, *see id.* at 19, the case is mentioned once; but each time, the Brief manages to skip around the crucial pages (322 U.S. at 535-36, 562) that mention the Sherman Act violation caused by coercion of insurance purchase. This gap may just be extraordinary coincidence, and wholly inadvertent; but in any case, the Court should know about the gap.[24]

[24] Speaking of the "prejudice to parties" issue, re intervention under Rule 24: the fact that the Government has failed, for literally years now, to mention the protections in *Underwriters* against forced purchase of insurance, may create a *de facto* "not entirely clean hands" situation precluding

Third, as mentioned *supra* at 8-11, the Mandate, through forced speech, violates First Amendment-protected free speech. It also violates First Amendment-protected freedom of association, even the relatively weak right of commercial association: *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23, 636 (1984) (noting the right *not* to associate, and *not* to enter a market), and *cf. Pattern Makers v. NLRB*, 473 U.S. 95, 106 (1985) (upholding the right of union members to resign from their union at any time), which implies a right to avoid commercial association, maybe even for consumers vis-à-vis businesses. And fourth and finally, forced contracts violate the logic or penumbra of the Thirteenth Amendment and its allied statute 18 U.S.C. § 1589 (2000; amended 2008), "Forced labor". While the Thirteenth Amendment was born of the Civil War anti-slavery struggle, forced relationships do not have to be as bad as slavery to be legally forbidden. To work for decades to earn a large amount of money to buy insurance you don't even want, is not fit for a free people. —Other Questions could be presented (if the Court likes), but the above may suffice for now.

V. KEEPING 11-398 FROM BECOMING A NEW *BOWERS V. HARDWICK*

If new Questions Presented on individual rights are approved, this will help prevent the kind of huge mistake the Court believed it made in *Bowers v. Hardwick* (478 U.S. 186 (1986)), which required correction by the Court seventeen years later in *Lawrence v. Texas* (539 U.S. 558 (2003)). If there is a due-process right to same-sex "consensual sodomy", *see id.*, an intimate practice which has not been

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them from complaining about any "prejudice" created by admission of Movant as an intervenor, or admission of the new Questions Presented he recommends.

traditionally regarded as a core American freedom, then there is very probably a due-process right not to purchase products without some degree of consent, especially when such forced purchase is highly untraditional in our free country.

But if the Court does not include due process (or other relevant rights) as part of a new Question, or Questions, Presented in considering the Mandate, it will be giving even less consideration to the People than respondent Michael Hardwick received in *Hardwick*, *supra*, since the *Hardwick* Court at least considered the (Fourteenth Amendment) Due Process Clause before upholding the Georgia statute in question, *see Hardwick* at 196. And Justice Lewis Powell, in his concurrence, noted that he might have voted to overturn the Georgia statute if Hardwick had raised the Eighth Amendment as a defense; but since Hardwick didn't, Powell didn't, *see Hardwick* at 197-98. (Hardwick also abandoned Ninth Amendment claims raised previously, and neglected to bring not only Eighth Amendment, but also Equal Protection Clause, claims, *see Hardwick*, 478 U.S. at 96 n.8.) Movant does not intend to follow Hardwick's unsuccessful strategy.

VI. RESPONDENTS' POSSIBLE INCONSISTENCIES ON RIGHTS ISSUES

However, while Respondents have abandoned formal rights claims (e.g., a Fifth Amendment Question Presented), they seem to be trying to "lump in" rights around the edges. E.g., in the 11-398 pre-certiorari Brief in Response for Private Respondents (document undated), Respondents cite, *see id.* at 9, the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), an opinion largely

about the Fifth Amendment (Takings Clause), *see Apfel*, *supra*, at 503-38. But if Respondents renounced formal Fifth Amendment claims,[25] then why are they citing a Fifth Amendment case? While Respondents have done a fine job on the whole: it almost looks as if the Private Brief in Response, *supra*, may be "gaining some of the mileage" of rights-based defenses, after a lower court rejected those defenses. (One is reminded of Flannery O'Connor's "Church of Christ without Christ" in her novel *Wise Blood* (1952), in that Respondents may approach a sort of "Benefits of Rights without Rights" stance: not raising explicit rights-based Questions Presented but seeking benefit in that rights-based direction anyway.)

And what of these "rights" or "liberties"? There is no need even to mention them, since the Court could decide if the Commerce Clause or other Article I provisions allow the State to "regulate" people into buying health insurance, without inquiring much (or at all) about any "liberties", "freedom", "dignity", etc. (In Chief Justice Rehnquist's *United States v. Lopez* (514 U. S. 549 (1995)) opinion limiting Commerce Clause power, for example, the words "liberties" appears only once, *id.* at 552, "tyranny" only once, *id.*, and "freedom" does not appear at all, nor does "due process" or "Fifth Amendment", *see id.* at 551-68.) The Court could just, say, note that the dictionary definition of "regulate" is not the same as the definition of "begin" or "inaugurate"[26], and strike down the Mandate on that or similar ground.

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[25] Respondents made a formal Fifth Amendment claim in their amended complaint of May 14, 2010, *see id.* at 24, but later abandoned it, after Judge Roger Vinson dismissed that claim in his Order and Memorandum Opinion, 716 F. Supp. 2d 1120 (N.D. Fla. Oct. 14, 2010), *see id.* at 1161-62.

[26] If someone wants to offer a tortured or massively attenuated meaning of "regulate" to justify the Mandate, e.g., noting that "regulate" sometimes means "command" or "order", and that therefore

In her *Safeguards* article, Professor Moncrieff has noticed, *see id. passim*, this tension between the rhetoric of "liberty", and the course of much of the Mandate litigation, which (at least after, e.g., Respondents dropped formal Bill-of-Rights-based claims) has been about Article I issues instead. (Incidentally, Movant respectfully disagrees with Moncrieff on whether liberty from the Mandate is really "non-fundamental", as her article title claims.) But if: (a) there really are fundamental rights against the Mandate, and (b) Respondents are still letting rights-based arguments hover around, lurking just within eyesight above the horizon, in their submissions to the Court, *see* the *Apfel* example, Resp'ts' Brief, *supra*, at 9, it is time to get rid of any void or inconsistency, and now consider such rights explicitly, as in new Questions Presented listing rights, rather than dodging the issues. *See also* Br. on the Merits for Pet'rs in 11-398 (Jan. 6, 2012) at 51-52, and Reply Br. on the Merits for Pet'rs (March 2012) at 9 (accusing Respondents of trying to lump in, or "smuggle in", Due Process issues with Article I issues).

VII. THE INCONSISTENCY OF NOT MENTIONING THAT INDIVIDUAL RIGHTS OR LIBERTIES MAY PRECLUDE THE *STATES'* MANDATES

Moreover, another massive issue that has avoided discussion is the issue of Mandates by the States. —An apposite introductory anecdote, *see* LeAnne Matlach, *NJ Governor returns to alma mater UD*, Nov. 16, 2011, updated 10:38 p.m., WDEL

"regulating commerce" comprises "inaugurating commerce *ex nihilo*": *see, e.g.*, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004), "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* at 252 (Scalia, J.) (internal citation omitted). Movant is hard put to believe that the *ordinary* meaning of "regulate" is "inaugurate", *see id.*

1150 AM, at http://www.wdel.com/story.php?id=38911, quoting New Jersey governor Chris Christie: "'[I]f you mandate to people they have to buy health insurance, what's next? Do you mandate that I have to eat broccoli, because I ain't eating it,' he said. 'I hate it[.]'" *Id.* What is most fascinating about the Governor's pronouncement is that New Jersey *has a Mandate to buy health insurance*, *see* N.J. Stat. Ann. § 26:15-2, "Coverage provided for residents 18 years of age and younger; terms defined." (2008), and the fact that Christie is apparently unaware of that Mandate, *see NJ Governor returns to alma mater UD*, *supra*. This anecdote is emblematic of the denial in which many seem to live, i.e., claiming that a Mandate is a terrible affront to liberty, but then failing to draw the logical conclusion that *all* Mandates, federal or state, are immoral and illegal. (If a Washington, D.C. "Beltway broccoli mandate" is perverse, then a "state stringbean mandate" should not be very tasteful to contemplate, either.[27]) Movant wants to end this denial.[28]

On that note: more tension has surfaced in Respondents' recent briefs. *See, e.g.*, the States' Merits Reply Br. in 11-398 (Feb. 6, 2012) at 17, "The power to force individuals to engage in commercial transactions against their will was the kind of police power that they reserved to state governments more directly accountable to the people." *Id.* But no, that power does not exist. (There would be little left of the Contract Clause if it did.) But if it did: seeing Michigan's horrific economic crisis of

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[27] Movant has doubts that that sort of "parade of vegetables" is actually going to occur, whether forced broccoli-buying, or a city or county carrot mandate, etc. But such scenarios need not be likely in order for the Mandate to be overturned: the Mandate is unconstitutional and invasive enough *in itself* to merit overruling, even if no "Mango Mandate" or "Dill *Diktat*" (or such) ever happens.

[28] Not living in the fine States of Massachusetts or New Jersey, Movant may not have standing to file suit against their Mandates; but still, the question of those Mandates' legitimacy is important.

some years' duration—largely motor-industry related—, why did their state government not order people to "rev up" Detroit by buying General Motors (or other) cars, under a "Michigan Motor Mandate"? The fact that that power was not used, even in dire straits, gives rise to the suspicion that no such power exists.[29] And until the two recent East Coast state Mandates, such a power may not have existed since the infamous (and quickly-repealed) Black Codes (mid-1860's).[30] (As noted before, Respondents themselves once argued that the Fifth Amendment prevented forced insurance purchase—which would prevent State Mandates as well. Also, Movant does not recall the Thirteen Colonies rebelling against the Crown in order to wield a terrible commerce power beyond even the Crown itself.) And, *compare* the Private Merits Reply Br. in 11-398 (Feb. 6, 2012) at 61-62, not only mentioning again *Apfel*, 524 U.S. 498, and the Takings and Due Process Clauses, but also declaring,

> Among citizens' most fundamental liberties is the power of choosing the private parties whom they will transfer property to or contract with. . . . [T]his Court invalidated a state law mandating that certain employers fund novel pension obligations, reasoning that it violated the Contracts Clause by "impos[ing] a completely unexpected liability in potentially disabling amounts" on a narrow class of employers. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 238-39, 247 (1978).

Private Merits Reply Br., *supra*, at 61-62. Exactly. I.e., the Private Brief acknowledges that "fundamental liberties", *id.* at 61, are involved, and that a

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[29] And Chrysler Group might not have needed Marshall Mathers III ("Eminem") and Clint Eastwood to make widely-seen Super Bowl television ads for Chrysler, if that firm could have just cashed in on compelled commerce forcing citizens to buy their cars. —Also, *see* Br. of *Amicus Curiae* Am. Catholic Law. Ass'n in Supp. of Resp'ts in 11-398 (Feb. 10, 2012) (making similar points about limits of a State's power to "coerce commerce" when consumers are not even in a regulable market).

[30] While the Mandate does not have the innate odiousness of the Black Codes, the point is that *nobody*, regardless of color or status, should be forced wholly unwillingly into a contract or market.

State's Mandate imposing contractual obligations was unconstitutional, *id.* So the Private and States' Briefs axes are not only diverging, as they were in the pre-certiorari stage, they are becoming mutually contradictory. (And the recentness of this development helps make Movant's intervention request, under Rule 24, timely.)

And, given the longtime incorporation of most of the Bill of Rights against the States, wouldn't the former declaration of due-process rights by Respondents, *see, e.g.*, States' Am. Compl., *supra* at 17, perhaps have obliged them to send New Jersey, and also Massachusetts (*see* Mass. Gen. Laws Ann. ch. 111M, § 2, "Individual Health Coverage Required." (2006; amended 2007)), notice, under Federal Rule of Civil Procedure 5.1, "Constitutional Challenge to a Statute - Notice, Certification, and Intervention", which calls for a complainant "drawing into question the constitutionality of a federal or state statute . . . . [to] file a notice of constitutional question . . . . if . . . . a state statute is questioned and the parties do not include the state"? *Id.* Without *per se* challenging the two States' Mandates, Respondents may have *de facto* challenged them by raising due-process and other constitutional questions applicable throughout the 50 States.[31] Also, *see* Moncrieff's *Safeguards* at 8 (noting the contradiction between the use of libertarian norms in judicial opinions disapproving the Mandate, at the same time those opinions would let States breach their residents' liberty to avoid a State's Mandate). Liberty is for all Americans. (Considering the Mandate as only a federalism, or *states'* rights,

[31] At this point, with Mandate/Act cases in the Supreme Court, and since 28 U.S.C. § 2403(b) (ch. 646, 62 Stat. 971 (1948; amended 1976)), "Intervention by United States or a State; constitutional question", may apply, somebody must mention the "5.1" issue before it is too late, so Movant is serving this Motion on the Attorneys General of the two States in question.

issue has an antebellum ring to it. This inaccurate posture may not sufficiently protect American individual rights.[32])

Finally, one notes that the Massachusetts Mandate is even more oppressive than the federal Mandate, in that a violator can apparently go to prison as a felon. *See* Mass. Gen. Laws Ann. ch. 111M, § 2, *supra*, including felony charges under Mass. Gen. Laws Ann. ch. 62C, § 73 (1976; amended 1983), with prison time mentioned as a possibility, *see id.* Thus, the question of "liberty" is even more trenchant re the Massachusetts Mandate than re the federal Mandate. And the Bay State has other lessons for us: see the words of Willard "Mitt" Romney, Governor Romney Speech to U.S. Chamber of Commerce, *Massachusetts Health Care Initiative*, C-SPAN Video Library, April 25, 2006, *available at* http://www.c-spanvideo.org/program/192192-1, including his saying of people without health insurance, "No more free ride" at 9:46, *id.*, and more notably, re insurance-purchase refusal: "That's not American." *Id.* at 28:20-21. This unbelievable kind of questioning of Americans' patriotism by a government official for not buying a private product, *see id.*, is, like the Government's expressively-harmful Mandate rhetoric, injurious and grossly excessive. This kind of State abuse of dignity should be ended, permanently.

VIII. A "POLICE POWER" DOES NOT ALLOW A "POLICE STATE"

[32] Federalism is a good thing, but if it were enough, a panacea, then the Bill of Rights need never have been written, nor incorporated against the States. And *see Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), *pet. for cert. pending* (U.S. Oct. 7, 2011) (No. 11-438), *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/102347.P.pdf: "Appellants provide no support for their suggestion that some novel, heretofore unknown, individual right [to avoid coerced commerce] can spring from the principles of federalism." *Id.* at 96. (Davis, J., dissenting)

Discussing states' Mandates further: Movant does not know the origin of the common, and puzzling, misconception that the 50 States may legally enact a Mandate. It may stem from a misreading of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), on the false logic that mandated vaccination or quarantine automatically legitimates mandated insurance purchase; *but see id.* at 29,

> [T]he rights of the individual . . . may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. . . . [C]ases of yellow fever or cholera . . . . may [require] quarantine against [one's] will. . . . It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to . . . regulations[.]

197 U.S. 129 (Harlan, J.). Justice Harlan is speaking of harm reduction and danger control, "at times", vis-à-vis "great dangers" or "imminent danger", *id.*, not about forcing almost everyone to do every possible ostensible social good, such as buying health insurance. (Movant has seen police dramas where a police officer, during an emergency, commandeers a car; but he has never seen a police drama where a policeman commandeers someone to *buy* a car.) Even in his *Lochner v. New York* (198 U.S. 45 (1905)) dissent, *see id.* at 67, Harlan, while quoting his own recently-written opinion in *Jacobson*, *supra*, at 26, he does so in supporting "regulations designed . . . to guard the public health", *Lochner*, *supra,* at 67 (Harlan, J.), and then discusses the unpleasant health problems and diseases of bakers, re the regulation of bakers' working-hours, for several pages, *see id.* at 68-72. Regulation of one voluntarily chosen occupation, like baking, for the "negative" (in the sense of

preventing an action or occurrence) purpose of forestalling illness, is miles away from the "affirmative" or "positive" (in the sense of originating an action) step of forcing Americans to buy health insurance in hopes that that may improve health, rather than just enrich the insurers. The State simply cannot force every "good".

Or the "legitimation" for a state Mandate may come from the notion that since cases like *Lopez* limited Government action because the Government does not have a police power, *see, e.g.*, 514 U. S. at 566: then since the States *do* have a police power, their governmental action is relatively *non*-limited. But this is not logical. There are still things a State cannot make you do, such as preventing you from using or buying contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). This is why even a "general police power" does not allow a police state, or State, to be established in our free Nation.

Proof of this may be seen from the hypothetical of the "contraceptive mandate". The "power" the States have to force health insurance purchase is the same power with which they can force individuals to buy contraceptives—or not to buy contraceptives—: i.e., no power at all.[33] Shockingly, if states do have the power to coerce contracts and purchases, they could indeed force contraceptive purchase. Because contraceptives have *non-contraceptive* uses, e.g., preventing menstrual cramps or clearing up acne, the Government could argue a "neutral, generally applicable rationale" (e.g., lowering contraceptive costs for state residents by

[33] Mandated individual contraceptive purchase, of course, is not exactly the same issue as either: (a) free contraceptives through a health plan; or (b) forcing pornographic movie "actors" to wear prophylactics, as a regulation helping prevent an epidemic of sexually transmitted disease.

increasing contraceptive-makers' business and creating economies of scale), under *Employment Division v. Smith*, 494 U.S. 872 (1990),[34] for forcing contraceptive purchase. (Not to mention a "health care" justification, e.g., lowering the number of pregnancies and avoiding strain on health care costs…which has an economic nexus, assisting any State argument that contraceptive purchase is forceable, i.e., "regulable as interstate commerce", by the Mandate's novel standards of "regulating commerce".) Since a purchaser would not be obliged to *use* the contraceptive to… contracept, this might void First Amendment "freedom of religion" defenses against such purchase. (E.g., the Catholic Church famously forbids artificial contraception; but chaste Catholics may licitly use contraceptives in a non-contraceptive manner.)

State-forced contraceptive purchase would lead to the bizarre situation whereby contraceptive purchase could not be forbidden, under *Griswold* and *Eisenstadt*, *supra*, but it could be forced. "What is not forbidden is compulsory." This "brave new world" is one where this Motion prays the Court not to go.[35]

IX. CHILLING OR PRECLUSIVE EFFECT ON INDIVIDUAL RIGHTS IF THOSE RIGHTS ARE NOT EXPLICITLY CONSIDERED HERE

If the Court rules that the Mandate is legal, without explicitly considering (for whatever reason) individual rights against Mandates, this will strongly tend to give a "green light" to state Mandates, on the putative logic that if the Government,

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[34] *But see* "RFRA", *infra* at 33.

[35] "He who believes absurdities will commit atrocities."—Voltaire (1694-1778)

without a general police power, can force health insurance purchase, then *a fortiori*, the States, with their general police powers, can "obviously" force that purchase.

Thus, it is important that this Court explicitly consider the idea of individual rights, constitutional, statutory, and otherwise, not to buy health insurance: not only because this consideration may offer useful context for the debate about the tax, commerce, or necessary-and-proper powers of the central government to force health-insurance purchase, but also because if the Court ignores individual-rights issues, that deliberate silence will tend to *de facto* decide the issue, against the rights of the People. It will preclude possibly-legitimate claims by ignoring them. (And if fifty states imposed a Mandate, a federal Mandate may *de facto* not even be a very important issue any more.) Hence, this Court should consider individual-rights issues as new Questions Presented.

X. INADEQUATE LOWER-COURT PERCOLATION OF RIGHTS ISSUES

But have rights issues already been explored in lower courts and found unworthy of further mention? —Although some rights-based claims or defenses against the Mandate have been percolating since 2010, that alone does not mean they have percolated well or thoroughly, or that all reasonable rights claims have percolated at all. On Fifth Amendment due process, for example: without mentioning any particular cases or plaintiffs (which might hurt feelings), Movant has noticed little serious, detailed analysis of how the New Deal line of "economic liberty" cases does not preclude a defense against the Mandate. By contrast, the

Attached Complaint "tears apart", among other cases, *Nebbia* and *Parrish*, *supra* at 17-18, and shows that *in those cases themselves*, two supposed landmarks of increasing government power and destroying a fundamental right to contract, there is very strong material protecting a fundamental right to primary contract or avoiding a primary market. (As opposed to secondary contract or a secondary market, e.g., the regulatory obligation to buy auto insurance *if* you *freely choose* to drive a car; or the regulatory obligation to buy fire extinguishers *if* you *freely choose* to run a motel where local regulations require a fire extinguisher in each corridor.)

And some issues, such as antitrust issues, have received basically no percolation at all, despite obvious, even glaring, antitrust issues, such as *Underwriters*' condemnation, under the Sherman Act, of forced insurance purchase, *see* 322 U.S. at 535-36, 562. Some lower-court percolation of antitrust and other issues, e.g., whether the Mandate penalty is void for vagueness, would be illuminating. (By the way, Movant would not mind a "Health Insurance Free Choice Act" illegalizing a Mandate by any State, if the U.S. Congress wants to pass a *legitimate* Commerce Clause-based law regarding Mandates. Congress should protect free, fair trade.)

Due to the lack of rights-issues percolation, Movant thinks that eventual dismissal of the Mandate/Act cases as prematurely ("improvidentially") granted could possibly be considered prudent.[36] Movant was in fact considering filing with the Court before November 14, 2011 a motion to delay certiorari in the present

[36] And *see* 661 F.3d at 23, 45-54, in which Judge Kavanaugh discusses various prudential reasons (e.g., caution when facing difficult issues) for delaying consideration of the Mandate cases until 2015.

cases, although delaying factors supervened, including the facts that: Movant was not a Supreme Court Bar member; and that he electronically mailed the Solicitor General of the United States (copy of e-mail available upon request) and requested permission to file an amicus brief, but never heard back in any form, either refusal, acceptance, or anything else.[37] (Movant was surprised and even offended by this.) But if delaying the cases until 2015 is considered excessive, it is better to consider all viable rights-based defenses against the Mandate right now, even with inferior lower-court percolation of them, rather than not to consider them at all.

XI. FULL SEVERABILITY OF THE MANDATE FROM THE ACT

As bad and rights-violative as the Mandate is, though, it need not taint the whole Act. Movant does not think that Act is perfect, but with others, he sees no need to overturn it *in toto*. *See, e.g.*, Cardinal Daniel N. DiNardo, Secretariat of Pro-Life Activities, United States Conference of Catholic Bishops, Letter to "Dear Member of Congress", Oct. 12, 2011, *available at* http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/protect-life-act-letter-2011-11.pdf (lauding aspects of Act which universalize health care coverage; and urging changes to abortion, conscience, and immigrant-healthcare aspects of the Act rather than overturning the whole Act). What is not broken may not need fixing. —And while Movant does not have room to discuss all his thoughts on severability,[38] he

[37] There may have been blanket permission previously given to file amicus briefs; but if Movant did not know this at the time, he certainly should have been told when he asked.

[38] Incidentally: because neither the Government nor Respondents advocate full severability, Movant was going to petition the Court that he be allowed to argue in the Court in favor of full severability;

shall just mention for now that Respondents create a headwind against themselves on the Mandate issue by asking for the whole Act to be struck down. Instead of the clean, surgical severance this Motion seeks, the snipping out of the Mandate and no other part of the Act, Respondents attach the whole massive weight of that Act to the Mandate, as if the issues are irrevocably chained. This Motion advocates "severing" this weight, which should make removal of the Mandate easier.

XII. TIMING AND DOCKETING CONSIDERATIONS RE RIGHTS ISSUES

There is the question which naturally raises itself, of whether consideration of rights-based issues should be "lumped in" with 11-398, or whether, say, they should receive their own docket number and consideration either in late March with 11-398, or even in April or later, which would let the Court decide on the Mandate in late summer or early fall 2012. While Movant has no desire to inconvenience the Court, the fallout from *not* considering individual rights re the Mandate, now that Movant (and others, e.g., plaintiffs in *Seven-Sky v. Holder* (offering Question Presented re "RFRA", the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4) are publicly bringing up individual rights re the Mandate, might be far more inconvenient, and damaging, to both the Court and the public.

XIII. *IMS HEALTH*, *CITIZENS UNITED*, AND THE MANDATE

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however, the Court then appointed esteemed counsel H. Bartow Farr to do that important job. So, instead, Movant is submitting a document in 11-393 and 11-400 on behalf of full severability.

In addition, some recent cases of the Court, and those cases' individual-rights or police-power aspects, are implicated by the Court's decision on the Mandate, even if in unexpected ways. For example, in *Sorrell v. IMS Health Inc.*, 564 U. S. ____ (2011) (overturning, on basis of First Amendment, Vermont statute regulating pharmaceutical companies' use of medical information for marketing purposes), the Court decided, *see id.*, that constitutional rights, especially free-speech rights, trumped a government police power over health. If the Court were to approve the Mandate, with its forced-speech component, this would undermine, or even directly contradict, the free-speech rationale of *IMS Health*, *supra*. A pro-Mandate decision would also undermine the more general lesson of *IMS Health*, i.e., that governmental police power over health care is not unlimited. (Since the federal Government does not have a State's police power—like that of Vermont[39] in *IMS Health*—, either, the case against the federal Mandate is even stronger.) Finally, if the Court were seen to be anxious to protect the speech, and other, rights of merchants, pharmaceutical companies, *see IMS Health*, but not to protect the speech, and other, rights of healthcare consumers unwilling to buy health insurance, such discordance could look insensitive, inconsistent, and embarrassing.

On a similar note: Movant is pleased to see the Court has survived the "Occupy the Courts" rally on the Court steps (why not a protest at ACLU headquarters, too?), of January 20, 2012, featuring protesters freely speaking against corporate free speech, i.e., against *Citizens United v. Federal Election Commission*, 558 U.S.

[39] A state nearby Massachusetts, with its Mandate. Movant will let the Court draw any implications.

____ (2010) (overturning, in name of First Amendment, legal provisions preventing various groups from electioneering within short time of elections). *Citizens United*, *supra*, produced a controversial and widely unpopular Court opinion, as seen from actions like the "Occupy the Courts" movement. However, without endorsing (or condemning) *Citizens United*, this Motion notes the case may have an unexpected "silver lining". I.e., the logic of the opinion could be used to protect isolated individuals, not just large, powerful groups such as corporations or unions.

For instance, since, as noted, the Mandate has a forced-speech, speech-chilling component, it would comport with *Citizens United* to overturn the Mandate, and let individuals freely choose and freely communicate. If the Court were to turn a blind eye to the free-speech problems of the Mandate (which, as an "individual mandate", targets isolated individuals), while maintaining freedom of spending and speech for large, powerful groups, this would be inconsistent with the spirit of *Citizens United*, not to mention the spirit of freedom. —In fact, the Court has signaled in recent years that, contrary to a popular "*Citizens United* means the Court are slaves to the corporations" stereotype, that the Court believes people really are more precious than corporations; *see, e.g.*, the words—and possible wordplay—in *FCC v. AT&T, Inc.*, 562 U.S. ____, 131 S. Ct. 1177, 1185 (2011): "The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally." (Roberts, C.J.) After that move towards open recognition of the dignity of people, *see id.*, it would be not only awkward but maybe

disastrous for the Court to deny American individuals the liberty, and privacy, not to be subject to coercion and unwanted inquiry by the State, as to whether they have health insurance. After all, the AP-GfK Poll, *supra* at 7, shows that citizens are largely united (84%) against the Mandate; and they might take it personally were they to be thrust under the Mandate's unconstitutional and offensive yoke.

XIV. VEHICLES FOR NEW QUESTIONS PRESENTED

The Court does not tend to consider issues that were not raised below. However, there may be vehicles to bring up those issues, if the Court prefers not to add those issues *sua sponte*. For example, though Respondents did not raise First Amendment issues, the case of *Liberty University*, *supra* at 26 n.32, could be a vehicle for considering them. Although the University is not presently raising those issues in the Questions Presented of its certiorari petition, *see id.* at i-ii,, it did in the past, albeit unsuccessfully, *see, e.g.*, 753 F. Supp. 2d 611, 645-47 (W.D. Va. 2010) (dismissing Liberty University's freedom-of-speech-and-association claims); therefore, the school might be persuaded to revive these liberty-related claims at present, if the Court grants it certiorari,[40] even if the school has to argue those claims in a different way. And the Court, while it usually does not add new Questions Presented or issues, has the power to do so, *see, e.g.*, *Vt. Agency* and *Norfolk*, *supra* at 12 & n.20, as well as *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211,

[40] Movant politely deplores, by the way, the "certiorari shootout" in which various parties requesting certiorari for their own Mandate/Act cases attack other parties' cases as being "inferior vehicles" for consideration of the issues by the Court. (And this despite various parties' stances having a great deal in common, too.) Movant believes, by contrast, that there should be "room for lots of folks at the table", as long as all the "folks" have something unique to offer to the "pot" of arguments and claims.

216 n.2 (1995) (deciding "constitutional question of undoubted gravity", even though respondents did not bring it up in court of appeals), and *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) (deciding case on due-process grounds even though appeals court and petition for certiorari relied only on double-jeopardy grounds)[41]. Movant believes any constitutional issue present, even in latent form, in the Mandate/Act cases is "of undoubted gravity", *Plaut*, *supra*, at 216 n.2, seeing the immense gravity of the cases. And "getting it right the first time" is rarely something to be regretted.

XV. CRUCIAL INSIGHTS FROM RECENT AMICUS BRIEFS

Movant's filing at this point in time has given him the privilege of reviewing the February 13-due amicus briefs for Respondents in 11-398.[42] Two are of special note. First, the Brief of Egon Mittelmann, which, *see id. passim*, calls the Mandate a forbidden bill of attainder (*see* U.S. Const. art. I, § 9, cl. 3), and also, *see* Mittelman Br., *supra*, at 12, calls the Mandate's penalty-enforcement mechanism a possible "nullity", which chimes with Movant's idea that the Mandate is void for vagueness because of its amorphous yet possibly dangerous penalty. Without necessarily considering the Mandate a full bill of attainder, Movant does note the expressive harm which emanates from the Mandate and is rendered without trial; *see* Mittelman Br. at 12 (noting reputational harm from Mandate). Second, Stephen M. Trattner's amicus brief is largely about, *see id. passim*, the need for the Court to consider the Tenth Amendment here. Movant agrees the Mandate violates the

[41] *See also Redrup v. New York*, 386 U.S. 767 (1967) (deciding several related cases on constitutional grounds explicitly excluded from review).

[42] Movant was not easily able to send in an amicus brief himself, by the deadline for such submission, especially since he was not a member of the Supreme Court Bar.

Tenth Amendment, though there is a danger that if the Court considers that Amendment instead of—as opposed to along with—those Amendments this Motion recommends (First, Fifth, Thirteenth), the Court could still say that only *States'* rights are violated by the Mandate, given the Tenth Amendment's discussion of States' rights, *see id.* At least, though, Trattner observes: "Here the Court is being asked to protect individual liberty directly under the People prong of the Tenth Amendment [and] being asked to preserve the ultimate sovereignty of the People by protecting rights that the People never delegated to the States or the Federal Government." Trattner Br., *supra*, at 31. Movant concurs. While Trattner does not take the next logical step, i.e., calling for the abolition of the States' Mandates (as Movant is effectively trying to do), his brief provides valuable "ammunition" for that abolition. Movant thanks the various amicae/i for their ideas, which he hopes will help the Court give the Mandate the strict scrutiny (in various senses) it deserves.

XVI. MISINFORMATION AND MANDATE; ISSUES AND INTERVENTION

Despite useful information like that in the briefs immediately *supra***,** there has been much inaccuracy, or lack of information, about the Mandate, even from the highest levels: *see, e.g.*, Calvin Woodward, *Fact check: Obama pushes plans that flopped before*, Associated Press, Det. News, Jan. 24, 2012, 11:47 p.m., at http://www.detroitnews.com/article/20120124/POLITICS02/201240459/, re the current President's State of the Union Address (Jan. 24, 2012): "Obama: 'Our health care law relies on a reformed private market, not a government program.' The facts: That's only half true. . . . [M]ost Americans will be required [by government] to

carry health coverage, either through an employer, by buying their own plan, or [] a government program."[43] *Fact check*, *supra*. Movant has been trying to add clarity and coherence to the Mandate/Act debate, even if some may be offended by certain truths. On that note: even if he for some reason is not allowed to intervene here, that does not *ipso facto* mean that the recommended Questions Presented, or other matters such as expressive harm or forced-speech issues, should not be added to this case. The questions are more important than the questioner, so to speak.[44]

XVII. RELIANCE ON COMMON SENSE AND LIMITED POWER

This Motion recommends, in this instance, reliance on *stare decisis*, and the upholding of the Eleventh Circuit's August 12, 2011 opinion *in toto* (except for the Mandate), albeit on broader grounds, including rights-based grounds which would happen to prevent any State from imposing a Mandate. Not only that Circuit's (and other) legal precedent, but also common sense, shows us the absurdity of imagining the State can tell you to buy health insurance. If so, what could it *not* tell you?

The power to coerce commerce is a shiny, enticing power, a seductive sort of would-be alkahest that governments may see as an easy solution to problems. But that kind of unexampled power, with its reek of abuse, theft, and contempt for the People and their freedom, may turn out to be more of a curse than a blessing.[45]

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[43] Re the ills of State misinformation, *see Olmstead v. United States*, 277 U.S. 438, 485 (1928): "Our government is the potent, the omnipresent teacher." (Brandeis, J., dissenting from the judgment)
[44] Movant's zeal, and ability to spot relevant issues, should be recommendations for his inclusion as an intervenor; but those crucial issues are even more important than his intervening *per se*.
[45] As for glittering, accursed powers: *see generally* Richard Wagner, *Götterdämmerung* (premiered 1876). *See also* the ancient legend of Midas, and Tolkien's *Lord of the Rings* trilogy, *supra* at 6 n.10.

And the overruling of the Mandate should perhaps be a 9-0 decision, not a 5-4 decision showing how "ideologically split" the Court supposedly is. "Conservative" judicial sensibilities should worry about the huge expansion of government power by the Mandate. "Liberal" ones should worry about the huge expansion of corporate (health insurer) privilege by the Mandate—isn't government-forced purchase of a company's products something like the company's fondest surreal dream come to life? In the Mandate, there is something for all good people to fear and avoid.

And so, Movant asks the Court to put Man (people) above the illegal Mandate.[46]

CONCLUSION

For the preceding reasons, Movant respectfully requests that this Motion be granted by the Court, under either 11-398, or a new docket number, in March 2012 or later in 2012, for: leave to intervene; and the adding of new Questions Presented, mentioned above. Movant humbly thanks the Court for its time and consideration.

Dated: March 16, 2012 Respectfully submitted,

_____

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[46] *See* once more the Jacques Maritain quote *in* Maritain Article, *supra* at 1 & n.1.

TABLE OF CONTENTS OF APPENDIX

(Note: the capital-Roman-numeral page numbers in this Table of Contents, and the numbers-between-dashes page numbers on the pages of the Complaint in Intervention below, are used in preference to, say, "ia", "1a", or other numbers followed by "a", due to software compatibility issues.)

(A Table of Authorities may not be required here, *see* the apparently-accepted format of the Mot. of Ass'n of Am. Physicians & Surgeons, Inc. & Alliance for Nat. Health USA for Leave to Intervene as Resp'ts in 11-398 ("AAPS Motion"), Dec. 6, 2011, *mot. denied* Jan.12, 2012, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-398-Mot-to-Intervene-AAPS-ANH-USA.pdf (courtesy of SCOTUSblog), in which there is no Table of Authorities for the Complaint in Intervention—and a Table of Authorities is usually not appropriate for a Complaint, anyway—, and is not included; but the above Table of Contents is included as a "road map", for ease of navigation by readers.)

No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

COMPLAINT IN INTERVENTION ACCOMPANYING MOTION OF DAVID BOYLE FOR LEAVE TO INTERVENE AS RESPONDENT OR OTHERWISE, AND TO ADD QUESTIONS PRESENTED

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INTRODUCTION

1. The present movant and plaintiff-intervenor, David Boyle (hereinafter, "Movant"), an American citizen, is respectfully requesting leave to intervene under Rule 24 of the Federal Rules of Civil Procedure, "Intervention" ("Rule 24"), or similar provisions or powers as needed, and filing the accompanying *pro se* Motion for Leave to Intervene as Respondent or Otherwise, and to Add Questions Presented ("this Motion") in the matter of Case 11-398 ("*HHS v. Florida*"), or under a new number, on this Court's docket. This present Complaint in Intervention is being submitted because of Rule 24(c), "Notice and pleading required": "The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim[s] or defense[s] for which intervention is sought." *Id.*

PARTIES TO THE PROCEEDINGS

2. Movant is an American citizen opposed to the compelled-health-insurance-purchase "individual mandate" in the health care act mentioned *infra* at - 4 -.

3. Three federal officers and their three respective Departments are Petitioners in 11-398, and were defendants-appellants/cross-appellees below: Kathleen Sebelius, Timothy F. Geithner, and Hilda L. Solis, in their respective official capacities as Secretary of Health and Human Services, Secretary of the Treasury, and Secretary of Labor; and the three aforementioned United States Departments.

4. Four individuals, one organization, and twenty-six States are Respondents in 11-398, and were plaintiffs-appellees/cross-appellants below: the individuals are Kaj Ahlburg, Mary Brown, Dana Grimes, and David Klemencic; the organization is National Federation of Independent Business ("NFIB"); and the States, by and through their Attorneys General or Governors, are 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.

OPINIONS BELOW

5. The District Court opinion in *Florida ex rel. Bondi v. United States Department of Health & Human Services* (N.D. Fla., Jan. 31, 2011) was reported at 780 F. Supp. 2d 1256. The Court of Appeals opinion in *Florida ex rel. Attorney General v. United States Department of Health and Human Services* (11th Cir. Aug. 12, 2011) ("*Florida v. HHS*") was reported at 648 F.3d 1235.

JURISDICTION

6. The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 12, 2011. The petition for a writ of certiorari was filed on September 28, 2011, and was granted on November 14, 2011. The jurisdiction of this Court lies under 28 U.S.C. § 1254(1), "Courts of appeals; certiorari; certified questions", and also exists because the subject matter presently raised by Movant arises under the Constitution, and the laws, of the United States of America,

cognate to the conditions for district-court jurisdiction under 28 U.S.C. § 1331, "Federal question". As well, 28 U.S.C. § 2403(b) (re State intervention) may apply.

7. This Court is authorized to offer a declaratory judgment under 28 U.S.C. §§ 2201, "Creation of remedy", and 2202, "Further relief", and Rule 57, "Declaratory Judgments", of the Federal Rules of Civil Procedure.

CONSTITUTIONAL OR STATUTORY PROVISIONS

8. Relevant constitutional or statutory provisions are multifarious and discussed *passim*, and listed in the Table of Authorities.

ARGUMENT AND BACKGROUND, LEGAL AND FACTUAL

I. STATEMENT OF THE CASE

9. (For reasons of space and of avoiding unnecessary repetition of what either Movant or others (e.g., Respondents) have said elsewhere, the Argument and Background below may be seriously abbreviated in places. However, one can find a longer discussion of various issues in, e.g., Movant's *Boyle v. Sebelius* complaint, *infra* at - 5 -.) 11-398 ("*HHS v. Florida*") concerns the Government's appeal of the portion of *Florida v. HHS* that did not overturn the Patient Protection and Affordable Care Act or "PPACA" (Pub. L. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("Act" or "the Act")), but overturned the Act's "individual mandate" ("Mandate", a.k.a. Section 1501, or 26 U.S.C. (or 26 U.S.C.A.) § 5000A) to

buy health insurance. And the present Question Presented in 11-398 is whether Article I of the Constitution gives the Government power to impose the Mandate ("minimum coverage provision").

10. Movant filed his own district-court suit, *Boyle v. Sebelius* (CV-11-07868-GW(AJWx)) (currently *dismissed* for lack of jurisdiction, without ruling on the merits, *see* Ruling on Def. Kathleen Sebelius's Mot. to Dismiss, or in the Alternative, for a Stay of Procs. (Feb. 3, 2012), though Movant presents somewhat different arguments for standing here than in that suit, and also plans to appeal the ruling), in the federal judicial Central District of California where he resides, on September 22, 2011: in order to express detailed rights-based defenses against the Mandate, and to sever the Mandate from the Act so that the Act might survive and protect Americans' health care. But now the Court has granted certiorari to *Florida v. HHS*, along with two companion cases. Thus, Movant is filing (along with an amicus brief, or Motion for leave to intervene, in 11-393 and -400, supporting full severability of the Mandate) this Complaint, and the accompanying request (Motion) to intervene and add Questions Presented to 11-398, largely about individual rights, lest many of the considerations brought up in his district-court suit (and, to some extent, in other Mandate/Act plaintiffs' suits) be effectively ignored or otherwise mooted.

II. STANDING, DIGNITARY HARM, AND FORCED SPEECH

11. If Movant needs to assert his own Article III standing to sue, instead of relying on the standing of Respondents, *see, e.g.*, *Trbovich v. United Mine Workers*,

404 U.S. 528, 536-37 (1972) (allowing intervenor to utilize standing of other party already in litigation): Movant pleads, among other things, dignitary injury or expressive harm. (The following section on standing reprises much of the similar section in the Motion, though it adds much, too.)

12. Movant is not the only one who has noticed the reality of such harm; *see, e.g.*, Robert J. Muise and David Yerushalmi, Document 006110967617 ("*Thomas More* Letter"), May 25, 2011 (*available at* http://aca-litigation.wikispaces.com/file/view/Appellants+additional+letter+%2805.25.11%29.pdf), preceding *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir., June 29, 2011), *petition for cert. pending* (U.S. July 26, 2011) (No. 11-117) as of Nov. 14, 2011: "Congress considers it a 'shared responsibility' of all Americans to have health care coverage and those who do not are considered freeloaders. Therefore, there is an official social stigma that the Act imposes on those Americans . . . who do not have health care coverage." Decl. of Pl. Jann DeMars, *Thomas More* Letter, *supra*, at 3 n.4. *See also*, e.g., this reader comment, in pertinent part, from *A guide to the legal arguments over the individual mandate* by Ezra Klein, Wash. Post, Dec. 29, 2010, 4:13 p.m., at http://voices.washingtonpost.com/ezra-klein/2010/12/a_guide_to_the_legal_arguments.html,

> The problem with the mandate, and I have been saying this since it entered the national debate, is that there is a lot of moral opposition to the individual mandate.
>
> . . . .
>
> I liken the mandate to purchase insurance from the same private corporations that have repeatedly denied me and abused me akin to the government ordering a woman

> or man to reenter into a relationship with an abusive spouse or to live with their rapist. It is an immoral thing to ask of people.
>
> . . . .
>
> Insurance companies have made my life hell for many years. Now forcing me into a contract with them is, in my mind, a fascist demand. A collusion between government and corporations to force people into a contract with a private corporations [sic]. And to top off the insanity, the government will use the IRS to enforce it.
>
> Who needs a legal argument against the individual mandate, when a moral one will do just fine?
>
> Posted by: jc263field | December 29, 2010 4:59 PM . . .
>
> .

A guide to the legal arguments over the individual mandate, *supra.*

13. But not only Mandate/Act plaintiffs, and angry citizens, have recognized such harm; so has the legal academy itself, *see* Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties* ("*Safeguards*"), Aug. 29, 2011, posted Aug. 31, 2011, last revised Oct. 28, 2011 64 Fla. L. Rev. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1950612_code784767.pdf?abstractid=1919272 (courtesy of Social Science Research Network). (Movant is assuming that this and other documents mentioned are available on the Internet; but if somehow a copy is totally inaccessible, please feel free to contact Movant, who should be able to supply a paper copy). Moncrieff, a law professor, notes, "[T]he ACA mandate has been accompanied by an extensive rhetoric of obligation, including the 'mandate' moniker as well as state-interest justifications related to free-rider and collective action problems", *id.* at 25-26, and explicitly calls the "rhetoric of obligation" elements "'expressive' harms", *id.* at 26. Moreover, Professor Moncrieff is a *supporter* of the

Mandate, *see Safeguards*, *supra*, *passim*, making her acknowledgement of the Mandate's stigmatic harm—even in the label "Mandate" itself—all the more credible, since she does not help support the Mandate by admitting the harm it causes. (*See also* Br. of Amicus Curiae Egon Mittelman, Esq., in Supp. of Resp'ts Mary Brown & Kaj Ahlburg on the Minimum Coverage Prov. Issue, Supporting the Trial Ct. & Ct. of App. Decs.—Amicus Br. on the Minimum Coverage Issue (undated but file-stamped Feb. 9, 2012) in 11-398, at 12 (noting reputational harm from Mandate, rendered without trial).)

14. Indeed, the whole Mandate case or cases may hinge, at least in part, on the idea of the insult or stigmatic harm done by the Mandate and its accompanying penalty for noncompliance, the "Shared Responsibility Payment", 26 U.S.C.A. § 5000A(b). (*Pace* the Orwellian-tinged name of that penalty: it is not anyone's "responsibility", "shared" or otherwise, to buy a private product like health insurance at governmental whim. —By the way, the nomenclature of the so-called "Shared Responsibility Payment" has an eerie resemblance to an incident in "The Scouring of the Shire", chapter 8, Book VI, of J.R.R. Tolkien's *The Return of the King* (1955), the final book of the *Lord of the Rings* trilogy (1954-55). In that chapter, *supra*, Hob Hayward, a denizen of the Shire, which is under the alien occupation of a "Chief" (the nefarious Saruman), notes: "'We grows a lot of food, but we don't rightly know what becomes of it. It's all these "gatherers" and "sharers", I reckon, going around . . . . They do more gathering than sharing, and we never see

most of the stuff again.'" *Id.* The real-life Mandate may be stranger than Tolkien's fiction.)

15. After all, if the Mandate had been phrased as a tax credit for health insurance purchase, rather than a penalty for non-purchase, nearly the exact same amount of money might accrue to the Government from non-purchasers in either case. (Interestingly, in the 11-398 brief which has Moncrieff's name on it, "Brief of *Amici Curiae* Jewish Alliance for Law & Social Action [*et al.*] and Professor Abigail R. Moncrieff in Support of Petitioners on the Individual Liberty Implications of the Minimum Coverage Provision", there is no mention of dignitary or expressive harm, *see id.* In that Brief, *supra*, there is the quote, "The mandate is . . . . indistinguishable from an ordinary tax in terms of its imposition on liberty." *Id.* at 39. But an ordinary tax may not have the charge of expressive harm which the Mandate has, a social stigmatization which wields a chilling effect on a consumer's liberty (and an assault on her dignity). So, *pace* Moncrieff, the Mandate *does* injure American liberty.)

16. Thus, critics might claim, "Whither the problem?" if the amount of "financial injury" were practically identical as either a "tax" (foregone tax credit) or a "penalty". —In *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Circuit Nov. 8, 2011), *petition for cert. pending* (U.S. Nov. 30, 2011) (No. 11-679), Judge Brett Kavanaugh offers, in his dissent as to jurisdiction, some putative solutions to Taxing and Spending Clause-related issues re the Mandate, solutions such as turning the Mandate penalty into a "mere tax" on being uninsured, *see id.* at 49-50. Kavanaugh does

seem to grasp that the penalty, as a penalty, may have expressive harm (or other shaming, coercive quality); but so might a tax, even if it were not called a "penalty". A tax on, say, gender or skin color, would be wildly offensive, whether explicitly called a "penalty" or not. Also, would a tax on having functional eyesight be appropriate (or escape charges of arbitrariness, expressive harm, or plain stupidity), instead of a tax credit for being blind? Or how about a tax on institutions for not being *per se* religious, instead of a tax credit for being a religious institution? Or a "Youth Tax" instead of tax credits for the elderly? Etc. Judge Kavanaugh creates a slippery slope through his well-meant attempt to avoid the "penalty problem" by the alchemy of making the penalty into "just a tax".

17. But the problem, or much of it, is in the Mandate's dignitary harm to Americans. "[E]ven a dog distinguishes between being stumbled over and being kicked." (Justice Oliver Wendell Holmes, Jr., *The Common Law*, Lecture 1 (1881)) And *see, e.g.*, the Dec. 8-11, 2011 AP-GfK poll at http://ap-gfkpoll.com/main/wp-content/uploads/2011/12/AP-GfK-Poll-December-2011-Topline_Obama.pdf, in which an overwhelming 84% of respondents said the Government should not have the power to enact a Mandate and to fine noncompliants, *see* AP-GfK Poll, *supra*, at 42. The Mandate is truly not loved by most Americans, unless the preceding poll is seriously in error. And their reasons may well be dignitary, not just legalistic. (Bertolt Brecht once wrote, in the poem *Die Lösung* ("The Solution") (c. 1953), something to the effect of, "If the government doesn't trust the people…why don't

they just dissolve the people?" *See id.* Dissolving people's ancient rights and dignities comes uncomfortably close to that.)

18. Or, more formally put: the dignitary injury the Mandate causes to Movant and other Americans is one element allowing standing to sue under Article III of the Constitution. There is a live "case or controversy" about the Mandate, as the phrase drawn from Article III goes; the issue of the Mandate is hardly moot; and with the Mandate penalty coming in less than two years, the issue is ripe for resolution. (Re "ripeness", this Motion will not extensively explore the ongoing Anti-Injunction Act (14 Stat. 475, codified as amended at 26 U.S.C. § 7241(a)) (1867) (amended 1966)) controversy re the justiciability of Mandate/Act suits, beyond an observation *infra* at - 13 -, and the following question-or-two in *reductio ad absurdum* form: what if, say, Congress singled out Oppressed Minority Group ("OMG") for some terrible, and unconstitutional, burdens or punishment; and also attached a two-penny tax on each member of that group…but with the tax delayed for fifty years? Would members of OMG really have *no* recourse in the courts for five decades, and not be able to say their two cents in court until they had paid their two cents to the IRS? The mind reels.)

19. In addition, the three "aspects of standing", i.e., "injury", "causation", and "redressability", listed in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), are all present here. Redressability exists, since overturning the Mandate will end the expressive harm to Movant and others, or the threat of having to buy or

maintain health insurance against one's will, at the risk of State punishment. Causation also exists, in that the Mandate causes the aforementioned threat.

20. About injury: the Mandate's dignitary injury is a non-economic harm, and a non-economic harm is allowed to establish standing, *see, e.g.*, *ASARCO v. Kadish*, 490 U.S. 605, 616 (1989). In one case, *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), plaintiffs were allowed standing for, among other things, the non-economic harm of defendants' actions leading to plaintiffs being perceived as members of a "white ghetto", *id.* at 208 & n.5. And the plaintiffs were arguably not even *directly injured*, *see id.* at 207-08: while they claimed stigmatic harm, at least they did not suffer the insult of being excluded from living in their housing as others, presumably minorities, were excluded. Contrast that with the Mandate, which directly insults and injures, or perpetually threatens to insult and injure, Americans, whether they have health insurance or not. And the mere threat of injury allows standing, *see, e.g.*, *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973).

21. Moreover, a statute, such as the Mandate, may do damage merely by means of its enactment, *see Bush v. Vera*, 517 U.S. 952, 1053 (1996) (finding "expressive harm" in government action, e.g., a bizarrely-shaped voting district, which promulgated discriminatory and insulting race-related ideas). Justice David Souter (dissenting from the judgment) noted that, *see id.* at 1053, "expressive harm" can stem from the attitudes evinced by the statute itself, any other consequences of the statute aside. Thus, since the Mandate's stigmatic injury started on March 23, 2010, when the Act was signed, the injury is not merely prospective, and presently

exists, no more "ephemeral" than the expressive harm in *Bush v. Vera*, *supra*. (Incidentally, this may impact the Anti-Injunction Act issue in the present cases: if the Mandate's harm began in *March 2010*, long before any "penalty collection", it is harder to argue that 11-398 and its companion cases should be delayed until *2015*.)

22. The ugly messages of the Mandate, e.g., that you have a sort of inferior citizenship, and "freeloader" status, based on not buying a certain private product, constitute false stereotyping by the State and cause dignitary harm, as any State-promulgated stereotype might. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 388, 394 (2003), Justice Anthony Kennedy's dissent from the judgment (mentioning "corrosive" effect of using racial categories). For further comparison: a statute, saying that "Good people are Seventh-day Adventists—and no other belief", would be wildly out of bounds and deeply stigmatizing. Another kind of statute, one that said "Good people bank at West Seventh Street Savings Bank", might not be quite as bad as the religion-related hypothetical statute immediately *supra*, but it would still be very bad, for reasons including favoritism to that bank, etc. (As would its converse, "Bad [or "Irresponsible] people do not bank at West Seventh Street Savings Bank".) And the Mandate is essentially a version of the "West Seventh Street Savings Bank" statute, even though the health insurance industry is not as narrow a target or focus as is "West Seventh Street Savings Bank". The Government should not instigate a witch hunt, even a low-intensity one, against those who do not want to buy a certain consumer good, health insurance. (As for the divisiveness of the Mandate: one can now imagine a bewildered child tearfully

asking his father, "So Mommie is an irresponsible bum because she doesn't want health insurance, huh?" The Mandate's potential not only to thieve (or "coercively exact") from millions of Americans a fee that they don't want to pay, but also to be dividing American individuals and families against each other, is not to be tolerated. The Mandate's false, ugly characterization of people as essentially "bums" for not having insurance may not be as vituperative as Stalin's imprecations against the *kulaks* for their "crime" of making their own economic decisions, but it is still vituperative, and intolerable.)

23. For one notable example of the frightening, manipulative, and polarizing "good/bad, obedient/disobedient" dichotomy the government sets up for Americans through the Mandate and its accompanying shaming mechanisms, *see, e.g.*, the words of Stephanie Cutter, Assistant to the President and Deputy Senior Advisor, in a post written after the issuance of the Eleventh Circuit opinion, *The Latest Health Care Court Cas*e, The White House Blog, Aug. 12, 2011, 2:37 p.m., at http://www.whitehouse.gov/blog/2011/08/12/latest-health-care-court-case?utm_source=wh.gov&utm_medium=shorturl&utm_campaign=shorturl,

> Individuals who choose to go without health insurance are making an economic decision that affects all of us . . . .
>
> . . . .
>
> . . . [T]he Affordable Care Act requires everyone who can afford it to take responsibility for their [sic] own health care and carry some form of health insurance.
>
> . . . 83% of Americans . . . have coverage and . . . are already taking responsibility for their health care . . . .

The Latest Health Care Court Case, *supra*. Movant points out the demonization of those "who choose to go without health insurance [and] are making an economic decision that affects all of us", *id.* But an individual may not *choose* not to have health insurance; she may simply not bother to choose at all. And she shouldn't be bothered by others about whether she chooses or not. In addition, her decision, or lack of decision, might not "affect[ ] all of us", *id.*, in a more than *de minimis* way.

24. As for the rest of the quotes from the blog post, Cutter cuts somewhat sharply (if without intentional malice; Movant ascribes no bad motives to anyone in this Complaint or other submissions) against those who don't, or do, have health insurance, ascribing irresponsibility or responsibility, guilt or innocence, respectively, to Americans based on whether they purchase a private product or not, *see id.* (Incidentally, *see* Jonathan Turley (on his eponymous blog), *Obama Aide: A Strong President Doesn't Check With Lawyers*, Feb. 24, 2012, at http://jonathanturley.org/2012/02/24/obama-aide-a-strong-president-doesnt-check-with-lawyers/, quoting Stephanie Cutter's legal theories, expressed during her appearance on the MSNBC show *The Last Word* with Lawrence O'Donnell (Feb. 22, 2012), on Presidential legal responsibility: "That does not make a Commander-in-Chief, somebody who has to check with his lawyers." *Id.*) This is poisonous and divisive. Movant never thought his wonderful country would come to this sad day, and means to reverse the situation, including by filing this request for intervention against a government Mandate which insults and injures hundreds of millions of Americans, including shaming and bullying them into spending decades buying and

maintaining an expensive, unwanted product. (*See* once more Jann DeMars' words, "Congress considers it a 'shared responsibility' of all Americans to have health care coverage and those who do not are considered freeloaders. Therefore, there is an official social stigma that the Act imposes on those Americans . . . who do not have health care coverage." *Thomas More* Letter, *supra*, at 3 n.4.) —"How dare the Government" (one is tempted to say) spread the degrading and dangerous stereotype, and send out the expressively harmful message, that good *public* citizenship depends on submissively buying the State's preferred, pet *private* product of the moment, health insurance.

25. While the Mandate's dignitary harm, like that in *Bush v. Vera*, may, over the years, with the fluctuations of people in and out of poverty or other conditions, potentially "fall on [virtually] every citizen", *id.* at 1053 (Souter, J., dissenting): this may make the Mandate's stigmatic wound a somewhat generalized *injury*, but that does not equal a mere "generalized *grievance*". *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-25 (1998) (effectively allowing "generalized grievances" which cause concrete injury-in-fact, instead of just ruffling feathers with abstract nuisances). (In *Akins*, *supra*, there was a statute allowing a *de facto* cause of action, i.e., a right to file a complaint with a commission, or a district-court petition for review of dismissal of that complaint, *see id.* at 19. In the present case, there is not a statute, to Movant's knowledge, saying, "There is a cause of action if the Government denigrates your citizenship based on what products you purchase." (Such a statute sounds strange, anyway.) However, since there is dignitary harm from the

Mandate, *see, e.g.*, *Safeguards* at 26, it is prudent to allow standing in this case, as it would be to allow standing to sue in the case of a statute calling all Americans "swine" or some other ugly name. Injury tends to deserve remedy.) If Congress passed a law calling all Americans "swine", that surely would be an injury, not just a grievance, even if "generalized".

26. Moreover, an *individual* mandate which evokes "individual responsibility"—*see* Title I, Subtitle F of the Act, "Shared Responsibility for Health Care", including Part I of Subtitle F, "Individual Responsibility" (where Section 1501 is placed)—is hard to call *generalized*. Also, Souter says of the expressive harm in question, "[its] shadow[ ] fall[s] on majorities as well as minorities", *id.* at 1054; while Souter does not seem pleased with what he denotes "the overreach of the Court's concept of injury", *id.* at 1056, the *Bush v. Vera* Court is right about the possible majority-harming breadth of expressive injury. And this is a valuable point in considering the non-economic, dignitary harm from a widely-spread, majority-targeting statute like the Mandate.

27. The dignitary/expressive injury stemming from the Mandate is actual and not just hypothetical or far in the future, and invades Movant's presumably legally-protected interest in his own dignity, and is concrete and particularized (it affects the dignity and autonomy of Movant himself, though others are also affected). However, there are also other injuries from the Mandate as well, which may include economic harm, non-economic harm, or a "gray zone" between those two harms.

28. For example, the Mandate serves as a chilling effect, a sort of prior restraint or false imprisonment preventing Americans from exiting their health insurance plans, since they would be penalized for doing so. Since Movant has a right to privacy, and is offended by the Mandate's presuming to know whether he has health insurance, he will not say here whether he has insurance or not. But he will note at least, as partially noted before, that he is an adult male American, and Californian, citizen and taxpayer. Also, Movant does not fall within any exception to the Mandate, or the "Shared Responsibility Penalty", mentioned in 26 U.S.C.A. § 5000A(d) and (e) (e.g., being Amish). Thus, he is in a more particularized group than the American public as a whole, which helps in achieving standing. (Anyone wondering if someone obeying the law, e.g., keeping health insurance, could possibly have standing, may want to see, e.g., the Brief for Private Respondents on the Anti-Injunction Act (Feb. 6, 2012) in 11-398. That Brief observes that law-abiding Americans, ones not violating the Mandate law, may have legal difficulty challenging the Mandate unless they willfully break the law; but they shouldn't have to endure that perverse incentive to break the law, especially since the point of the Mandate is to get people to obey the law, not to break it, *see id.* at 22-25 & n.2. And the Brief cites, *see id.* at 23, *Paul v. Davis*, 424 U.S. 693, 707-09 (1976), re the stigmatic harm attributed to lawbreakers in our society, and allied due-process concerns. Also, *see* Private Resp'ts' Pet. for a Writ of Cert. (undated) in 11-393, making similar points, *see id.* at 18-19, about the undue burden on law-abiding

people, caused by Anti-Injunction Act-based ostensible reasons for denying standing to sue.)

29. If Movant doesn't have health insurance, he is subject to the same potential difficulties as various plaintiffs may have mentioned in their own Mandate/Act lawsuits, e.g., having to spend money, or to plan to spend money, on insurance. But even if Movant has health insurance, there are the dignitary and other problems previously mentioned. Legally, a threat of slander or disclosure is actionable as blackmail or a similar crime; similarly, the threat of financial punishment and additional dignitary harm (beyond that from the passing itself of the Mandate statute, with its stigmatic harm) if Movant stopped having health insurance, should grant Article III standing.

30. Again, the Mandate's various threats or insults, including the threat of being forced or penned into a captive market for health insurance (as opposed to a free market), constitute a concrete injury suffered particularly by Movant. (Others may suffer it too; but in mass frauds or mass torts, or class actions, common suffering of a real injury does not tend to bar standing to any one member of a pool of sufferers—*see Akins*, 524 U.S. at 23-25 (1998) (noting that large number of injurees does not preclude standing for injurees)—, and it should not bar standing here, either.) Thus, Movant's injury gives him "Hohfeldian" standing, *see generally* the work of Wesley Hohfeld (1879-1918). —As for mass concrete injury: the *Bush v. Vera* criterion for standing seems to be residence in a district covered by the offending statute, *see id.* at 957-58 . The "district" covered by the Mandate is the

United States (and, possibly, territories or other pieces of land associated with the U.S.). This may seem to make standing fairly "easy" for Movant to achieve: but the law is the law, and the "relative ease" of standing to sue to overturn statutes causing dignitary harm makes sense, because the wide availability of such standing is an incentive for the State, or individual States, not to create expressively-harmful legislation in the first place. If Congress wants to make stigmatic legislation affecting the whole geographic scope of the country, they should not be surprised if someone living in that large region claims standing to go to court about it; *cf.* once more *Akins*, 524 U.S. at 23-25 (1998) (generalized injury to large group may not be mere grievance failing to give standing). And again, if the Mandate did not do expressive harm, Professor Moncrieff would probably not have said that it does, *see Safeguards* at 26; but, presumably, her standard of intellectual integrity obliged her to mention that harm, despite her support for the Mandate as a whole.

31. And freedom from dignitary or other injury by the State (at a federal, state, or other level) should be at least as important as merely recreational or aesthetic concerns that have been held to grant standing, *see, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) (granting standing to sue over recreationally/aesthetically-displeasing discharges polluting river). Movant is aware that his standing claim would be even stronger if he also had, say, a $2500 financial injury every month from the Mandate. But it would be futile to claim that every harm is financial, or that dignitary harms are not also part of American law and Court precedent. (Once again, Movant is perfectly ready to take his *locus standi*

from that of Respondents; but to establish additional standing, and to discuss the idea of the dignitary harm from the Mandate, he has written the foregoing.)

32. Also, speaking of "financial" matters: Movant would not greatly object to receiving damages, if victorious here, of a nominal $1, or even $0. The main "damages" this Complaint and accompanying Motion seek are the permanent end of all Mandates, federal or state, and the declaration that our laws prevent any such Mandate. This all comports with *Ragin v. N.Y. Times, Inc.*, 923 F.2d 995, 1004-05 (2d Cir. 1991) (observing that the fact of multiple plaintiffs claiming to be injured by an insulting, dignity-harming newspaper advertisement could lead to crushing damage awards, but declining to dismiss claims, since "we are confident that courts will be able to keep such awards within reason"). Movant is not intervening here to get rich, but to do justice. And *see Doe v. Chao*, 540 U.S. 614, 624-25 (2004), in which a plaintiff without actual damages was denied a $1000 statutory award, but was still allowed "to open the courthouse door", *id.* at 625 (Souter, J.), i.e., not to have his claim dismissed. (*See also, e.g.*, *Carey v. Piphus*, 435 U.S. 247 (1978), which mentions that even without actual injury, nominal damages may still be available for violation of rights important to society, *see id.* at 266, and *cf. City of Riverside v. Rivera*, 477 U.S. 561 (1986): "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms", *id.* at 574 (Brennan, J.). Some of the rights Movant defends here, including First or Fifth Amendment rights, may be considered "civil rights", *cf. City of Riverside*, *supra*, at 564.) So even if Movant

hypothetically has little or no "actual damages", his claim here should still stand, and he can live with no monetary award, not even one cent of reward. The freedom of his people may be award enough.

33. Movant may also have standing to intervene re the Mandate's interference with his or others' First Amendment rights. Health insurers lobby: *see, e.g.*, Jim Spencer, *Reform fight leaves insurers in a delicate position*, Minnesota Star Tribune, updated Feb. 12, 2011, 9:52 p.m., at http://www.startribune.com/business/115950604.html: "Wendell Potter, an ex-Cigna insurance executive . . . , says his former colleagues spent millions of dollars lobbying for the individual mandate to replace a public option . . . because it gave private companies a giant new revenue stream that was in some cases subsidized by taxpayers", *id.*; and Chris McGreal, *Revealed: millions spent by lobby firms fighting Obama health reforms: Six lobbyists for every member of Congress as healthcare industry heaps cash on politicians to water down legislation*, The Guardian (London), Oct. 1, 2009, 11:55 a.m., at http://www.guardian.co.uk/world/2009/oct/01/lobbyists-millions-obama-healthcare-reform,

> The industry and interest groups have spent $380m (£238m) in recent months influencing healthcare legislation through lobbying [and] advertising . . . . [C]lose to $1.5m, has gone to the chairman of the senate committee drafting the new law. . . . The pharmaceutical companies . . . are now putting $120m into advertising supporting the emerging legislation.

Revealed: millions spent by lobby firms, *supra*. Even if, say, Movant has health insurance, and thus tacitly agrees that part of his insurance fees go to funding political lobbying, or to commercial advertising, by an insurer: he is entitled, under

the First Amendment "overbreadth doctrine", *see, e.g.*, *Broadrick v. Oklahoma,* 413 U.S. 601, 612-13 (1973), to assert the speech rights of those who don't have insurance and don't want it, and who are thus commandeered into forced insurance-purchase, and thus forced speech, by the Mandate. (*But see Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)) (declining to apply overbreadth doctrine to the form of commercial speech which is professional advertising); however, the *Bates* Court, *see id.*, was not considering a forced-speech-by-consumers situation as in the Mandate, so that in this instance, overbreadth should perhaps cover the commercial speech which unwilling consumers subsidize.)

34. As for possible *prima facie* "contrary authority" re the viability of claiming "overbreadth": while *Virginia v. Hicks*, 539 U.S. 113 (2003), notes that an overbreadth claim is more difficult when the relevant statute is more about conduct than expression, *see id.* at 124, as the Mandate is more about conduct than expression; the statute in *Hicks* was meant to deter trespassers, *see id.* at, e.g., 115, and such deterrence is a legitimate form of harm prevention. Also, there was no real First Amendment issue, *see id.* at 123. With the Mandate, though, there is no harm prevention; although someone not buying insurance arguably is not doing as much social *good* as he could, since he is not paying into the pool which may help lower insurance costs, he certainly does not *hurt* anyone by abstaining from insurance. Moreover, the Mandate does force a substantial amount of unwanted expression, including all the money of unwilling consumers going to lobbying and advertising by insurers.

35. Although the Mandate may not at first seem to fall within *per se* "First Amendment overbreadth" doctrine, e.g., it does not specifically forbid consumers' speech, it does *de facto* restrict and canalize their speech by making them use their money to fund the lobbying of insurance companies, *see, e.g.*, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (disallowing compulsory funding of political speech), and by *de facto* preventing them from using that money to fund other speech or other items. (One imagines a Congressional law that some Justices of the Supreme Court—not all—must at times vote as another Justice demands, and in a way the first Justice strongly opposes. While this would still allow the first Justice to vote as he or she would *most* of the time, diluting that Justice's voice, at all, with the "forced speech/vote" requirement, would hardly be appreciated, one weens…) Or, if one considers that: (a) while the Mandate may not be forcing speech from people who comply with the Mandate and *willfully* purchase health insurance—and who thus tacitly consent to the speech of insurers—, (b) the Mandate illicitly forces speech every time it forces speech from an *unwilling consumer*; that constitutes at least *de facto* overbreadth (the Mandate goes beyond bounds and causes a First Amendment violation by millions of people, i.e., "substantial overbreadth"), and allows Movant to complain, through a reasonable extension of existing law if necessary. (While overbreadth tends to be about otherwise-licit statutes which have an illicit ("overbroad") component, perhaps utterly illicit statutes like the Mandate, statutes causing a chilling effect, should also be attackable by a reasonable extension of overbreadth law. Otherwise, there might be a perverse incentive for

lawmakers to make statutes go utterly out of bounds, so that those *fully*-illicit laws will be *less* vulnerable to overbreadth attacks than partially-licit statutes would be.)

36. Additionally, *see Ariz. Free Enter. Club's Freedom Club PAC v. Bennett* ("*Freedom Club*"), 564 U. S. ____, 131 S. Ct. 2806, 2814-15 (2011) (forbidding government-forced speech, e.g., Arizona legal requirement that an election candidate's speech trigger funding for one's opponents, so that a message would then trigger an opposing message). And as the *Freedom Club* Court notes, the Ninth Circuit appeals court upheld the Arizona measure in question, saying that it did not bar anyone from speaking, *see Freedom Club*, *supra*, 131 S. Ct. at 2816, before the Supreme Court overturned it. Similarly, the Mandate does not explicitly censor any kind of speech, but it is a burden on speaking as one wants. (*See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), *citing* forced-speech case *Wooley v. Maynard*, 430 U. S. 705 (1977), for the proposition that forced speech has a chilling effect on speech.) The Mandate's chilling effect on people's health insurance choices, and what kind of lobbying, advertising, or other messages they may want to fund, is unacceptable. People should not have to forego their constitutionally protected activity of choosing to buy insurance or not, out of fear of fines, prosecution, or humiliation.

37. The argument for overbreadth may not be as easily apparent as some other arguments against the Mandate, but Movant is making this claim on others' behalf in defense against overbreadth or other denial of freedom. —In sum, there are

multiple grounds for Movant's Article III and prudential standing to protect himself or others.

III. INTERVENTION IN 11-398, UNDER RULE 24

38. Movant incorporates here his arguments made in the accompanying Motion, in favor of his intervention in 11-398, under Rule 24 of the Federal Rules of Civil Procedure, "Intervention"; including the observation that in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court considered in oral argument (November 29, 1999), *see id.* at, e.g., 768, an question to which they granted certiorari only *ten days* before, *see Vt. Agency*, *supra*, 528 U.S. 1015 (November 19, 1999), so that, by comparison, Movant's present request may be considered timely.

IV. ARTICLE I CLAIMS

39. The Mandate does not legitimately use the taxing power under the Taxing and Spending Clause, U.S. Const. art. I, § 8, cl. 1, especially since the Mandate's "Shared Responsibility Payment", 26 U.S.C.A. § 5000A(b), does not fall into any accepted category of tax. Rather, the "Shared Responsibility Payment" is a penalty, and as a penalty must serve an enumerated power of Congress, *see, e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940). Not serving an enumerated power, whether the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) or any other, that penalty, and the Mandate, are invalid.

40. The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, letting Congress "regulate Commerce . . . among the several States", *id.*, allows only "regulation", *see id.*, of commerce, not coerced commerce such as forced health insurance purchase; and the Mandate may in fact impair the freedom and consumer choice necessary in interstate commerce. (There is no "Coerced Commerce Clause", or "Compelled Commerce Clause", in our Constitution. An analyst could almost write an equation, inspired by Albert Einstein's "$E = mc^2$", reading, "~~C~~^{3} = ~~M~~" ("No Coerced Commerce Clause equals no Mandate"), especially since no other part of the Constitution gives Congress the power to enact the Mandate either.) The tradition of cases such as *United States v. Lopez*, 514 U. S. 549 (1995), and *United States v. Morrison*, 529 U. S. 598 (2000), discourages misuse of the Commerce Clause to support an effectively unlimited federal (or state) commerce power, such as that to coerce wholly-unwilling commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), are cases that allow crop curtailment. That does not mean they allow coerced commerce or the Mandate. If they did allow those things: then if, for example, at some point marijuana becomes legal, how could the Government be prevented from enacting a law inflicting a fine on glaucoma (or other) patients for not smoking (or at least not purchasing) marijuana, at least some low-strength version of the herb which could help reduce glaucoma, enhance appetite, and promote a relaxed, stress-reductive attitude to life which could reduce street violence? (*Cf.* the song *In the Year 2525 (Exordium and Terminus)* (RCA 1969) by Zager & Evans: "Everything you think, do and say/Is in the pill you took today." *Id.*)

Such a law could also rely on the rubric of lowering health care costs, since patients' glaucoma or other disorder, not to mention hypertension and stress, could maybe be dealt with more cheaply by marijuana use than by other means, That forced-marijuana-purchase law, perhaps called the CHILL (Cannabis/Hemp Individual Leisure and Levity) Act, is terrifying; but so is the Mandate itself.

41. As noted in the Motion: Movant wants to highlight two problems regarding the use of the Commerce Clause to legitimate the Mandate. First, re the issue of "regulating inactivity": Judge Boyce Martin, in his Sixth Circuit *Thomas More* opinion upholding the Mandate, observed that his Circuit had not overturned, under the Commerce Clause, child-support recovery legislation simply because of the "inactivity" of those who failed to pay support, *see* 651 F.3d at 549. However, one should differentiate "guilty inactivity" from "innocent inactivity". (*See, e.g.*, *Shuttlesworth v. Birmingham*, 382 U.S. 87, 89 (1965) (overturning punishment of preacher for standing peacefully outside department store), and *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (overturning punishment of drug addict just for illness of being an addict).) Failing to pay child support is clearly morally repulsive. Also, police can "regulate" the "inactivity" of a bank robber who refuses to drop his gun. But commercial inactivity, by an innocent citizen who doesn't want insurance, seems much more outrageous to "regulate" (commandeer, punish) than the inactivity of a child-support evader or bank robber. (Inactivity that lets evil happen is one thing; inactivity that just means refusing to do every possible good thing—and buying health insurance can, admittedly, be good—, is another. *See, e.g.*,

the *Magna Carta*, cl. 23 (1215), "*Nec villa nec homo distringatur facere pontes ad riparias, nisi qui ab antiquo et de jure facere debent*", i.e., in English, "No village or individual shall be compelled to make bridges at river banks, except those who from ancient times were legally bound to do so." *Id.*)

42. Moreover, a child-support evader has *consented* to have children, or to be in a child-making relationship; a bank robber has *voluntarily* robbed a bank. (*Cf.* Daniel Arkin, *Judge Orders Florida Man To Take His Wife on a Date*, NBC 6 Miami, Feb. 8, 2012, updated 9:41 a.m., at http://www.nbcmiami.com/news/weird/Judge-Orders-Florida-Man-To-Take-His-Wife-on-a-Date-138920574.html (court mandates abusive husband to take spouse to Red Lobster and bowling alley, and buy her flowers). There is some "coerced commerce", *see id.* (order to go to seafood restaurant, etc.); but one assumes the man *voluntarily* married—and abused—his wife.) Thus, the malefactors willfully make their (in)activities regulable by the State. Everything considered, then, inactivity is a factor which may be considered judiciously in blocking state action (like the Mandate), though is not always an automatic, 100% block to state action.

43. Speaking of the Sixth Circuit *Thomas More* opinion, *supra*: one should mention the concurrence there of Judge Bruce Sutton, which received much attention as the opinion of a "conservative" judge nevertheless approving the Mandate. This Complaint will offer only one quote from Sutton here, to give some of the flavor of Sutton's concurrence. "And it [the Mandate/Act] does not compel individuals to buy insurance or even health insurance. They may pay a penalty

instead . . . .” 651 F.3d at 563 (Sutton, J., concurring, and partially delivering Court opinion). But the same logic could be used by a criminal pointing a gun at someone and asking him for his wallet: the criminal could ask the victim to thank the criminal for not “compelling” him, since the victim has the “choice” between complying with the criminal or paying the “penalty” of being shot in the head. Such a choice is often associated with the name “Hobson”, though one hopes it will not be associated with the name “Sutton”. —And now to the other of the two Commerce Clause problems:

44. Second, Respondents have conceded “regulability”, i.e., forcing, of insurance purchase at the point of consumption, *see, e.g.*, the Eleventh Circuit opinion, 648 F.3d at 1295. This is a gigantic concession, which Movant would not have made without serious disclaimers, if at all. That needless concession might allow a Court to claim that if insurance purchase can be forced at the hospital, it is acceptable to move the point of forced purchase back to a calmer time when someone is not at the hospital yet. But Movant believes that any forcing of people to buy health insurance at or after medical treatment should, if allowed at all (which it shouldn’t be, since it is coerced commerce), be “congruent and proportional”: e.g., getting a mere $100 worth of free care, maybe a few iodine-swipes worth, should not allow government to force you to buy *$100,000 or more* of health insurance for the rest of your life. But if your hangnail treatment is $100, maybe the government could ask you for exactly $100 and then apply it to health insurance, —unless you don’t want it. (Not to mention that the forced insurance contract would tend to be invalid since it was

under duress, in a possibly life-or-death medical situation; a situation also giving rise to suspicion of diminished capacity, another bar to formation of valid contract.)

45. The Mandate misuses Congress' Necessary and Proper Clause powers under Article I, Section 8, Clause 18 of the Constitution, failing the considerations of modesty, reasonability, state interests, and narrow tailoring referenced in *United States v. Comstock*, 560 U. S. ____, 130 S. Ct. 1949, 1958-65 (2010). It also fails the test posed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819), of constitutionality, as discussed in the following commentary which shows the unconstitutionality of the Mandate re individual rights, not just government powers; so that the individual mandate is not "proper" at all.

V. CONSTITUTIONAL AND STATUTORY INDIVIDUAL RIGHTS MUST BE CONSIDERED EXPLICITLY IN THESE CASES' QUESTIONS PRESENTED

46. Sir Arthur Conan Doyle's Sherlock Holmes noted, in the 1892 story *Silver Blaze*, "the curious incident of the dog in the night-time", *id.*, the "curious incident" being that "[t]he dog did nothing in the night-time", i.e., it did not bark when it should have. Similarly, 11-398, a hugely important case along with its companion cases, makes no mention whatsoever in its present Question Presented of individual rights, which is very, very curious, given the enormity and novelty of the claim that American government can order people to buy a product, or to enter a market, completely against their will. (Movant hardly blames the Court for not approving any "Questions Presented" about rights; Respondents didn't offer any.) Well, to use

the vernacular, the dog is barking now, and this Complaint and accompanying Motion are calling for the introduction of individual rights in 11-398's Questions Presented (or under a new docket number), and constitutional and statutory individual rights at that, not just individual rights as supposedly protected by federalism.

47. Last year, in the case of *Sorrell v. IMS Health Inc.*, 564 U. S. ____, 131 S. Ct. 2653 (2011) (overturning, on basis of First Amendment, Vermont statute regulating pharmaceutical companies' use of medical information for marketing purposes), the Court decided, *see id.*, that constitutional rights trumped a government police power over health. E.g., "[Vermont] contends that [the statute in question] advances important public policy goals by lowering the cost of medical services and promoting public health. . . . [but w]hile Vermont's stated policy goals may be proper, [the statute] does not advance them in a permissible way." 131 S. Ct. at 2670 (Kennedy, J.).

48. The Court majority was practically accused of "Lochnerism", *see id.*, in Justice Stephen G. Breyer's dissent from the judgment, 131 S. Ct. at 2675, 2679, 2685; but Movant respectfully disagrees with the Justice. Like Breyer, Movant does not endorse the opinion or ethos of *Lochner v. New York* (198 U.S. 45 (1905)); but one need not summon the specter of *Lochner*, *supra*, by overturning overly-restrictive health legislation, including the Mandate. To see individual rights evoked in *IMS Health*, *supra*, but not in the vastly more important present cases at bar, seems imprudent. Thus, it would be prudent to add several Questions

Presented, so as to give the People a "fair trial", a "fair fight" against government Mandates to buy expensive, unwanted products: the latter Mandates being a far more real specter than the resurrection of *Lochner*.

49. The additional Questions Presented are crucial, since litigation against the Mandate which considers only the Commerce Clause or other Article I issues, not individual rights (independent of federalism issues), is like fighting with one hand tied behind one's back. Or, since any of various Amendments of the Constitution could prevent the Mandate, whether First, Ninth, etc., the situation more resembles that of a mythological warrior god, with ten arms, having nine of them tied behind his back. This is not the way to fight against potential tyranny; and there are people, including Movant, who see the Mandate as tyranny. Legal strategy often dictates that one assert as many reasonable claims as possible in one's favor. Movant intends to do this as an intervenor, since other parties may not be currently doing so, respectfully speaking. (As noted in the Motion: even if Movant is not allowed to intervene, that does not in itself mean that the recommended Questions Presented, or other relevant matters such as expressive harm or forced-speech issues, should not be added to this case, since "the questions are more important than the questioner", as it were. Justice for the People and their rights must prevail in this Court, even if Movant's attempt at intervention does not.)

VI. FOUR IMPORTANT QUESTIONS, AND WHY

50. But adding Questions Presented leaves open the question of which to add.

—Movant's own September 22, 2011 complaint in the Central District of California has eighteen separate claims. However, if Movant were to put all those claims in a conglomerate Question Presented, this could trigger a "collective heart attack" for the Court if such a colossal Question were presented, or even if a dozen-plus smaller Questions, carved out of the larger Question, were presented.

51. Thus, as a sensible alternative, here follows a list of the rationale for four additional, normal-sized Questions Presented, in roughly decreasing order of importance, though each Question is quite important. (Movant sees it as unlikely that the Court would add many more than four, if indeed it accepted four.)

52. (1) *Fifth Amendment*. Because of the wide sweep of this Amendment of the Constitution of the United States, including its:

a. Due Process Clause which covers life, liberty, property, fairness, dignity, and privacy concerns (thus covering some of the territory of the Fourth, Eighth, Ninth, and possibly other Amendments), and also "void for vagueness" concerns;

b. Takings Clause relevant to requisitions of property such as the Mandate exerts; and

c. interrelation with the Fourteenth Amendment (and the "reverse incorporation" of the latter Amendment's Equal Protection Clause into the Fifth Amendment);

the Fifth Amendment is the single most important "rights-based defense" for the Court to add as a Question Presented.

53. (2) *Sherman Act*. The Sherman Antitrust Act (July 2, 1890, ch. 647, 26 Stat. 209, codified at 15 U.S.C. §§ 1–7 (amended 2004)) is meant to protect free competition and consumer welfare, and to prevent excessive agglomeration of coercive or corruptive power by businesses. Thus, it is highly germane to the Mandate, which forces unwilling consumers to fund health insurers. Considering the Sherman Act also allows consideration of some of the spirit of the Guarantee Clause (U.S. Const. art. IV, § 4, cl. 1), a clause which, while not really justiciable, raises questions about sovereignty and free-republican status worth noting, e.g., should insurance companies be allowed to become quasi-sovereigns, or a "trust" of the kind that President Theodore Roosevelt abhorred, using the Government as a device to force unwanted subscriptions for health insurance? Discussing the Sherman Act will also let the Court consider whether *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944), a case involving the Sherman Act, supports the Mandate, or, on the other hand, undercuts it.

54. (3) *First Amendment*. This Amendment's special tang of freedom and individuality makes the Amendment especially important to consider in a Question Presented. The idea that the Mandate poses free-speech questions may be somewhat counterintuitive, but as explained *supra* at - 22-26 - re overbreadth/ forced-speech issues, and also below, free speech is a genuine issue here, as it was in *IMS Health*. And freedom of association, for Americans who want badly not to associate with health insurers at all, is well worth consideration.

55. (4) *Thirteenth Amendment and 18 U.S.C. § 1589.* Some may be uncomfortable including a post-Civil War amendment meant to remedy slavery, as a defense against the Mandate. However, coercion is coercion, and the innocent inactivity of not buying health insurance should not bring down the punishment of being coerced to buy that insurance, and work for the money to buy it, under financial and reputational penalty for dissent. The logic, or penumbra, of the Thirteenth Amendment and its allied statute 18 U.S.C. § 1589 (2000; amended 2008) should prevent the Mandate, or any similar government-forced purchase (food, motor vehicles, etc.).

56. The other fourteen claims of Movant from his *Boyle v. Sebelius* Complaint will be mentioned in broad detail later on, for context or other reasons. And now for a detailed look at the reasons for the four Questions Presented above:

VII. FIFTH AMENDMENT

57. The Fifth Amendment says, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.* The Mandate so deprives and takes, as explored below.

58. Movant is aware that Respondents made a formal Fifth Amendment claim in their amended complaints, but later abandoned it, after Judge Roger Vinson dismissed that claim in his Order and Memorandum Opinion, 716 F. Supp. 2d 1120 (N.D. Fla. Oct. 14, 2010), *see id.* at 1161-62. However, while Movant respects the

exceptionally brilliant counsel of Respondents, he need not agree with every element of their strategy. Respectfully speaking, Movant, in Respondents' shoes, would have attempted to revive the Fifth Amendment claim at the appeals court and Supreme Court levels. Movant sees ample ground for challenging Judge Vinson's logic, and thus is reviving the Fifth Amendment claim in this Supreme Court Complaint and accompanying Motion.

59. Judge Vinson cites and quotes, *see* Ord. and Mem. Op., *supra*, at 1161, *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), and *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 106-07 (1978), as proof for his assertion that only "rational basis" analysis of the Mandate is needed, since, in his eyes there is no fundamental right protecting against the Mandate. However, those cases both mention economic *regulation*, not coercion to buy a product: *see Skrupa*, *supra*, at 731-32 (upholding state regulatory powers, including the power to prohibit a noxious business from operation, against due-process claim), and *New Motor Vehicle Bd.*, *supra*, at 107 (noting absence of substantive due process re economic *regulation*, and giving examples of "regulation" as being restriction of dangerous practices, not creation of new contracts).

60. Thus, Vinson, while a fine judge, establishes his conclusion by making the hidden assumption that coerced purchase counts as mere regulation. And one of the prime questions in the Mandate cases concerns precisely that: whether coercion to enter a market counts as "regulation". Movant does not see how it can, at least on a primary level of the market or markets.

61. An illustration of "primary level" is seen in considering mandatory automobile insurance. Driving is not mandatory, and one chooses freely to drive an automobile; so that a driver is tacitly agreeing to pay for insurance, just as a motel operator is tacitly agreeing to buy fire extinguishers for his motel if State regulation mandates that purchase for safety reasons. (But can the State, either the federal Government or a state government, force him into the motel business? Not likely.) And the State cannot (yet) force you to drive an automobile, or to buy one in the first place. So, although you may have to enter the "secondary market", i.e., buy certain items as a regulation of your entering a primary market, that does not mean the State can ever force you into a primary market in the first place.

62. Seeing that our Government has limited powers, under the Constitution, over our unalienable rights, it is proper to assume that Americans have a fundamental right not to enter a primary market, until there is very solid proof that they do not have that right. This Complaint will now offer proof in the other direction, i.e., that they do have that right, though common sense should suffice without additional proof.

VII(A). HOW DUE PROCESS PREVENTS PURELY-UNWILLING CONTRACT

63. There is a truism that economic due process is now a virtual oxymoron. But is the truism true?

64. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), perhaps *the* iconic New Deal economic-rights case, is a prime "go-to" case when arguing that due process does not substantively protect a fundamental right to contract. However, *Parrish*, *supra*, is largely about protecting the rights of employees (such as female workers' minimum-wage rights, *see id.* at 386-87) against employers, *see id. passim*. How this metamorphoses, or metastasizes, into an endorsement of governmental power to force contracts on decent people completely against their will is beyond Movant's ken.

65. Government policing of a contract to make sure that women (or men) are paid an adequate wage is one thing, as in the case of chambermaid Elsie Parrish suing her hotel-company employer for an adequate wage, *see id.* at 388. But does that mean the State could have forced the employee to seek work with the employer in the first place, or forced the employer to go into business in the first place? That would be absurd. And that is largely what the defenders of the Mandate are asking us to believe, if they believe contract can be so easily mandated by the State. This belief lacks a rational basis.

66. Close inspection of the text of *Parrish* lends further weight to the side of consumer freedom instead of coerced commerce. *Parrish* quotes *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which *Parrish* overruled: in *Adkins*, *supra*, Justice Oliver Wendell Holmes, Jr. says of the District of Columbia Minimum Wage Act (40 Stat. 960, c. 174 (1918)), "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement

of health and right living." 261 U.S. at 570 (Holmes, J., dissenting from the judgment). *Cf. also Adair v. United States*, 208 U.S. 161, 191 (1908), effectively *overruled*, *see, e.g.*, *Lincoln Fed. Lab. Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949): "The [statute in question, criminalizing firing an employee for being a union member] is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ anyone." (Holmes, J., dissenting from the judgment)

67. The words "does not compel anybody to pay anything", *Adkins* at 570 (Holmes, J., dissenting), show, *see id.*, that Holmes questions the extreme coercion of forcing people to pay for something they don't at all want to pay for. And Holmes' statement is specially singled out for emulation by the *Parrish* court: "The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: [followed by the Holmes quote immediately *supra* and two more sentences by Holmes]", *Parrish* at 396 (Hughes, C.J.). Thus we see a limiting principle to overweening state power; and freedom of contract is not completely extinguished by *Parrish*. Movant is not arguing *per se* that *Parrish* has been misread for 75 years, but he does suggest that in this present unprecedented situation, the advent of the Mandate, *Parrish* should not be read to permit a Mandate.

68. In addition, Movant believes it unlikely that Justice Owen Josephus Roberts would have made the famous Franklin Roosevelt-era "switch in time that saved nine" and joined the *Parrish* opinion if he thought that liberty would be extinguished thereby. Roberts had a previous history of upholding freedom of

contract, *see, e.g.*, Roberts' opinion in *United States v. Butler*, 297 U.S. 1 (1936), in which he joined the "Four Horsemen of Free Contract" (Justices Butler, McReynolds, Sutherland, and Van Devanter) and struck down the Agricultural Adjustment Act of 1933 ((Pub. L. 73-10, 48 Stat. 31) as exceeding the ambit of the Taxing and Spending Clause and interfering with free contractual choices, *see Butler*, *supra*, at 73. Also, *see* Roberts' dissent from the *Korematsu v. United States* (323 U.S. 214 (1944), effectively *superseded* by Civil Liberties Act of 1988 (Pub. L. 100-383, 102 Stat. 904 (1988), codified at 50a U.S.C. § 1989b–b9)) decision upholding Japanese-American internment, showing Roberts' endorsement of freedom, dislike of compulsion, and condemnation of stereotyping, *see* 323 U.S. at 225-33. Movant does not believe that that noted Justice would endorse the injustice of coerced contract for health insurance under penalty of fine and stigmatization as being "irresponsible".

69. Moreover, Roberts, writing for the Court in *Nebbia v. New York*, 291 U. S. 502 (1934), upheld a precursor of "rational basis" analysis, *see id.* at 525, 537-38; but, crucially, he also defended the right not to enter a market: "[I]f Munn and Scott wished to avoid having their [warehouse] business regulated, they should not have embarked their property in an industry which is subject to regulation[.]" *Id.* at 533 (Roberts, J., *quoting Munn v. Illinois*, 94 U. S. 113 (1876)). Unless someone successfully argues (how?) that *Parrish* overrules Roberts' words above from *Nebbia*, then those words still stand as legal precedent; and an American can avoid economic regulation (or purported "regulation" like the Mandate) simply by leaving,

or never entering, the regulable field. Not only is this common sense, it is also the law, *see id.* at 533. And this long-held due-process law precludes the Mandate.

70. *Parrish* also mentions discrepancy of bargaining power between employer and employed, *see id.* at 393-94, as a reason to protect the weaker party. With the Mandate, the unwilling consumer is that weaker party, since she is fighting the weight not only of the whole health insurance industry, but also of the Government itself. Thus, re the Mandate, the "unequal bargaining power" rationale of *Parrish* would militate for *more* freedom of contract for the consumer, i.e., the ability to be free from the health insurance market if desired. —And the issue of inequality of power has been noted not only by "arch-liberals" like John Kenneth Galbraith, coiner of the phrase "countervailing power", e.g., the power of workers or citizen organizations to resist corporate domination (originally in his *American Capitalism* (1952)), but also "arch-conservatives" like Chief Justice William Howard Taft, *see* Taft's dissent (complementing Holmes' dissent) in *Adkins*, mentioning employees' lacking "a full level of equality of choice with their employer", 291 U.S. at 562 (Taft, C.J.).

71. And *Parrish* is not the only case in Movant's favor; *see, e.g.*, not only the well-known defense of a fundamental freedom of contract in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), but also an older case, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). In *Allgeyer*, *supra*, Justice Rufus Peckham, while finding some police power over insurance purchase permissible, *see id.* at 583, then cites the Fourteenth Amendment and its due-process provisions, *see Allgeyer*, 165 U.S. at 589, and says,

"The 'liberty' mentioned in that amendment . . . embrace[s] the right of the citizen to . . . . enter into all contracts which may be proper, necessary, and essential[.]" *Id.* (Peckham, J.) In fact, and strikingly apposite for our purposes, he specifically mentions "the liberty to contract for insurance or to do an act to effectuate such a contract already existing", *id.* at 591 (Peckham, J.).

72. Therefore, if there is a right to contract to buy insurance, *id.*, there is, by implication or extension, a right *not* to contract to buy insurance. (*See infra* at - 67 - in our discussion of the First Amendment, "Freedom of association therefore plainly presupposes a freedom not to associate", *Roberts v. U.S. Jaycees*, 468 U.S. at 623 (Brennan, J.).) This strengthens the case against the Mandate.

73. And a much more recent case, *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), held that it violates due process (as well as equal protection) for the state of Tennessee to let only licensed funeral directors sell caskets, *see id. Craigmiles* is much more recent than *Parrish*, and thus shows that freedom of contract has hardly been laid in the tomb yet.

74. If this all does not conclusively decide the matter of a Due Process Clause immunity to forced health-insurance purchase, it makes a detailed *prima facie* case for it, so that for a court to ignore it and not even consider the matter, e.g., as a presented question, would fly in the face of longtime Court precedent against (or giving no support for) forced purchase of the kind in the Mandate, and zero Court precedent in favor of that kind of forced purchase.

75. Fortunately, the *stare decisis*-violating Mandate is not fully operative yet, and the Court has the chance to nip it in the bud by consideration of due process and other constitutional or statutory freedoms. This will prevent the kind of mistake the Court believed it made with *Bowers v. Hardwick* (478 U.S. 186 (1986)) which required correction by the Court seventeen years later in *Lawrence v. Texas* (539 U.S. 558 (2003)). If there is a due-process right to same-sex "consensual sodomy", *see id.*, an intimate practice which has not been traditionally regarded as a core American freedom, then there is very probably a due-process right not to purchase products without some degree of consent, especially when such forced purchase is highly untraditional in our free country.

76. But if the Court does not include due process as part of a new Question Presented in considering the Mandate, it will be giving even less consideration to the People than respondent Hardwick received in *Hardwick*, *supra*, since the *Hardwick* Court at least considered the (Fourteenth Amendment) Due Process Clause before upholding the Georgia statute in question, *see Hardwick* at 196. And Justice Lewis Powell, in his concurrence, noted that he might have voted to overturn the statute if Hardwick had raised the Eighth Amendment as a defense, but since Hardwick didn't, Powell didn't, *see Hardwick* at 197-98. (Hardwick also dropped Ninth Amendment claims raised previously, and neglected to bring not only Eighth Amendment, but also Equal Protection Clause, claims, *see Hardwick* at 196 n.8.) Movant does not intend to follow Hardwick's unsuccessful strategy of

dropping, or not even raising, viable rights claims. As a rule, valid claims should be brought.

VII(B). HOW THE MANDATE IS REDOLENT OF *LOCHNER*

77. By the way, Movant is assuredly not trying to bring back *Lochner*, *cf.* Justice Breyer's "Lochnerism" rhetoric in *IMS Health*, *supra* at - 32 -. *Lochner* is sometimes illegitimately used as a legal Loch Ness Monster, or a "spook" or "ghoul"; *see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993), "Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our . . . jurisprudence once again" (Scalia, J., concurring in the judgment), to convince people falsely that any limits on overweening State regulation (or on outright State commandeering) will lead to a parade of horribles.

78. But it is very simple to overturn the Mandate, through due process or otherwise, without the necromancy of resurrecting *Lochner*. *Lochner* precluded, or made very difficult, state regulation of businesses or of those who had voluntarily chosen to be in a contract, *see id.* However, the Mandate deals with consumers who have *not* chosen to be in a (health insurance) contract: a different matter entirely. Therefore, overturning the Mandate does not mean raising the Lazarus of *Lochner* from its sepulchre.

79. ...Especially when one could argue that upholding the Mandate actually comes closer to bringing *Lochner* back. After all, *Lochner* has come to be associated

with denial of protection for "small people", workers with little bargaining power, from "big people", powerful business interests. The Mandate not only lowers the bargaining power of American consumers vis-à-vis health insurers, but in a sense destroys it entirely, by taking away Americans' choice not to have health insurance, thus making Americans prey to the insurance industry. So, the Mandate brings back some of the worst of *Lochner*, though through "non-Lochnerian means", i.e., through legislation, not through *Lochner*-era excessive "freedom of contract" allowing employers to abuse employees. Movant is pleased to let *Lochner* lie, and pleased to support the ability of the State to regulate business and contracts; but Movant also recommends against approving an unconstitutional new power of the State to force the innocent unwilling into business or contracts, a power with some of the unpleasant, abusive odor of *Lochner*. (*See Boyd v. United States*, 116 U.S. 616, (1886),

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* ["resist (beware) the beginnings", or "nip it in the bud"].

Id. at 635 (Bradley, J.).)

80. —Returning to *Parrish* for our conclusion: that epochal New Deal case is near or at the aphelion, the far boundary, of lowering due-process protection of contractual rights vis-à-vis state legislation. But if even this "aphelion"
1) applauded "not compel[ling] anybody to pay anything", *id.* at 396 (*quoting Adkins*, 261 at 570 (Holmes, J., dissenting));
2) decried the coercive effects of unequal bargaining power, *see Parrish* at 393-94;
3) and drew the support of a friend of freedom like Justice Roberts, *see id.*;
if, then, even a "pro-regulation" case like *Parrish* has those features, then *a fortiori*, how can one rationally claim that freedom of contract is so extinguished that coerced commerce is legal, when it has not ever been before? (With the possible exception of the "Musket Mandate", i.e., the Second Militia Act of 1792, 1 Stat. 271 (repealed 1903); but buying a flintlock for national defense involved a paramount public interest in a way that private health insurance does not.)

81. However, if the Court, under the shadow of the popular platitude that following *Parrish*, "economic substantive due process is dead", is not happy finding any kind of economic substantive due process whatsoever: the Court can simply say that the choice not to contract, not to enter the market, at all, is *non-economic*, since it is anti-economic, a refusal to be part of the economy. Thus, the Court could still hold, if truly desired, that there is no economic substantive due process at all; but whether a right of *non-economic* substantive due process exists, or a liberty or privacy right not to enter the economy (or a particular economy, e.g., the health-insurance market), or a right to consider coerced commerce arbitrary and capricious

(and thus not affording a rational basis), *see Parrish* at 399, however the Court would like to articulate it, there is still a due-process right not to buy health insurance (or other products) when consent is wholly lacking. *See Nebbia*, 291 U.S. at 533. Without such a right, the Constitution and Bill of Rights may as well not have been written, since public power could overwhelmingly take over private life if any "rational basis" will do for the State to commandeer and inaugurate private contracts.

VII(C). STRICT SCRUTINY; OR, THE MANDATE AS "MOST RESTRICTIVE MEANS"

82. Proponents of the Mandate could try to argue that even if there is some fundamental right not to contract, the issue is "moot", since the Mandate might still pass "strict scrutiny" (the standard that laws must pass to overcome a fundamental right) anyway. This assertion would be incorrect.

83. If strict scrutiny is used to examine a statute, the law must have a compelling governmental interest, be narrowly tailored to that interest, and be the least restrictive means for achieving it. Health care improvement is obviously crucial for Americans, maybe even a "compelling state interest". However, purchasing private health insurance is not identical with improvement of health care. Health insurers are "middlemen" who take a significant cut of insurance premiums instead of spending it all on patient care, that "cut" being money that could otherwise go straight to health care providers such as physicians. (*See, e.g.*,

the Mot. of Ass'n of Am. Physicians & Surgeons, Inc. & Alliance for Nat. Health USA for Leave to Intervene as Resp'ts in 11-398 ("AAPS Motion"), Dec. 6, 2011, *mot. denied* Jan. 12, 2012, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-398-Mot-to-Intervene-AAPS-ANH-USA.pdf, at, e.g., 20-21, on the competitive injury the Mandate wields on physicians.) Thus, purchasing health insurance may even stymie health care improvement at times, since an individual consumer may get better health care by going directly to a health care provider than spending money on a middleman.

84. Moreover, the Mandate badly fails the other two prongs of strict scrutiny. The Mandate is largely a fundraising device, *see* the Act, § 1501(a)(2)(F). But instead of the Mandate, the Government has almost endless options to raise funds. It could simply raise taxes; or end tax breaks for the extremely wealthy; or offer a $695 tax credit for insurance purchase, instead of a $695 penalty for nonpurchase, on the theory that honey draws more flies than vinegar. (*Cf., e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U. S. ____, 131 S. Ct. 1436 (2011), *passim*, on the constitutional virtues of voluntary donations of money that receive tax credits, versus the vices of state spending and action forbidden under, e.g., the Establishment Clause.)

85. Or the Government: could charge, or put a lien on the property of, people who get free treatment, albeit after the treatment is over; could induce people to buy health insurance through legally allowable means like open- or closed-enrollment periods, and advertising the benefits of being prepared for health

emergencies; or could reduce costs, instead of raising revenue, e.g., there could be federal caps on health-procedure costs, or voluntary and encouraged caps on insurance company executive salaries.

86. Notably, re alternatives to a Mandate, Dr. Howard Dean, former Democratic governor of Vermont, has stated that Vermont's health care system did not need a Mandate*, see, e.g.*, *Howard Dean Rails Against Health Care Mandate*, YouTube, uploaded by goprapidresponse on Aug. 6, 2010 (showing a portion of the MSNBC show The Daily Rundown), at http://www.youtube.com/watch?v=u39vJ1UXW84,

> [T]he truth is the mandate's not essential . . . . We did it 20 years ago in my state . . . without a mandate. . . . The American people aren't going to put up with a mandate. . . . There will be 2 or 3 people, percent of the people who cheat. That is not enough to bring the system to a halt. And people don't like to be told what to do.

Howard Dean Rails Against Health Care Mandate, *supra. See also* the Eleventh Circuit opinion, re the supposed "cost-shifting" done by "free riders" who dare not to have health insurance: "[T]he data demonstrate that the cost-shifters are largely persons who either (1) are exempted from the mandate, (2) are excepted from the mandate penalty, or (3) are now covered by the Act's Medicaid expansion." 648 F.3d at 1299 (Dubina and Hull, JJ.). Thus, dragooning people into buying health insurance may not help improve health care very much anyway, *see id.* So the least restrictive means of improving health care coverage are not being used by the Mandate, since we see numerous other means mentioned above, including Movant's suggestions, and the observations by Howard Dean and the Eleventh Circuit, *supra.*

87. Returning to the topic of auto insurance for illustration: if one isn't driving an auto on public lands, or if one posts a bond instead of buying auto insurance, one may escape having to buy insurance. Thus, auto insurance may even pass strict scrutiny, seeing the voluntary status of driving (or buying a car in the first place), or of driving on public land, and the availability of alternatives such as posting a bond. So, mandatory auto insurance may fill "least restrictive means" (and "narrow tailoring", see immediately *infra*) requirements—if it even needs to meet those requirements, since it is merely a regulation on voluntary driving, just as "mandatory fire extinguisher purchase" may be merely a regulation on voluntarily running a motel.

88. As well, the Mandate is not narrowly tailored. It is overbroad in various senses, not only in the sense of First Amendment overbreadth: e.g., the Mandate targets some people who may be taking fine care of their health and using their money for physicians more effectively than they would be using it to buy health insurance. (*See* the well-known quote, "Better that ten guilty persons escape than that one innocent suffer", William Blackstone (1723-1780), *Commentaries on the Laws of England* (1765-69).) Also, the Mandate doesn't merely facilitate health insurance purchase (which it does by highlighting the importance of being insured), it actually compels purchase—so that that which was permitted is now compulsory, a rather strange state of affairs. And the Mandate is also underinclusive, at least in a broad sense. E.g., it does not address the possibility that it may be self-defeating: for instance, it could make health care worse by providing a quasi-monopoly over a

pool of captive consumers. This situation may make health insurers more lax about the level of care they provide, since it is nearly impossible for a huge pool of consumers to escape from forced contribution to a health insurance corporation.

89. Thus, the Mandate fails both "least restrictive means" and "narrow tailoring tests". In fact, the Mandate, coercive and intrusive, may actually meet a "*most* restrictive means" test, which is not enviable. As listed *supra* at - 49-50 -, there are many acceptable "subtle scalpels" to use to improve health care, rather than the unconstitutional brute bludgeon of the Mandate. Therefore, the Mandate fails strict scrutiny and should be struck down.

VII(D). THE MANDATE'S TAKINGS FROM AMERICANS

90. As for the Takings Clause of the Fifth Amendment, concerning "private property . . . taken for public use, without just compensation", *id.*: if citizens are "peacetime-drafted" into buying unwanted private health insurance for the ostensible sake of improving public healthcare, all the money, and liberty, taken from them should be compensated, and at a considerable rate, seeing the weight of this unexampled imposition on them. If the insurance they receive is considered a sort of compensation in itself, it is compensation in a form they don't want. Movant knows of no enumerated power which allows the Government to perform this taking, either; as noted *supra* at - 26 -, the Commerce Clause does not offer such power.

91. Even if: the forfeited choice of buying insurance or not; the insurance fee; or the penalty for refusing insurance, are all not considered as "takings", then all the health information ending up in government databases, *see* this Complaint's commentary *infra* at - 85 - on the possibly Fourth-Amendment-violating seizure of insurance purchasers' private information, could be considered a "taking" for public use. This taking too could demand immense compensation; the theft of private information about abortion, AIDS, mental illness, etc., may be cause for award of immense damages, if the information is taken unlawfully and spread about against the victim's will. And an unwanted taking of information, as effected through the Mandate, uncomfortably resembles theft.

92. It is true that the case of *Kelo v. City of New London*, 545 U.S. 469 (2005) allows government taking of private property, such as a house, *see id.*, to give to someone else for "public use". Thus, if the Government paid a large sum to unwilling insurees for their health information, it might not be impossible to justify that taking. However, Movant knows of no government plan for such financial compensation.

93. Too, health care implicitly is about the body, not just about a house as in *Kelo*, *supra*, and the body counts as more than just "private property", *see infra* at – - 96 - this Complaint's comments on *habeas corpus*. (*See also Kyllo v. United States*, 533 U.S. 27, 38 (2001), with its insights into Fourth Amendment privacy of, e.g., a lady's nighttime regimen: which insights may help understand the homonymous *Kelo* as not enabling a "taking" by government of the very private zone of the

human body, nor a "taking" of the also-very-private zone of care of the body, even if *Kelo* allows condemnation of a house.) Thus, government can not "take" citizens' basic right to decide about health care, e.g. to refuse medical treatment, *see, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990), at least not to the extent that the Mandate does. If it could utterly "take" that right, then America would slide closer to the nightmare scenario described in Justice Sandra Day O'Connor's *Kelo* dissent, including the assertion, "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public . . . .", *id.* at 494, and the quip, "The specter of condemnation hangs over all property", *id.* at 503 (O'Connor, J., dissenting from the judgment), apparently referencing the quote "A specter is haunting Europe—the specter of Communism", which begins Karl Marx's and Friedrich Engels' *The Communist Manifesto* (1848). But even if Justice O'Connor is using poetic license here about "specters" (as some do about the specter of *Lochner*), the Mandate is bad in itself, even if it is not used as a precedent to "condemn[ ] all property", *Kelo* at 503 (O'Connor, J., dissenting).

VII(E). UNEQUAL PROTECTION FOR CONSUMER, INSURER, AND HEALTH CARE PROVIDERS

94. Re the Fourteenth Amendment's Equal Protection Clause, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws", *id.*, which is "reverse-incorporated" into the Fifth Amendment's Due Process Clause:

there may be no conventional equal-protection violation in the Mandate, e.g., there is apparently no invidious racial or gender classification in the Mandate. However, if one opens the field of inspection slightly wider, there may be several violations. First, re the forced contracts with insurers into which the Mandate forces citizens, citizens are treated as second-class citizens of sorts, with their assent not required, and their bargaining power reduced (or even eliminated) by the State. By contrast, the Mandate places health insurers up on a quasi-sovereign tier above consumers, with the Government doing the bidding of the insurers by dragging consumers into the companies' net. This does not sound like equal protection of the laws for consumer vis-à-vis insurer.

95. As well, health care providers in general, and their suppliers, may be suffering from discrimination, and not being equally protected by the State, since the Mandate directs Americans to buy health insurance, not just to buy medical care in general. Thus, money that might flow directly to the medical profession from consumers, is siphoned off to the insurance industry, as noted *supra* at - 48 - re the AAPS Motion at 20-21. (Movant is not a formal health care provider and hypothetically may not have standing to mention such injuries vis-à-vis himself, *but see Bond v. United States*, 564 U.S. ____, 131 S. Ct. 2355, 2367 (2011), "The Court must entertain the objection . . . even if the right to equal treatment resides in someone other than the defendant." *Id.* (Ginsburg, J., concurring in the judgment)

96. While, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) may allow governmental burdening of one industry so that another is benefited (e.g.,

optometrists over opticians, *see id.*), that case did not mention *forcing* people to see an optometrist, in the way the Mandate forces people to pay health insurers. *see* once more AAPS Mot. at 20-21. Thus, this state-created "monopoly" by means of the Mandate may be an equal protection violation (and *see infra* at - 59 - *et seq.* on antitrust and Sherman Act issues). *See also* Br. of Authors of *The Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson & Guy Seidman) and the Independence Inst. as *Amici Curiae* in Supp. of Resp'ts in 11-398 (undated), at 37-39 (decrying the quasi-monopolistic aspects of the Mandate).

VII(F). THE MANDATE AND ITS PENALTY ARE VOID FOR VAGUENESS

97. The Mandate is void for vagueness, a violation of due process. For example, is the "Shared Responsibility Payment" a tax, or a penalty? And the power to demand this payment and demand that Americans buy health insurance cannot come from merely "regulat[ing]", § 1501(a)(2)(A) of the Act, so where does it come from?

98. Moreover, Section 5000A(g)(2) of the Act says,

> "(A) WAIVER OF CRIMINAL PENALTIES.—In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.
>
> "(B) LIMITATIONS ON LIENS AND LEVIES.—The Secretary shall not—
>
> "(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or
>
> "(ii) levy on any such property with respect to such failure.".

§ 5000A(g)(2).

99. This, *see id.*, is "nice", in that the Mandate may thus not seem as brutal as it could possibly be; but what it apparently loses in brutality, it gains in vagueness and power to confuse. For instance, while there are apparently no "criminal penalties", § 5000A(g)(2)(A), under the Mandate for nonpayment of penalty (or for "timely" nonpayment, § 5000A(g)(2)(A)—but might that still allow prosecution for "grossly untimely" nonpayment, e.g., 10 years late, or "never pay at all in your life" nonpayment?), there still could be penalties of some sort for, say, inaccurate or fraudulent reporting or accounting of how much penalty one owes to the IRS due to the Mandate. *Cf.* Robert A. Long, Br. for Ct.-Appointed Amicus Curiae Supporting Vacatur (Anti-Inj. Act) (dated Jan. 2012): "If the IRS prevails, however, the taxpayer may be liable for statutory penalties as well as interest on the amount owed." *Id.* at 28-29. And *see* Br. on the Merits for Pet'rs. in 11-398 (Jan. 6, 2012) at 54 (noting that Attorney General can sue people for unpaid taxes). Or what about actions the IRS could take which would ruin the credit rating of a taxpayer refusing to pay the "Shared Responsibility Payment"? Would this not also be a form of punishment?

100. If Americans are due a tax refund, one notes, then by 26 U.S.C. § 6402(d)(1)(A) (1954; amended 2010), the IRS is allowed to "reduce the amount of any overpayment payable to such person by the amount of such debt", *id.* However, the statute in Section 5000A(g)(2), *supra*, is so bare and sketchy, on its face, that there is serious room for confusion about the nature or likelihood of any penalty.)

—So, how is the "Shared Responsibility Payment" going to be collected? Or is it going to be collected at all?

101. Movant believes that an average person reading Section 5000A(g)(2) could be very confused, and justifiably so, by the lack of clarity in the statute. An average person reading the statute could believe that the Mandate is merely precatory, suggestive, and that there will be no civil or criminal punishment, i.e., no punishment at all, or extremely little chance of punishment, for failure to make the "Shared Responsibility Payment", when in fact there could be a great deal of punishment. (*See* this telling comment by "surfered", whoever he or she may be, following the article *Obama's Bizarre Alternate Universe* by Larry Johnson, No Quarter blog, Aug. 24, 2010, 9:39 p.m., at a text-only webcache version on the "Google" search engine, http://webcache.googleusercontent.com/search?q=cache:wCHcOb-rNU4J:www.noquarterusa.net/blog/49498/obamas-alternate-bizarre-universe/+%E2%80%9CThere+is+no+penalty.+It+is+unenforceable%E2%80%9D&hl=en&gl=us&strip=1 (if the webcache has expired by the time a reader reads this, one should simply be able to put "There is no penalty. It is unenforceable", in quotes, into Google and seek the text-only webcache link), in pertinent part,

> About that penalty for failure to have health insurance…
> The shared responsibility penalty will be due upon notice and demand by the IRS; HOWEVER . . . .
> . . . .
> There is no penalty. It is unenforceable and written that way on purpose.

Id.) This vagueness, wherein someone can think "[t]here is no penalty", *id.*, should make the Mandate and penalty utterly void. *See BMW of N. Am., Inc. v. Gore*, 517

U.S. 559 (1996) (preventing excessive punitive damages, under Fourteenth Amendment Due Process Clause): "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am.*, *supra*, at 574 (Stevens, J.).

102. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 164 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), are two additional sources, if needed, of "void for vagueness" doctrine, including how that doctrine protects the ordinary person's right to fair notice that his conduct is forbidden and what the penalties are. In addition, *see also* Br. of Amicus Curiae Egon Mittelman (*supra* at - 8 -) at 12 (calling the Mandate's penalty-enforcement mechanism a possible "nullity"). Finally, *see* Lee Ross, *Federal Judges Raise Questions About ObamaCare Mandate*, FoxNews.com, June 8, 2011, at http://www.foxnews.com/politics/2011/06/08/key-challenge-to-obama-health-care-law-heard-by-federal-court/#ixzz1R0TcRs6S,

> At the end of the case, [Judge Frank] Hull hit upon another controversial matter over the penalty that's imposed on people who don't buy insurance. She noted with some derision the government's enforcement mechanism for collecting fines: essentially trusting that people who don't comply with the law will tell the truth on their tax returns.
>
> "How is that penalty even more collectible in any way than an unpaid medical bill?" Hull asked.

Federal Judges Raise Questions About ObamaCare Mandate, *supra*. Movant concurs with Judge Hull's querying, *see id.*, of the vagueness or ephemeral quality of the Mandate penalty. —In sum, the Mandate and penalty, especially given legal precedent as cited *supra*, are void for vagueness and thus lawless.

VIII. THE SHERMAN ACT, AND HOW *SOUTH-EASTERN UNDERWRITERS* CANNOT UNDERWRITE THE MANDATE

103. The Mandate violates the Sherman Act (July 2, 1890, ch. 647, 26 Stat. 209, codified as amended at 15 U.S.C. §§ 1–7 (amended 2004), and possibly other antitrust provisions. Section 1 of the Act, "Trusts, etc., in restraint of trade illegal; penalty", reads, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* For Movant to be forced to buy or retain insurance against his will, along with many millions of other Americans, strikes Movant as one of the severest and most unreasonable "restraints of trade" imaginable. (In the antitrust context, a more usual meaning for "contract" may be a contract between businesspeople to restrain trade. However, in the bizarre new world of the Mandate, where the contract restraining trade is between the unwilling consumer and the health insurance company, it seems fair to allow such a contract to be reached by the words, "*Every* contract . . . . in restraint of trade or commerce", Sherman Act § 1 (emphasis added).

104. Procedurally, Respondents' cases do not raise antitrust issues, which may seem an obstacle to raising a new Question Presented on those issues. However, even if such issues are thus not "resuscitable" in the way the Fifth Amendment is resuscitable because Respondents mentioned that Amendment in their complaints, the antitrust issues raise themselves by reason of the Government using *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944) as its core case to

empower the Mandate, but not telling the Court or the public that the case is meant to *prevent* coerced insurance purchase, *see infra* at - 62 -, under the Sherman Act. Given the Government's massive omission here, it seems fair, or even necessary, to raise the antitrust issue in a Question Presented.

105. Restraint of trade happens in at least four senses here: first, one is bound into insurance purchase against one's will; second, someone with health insurance is restrained from exiting that market at will; third, one is restrained from using the money used for forced insurance purchase, for purchasing something else instead; and fourth, a *per se* or *de facto* monopoly, cartel, or "trust" is created, such that insurers are given an anticompetitive, trade-restraining privilege that other health care "competitors", such as physicians, are not: i.e., State-forced purchase of insurers' products.

106. Actually, something worse than a monopoly is created: a "cratopoly" (from the Greek *cratos*, meaning "rule" or "power", and *polein*, "to sell"), i.e., a commercial agglomeration that uses the State to *make* you buy its goods. (Or at least, a commercial agglomeration that benefits from the unjust enrichment, the coerced payments, that forced purchase produces.)

107. Our laws dislike such corporate coercion of citizens. *See, e.g.*, *German Alliance Ins. Co. v. Hale*, 219 U.S. 307 (1911), in pertinent part:

> We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates . . . In order to meet the evils of such combinations . . . ,

> the state is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly.

German Alliance Ins. Co., *supra*, at 316 (Harlan, J.). What worse type of having insurance consumers "at [insurers'] mercy in the matter of rates", *id.*, can there be, than forcing unwilling consumers to buy their products, as the Mandate does?

108. Another case, whose name may be familiar to students of the Mandate, is *United States v. South-Eastern Underwriters* ("*Underwriters*"), 322 U.S. 533 (1944) (allowing federal regulation of insurance under Commerce Clause and Sherman Act) (*superseded or updated* by the McCarran–Ferguson Act (Pub. L. 79–15, 59 Stat. 33, S. 340, codified as amended at 15 U.S.C., ch. 20, §§ 1011-1015 (1945) (amended 1994)), which allows states some insurance regulation powers and partially curbs federal antitrust regulatory power over insurance).

109. Justice Hugo Black discusses the depredations of the eponymous South-Eastern Underwriters Association ("SEUA"), *Underwriters*, *supra*, at 535-36, in pertinent part:

> The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from SEUA members on SEUA terms. . . . [A]nd persons needing insurance who purchased from non-SEUA companies were threatened with boycotts and withdrawal of all patronage.

Id. (Black, J.) Black goes on to conclude his opinion, *id.* at 562, "No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices."

(Black, J.) If it is wrong for insurers to "coerce…consumers", *id.*, then how is it right for the Government to do so?

110. On that note, i.e., the anti-coercion axis found in *Underwriters*, it is not just surprising but incomprehensible that when Congress passed the Act, Section 1501(a)(3) mentioned *Underwriters* as the prime legal reason Congress could enact the Mandate, "SUPREME COURT RULING.—In United States v. South-Eastern Underwriters Association (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation", Act, § 1501(a)(3), but did not mention that *Underwriters* was largely about antitrust issues and *preventing coercive practices by insurance companies*, *see id.* at 535-36, 562. This gross material omission by the National Legislature is something which this Complaint and accompanying Motion are currently seeking to correct, by informing the Court and the public.

111. Indeed, *Underwriters* gives more reason against the Mandate than for it, when read properly. When discussing any putative reasons in favor of the Mandate, a person could even cite *Underwriters* with a "*contra*" signal, or at least a very strong "*But see Underwriters*", against the Mandate.

112. Movant expects some Mandate supporters might try to plead, e.g., "state action" in defense. Under, e.g., *Parker v. Brown*, 317 U.S. 341 (1943), some anti-competitive state action in the antitrust realm is permitted. But that case concerns such action by States, not by the federal Government; and *Parker*, *supra*, involves

regulating businesspeople, California raisin-growers, *see id. passim*, not *forcing* consumers to buy raisins, or forcing growers into the business of growing them. Movant knows of no antitrust "state action" provision which would allow the State, or states, to inflict coerced contract on consumers, as the Mandate demands. (And *see McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944): "The very purpose of the Commerce Clause was to create an area of free trade among the several States." *Id.* at 330 (Frankfurter, J.).) Thus, the end of all Mandates, state or federal, would comport well with the Commerce Clause, and the Commerce Clause's empowerment of the Sherman Act, *see Underwriters*, 322 U.S. at 535-36, 562.)

113. —A commonsense comparison: if two gasoline companies colluded in raising the price of gas by 10 cents from $3.90 to $4.00, that would likely be an antitrust violation; but if those companies (through government coercion) forced unwilling consumers to buy gas *at all*, for a period of decades (and paying not $0.10, but $4.00, more for each gallon than desired, since the consumers didn't want any gas in the first place), and that coercion gets excused through "state action" or otherwise, that sounds wrong to Movant. And similarly with the Mandate.

114. If some argue that the Government is doing the coercion, not the insurers; then any affirmative act of health insurers to *accept the coerced fees*, should be prohibited, since their accepting the money would mean private parties are reaping the fruits of the anticompetitive behavior: a form of "unjust enrichment". And the insurance companies and the State are certainly violating the spirit of *Underwriters*, a spirit of consumer protection and opposing coerced insurance

purchase, even if the companies and the Government argue they are somehow within the letter of the case.

115. Now if, say, there were in the Act some specific exemption for the Mandate from antitrust laws, that exemption might possibly defend the Mandate. However, the Act's Section 1560 (42 U.S.C. § 18118), "Rules of Construction", says specifically, "(a) NO EFFECT ON ANTITRUST LAWS.—Nothing in this title [Title I of the Act, including Section 1501] (or an amendment made by this title) shall be construed to modify, impair, or supersede the operation of any of the antitrust laws." Act, § 1560. Hence, by the words of the Act itself, *see id.*, the Mandate has no defense.

116. If Congress wants to grant exemptions from the Sherman Act, it can and should...grant exemptions from the Sherman Act, as it did with the McCarran-Ferguson Act. The fact that it didn't, speaks volumes—as *Underwriters* itself can tell us: "Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress[.]" *Underwriters* at 561 (Hughes, C.J.).

117. The McCarran–Ferguson Act, one notes, immunizes insurance companies, *see id.*, from various provisions of the Sherman Act. However, Section 1013(b) of the McCarran–Ferguson Act reads, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." § 1013(b). Since every single forced contract to buy health insurance under the Mandate is an act of "coercion, or

intimidation", McCarran–Ferguson Act § 1013(b), that Act does not protect the Mandate from being overturned by the Sherman Act.

118. There may be other antitrust provisions violated by the Mandate, though there is not room to discuss them beyond a very brief mention: i.e. the Clayton Antitrust Act of 1914 (Pub. L. 63-212, 38 Stat. 730, codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (1914) (amended 2000)); the Robinson–Patman Act of 1936 (Pub. L. No. 74-592, 49 Stat. 1526, codified at 15 U.S.C. § 13 (1936)); and the Federal Trade Commission Act of 1914 (63 Pub. L. 203, 38 Stat. 717, codified as amended at 15 U.S.C §§ 41-58 (1914) (amended 2006)) provision 15 U.S.C. § 45(a)(1), may protect, respectively, against any forbidden *per se* or *de facto* "tying" effect; price discrimination; or unfair or deceptive competition, or acts and practices, affecting commerce, that the Mandate works against Americans, though the McCarran–Ferguson Act may prevent consideration of those issues or those particular acts anyway, *see id.* § 1013(a). But a full-length intervenor's brief could address those issues.

119. Finally, *see* Title III of the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (Pub. L. 94-435, 90 Stat. 1383, codified as amended in various parts of 15, 18, and 28 U.S.C. (1976) (amended 2001)), allowing *parens patriae* actions, i.e., allowing state attorneys general to file antitrust suits on behalf of their states, *see* 15 U.S.C. § 15(c). Thus, Virginia Code Section 38.2-3430.1:1 (2010), "Health insurance coverage not required", which, *see id.*, exempts Virginians from the Mandate, may have more legitimacy than some may have thought. If the Virginia

Code, *supra*, is merely protecting Virginians' rights not to be the victim of forbidden anticompetitive or monopolistic behavior, *see German Alliance Ins. Co.*, 219 U.S. at 316, then maybe the federal Supremacy Clause is not as supreme as usual here.

IX. FIRST AMENDMENT

IX(A). FREEDOM OF ASSOCIATION

120. The Mandate violates Movant's and other Americans' First Amendment ("Congress shall make no law . . . . abridging the freedom of speech . . . . or the right of the people peaceably to assemble [etc.]". *id.*) rights, including freedom of association, so that strict scrutiny of the Mandate may be appropriate, as with the Fifth Amendment claims previously made. *See Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984): "[W]e [see] in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of . . . political, social, economic [and other] ends", *Roberts*, *supra*, at 622 (Brennan, J.). Purchasing insurance has "economic" aspects, *see id.*, and maybe also some of the other, non-economic aspects listed by Justice William Brennan, *see id.* The *Roberts* Court also says, "Freedom of association therefore plainly presupposes a freedom not to associate." *Id.* at 623 (Brennan, J.). Thus, *see id.*, freedom to opt out of commercial association is protected, at least partially, by the Constitution. (It is a good thing that under the First Amendment, members of one political party, say, are not forced to associate with another, and vice versa. But if forced commercial association, e.g., government commanding or commandeering you to join an

insurance company's membership roster against your will, is permitted, then free speech, including political speech, may not matter so much anymore, since a government that dictates your deeds may not need to worry about your words. Imagine America becoming a company town where you can squawk about politics with your "freedom of speech" all you want, but you must buy a particular slate of goods regardless of your squawking. *Cf. IMS Health*, "A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.' *Bates v. State Bar of Ariz.*, 433 U. S. 350, 364 (1977)." 131 S. Ct. at 2664 (Kennedy, J., *quoting* Blackmun, J.).)

121. *Roberts* does say that usually, small, intimate relationships are protected by freedom of association more than business relationships are, *see* 468 U.S. at 620. However, in support of that contention, *Roberts* cites *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), *see Roberts* at 620. In *Corsi*, *supra*, the Court allowed a New York antidiscrimination law to reach a labor organization with racial restrictions on its membership, despite that organization's protest that that law interfered with the group's associative right to choose its own membership, *see id.* at 93-94. In other words, in a commercial setting, freedom of association is not allowed to excuse bigotry, *see id.*; but the "bigotry exception" proves the rule, that there is usually some freedom of association in a commercial setting in the first place, *see id.*

122. The concurrence of Justice O'Connor in *Roberts* is also instructive. She posits a minimal freedom of association for commercial, relatively "non-expressive" transactions, as opposed to a stronger freedom of association for expressive

transaction; hence, she supports rational-basis regulation of commercial transactions vis-à-vis freedom-of-association rights, *see id.* at 634, and at 637-38, where she supports "rational regulation" (O'Connor, J., concurring in part and in the judgment) by citing *Corsi*, *supra*, 326 U.S. at 94. (Though, as noted *supra*, this rational regulation is largely to prevent bigotry by organizations, *see id.* at 93-94; and *see also N.Y. Club Ass'n v. City of New York*, 487 U.S. 1, 20 (1988) (concurrence of O'Connor, J., in the judgment, noting that commercial groups are not free from antidiscrimination laws).)

123. However, the Justice also notes the right to enter a market *voluntarily*, since she uses the word "choose": "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree, it loses the complete control over its membership that it would otherwise enjoy[.]" *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). Logically, then, an association (or, one presumes, an individual, who has associational rights as all Americans do) has the right not to enter a market; and Americans have the right not to associate with a health insurer if they don't want to enter that market, *cf. id.* Justice O'Connor's analysis, by the way, mirrors Justice Roberts' analysis in *Nebbia*, which allows rational-basis regulation—but does not allow for coercing someone into the regulable field in the first place, *see* 291 U. S at 533.

124. There are some instances of *prima facie* "coerced association" under our laws, but not enough to justify the Mandate. A look at labor law and issues may be useful here. —The State has allowed "union shop" agreements whereby rail

workers must join a union within 60 days, *see Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 227 (1956). However, there is no government edict compelling those workers to work for the railroad in the first place, so the "union shop" can be seen as secondary, a regulation of their voluntarily becoming rail workers. As well, the "union shop" is permissive, i.e., the Government does not force it on workers, but a particular railroad and its union(s) are permitted to reach a union shop agreement, *see id.* at 227. The *Hanson* Court also says the union-shop "forced association" with a labor union is no more odious than the "forced association" of a lawyer with an integrated bar association, *see id.* at 238. Finally, the Court phrases the union-shop idea as the "requirement for financial support of the collective bargaining agency by all who receive the benefits of its work", *id.* (Douglas, J.), i.e., the worker reimbursing fairly the union for value received. Under the Mandate, though, paying for insurance one doesn't even want, hardly counts as "fair reimbursement". Additionally, this Court has more recently upheld the right of members to resign from their union at any time, *see Pattern Makers v. NLRB*, 473 U.S. 95, 106 (1985). Thus, relying on the forms of "forced association" noted immediately *supra* would be a very thin reed on which to hang the huge weight of justifying the Mandate.

125. Another valuable consideration from labor law is the right to strike. If one considers a strike by a union to be a corollary of the union's freedom of association (especially since inability to strike might leave a union a very ineffective association): a strike may have some expressive, communicative component, but perhaps the more important component is the material, commercial element of

being physically absent from the workplace, and not going to work for the employer, not commercially associating with the employer. So if unions have this right of commercial non-association with their employer, then why should a consumer not have the right to "strike" by not associating with a company? (For example, not buying health insurance) In the "commercial triad" of employer, employee, and consumer, why should the consumer be the only one unprotected by freedom of association? That would seem absurd; but on the other hand, a freedom-of-association defense against unwanted commercial association in the form of compelled purchase would make sense. The old adage of "the customer is always right" should not be replaced by "the compelled customer does what the Government and corporations tell him to".

126. And the right to quit ("strike against") one health insurer is not enough of a real right, if, under the Mandate, one then has to find another insurer instead. That revolving-door situation resembles the legendary Hotel California, in the eponymous 1976 song by the Eagles rock band, a hotel which "you can never leave", *id.* That nightmare world must not be. Thus, the Mandate, which violates freedom of association, must be overruled.

IX(B). FREEDOM OF SPEECH

127. As for freedom of speech, Movant incorporates and reiterates what said *supra* at - 22-26 - about First Amendment overbreadth and forced speech. He also adds mention of three cases. First, *Buckley v. Valeo*, 424 U.S. 1 (1976), which notes

that expending money to communicate one's views is essentially unfettered by government, *see Buckley*, *supra*, at 57-59. (*Buckley* also mentions not just freedom-of-speech concerns, but freedom-of-association concerns as well, in finding restrictions on political expenditures unconstitutional, since expenditure limits on independents might hinder many associations in efforts to increase the voice of their members, *see id.* at 22.) *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), is a case whose logic, opposing forced private speech, *see id.* at 557-58, shows that the Mandate may interfere with expressive freedom in a forbidden manner, since an unwilling consumer's money may go to subsidize speech by an insurance company, speech (including lobbying government for more giveaways to insurance companies) that is antagonistic to his or her values and desires. And the controversial case of *Citizens United v. Federal Election Commission*, 558 U.S. ____ (2010), should preclude the Mandate, since the Mandate has a forced-speech, speech-chilling component that defies the *Citizens United* ethos, *see id.*, of free communication.

X. THIRTEENTH AMENDMENT

128. The Mandate does not comport with the spirit of the Thirteenth Amendment, in pertinent part, "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime . . ., shall exist within the United States . . . ." *Id.* While the Mandate is not slavery or full involuntary servitude: still, one is obliged under color of law to buy a product, health insurance, until age 65 (Medicare age) or death, and a costly product at that. And unless maybe if one is quite rich,

one must almost certainly work many hours of work against one's will to earn the money to do the buying. (One may have been working anyway, but one is effectively "working for the insurance company" during any hours spent earning money to pay the insurer.) The Thirteenth Amendment has not been brought up in many Mandate/Act cases, to Movant's knowledge; but since forced contract should have perished with the Black Codes (mid-1860's), it is appropriate to consider that Amendment in this case.

129. Thirteenth Amendment jurisprudence is fascinating, in that the Amendment may *prevent* bigots from *refusing* contract on a racist basis, *see, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 276 (1964) (concurrence of Black, J., saying that Thirteenth Amendment supports idea of protecting blacks from discrimination such as inability to get a motel room); but the Amendment also prohibits servitude, i.e., *allows refusal of unwanted contracts* like those forced on African Americans in the infamous Black Codes. *Vide* the horror of the Mississippi "Black Laws" *circa* 1865: "Negroes . . . . must make annual contracts for their labor in writing; if they should run away from their tasks, they forfeited their wages for the year." Ellis Paxson Oberholtzer, 1 *A History of the United States since the Civil War* 128 (1917), *available at* http://www.questia.com/PM.qst?a=o&d=55407034. While the Mandate is not nearly as odious as the Black Codes: no one, black, white, or other, should have to make a primary contract (including a contract to buy health insurance) against her will, in a free country. (Incidentally, for those who have contempt for "substantive due process" re contracts or economic issues: due process

was protecting African-American contract and property rights decades before *Heart of Atlanta*, *see, e.g.*, *Buchanan v. Warley*, 245 U. S. 60 (1917).)

130. Just as one noted, above, Justice Hugo Black upholding the rights of blacks, *see* 379 U.S. at 276: one will also mention an apposite instance of Justice Byron White trying to allow whites an unjustified right to refuse to contract with blacks. In *Runyon v. McCrary*, 427 U.S. 160 (1976), a school-integration case involving not only the Thirteenth Amendment but also freedom of association and freedom of contract, *see McCrary*, *supra*, *passim*, White's dissent from the judgment claims whites still have a right not to privately contract with blacks (as opposed to forbidden practices such as *public* entities not contracting with blacks), *see, e.g.*, *id.* at 204. Movant disagrees (as did the *McCrary* Court) with White that whites supposedly have much or, any, right to refuse to contract with blacks. In opining as he did, White thus took too seriously the general right, which he mentions, not to contract with people, including a right not to contract with unassenting people, *see id.* at 194; but the existence of that right should help dispel notions that cases like *West Coast v. Parrish* ended such a freedom of contract, or freedom not to contract. And that general right not to contract should also help dispel notions that the Mandate is legal. (By the way, there is probably some overlap between due-process freedom of contract, and First Amendment freedom of commercial association. Or maybe even expressive association: e.g., in *McCrary*, the Court makes the interesting observation, *see id.* at 175-76, that, while the McCrary family had a right, under freedom of expressive association, to send their child to the Runyons'

"Bobbe's School" even though it taught racial discrimination (!), the Runyons did not have a corresponding "right of association" to exclude young Michael McCrary and *execute* those discriminatory ideas. One also presumes the McCrarys had a right *not* to associate with the school, just as Americans have a right not to associate with health insurance companies.)

131. As well, there is a relevant statute in the spirit of the Thirteenth Amendment, i.e., 18 U.S.C. § 1589, "Forced labor" (2000; amended 2008). 18 U.S.C. § 1589(a)(4) mentions obtaining labor or services "by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint", *id.*, and § 1589(c)(2) notes, in pertinent part, "The term 'serious harm' means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious . . . to compel a reasonable person . . . to continue performing labor or services in order to avoid incurring that harm", *id.* The threat under the Mandate "scheme" or "plan", § 1589(a)(4), of a $695 or more penalty after the year 2015, not to mention the stigmatization of being a person who lacks individual responsibility, or "Shared Responsibility", just for not buying a certain product, seems to fit the criteria, at least the "financial, or reputational harm", that are mentioned in § 1589(c)(2), *id.* Thus, the Mandate violates 18 U.S.C. § 1589, and the Thirteenth Amendment, either *per se* or in the penumbra. (Movant believes that all things considered, the Mandate and "Shared Responsibility Penalty" are so beyond the customs of our free

people that they wield a type of illegal involuntary servitude, or something approaching it.)

132. Speaking a little further about *Heart of Atlanta*: in his *Seven-Sky* appellate opinion, Judge Silberman opines of the Mandate, "It certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race", 663 F.3d at 20 (Silberman, J.), then cites in support, *see id.*, *Heart of Atlanta*. But, respectfully speaking, that idea is not only false, but borderline-offensive. Ordering people to buy an expensive product for decades is a huge burden on liberty (and privacy, dignity, and wallets). Moreover, Judge Silberman does not mention the real burden, the burden on the *black customers'* freedom, in the *Heart of Atlanta* scenario, from not being served. An Atlanta motelier's having to serve African Americans is itself not a substantial encroachment on *his* liberty; rather, his refusal to serve them is a functional infringement of *their* liberty, and dignity, and is wildly arbitrary. Civil rights legislation is merely a regulation of his running a motel—and he can always withdraw from the motel market. And *see* these words: "[R]acial . . . discrimination is [not] vital . . . in the ability of private property to . . . assur[e] personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices." *Heart of Atlanta*, 379 U.S. at 285-86 (Douglas, J., concurring in the judgment) (emphasizing that liberty of black consumers was enhanced by preventing discrimination by public-accommodations owners) (citation and quotation marks or indentation omitted).

133. Or, from another point of view: could the Government, or a state government, have forced the motel owner in *Heart of Atlanta* to get into, or stay in, the motel business in the first place? Or, post-integration (or even pre-integration), could government have "mandated" Martin Luther King or Rosa Parks to purchase rooms at the motel to "promote interstate commerce"? One certainly hopes not. That would be King's or Parks' choice, not the Government's. Those two civil rights icons did not demonstrate for the "right" of government to compel them to buy things.

XI. STATES AND MANDATES; AND THE COURT'S IMAGE AS PROTECTOR OF INDIVIDUAL RIGHTS

134. Having listed above many objections to the Mandate, this Complaint reiterates what said in the Motion about the illegality of States' Mandates (*see, e.g.*, Mass. Gen. Laws Ann. ch. 111M, § 2, "Individual Health Coverage Required." (2006; amended 2007)), and the desirability of using rights-based defenses against the federal Mandate, to illegalize the State Mandates as well. (*See* Br. of *Amicus Curiae* Stephen M. Trattner in Supp. of Resp'ts (Minimum Coverage Prov.) in 11-398 (undated, but file-stamped Feb. 8, 2012): "Here the Court is being asked to protect individual liberty directly . . . [and] being asked to preserve the ultimate sovereignty of the People by protecting rights that the People never delegated to the States or the Federal Government." Trattner Br., *supra*, at 31.) Both the Government and States have some so-called "coercive commerce powers", *see, e.g.*, *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8,

2011), *pet. for cert. pending* (U.S. Oct. 7, 2011) (No. 11-438), *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/102347.P.pdf:

> [T]he Federal Motor Carrier Safety Administration, acting pursuant to the Motor Carrier Act of 1980, requires that motor carriers purchase either liability insurance or a surety bond . . . . See 49 C.F.R. § 387. And the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) requires that the owner of property contaminated by a hazardous substance 'provide removal or remedial action'—likely requiring resort to the market[.] 42 U.S.C. § 9607(c)(3).

, id. at 99 (Davis, J., dissenting), and multifarious state requirements (e.g., purchasing auto insurance for those who voluntarily drive a car on public land unless they post a bond or do other "substitute" activity). But in all the above cases, a person has to do something other than breathe, e.g., voluntarily enter the motor carrier business, or hold property, or drive. (*See* Br. of *Amicus Curiae* Am. Catholic Law. Ass'n in Supp. of Resp'ts in 11-398 (Feb. 10, 2012) (making similar points about serious limits of a State's power to "coerce commerce" when consumers are not even in a regulable market). So, once again, neither federal nor state government can force you unwilling into a primary market, though they may regulate you once you are there. But not everyone understands this.

135. This is why when the States' Merits Reply Brief in 11-398 (Feb. 6, 2012) says it is unnecessary "[t]o require resort to the murky doctrine of substantive due process to impose any meaningful limits on the commerce power", *id.* at 32, that may be partially true—common sense itself should tell us the commerce power cannot force you to buy health insurance—, but there are still problems with the States' statement, *supra*. First, Commerce Clause doctrine is rather "murky" itself, or this case would likely not be in court at all. Second, if due process is so "murky", why are the States' friends in the Private Merits Reply Brief in 11-398 (Feb. 6, 2012) mentioning…*due process*? and, *mirabile dictu*, "fundamental liberties"? *id.* at 61-62, as defenses against the Mandate? Therefore, keeping due process and other Constitutional or statutory rights as little more than a mere whisper in 11-398, an afterthought, that could safely be ignored by a court, would be unwise. (*Cf. Liberty Univ.* Op. PDF, *supra* at - 77 -: "Appellants provide no support for their suggestion that some novel, heretofore unknown, individual right [to avoid coerced commerce] can spring from the principles of federalism." *Id.* at 96. (Davis, J., dissenting)) Rather, such issues should now be featured in explicit Questions Presented in 11-398 or allied (and possibly later) Court proceedings, which would put the issues front and center for the Court and also for the public witnessing the proceedings.

136. This Complaint also notes here, re State Mandates, that the New Jersey Mandate, N.J. Stat. Ann. § 26:15-2, "Coverage provided for residents 18 years of age and younger; terms defined." (2008), may not have any penalty or enforcement mechanism, at least according to *New Jersey's Children's Mandate and Coverage*

Expansion for Parents, The Commonwealth Fund (originally appearing as an article in the Oct./Nov. 2008 newsletter States in Action), Nov. 7, 2008, at http://www.commonwealthfund.org/Innovations/State-Profiles/2008/Nov/New-Jerseys-Childrens-Mandate-and-Coverage-Expansion-for-Parents.aspx?view=print: "'This is a "soft" mandate, with carrots, not sticks,' says Suzanne Esterman, spokeswoman for New Jersey's Department of Human Services. There are currently no penalties for non-compliance, but there are many opportunities to obtain affordable coverage." *Id.* While, to a court, there might seem some appeal in a putative "Solomonic solution" such as allowing "soft" Mandates like New Jersey's, but banning any *penalties* under a Mandate (which would end the penalties in the Act's, and Massachusetts', Mandates): Movant counsels strongly against that. A Mandate is an evil in itself, coercion, commandeering, dignitary harm and all, even if there are no (material or financial) penalties attached. So every Mandate must be overturned. *See* once more *IMS Health*, 131 S. Ct. 2653, 2670 (restricting government police power over health-related matters, in the name of individual rights).

137. This is especially important, the need to overturn every Mandate either directly, or indirectly (e.g., through finding a First or Fifth Amendment right against any health-insurance Mandate), because the Court's image might tend to suffer if, echoing *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court decided that re the choice to purchase health insurance or not, "Most Americans have no rights that the Government is bound to respect." While *Dred Scott* is a uniquely horrific decision, at least one jurist has compared a Fifth Amendment case to it: *see* Abdon

M. Pallasch, *Scalia offers ruling: Deep dish v. thin crust?* Chicago Sun-Times, Oct. 18, 2011, 4:08 p.m., at http://www.suntimes.com/news/politics/8286260-418/scalia-offers-ruling-deep-dish-v-thin-crust.html (Justice Antonin Scalia compares *Kelo v. City of New London* to *Dred Scott*). But again, in *Kelo*, the matter concerned one house at one time, not decades of unwanted purchase of an expensive product, health insurance, related to intimate bodily decisions; thus, by *kal va-chomer* (a Talmudic term for *a fortiori*-type reasoning), the Mandate would be even more like *Dred Scott* than *Kelo* is. That said, Movant looks forward to the Court's ruling in 11-398 and allied cases, and humbly thanks the Court for its time and consideration.

138. As for the Counts to follow, Movant does not always like needless repetition of the exact same language, so, instead of repeating the following language in each Count: all the Counts below reassert and incorporate by reference all the previous paragraphs of this complaint, especially those particularly mentioned in each Count; and if need be, any Count reasserts the Counts preceding it, or references any or all Counts following it. Also, any violations of a constitutional provision, or law, are alleged to be either violations *per se*, or violations of the penumbra, of the provision or law. Also, while Movant is propounding these eighteen Counts, he is offering up only a few of them as Questions Presented. However, the Court is welcome to raise any or all of the counts to the status of Questions Presented, if the Court feels like doing so.

COUNT ONE

TAXING AND SPENDING CLAUSE VIOLATION,

AND UNCONSTITUTIONAL PENALTY

139. The Mandate does not legitimately use the taxing power under the Taxing and Spending Clause, U.S. Const. art. I, § 8, cl. 1, especially since the Mandate's "Shared Responsibility Payment", 26 U.S.C.A. § 5000A(b), does not fall into any accepted category of tax. *See* especially para. 39 *supra*. Rather, the "Shared Responsibility Payment" is a penalty, and as a penalty must serve an enumerated power of Congress, *see, e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940). Not serving an enumerated power, whether the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) or any other, that penalty, and the Mandate, are invalid.

COUNT TWO

COMMERCE CLAUSE VIOLATION

140. The Mandate, *see* especially paras. 40-44 *supra*, does not legitimately use the commerce power under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which allows only "regulation" of commerce, not coerced commerce such as forced health insurance purchase; and the Mandate may in fact impair the freedom and consumer choice necessary in interstate commerce. The Commerce Clause does not allow punishment or commandeering of people in the midst of innocent inactivity; nor does it allow forcing health-insurance purchase at the point of healthcare consumption, although if it did, only a limited, fair and proportional amount of forced insurance purchase should be allowed. *Wickard v. Filburn*, 317 U.S. 111

(1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), are cases that capacitate crop curtailment but do not in any way legitimate coerced commerce or the individual mandate. Rather, the tradition of cases such as *United States v. Lopez*, 514 U. S. 549 (1995), and *United States v. Morrison*, 529 U. S. 598 (2000), not to mention sheer common sense, is instructive in preventing misuse of the Commerce Clause to support an unexampled and invalid federal (or state), untrammeled power such as that to coerce wholly-unwilling commerce.

COUNT THREE

NECESSARY AND PROPER CLAUSE VIOLATION

141. The Mandate, *see* especially para. 45 *supra*, does not legitimately use the powers under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, failing the considerations of modesty, reasonability, state interests, and narrow tailoring referenced in *United States v. Comstock*, 560 U. S. ____, 130 S. Ct. 1949, 1958-65 (2010). It also fails the test posed in *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819), of constitutionality, as discussed in those following Counts which help show the unconstitutionality of the Mandate; so that the Mandate is not "proper", but invalid.

COUNT FOUR

FIRST AMENDMENT VIOLATION—FREEDOM OF

ASSOCIATION AND FREEDOM OF SPEECH

142. The Mandate violates Movant's and other Americans' rights under the First Amendment, *see* especially paras. 33-37 and 120-127 *supra*, such as freedom of association, as referenced in *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984), *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945), *Pattern Makers v. NLRB*, 473 U.S. 95, 106 (1985) and *Buckley v. Valeo*, 424 U.S. 1, 22, 57-59 (1976); and freedom of speech, as referenced in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. ____, 131 S. Ct. 2806, 2814-15 (2011), *Broadrick v. Oklahoma,* 413 U.S. 601, 612-13 (1973), *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), *Wooley v. Maynard*, 430 U. S. 705 (1977), *Sorrell v. IMS Health Inc.*, 564 U. S. ____, 131 S. Ct. 2653 (2011), *Buckley v. Valeo*, 424 U.S. 1, 22, 57-59 (1976), *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557-58 (2005), and *Citizens United v. Federal Election Commission*, 558 U.S. ____ (2010). To force Movant and other Americans to associate with insurance companies or their captured membership under the Mandate, or to subsidize insurance companies' political or other speech while having their own speech diluted or chilled, against Movant's and other Americans' will, is thus invalid.

COUNT FIVE

THIRD AMENDMENT VIOLATION—ILLEGITIMATE CONSCRIPTION

143. The Mandate violates Movant's and other Americans' rights under the Third Amendment, such as freedom from arbitrary conscription to a private regime

like forced health insurance purchase, serving a supposed public purpose like health care, outside of a state of national extreme emergency or total war: if even those latter states of affairs could justify such conscription.

COUNT SIX

FOURTH AMENDMENT VIOLATION—PRIVACY, SEARCH AND SEIZURE

144. The Mandate violates Movant's and other Americans' rights under the Fourth Amendment, such as freedom from violation of privacy or unwanted search or seizure, instantiated in cases including *Kyllo v. United States*, 533 U.S. 27, 38 (2001). The privacy of Movant and other Americans regarding either their private medical information may be violated by Section 4302, "Understanding Health Disparities: Data Collection and Analysis", or other parts, of the Act, especially since the Mandate forces Americans to sign up with health insurers against their will, whereby Americans will be pressed to give up their health secrets to entities whom Americans may not want to see those secrets, including government data-collecting entities interacting with those insurers.

COUNT SEVEN

FIFTH AMENDMENT VIOLATION—DUE PROCESS,

LIBERTY, PROPERTY, TAKING OF PROPERTY

145. The Mandate violates Movant's and other Americans' rights under the Fifth Amendment, *see* especially paras. 57-102 *supra*, to due process re their liberty

and property, such as freedom of contract, enshrined in cases like *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), or *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897), the latter case specifically mentioning the right to buy insurance, with a presumed right not to buy insurance. A right not to be forced to purchase things against one's will, not to enter a market, or to be overly restricted by government re economic transactions, is defended, either *per se* or by strong implication, in New Deal economic rights cases *Nebbia v. New York*, 291 U. S. 502, 533 (1934), *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 396 (1937), and in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), and also in Justice Oliver Wendell Holmes, Jr.'s dissents in *Adkins v. Children's Hospital*, 261 U.S. 525, 570 (1923) and *Adair v. United States*, 208 U.S. 161, 191 (1908). The Mandate creates unfair lack of bargaining power for unwilling consumers vis-à-vis insurers and the Government; *see, e.g.*, *Parrish*, *supra*, at 393-94, and *Adkins*, *supra*, at 562, on the need to avoid unfair bargaining power. The Mandate, which is not narrowly tailored, and is not the least restrictive means to fund or improve health care, seeing the many alternatives mentioned by Governor Howard Dean; in the *Florida v. HHS* August 12, 2011 opinion co-authored by Chief Judge Joel Dubina and Judge Frank Hull, 648 F.3d at 1299; and others, fails strict scrutiny: a level of scrutiny which is needed, if not sufficient, since the liberty to avoid commerce is, at the least, a fundamental right. As well, the Mandate takes Movant's and other Americans' choices, property, or medical information without proper compensation, though they should not be taken at all, since the Mandate is invalid and unconstitutional. (Issues mentioned in

paras. 57-102 *supra* which are not mentioned here under this Count may be mentioned *infra* in, e.g., Count Eight, about the Eighth Amendment.)

COUNT EIGHT

EIGHTH AMENDMENT VIOLATION—EXCESSIVE

FINES, CRUEL AND UNUSUAL PUNISHMENT

146. The Mandate violates Movant's and other Americans' rights under the Eighth Amendment, such as freedom from excessive fines or cruel and unusual punishment. Insulting misuses of language such as "Shared Responsibility Payment" and "Individual Responsibility" in Section 1501 of the Act are a sort of undeserved punishment and dignitary injury in themselves; and the cases of *Shuttlesworth v. Birmingham*, 382 U.S. 87, 89 (1965) (overturning punishment of preacher for standing peacefully outside department store), and *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (overturning punishment of drug addict just for being an addict), show the absurdity of punishing innocent inactivity such as refusal to buy health insurance. Any fine at all for not purchasing insurance is *per se* excessive, not to mention the false stigmatization of being a "freeloader" or other "irresponsible" malefactor. (The Eighth Amendment usually applies to criminal matters, so some of the force and spirit of the Eighth Amendment can be channeled through the Due Process Clause of the Fifth Amendment if and as needed.)

COUNT NINE

NINTH AMENDMENT VIOLATION—PRIVACY

AND UNENUMERATED RIGHTS

147. The Mandate violates Movant's and other Americans' rights under the Ninth Amendment, such as Americans' freedom from violation of privacy, and freedom from deprivation of unenumerated rights, such as the right not to buy health insurance. The cases of *Griswold v. Connecticut*, 381 U.S. 479, 484, 486, 490 (1965) (general privacy, and contraception), *Roe v. Wade*, 410 U.S. 113 (1973) (abortion), *Lawrence v. Texas*, 539 U.S. 558 (2003) ("sodomy"), *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (citizens' basic right to decide about health care, e.g. to refuse medical treatment), *Gonzales v. Oregon*, 546 U.S. 243 (2006) (assisted suicide), and the 2005 Terri Schiavo case, are ample precedent, under the Ninth Amendment or other Amendments or measures, that there is a right "to be let alone", *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting from the judgment), vis-à-vis bodily-related or health-related decisions such as health insurance purchase.

COUNT TEN

TENTH AMENDMENT VIOLATION—UNENUMERATED

RIGHTS, AND FREEDOM FROM COMMANDEERING

148. The Mandate violates Movant's and other Americans' rights under the Tenth Amendment, such as Americans' freedom from federal (or state)

commandeering of private decisions about health insurance purchase, and freedom from deprivation of unenumerated rights, such as the right not to buy health insurance. *Printz v. United States*, 521 U.S. 898 (1997), Brief of *Amicus Curiae* Stephen M. Trattner in Support of Respondents (Minimum Coverage Provision) in 11-398 (undated, but file-stamped Feb. 8, 2012), and *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581-637 (2010), by Randy Barnett, are three relevant authorities.

COUNT ELEVEN

THIRTEENTH AMENDMENT VIOLATION—INVOLUNTARY SERVITUDE

149. The Mandate violates Movant's and other Americans' rights under the Thirteenth Amendment, *see* especially paras. 128-133 *supra*, such as freedom from involuntary servitude. The "Shared Responsibility Payment" penalty is a form of legal coercion, or part of a scheme intended to cause fear of serious harm, *see* 18 U.S.C. § 1589(a)(4), (c)(2) (2000; amended 2008): a penalty which forces involuntary health insurance purchase and the involuntary work done to pay the money for that purchase or the penalty. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964), *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (protecting African-American "willing purchasers" of property from bigotry, albeit under Fourteenth Amendment), respect anti-discrimination, voluntary choices, and the pleasure of consumers, and do not legitimate contracts forced on the unwilling consumer, contracts which are invalid.

COUNT TWELVE

FOURTEENTH AMENDMENT VIOLATION—DUE PROCESS, LIBERTY, PROPERTY, EQUAL PROTECTION

150. The Mandate violates Movant's and other Americans' rights under the Fourteenth Amendment, or those rights' incorporation into the Fifth Amendment, such as due process, equal protection of the laws, and any liberty, dignity, property, and privacy rights thereto. The Fourteenth Amendment should also prevent any State in the Union from forcing a Mandate on its people. Also, Movant may be entitled to mention equal-protection violations against others, *see Bond v. United States*, 564 U.S. ____, 131 S. Ct. 2355, 2367 (2011), such as the Mandate's allocation of unwilling Americans' money to insurers rather than directly to health and medical care providers in general, *see, e.g.*, Mot. of Ass'n of Am. Physicians & Surgeons, Inc. & Alliance for Nat. Health USA for Leave to Intervene as Resp'ts in 11-398 ("AAPS Motion"), Dec. 6, 2011, *mot. denied* Jan.12, 2012, at 20-21. The Mandate also makes Movant and other Americans less than equal to insurers, who now have a quasi-sovereign status and use the State as an instrument to force a flow of profits to the insurers from unconsenting consumers.

COUNT THIRTEEN

CONTRACT CLAUSE VIOLATION

151. Although the Contract Clause, U.S. Const. art. I, § 10, cl. 1 (in pertinent part, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts", *id.*), does not explicitly bind the federal government, the logic of the Clause allows for, among other things, a federalism argument which should bind the Government re the Mandate. E.g., "If the Government can force contracts on people sans consent, but state governments can't, doesn't this massively, unfairly unbalance power in favor of the Government: especially since the federal government is supposed to have *limited, enumerated* powers?" The lack of explicit binding of the federal government by the Contract Clause is likely more about federal powers over bankruptcy and currency (which powers may indirectly "impair contract") than about some imaginary, *ultra vires* power to force contracts on unwilling citizens. Also, cases such as *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-89 (1798) (condemning arbitrary transfer of property from "A" to "B", i.e., from one private party to another), *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 707-08 (1819) (stating the right to refuse a grant, and not to have the State force one into a corporate membership), *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13, 416, 418 (1983) (evoking various protections against unlimited state interference with contract, including the need not to coddle special interests by such state interference), and *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439 (1934) (disapproving total destruction of contracts by the State; and creation of a contract *ex nihilo* is roughly of the magnitude of the total destruction of a contract), all militate against an overweening measure like mass State-forced

creation of contracts with health insurance companies, either through a federally-imposed, or a state-imposed, Mandate. Moreover, there is an unrefusable offer to, a lack of acceptance by, and likely a lack of consideration for, those forced into health insurance contracts, making those contracts invalid by traditional contract law.

COUNT FOURTEEN

SHERMAN ACT AND OTHER ANTITRUST STATUTE

VIOLATION, AND ILLEGAL UNFAIR COMPETITION

152. The Mandate violates the Sherman Act (July 2, 1890, ch. 647, 26 Stat. 209, codified at 15 U.S.C. §§ 1–7 (amended 2004)), due to the Mandate's coercion of commerce, restraint of trade, and creation of monopolistic, cratopolistic power in the hands of health insurers and their effective agent the government, *see* especially paras. 103-119 *supra*. Cases such as *German Alliance Insurance Co. v. Hale*, 219 U.S. 307, 316 (1911) (discouraging the practice of insurance companies' having consumers at their mercy), and *United States v. South-Eastern Underwriters*, 322 U.S. 533, 535-36, 562 (1944) (condemning coercion, intimidation, and abuse of power by companies trying to force people to buy insurance from them), emphasize the lawlessness and evil of forced insurance purchase, the kind of evil that antitrust laws should prevent from damaging Movant and other Americans. As well, the Brief of Authors of *The Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson & Guy Seidman) and the Independence Institute as *Amici Curiae* in Support of Respondents in 11-398 (undated), at 37-39, decries the quasi-

monopolistic aspects of the Mandate. If not prohibited by the McCarran–Ferguson Act (Pub. L. 79-15, 59 Stat. 33, S. 340, codified as amended at 15 U.S.C., ch. 20, §§ 1011-1015 (1945) (amended 1994)) or otherwise, then the Clayton Antitrust Act of 1914 (Pub. L. 63-212, 38 Stat. 730, codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (1914) (amended 2000)), the Robinson–Patman Act of 1936 (Pub. L. No. 74-592, 49 Stat. 1526, codified at 15 U.S.C. § 13 (1936)), and the Federal Trade Commission Act of 1914 (63 Pub. L. 203, 38 Stat. 717, codified as amended at 15 U.S.C §§ 41-58 (1914) (amended 2006)) provision 15 U.S.C. § 45(a)(1) are also evoked here in protection against any forbidden tying effect, price discrimination, or unfair or deceptive competition, or acts and practices, affecting commerce, that the Mandate works against Movant or other Americans.

COUNT FIFTEEN

ILLEGAL RESTRAINT OF TRADE

153. The Mandate violates ancient common-law restrictions on restraint of trade of Movant and other Americans, so Movant complains here under that venerable tort, unless antitrust statutes previously mentioned subsume or preempt the right to do so.

COUNT SIXTEEN

VIOLATION OF "ARBITRARY AND CAPRICIOUS" STANDARD

154. The Mandate is illegally arbitrary and capricious, a standard mentioned in 5 U.S.C. § 706(2)(A) (1946) (amended 1966) and elsewhere. It is arbitrary and capricious not only for multiple violations of the law and human dignity already mentioned, but also because Congress may have passed the Mandate without fully realizing its implications. *See, e.g.*, former Speaker of the U.S. House of Representatives Nancy Pelosi's well-known pronunciamento about the Act, "But we have to pass the bill so that you can find out what is in it", as recorded in, e.g., David Freddoso's article *Pelosi on health care: 'We have to pass the bill so you can find out what is in it...'*, Wash. Examiner, Mar. 9, 2010, 5:00 a.m., at http://washingtonexaminer.com/blogs/beltway-confidential/pelosi-health-care-039we-have-pass-bill-so-you-can-find-out-what-it039. (While most of the Act may be coherent enough to pass legal muster, those parts of the Act which are obviously arbitrary and capricious, such as the Mandate, deserve to be overturned.)

COUNT SEVENTEEN

VIOLATION OF "VOID FOR VAGUENESS" STANDARD

155. The Mandate is unconstitutional because it is void for vagueness, *see* especially paras. 97-102 *supra*. The oscillation, by supporters or designers of the Mandate, between or among various claims or characterizations of "tax", "penalty", etc., compounds the effect of the vagueness in Section 5000A(g)(2) of the Act about possible criminal penalties or civil penalties related to the Mandate, some of which are noted in Robert A. Long's Brief for Court.-Appointed Amicus Curiae Supporting

Vacatur (Anti-Injunction Act) (dated Jan. 2012) at 28-29: penalties that Americans might not expect. The civil-penalty form of vagueness has been noted in the Brief of Amicus Curiae Egon Mittelman, Esq., in Support of Respondents Mary Brown & Kaj Ahlburg on the Minimum Coverage Provision Issue, Supporting the Trial Court and Court of Appeals Decisions—Amicus Brief on the Minimum Coverage Issue in 11-398 (undated but file-stamped Feb. 9, 2012), at 12, and by Judge Frank Hull of the United States Court of Appeals for the Eleventh Circuit, *see* Lee Ross, *Federal Judges Raise Questions About ObamaCare Mandate*, FoxNews.com, June 8, 2011, at http://www.foxnews.com/politics/2011/06/08/key-challenge-to-obama-health-care-law-heard-by-federal-court/#ixzz1R0TcRs6S. Cases such as *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996), *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 164 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), uphold the tradition of avoiding undue and unforeseen punishment, and of the need for clarity, fairness, and fair warning in the laws, so that Movant and other Americans are treated with respect and justice.

CLAIM EIGHTEEN

VIOLATION OF PUBLIC POLICY

148. The Mandate is contrary to public policy, for manifold reasons, including the Mandate's disregard for the very idea of a public, as opposed to mere forced purchasers of insurance. In addition, the weight of the protections in, and ideas of: American consumer rights as enunciated by President John F. Kennedy in 1962,

see, e.g., John T. Woolley and Gerhard Peters, *The American Presidency Project*, University of California at Santa Barbara, webpage *John F. Kennedy—XXXV President of the United States: 1961-1963 —93 - Special Message to the Congress on Protecting the Consumer Interest. —March 15, 1962*, at http://www.presidency.ucsb.edu/ws/?pid=9108#axzz1OLol00NP, such as, *see id.*, the right to be informed (e.g., calling the Mandate an "individual responsibility" may be propagandistic misinformation) and the right to choose; the Intellectual Property Clause of the Constitution, U.S. Const. art. I, § 8, cl. 8, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries", *id.* (respecting the value of Americans' choices and property); the Habeas Corpus Clause, U.S. Const. art. I, § 9, cl. 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it", *id.* (respecting the dignity of Americans' bodies); and the Guarantee Clause, U.S. Const. art. IV, § 4, cl. 1, "The United States shall guarantee to every State in this Union a Republican Form of Government", *id.* (which may not be *per se* justiciable, but respects the right to republican government free of unelected sovereigns or quasi-sovereigns: and the context of which Clause evokes issues such as States' relative inability to shrug off the federal Mandate; health insurers' lobbying for government favoritism; the fears of Presidents Theodore Roosevelt and Grover Cleveland, among other people, about corporate domination of society through "trusts" or otherwise; and the importance of the reality and appearance of

government impartiality, as per *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____ (2009)), also counsel against the Mandate being acceptable or allowable as public policy. In addition, the best of the cultural and philosophical tradition of our Nation and the world, as found in sources such as the Bible, the Magna Carta, the Declaration of Independence, and various notable literature, weighs on the side of individual freedom and dignity, and against the Mandate being good public policy. The Mandate is intrusive, coercive, and insulting, despite any claims that "a comprehensive regulatory scheme", "eliminating free riding", "the needs of the many always outweigh the rights of the few", "uniqueness of the health care market", "18th-Century health care tax on American sailors returning from foreign ports", "secondary-boycott ban allowing a ban of the freedom to avoid health insurance", or any other excuse will validate any and every violation of liberty, constitutionality, dignity, good reputation, or personal choice that the Mandate inflicts on Movant and other Americans. Even well-meant government efforts at improving health care must not be oppressive or violate the boundaries of the law, *see IMS Health*, 131 S. Ct. at 2670. A captive, dictated market for health insurance upsets the balance between liberty and commonweal, especially since there are better ways than the Mandate to heal the medically-related pain and suffering of our people. Hence, all these things considered, the Mandate is not only unwise and evil, but also invalid, illegal and unconstitutional.

PRAYER FOR RELIEF

Wherefore, on the basis of the Counts above, Movant humbly and respectfully requests relief from the Court, as hereunder:

1. To declare under 28 U.S.C. § 2201, since there is an actual controversy regarding the issues mentioned in this complaint, that Section 1501 of the Act is illegal, unconstitutional, invalid, and a violation of Movant's and other Americans' rights, as claimed above—and ideally on grounds broad or deep enough to deem illegal, unconstitutional, and invalid any "individual Mandate" laws of any State or other subdivision of the United States—, without declaring the rest of the Act illegal, unconstitutional, invalid, or a violation of Movant's and other Americans' rights;

2. To make Section 1501 of the Act void, and to enjoin it from having any effect on Movant and other Americans, along with enjoining Defendants or any other officials, or agencies or personnel, of the United States Government, or anyone acting on the Government's behalf, from attempting to put Section 1501 into effect;

3. To make proper remedies to Movant and other Americans for any past, present or future attempts of the Government or its agents in effectuating or enforcing Section 1501 of the Act;

4. To award Movant meet damages and costs, under 28 U.S.C. § 2412, "Costs and fees", or other apposite provisions; and

5. To award any further relief deemed fair, proper and just.

So does Movant pray for relief in all the above Counts, and again he thanks the Court.

Dated: March 16, 2012 Respectfully submitted,

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