IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

LT. GOV. PHIL BRYANT, in his private and individual capacity, on behalf of himself and others similarly situated
RYAN S. WALTERS, MICHAEL E. SHOTWELL and RICHARD A. CONRAD, ET AL., on behalf of themselves and others similarly situated — PETITIONERS

VS. — NO.2:10-cv-76

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, et. al — DEFENDANTS

PETITIONERS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Petitioners hereby move for an order of summary judgment in this matter. At this point, Petitioners' claim is limited by the Court's previous orders to the right to privacy issue. In short, Petitioners have claimed that the individual mandate of the PPACA has violated Petitioner's rights to privacy under the 14th Amendment to the Constitution of the United States, and ask that the Court enter an order finding the PPACA to be unconstitutional, and issue an injunction prohibiting enforcement thereof.

Because the right to privacy is deemed fundamental, any statute that threatens that right is subject to "strict scrutiny" by the courts. The mandate does not survive this strict scrutiny analysis, and Petitioners therefore move for an order granting summary judgment.

I. ISSUES TO BE DECIDED.

There are to issues to be decided: (1) whether the mandate[1] constitutes a de facto requirement that Petitioners disclose private information to a private third party to whom they would not voluntarily disclose such information or, alternatively, subject themselves to a government-imposed financial penalty, and if so (2) whether such government action is constitutionally permissible or instead violates Petitioner's privacy rights.

II. STATEMENT OF UNDISPUTED FACTS.

Petitioners submit under seal their all of their discovery responses as facts that cannot be genuinely disputed pursuant to Fed.R.Civ.Proc. 56(c). The discovery responses we have filed include their initial answers and their supplementary answers, the latter of which were made pursuant to a discovery order [62] issued by Judge Parker. Petitioners have demonstrated through discovery that they are each subject to the individual mandate of the PPACA. Specifically:

The fact that each person will be subject to the individual mandate's requirement to obtain health insurance coverage when the mandate is implement in 2014 is proved by the Petitioner's answer to Interrogatory No. 1 and/or Request for Production No. 1, since each Petitioner has shown sufficient income that they have had sufficient income. In particular, Governor Bryant's responses also show that he is the elected governor of the State of Mississippi and will continue certainly fall under the individual mandate in 2014, since his term of office extends past that date.

[1] The minimum essential coverage provision has been referred to by all of the parties (including Defendants) and each of the justices as "the mandate" during the recent oral arguments before the Supreme Court. We therefore will use the same terminology herein.

The fact that each of the Petitioners have in some way planned for the implementation of the individual mandate is proved by each of the Petitioners in their responses to Interrogatory No. 7.

The fact that some of the Petitioners do not have and do not wish to be forced into purchasing health insurance is shown by their answers to Interrogatory No. 8. Petitioners who currently have health insurance but who do not want to be coerced by the government into maintaining insurance in the future, such as Governor Bryant, were not required to answer that interrogatory. Nevertheless, there is no evidence to contradict the pleadings, showing that all Petitioners are opposed to being coerced into maintaining health insurance in the future.

In their answers to Interrogatory No. 10, the Petitioners have reaffirmed their claim that 26 USC sec. 5000A, the individual mandate, will cause an invasion of their privacy rights.

III. PETITIONERS HAVE STATED A VALID DUE PROCESS CLAIM.

Petitioners state a valid due process claim against the federal government, because the mandate unconstitutionally deprives them of the personal right not to disclose privileged and confidential medical information to a corporate stranger. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S., 261 (1990); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Petitioners, including Gov. Bryant, have recited a number of straightforward and detailed assertions regarding violation of medical privacy claims, including the following:

> Each and every Petitioner has pled a cause of action based upon their constitutional right to medical privacy which has been infringed by the PPACA. Third Am. Petition ¶15.

> Petitioners all specifically allege that they will be required to divulge confidential medical information to insurance companies if they enter into a health insurance contract as a result of the Individual Mandate. Third Am. Petition ¶15.
>
> The Petitioners who do not currently have health insurance specifically allege that they do not wish to divulge their confidential medical information to any insurance company and would for this reason alone bring this action to contest the constitutionality of the PPACA and the Individual Mandate. Third Am. Petition ¶15.

Citizens of the United States possess a fundamental right to be free of government coercion. Put another way, citizens possess a fundamental right to not be forced against their will to exercise any other right. This freedom from government coercion is both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Palko v. Connecticut*, 302 U.S. 319 (1937). Compelling Petitioners to enter into a private contract to purchase insurance from another entity will legally require them to share private and personal information with the contracting party. Specifically, by requiring Petitioners to abide by the Act's individual mandate, Congress is also compelling Petitioners to fully disclose medical conditions, habits and behaviors. Not only will the insurer be privy to all past medical information, the mandate will, by necessity, allow the compelled insurer access to Petitioners' present and future medical information of a confidential nature. If judicially enforceable privacy rights mean anything, then private and confidential medical details certainly merit Constitutional protection. Petitioners should not be forced to disclose the most intimate details of their past, present and future medical information.

IV. PETITIONERS' RIGHT TO PRIVACY PROTECTS PETITIONERS FROM UNDULY BURDENSOME INTERFERENCE WITH THEIR FREEDOM TO DECIDE WHETHER TO VOLUNTARILY PURCHASE HEALTH INSURANCE AND TO THEREFORE SHARE CONFIDENTIAL AND PRIVILEGED INFORMATION

The Act's individual mandate expressly violates Petitioners' fundamental rights they enjoy as part of the "liberty" interest under the Fifth Amendment. Fundamental rights such as "the right to make one's own health care decisions," "the right to abstain from entering into a contractual relationship with another private entity" and "the right to not be compelled to divulge private medical information to another private entity" are deeply rooted in American history and tradition and implicated by the imposition of the Act. The Act's individual mandate represents an abuse of Congressional authority and a clear violation of substantive due process protections, since Petitioners benefit from a constitutionally protected interest in making certain kinds of important decisions free from governmental compulsion.

The right to privacy judicially developed pursuant to the Fifth and Fourteenth Amendments can be understood only by considering both the Petitioners' collective interest and the nature of the federal government's interference with it. In short, a judicially recognized right to privacy protects Petitioners from unduly burdensome interference with their freedom to decide whether to voluntarily purchase health insurance and to therefore share confidential and privileged information.

V. THE MINIMUM ESSENTIAL COVERAGE PROVISION VIOLATES PETITIONERS' FUNDAMENTAL RIGHT TO PRIVACY.

The Court has previously ruled that the pertinent government action "is the threat of a financial penalty for non-disclosure. Regardless of who requires the information – the

government or the private third party – it would still be disclosed under threat of government action." Order at 10. Thus, whether the information is being disclosed to a government-run exchange or to a private company is not an issue in this case. The Court further stated that "the injury at issue is not the required disclosure of the information, but, rather, it is the penalty for failing to disclose it." Order at 10. It is thus unnecessary to address whether insurance companies will further divulge confidential information. Order at 11.

We therefore first address the nature of Petitioners' constitutional claim, and show that Petitioners do indeed have a constitutional right to privacy which is implicated in this matter.

VI. THE RIGHT TO MEDICAL PRIVACY IS FUNDAMENTAL, HAVING PREDATED OUR REPUBLIC BY MILLENIA.

The mandate is a direct affront to our right to be let alone -- a right that most Americans regard as sacrosanct:

> This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (dissenting opinion). That right includes the privilege of an individual to plan his own affairs, for,
>
> > "outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."

Doe v. Bolton, 410 U.S. 179 (1971) (Douglas, J., concurring), quoting *Kent v. Dulles*, 357 U.S. 116, 126. Hard on the heels of the right "to be let alone" is "*the freedom to care for one's health and person*, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf." Id. The PPACA is a direct affront to our rights to privacy and our freedom to care our own health as we see fit, without governmental intrusion.

The right to medical privacy is not a new idea -- like the desire for marital privacy, it predates our republic by millennia. In *Doe v. Bolton,* Justice Douglas wrote in his concurrence that the "questions presented in the present cases . . . involve the right of privacy, one aspect of which we considered in *Griswold v. Connecticut*, 381 U.S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy." He then quoted a passage from *Griswold*, in which the Court recognized that the right of privacy in marriage is very old indeed:

> We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

Doe v. Bolton, 410 US. 179, quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Similarly, the right to medical privacy is older than our Constitution, in some respects as old as Western Civilization itself. The oldest surviving example of medical privacy in Western civilization is the physicians' duty of confidentiality formulated in the fifth century B.C. by the Hippocratic Oath, by which a physician promised:

> [W]hatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things shameful to be holy secret.

Robert M. Gellman, Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy, 62 N.C. L. REV. 255, 267-68 (1984) (quoting 1 Hippocrates 164-65 (W. Jones trans. 1923), reprinted in Ethics In Medicine 5 (S. Reiser et al. eds., 1977)). The influence of this oath continued to prevail among physicians of the Western world into the modern period. The common law first clearly adopted the confidentiality principle for doctors only in 1776, in Rex v. Duchess of Kingston, 20 How. State Tr. 355, 572-73 (1776). See Daniel W. Shuman, The

Origins of the Physician-Patient Privilege and Professional Secret, 39 SW. L.J. 661, 671-72 (1985).

Privacy, like speech and assembly, is a fundamental constitutional right, according to *Roe v. Wade*, 410 U.S. 113 (1973). Although the immediate issue in *Roe* was abortion, the Supreme Court's decision created a broad "zone of privacy" that included not only abortion but more generally the right "to care for one's health and person," as Justice Douglas stated in his concurring opinion:

> It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy -- the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment -- becomes only a matter of theory, not a reality, when a "multiple physician approval" system is mandated by the State.

Doe v. Bolton, 410 U.S. 179 (1971) (Douglas, J., concurring). Clearly, the PPACA interferes with each person's right to "care for one's health and to seek out a physician of one's own choice" as each individual sees fit. Notice also that Justice Douglas was not just concerned about privacy *outside* of the physician-patient arena (such as when insurance companies receive private medical information), he was concerned that the government not be allowed to impose additional physician-patient relationships on a person. In other words, even forcing a person to divulge private medical information to a *doctor* not of her own choosing was deemed untenable by Justice Douglas -- to force a person to divulge private medical information to an insurance corporation certainly is even more untenable from a constitutional standpoint.

In *Planned Parenthood v. Casey*, the Court described *Roe* as a rule of "personal autonomy" that protects all "intimate and personal choices . . . central to personal dignity" in matters "fundamentally affecting a person." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). In judging which decisions are constitutionally protected as those "that an individual may make without unjustified government interference," the Court has set forth two criteria: they must be "personal decisions," meaning they must primarily involve one's self or one's family, and they must be "important decisions," which profoundly affect one's development or one's life. *Andrews v. Ballard*, 498 F.Supp. 1038 (S.D.Tex. 1980), quoting *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977). Consistent with these broad principles, courts have held have held that the right to privacy includes, for example, the right to refuse even life-saving medical treatment: "The decision to obtain or reject medical treatment, no less than the decision to continue or terminate pregnancy, meets both criteria." Id. at 1046-47. If the right to medical privacy is so broad that it encompasses the right to "obtain or reject medical treatment," how can it not encompass the right to either purchase or not purchase health insurance as each individual sees fit?

Whether or not to purchase health insurance is a "personal" and "important" decision as those terms are used in *Casey*. The minimum essential coverage provision is obviously a mandate to purchase health insurance. It is also, according to Solicitor General Verrilli in his recent arguments before the Supreme Court, "a law that <u>regulates the method of paying for a service</u> that the class of people to whom it applies are either consuming - or inevitably will consume." Exhibit *, transcript of oral arguments at 20:24-21:6 (emphasis added). In other words, the law requires that people have health insurance in order to pay for health care services: "The difference, Mr. Chief Justice, is that <u>health insurance is the means of payment for health</u>

care, and broccoli is significant . . . And broccoli is not the means of payment for anything else." 18:6-12 (emphasis added). Defendant's counsel also explained that "…the minimum coverage provision, is a means that regulates the - that regulates economic activity, namely your transaction in the health care market…" 23:16-21. Defendant has thus argued to the United States Supreme Court that the mandate requires Petitioners to use health insurance to pay for health care. Thus, the Defendant's argument that Petitioners will be able to pay for their healthcare out of pocket in order to avoid disclosure of health information to insurance companies is not just absurd, it is also directly contradicted by their own arguments to the Supreme Court. Therefore, the mere fact that the government has mandated the purchase of health insurance in and of itself violates the right to privacy.

The threat to privacy does not end there. Because of the individual mandate, each citizen will be required to divulge, on an ongoing basis, personal medical details to an insurance company. Defendants have argued in the past that we should not worry about this because we're only being made to disclose this information to insurance companies, which is somehow not the same as a "public" disclosure. The Court, however, has ruled that "the injury at issue is not the required disclosure of the information, but, rather, it is the penalty for failing to disclose it." Order at 10. It is thus unnecessary to address whether insurance companies will further divulge confidential information. Order at 11. The only issue left to address is whether or not the mandate is a de facto requirement that Petitioners divulge private information protected by the Constitution.

VII. THE MANDATE CONSTITUTES A DE FACTO REQUIREMENT THAT PETITIONERS DISCLOSE PRIVATE INFORMATION TO A PRIVATE THIRD PARTY.

Defendants have consistently maintained that Petitioners will not be required to divulge any health information when applying for insurance pursuant to the mandate. Defendants have offered no proof, having merely argued that health information will no longer be necessary upon enrollment. See, e.g., Def.Mem. at 12 [38]. However, the Defendants have contradicted themselves on argument with their own regulations.

In March, the Defendants released new regulations that protect the right of government-run insurance exchanges to "create and collect" the very information they have previously argued will be "unnecessary for insurers to collect" starting in 2014. In the proposed rules for 45 CFR Parts 155 and 156, the Defendants stated:

> Privacy policies for the Exchanges will need to allow for the appropriate collection, receipt, use, disclosure and disposal of the various kinds of information including health, financial and other types of personally identifiable information.

Federal Register Volume 76, Number 136 (Friday, July 15, 2011) at 41880 (emphasis added). Thus, the government itself includes both health and financial information under the rubric of "personally identifiable information." In the newly published final rules, the Defendants make is quite clear that such personally identifiable health and financial information may still be gathered by the government-run exchanges for a variety of purposes, including enrollment determinations:

> **§ 155.260 Privacy and security of personally identifiable information.**
>
> (a) *Creation, collection, use and disclosure.* (1) Where the Exchange creates or collects personally identifiable information for the purposes of determining eligibility for enrollment in a qualified health plan; determining eligibility for other insurance affordability programs, as defined in 155.20; or determining eligibility for

> exemptions from the individual responsibility provisions in section 5000A of the Code, the Exchange may only use or disclose such personally identifiable information to the extent such information is necessary to carry out the functions described in § 155.200 of this subpart.

45 CFR 155.260, at 18450. There are other sections of the regulations that betray the government's implicit assumption that the gathering of private health information will continue, such as a provision allowing individuals to dispute the accuracy or integrity of their health information:

> (ii) *Correction*. Individuals should be provided with a timely means to dispute the accuracy or integrity of their personally identifiable health information and to have erroneous information corrected or to have a dispute documented if their requests are denied;

45 CFR 155.260, at 18450. Thus, contrary to the Defendants' speculation, we have no guarantee whatsoever that either government exchanges or private insurers will cease the gathering of private information upon enrollment. Instead, we have regulations specifically giving government exchanges this right.

Although Defendants made the argument Petitioners will not be required to divulge any health information when applying for insurance pursuant, they have never really addressed our argument that health insurers will continue to gather private information in order to pay health care providers for their services. Defendants' own regulations, however, make it clear that this will certainly occur:

> Because personally identifiable information may be exchanged in the process of premium payment, we believe the protections for collection, use and disclosure of information contained in standard transactions for premium payments are as vital as the format of these transactions

id at 18338.

Before the PPACA, a person could opt out of this system by simply paying for medical expenses out of pocket -- now, people must either apply for and maintain insurance coverage or face a penalty. In fact, the newly issued regulations show that the invasion of privacy Petitioners will suffer is even more far-reaching than previously thought. The government-run exchanges have been empowered to divulge private information to "non-Exchange entities," as shown by the following regulations:

> (b) *Application to non-Exchange entities.* Except for tax return information, which is governed by section 6103 of the Code, when collection, use or disclosure is not otherwise required by law, an Exchange must require the same or more stringent privacy and security standards (as § 155.260(a)) as a condition of contract or agreement with individuals or entities, such as Navigators, agents, and brokers, that:
>
> (1) Gain access to personally identifiable information submitted to an Exchange; or
>
> (2) Collect, use or disclose personally identifiable information gathered directly from applicants, qualified individuals, or enrollees while that individual or entity is performing the functions outlined in the agreement with the Exchange.

The regulations therefore permit non-Exchange "individuals or entities" to access Petitioners' private information after it is submitted to an Exchange, and for the non-Exchange "individuals or entities" gather private information themselves and then collect, use and even disclose private information.

Making it even more obvious that the Exchanges are going to be creating, collecting, using and disclosing our private health care information, the new regulations state that HIPAA is not up to the task of protecting our privacy rights with respect to the government-run exchanges:

> We believe HIPAA is not broad enough to adequately protect the various types of PII that will be created, collected, used, and disclosed by Exchanges and individuals or entities who have access to information created, collected, used, and disclosed by Exchanges…

Id. at 18340. Curiously, the government has decided to fix this problem by creating privacy and security standards that are similar to HIPAA:

> … We believe that the privacy and security standards in the final rule are analogs of the HIPAA policies in the proposed rule, with similar standards and restrictions.

Id. at 18340. The point is not that our information will leak out of the exchanges and private insurance companies – that is not an issue in this case, since the Court has ruled that having to divulge information to the insurance companies is injury enough. The point is that the Defendants have already conceded that Petitioner's private information will be "created, collected, used and disclosed" against Petitioner's will, which is the injury that Petitioners complain of herein.

The moment that anyone succumbs to the mandate and purchases insurance, either through an exchange or a private insurer, an enormous complex of governmental and private entities will have complete access to all of our private financial and medical information. The fact that many people voluntarily allow this access does not give Congress the right to force Petitioners to do the same.

WHEREFORE, PREMISES CONSIDERED, the Petitioners, by undersigned counsel, respectfully request that this Court issue an Order denying the Defendants' Motion to Dismiss in Part and for Jurisdictional Discovery and for such other relief as the Court deems just and proper.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served using the Court's ECF system, on Tuesday, May 01, 2012 to the counsel of record for all Defendants

Dated Thursday, May 19, 2011

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