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

LT. GOV. PHIL BRYANT, et. al. **PLAINTIFFS**

VERSUS **CIVIL ACTION NO. 2:10-CV-76-KS-MTP**

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

MEMORANDUM OPINION AND ORDER

This case, like many others filed throughout the country, involves a facial Constitutional challenge to the "minimum essential coverage" provision of the Patient Protection and Affordable Care Act ("PPACA"), 111 PUB. L. NO. 148, § 1501(b), 124 Stat. 119, 244 (2010) (codified as amended at 26 U.S.C. § 5000A). Presently before the Court is Defendants' Motion to Dismiss [13].

It is not this Court's "task or duty to wade into the thicket of conflicting opinion" on any of the public policy matters implicated by this case. *Florida v. United States Dep't of HHS*, 716 F. Supp. 2d 1120, 1128 (N.D. Fla. 2010). A case which presents a Constitutional challenge is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Cantu-Delgadillo v. Holder*, 584 F.3d 682, 688-89 (5th Cir. 2009) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)); *see also Gonzalez v. Raich*, 545 U.S. 1, 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (question before the Court was not whether enforcement of statute was wise, but, rather, whether Congress had the power to regulate the market in question). The Court shall not address the merits of Plaintiffs' case here. Rather, its present task is solely to determine whether it has jurisdiction over this matter.[1]

[1]In support of their motion, Defendants advanced three arguments pertaining to subject matter jurisdiction. They have since withdrawn their argument concerning the Anti-Injunction Act. After reviewing the parties' briefs and relevant authorities, the Court is of the opinion that

For the reasons stated below, Defendants' Motion to Dismiss [13] is **granted in part**. The Court finds that the allegations of Plaintiffs' First Amended Petition, as stated therein, are insufficient to show that they have standing to challenge the minimum essential coverage provision of the PPACA. Therefore, the Court dismisses Plaintiffs' First Amended Petition without prejudice. However, as is its custom, the Court grants Plaintiffs leave to amend within thirty (30) days of the entry of this Memorandum Opinion and Order.

I. BACKGROUND

Plaintiffs challenge the Constitutionality of the minimum essential coverage provision of the PPACA, 26 U.S.C. § 5000A. The provision requires that "[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C. § 5000A(a). An "applicable individual" is any person in the United States except for the following: 1) persons who are subject to certain religious exemptions; 2) persons who are not lawfully present in this country; and 3) persons who are incarcerated. 26 U.S.C. § 5000A(d). "Minimum essential coverage" is defined as health insurance coverage obtained through certain government-sponsored programs, eligible employer-sponsored insurance plans, or other eligible insurance plans obtained through the individual market. 26 U.S.C. § 5000A(f)(1).

If any applicable individual or person for whom that applicable individual is liable – such as dependents or a spouse – fails to comply with the provision during any month, a tax penalty will

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the standing and ripeness issues concern, in pertinent part, the same issue: whether Plaintiffs' alleged injuries are sufficiently certain. Therefore, the Court's ripeness analysis would be substantially redundant of its standing analysis. As the standing issue is dispositive at this juncture, the Court left Defendants' ripeness argument unaddressed.

be imposed on the applicable individual. 26 U.S.C. § 5000A(b)(1). The penalty shall be included with the applicable individual's tax return for the year in which the failure to obtain minimum essential coverage occurs. 26 U.S.C. § 5000A(b)(2). However, no penalty will be imposed on 1) those who can not afford coverage; 2) those who have so little income they are not required to file a tax return; 3) members of Native American tribes; 4) those who experience only a short gap in coverage; and 5) those who, subject to the determination of the Secretary of Health and Human Services, "have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan." 26 U.S.C. § 5000A(e).

Ten of the Plaintiffs are private individuals residing in the state of Mississippi who do not possess any form of health insurance and purportedly have no desire or intention to comply with the minimum essential coverage provision. They argue that the provision constitutes a concrete threat of injury insofar as it will force them to purchase health insurance or be subject to a financial penalty. They further argue that it will force them to manage their financial affairs to prepare for the provision's requirements. One of the Plaintiffs is a state employee who argues that the minimum essential coverage provision will injure him insofar as it will force the state of Mississippi to offer insurance plans which conform to the PPACA's requirements, rather than conforming to the desires of state employees. He further argues that the provision will injure him because he will not be able to drop his employer-sponsored insurance coverage without incurring the tax penalty.[2]

[2]The Court assumes that Plaintiff Bryant receives health insurance coverage as part of his compensation as a state employee. Therefore, it is unclear – from the allegations of the First Amended Petition – what potential benefit could inure to him by dropping his health insurance coverage and, hence, what potential harm is done by his continued receipt of said coverage. Further, it is unclear whether state employees, such as Plaintiff Bryant, may even waive their health insurance coverage.

Plaintiffs allege that the minimum essential coverage provision: 1) exceeds the power granted to Congress by the Commerce Clause of Article I of the United States Constitution; 2) constitutes an unconstitutional taking pursuant to the Fifth Amendment to the United States Constitution; 3) violates substantive due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution; and 4) violates the Tenth Amendment of the United States Constitution. They further contend that the tax penalty is an unconstitutional capitation or direct tax. Plaintiffs seek declaratory relief in the form of a determination that 26 U.S.C. § 5000A is unconstitutional, and injunctive relief as the Court deems appropriate.

II. DISCUSSION

Defendants argue that the Court lacks subject matter jurisdiction over this matter because Plaintiffs do not have standing to challenge the minimum essential coverage provision. As always, the Court must address jurisdictional issues before it assesses the merits of Plaintiffs' claims. *Great Lakes Dredge & Dock Co. LLC v. La. State*, 624 F.3d 201, 209 (5th Cir. 2010); *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278 (5th Cir. 2010). "In applying Rule 12(b)(1), the district court 'has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Spotts v. United States*, 613 F.3d 559, 565-66 (5th Cir. 2010) (quoting *St. Tammany Parish v. FEMA*, 556 F.3d 307, 315 (5th Cir. 2009)).

Defendants have not provided any evidentiary support for their jurisdictional arguments. Rather, their motion to dismiss is "based on the lack of jurisdiction on the face of the complaint." *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981). Therefore, Plaintiffs are "left with

safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised – the court must consider the allegations in the [Plaintiffs'] complaint as true." *Id.*; *see also Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983); *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

Article III of the United States Constitution limits this Court's jurisdiction to "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 2. "The doctrine of standing is one of several doctrines that reflect this fundamental limitation." *Summers v. Earth Island Inst.*, – U.S. –, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009). The United States Supreme Court has described the following requirements as the "irreducible constitutional minimum" of standing:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations and punctuation omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561, 112 S. Ct. 2130. He must demonstrate that he has standing to sue at the time the complaint is filed. *Pluet v. Frazier*, 355 F.3d 381, 385 (5th Cir. 2004). Only one of the Plaintiffs needs to have standing for the Court to consider their challenge. *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S. Ct. 1439, 167 L. Ed. 2d 248 (2007).

"[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 112 S. Ct. 2130. "At the pleading stage,

general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)); *see also Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009) ("At the pleading stage, allegations of injury are liberally construed."). However:

> It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record. And it is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. Thus, petitioners in this case must allege facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing.

FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (internal citations and punctuation omitted); *see also Renne v. Geary*, 501 U.S. 312, 316, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.").

"[A]pplication of the constitutional standing requirement [is not] a mechanical exercise." *Pennell v. City of San Jose*, 485 U.S. 1, 7, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)) (second alteration original). Indeed, as explained below, when a party's purported standing to challenge a law is based on an alleged future harm, there are no bright-line rules to provide the Court with an easy answer.

A. Other Cases Addressing the Issue

Of course, standing has been addressed by other courts in cases involving challenges to the minimum essential coverage provision. Most frequently, the dispute has been whether the plaintiffs asserted an "actual or imminent" injury. Defendants have frequently argued – as they do here – that

the plaintiffs' alleged injuries are too remote temporally to confer standing, that the future injuries are too uncertain or speculative to confer standing, and that any present injuries are not fairly traceable to the minimum essential coverage provision insofar as they are the product of the plaintiffs' own choices. Before the Court conducts its own analysis, prudence demands that it review the decisions of other District Courts in these matters.

1. Virginia v. Sebelius

In *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 602-03 (E.D. Va. 2010), the United States District Court for the Eastern District of Virginia found that the Commonwealth of Virginia had standing to challenge the minimum essential coverage provision. The court held that Virginia was exercising a "core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause." *Id.* at 603. The court observed that the essential minimum coverage provision directly conflicts with the Virginia Health Care Freedom Act. *Id.* The court further held that Virginia had stated an imminent injury, insofar as it had claimed to have "already begun taking steps to prepare for the implementation of the Patient Protection and Affordable Care Act." *Id.* Additionally, Virginia asserted that its "officials are presently having to deviate from their ordinary duties to begin the administrative response to the changes in federal law as they cascade down through the Medicaid and insurance regulatory systems." *Id.* While the present case does not present the state and federal sovereignty issues that *Virginia v. Sebelius* did, the court's treatment of the "imminent injury" issue is relevant to the present case.

2. Baldwin v. Sebelius

In *Baldwin v. Sebelius*, No. 10-CV-1033-DMS-WMC, 2010 U.S. Dist. LEXIS 89192, at *6

(S.D. Cal. Aug. 27, 2010), the United States District Court for the Southern District of California found that the plaintiffs – a former member of the California assembly and a legal defense organization – lacked standing to challenge various provisions of the PPACA. In pertinent part, the court noted that the plaintiffs had not alleged "any particularized injury stemming from the" PPACA. *Id.* at *8-*9. With respect to the individual plaintiff, the court noted:

> As to Plaintiff Baldwin, he does not indicate whether he has health insurance or not. But that is of no moment because, even if he does not have insurance at this time, he may well satisfy the minimum coverage provision of the Act by 2014: he may take a job that offers health insurance, or qualify for Medicaid or Medicare, or he may choose to purchase health insurance before the effective date of the Act.

Id. Later in the opinion, the court noted that the individual plaintiff had failed to allege "that he would not purchase health insurance in 2014, but for the requirements of the Act." *Id.* at *11. Accordingly, the individual plaintiff's claims were dismissed for lack of standing. *Id.* at *14.

3. Thomas More Law Center v. Obama

In *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), a public interest law firm and several individual plaintiffs challenged the minimum essential coverage provision. The law firm challenged the provision on behalf of its members who objected to being forced to purchase health insurance. *Id.* at 887. The individual plaintiffs likewise objected to being compelled to purchase health insurance, and they claimed that they had arranged their personal affairs such that it would be a hardship for them to have to pay for health insurance or face a penalty under the PPACA. *Id.* at 887-88. The court noted that the minimum essential coverage provision "does not become effective until 2014. The provision thus neither imposes obligations on the plaintiffs nor exacts revenue from them before that time." *Id.* at 888. The court further noted that the provision "might not affect plaintiffs after 2014, if, for instance, changed health circumstances or

other events lead plaintiffs voluntarily to satisfy the minimum coverage provision by buying insurance. They may also satisfy the provision by obtaining employment that includes a health insurance benefit." *Id.*

The court noted that "[a]llegations of possible future injury do not satisfy the requirements of Art. III" unless they are "certainly impending." *Id.* (citing *Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918, 929 (6th Cir. 2002)). However, a plaintiff "facing a real and certain threat of future harm need not wait for the realization of that harm to bring suit." *Id.* (citing *Rosen*, 288 F.3d at 929). Such alleged future injuries must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* (quoting *Lujan*, 504 U.S. at 564 n. 2, 112 S. Ct. 2130).

Ultimately, the court did not address whether the plaintiffs' alleged future injury was sufficient to confer standing, as it held that the plaintiffs had alleged a present injury. *Id.* at 889. The plaintiffs described their present injury as "being compelled to reorganize their affairs" to prepare for the impending requirement to purchase health insurance. *Id.* at 888. The court noted that economic injuries can satisfy Article III's standing requirements, but such injuries must be "fairly traceable" to the essential minimum coverage provision. *Id.* (citing *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992)). An injury is not fairly traceable to the provision if it "stems not from the operation of [the provision] but from [the plaintiffs'] own . . . personal choice." *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 228, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)) (first alteration original).

The court found that "the government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required . . . well

in advance of the actual purchase of insurance in 2014." *Id.* Therefore, the plaintiffs' "decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the [PPACA] for the purposes of conferring standing." *Id.* Accordingly, the plaintiffs had standing to challenge the minimum essential coverage provision. *Id.* at 889.

4. Florida v. United States Department of HHS

In *Florida v. United States Department of Health and Human Services*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010), sixteen state attorneys general, four state governors, two private citizens, and an independent business organization challenged various aspects of the PPACA. Addressing the individual plaintiffs' standing to challenge the minimum essential coverage provision, the court first noted that the alleged injury had a definitively fixed date in 2014. *Id.* at 1145. While Defendants argued that the alleged injury was too remote in time to confer standing, the court noted that the length of time until the provision's enforcement was less important than the fact that its enforcement was "definitively fixed in time and impending." *Id.* at 1146.

Defendants further argued that the individual plaintiffs' alleged injuries were too uncertain, as any number of occurrences could alter their desire to purchase health insurance before 2014. *Id.* at 1146-47. The court acknowledged the possibility that altered circumstances may change the plaintiffs' position with respect to health insurance, but the court observed:

> Such "vagaries" of life are always present, in almost every case that involves a pre-enforcement challenge. If the defendants' position were correct, then courts would essentially never be able to engage in pre-enforcement review. Indeed, it is easy to conjure up hypothetical events that could occur to moot a case or deprive any plaintiff of standing in the future.

Id. at 1147. Accordingly, the court concluded that the individual plaintiffs were not required to show

that the anticipated injury was absolutely certain to occur despite all possible occurrences during the intervening time period. *Id.* Rather, to mount a Constitutional challenge, a plaintiff "need merely establish a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement that is reasonably pegged to a sufficiently fixed period of time, and which is not merely hypothetical or conjectural." *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979); *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1194 (11th Cir. 2009); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008)) (internal citations and punctuation omitted). As the individual plaintiffs alleged that they were forced "to divert financial resources from their business endeavors" and "reorder their economic circumstances" in preparation for the enforcement of the minimum essential coverage provision, the court found that they had standing to challenge its Constitutionality. *Id.*

5. Liberty Univ., Inc. v. Geithner

In *Liberty University, Inc. v. Geithner*, No. 6:10-CV-15-NKM, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. November 30, 2010), two individuals challenged the provision. They claimed that its impending enforcement forced them to "make 'significant and costly changes' in their personal financial planning, necessitating 'significant lifestyle . . . changes' and extensive reorganization of their personal and financial affairs." *Id.* at *17-*18. Defendants argued that the alleged injuries were not imminent. *Id.* at *18. Defendants further argued that it was speculative whether the individual plaintiffs would even be subject to the provision's requirements insofar as any number of intervening circumstances may alter their position before 2014. *Id.* at *19.

The court noted that "imminence is a somewhat elastic concept," but relevant United States Supreme Court precedent defined it as "at least a '*certainly* impending' injury." *Id.* at *18 (quoting

Lujan, 504 U.S. at 564 n. 2, 112 S. Ct. 2130). The court further observed that the "present or near-future costs of complying with a statute that has not yet gone into effect can be an injury in fact sufficient to confer standing." *Id.* at *20 (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 782 (1988)). The court held: "[T]he *present* detrimental effects on a plaintiff of a future *contingent* liability can constitute an injury in fact." *Id.* at *22 (citing *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298-1301 (10th Cir. 2008); *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006); *Lack Du Flambeau Band of Lake Superior v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005)). However, the court noted that plaintiffs must always show "a concrete, particularized injury that is fairly traceable to the challenged conduct and redressable" by suit. *Id.* at *24. In the end, the court ruled that they had standing to challenge the minimum essential coverage provision. *Id.* at *26.

6. New Jersey Physicians, Inc. v. Obama

In *New Jersey Physicians, Inc. v. Obama*, No. 10-1489 (SDW) (MCA), 2010 U.S. Dist. LEXIS 129445 (D. N.J. Dec. 8, 2010), a professional organization, a doctor, and one of the doctor's uninsured patients challenged the Constitutionality of the PPACA. The patient argued that he had standing to challenge the minimum essential coverage provision because he did not have health insurance and had no plans to purchase health insurance in the future. *Id.* at *12. However, the court noted that he may obtain insurance at some point before 2014 or have insufficient income to become liable for the provision's tax penalties. *Id.* at *11-*12. He failed to show that he would "certainly have to purchase insurance or that he will be subject to the penalty." *Id.* at *12. Therefore, the court ruled that his allegation of injury was "conjectural and speculative, at best." *Id.* at *12. The court further noted that he had not alleged any present injury fairly traceable to the impending

enforcement of the provision, such as the imposition of financial pressure. *Id.* at *14. Accordingly, the patient did not have standing to bring a Constitutional challenge to the law. *Id.* at *12.

B. The Present Matter

1. The First Ten Plaintiffs

In the present case, ten of the Plaintiffs are private individuals who allege that they do not currently have health insurance, and that they have no desire or intention to purchase it in the future. They allege that the essential minimum coverage provision will injure them by either forcing them to purchase health insurance or pay a tax penalty. They further allege that the provision will injure them by forcing them to expend financial and personal resources in preparation and in response to its enforcement.[3] Generally speaking, allegations of economic injury are sufficient for purposes of establishing the injury-in-fact element of standing. *Clinton v. City of New York*, 524 U.S. 417, 432, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); *Cole v. GMC*, 484 F.3d 717, 723 (5th Cir. 2007) (where plaintiffs alleged economic harm suffered by purchase of defective automobile, they had standing to pursue a class action against the manufacturer); *Okpalobi v. Foster*, 190 F.3d 337, 350 (5th Cir. 1999). However, Defendants argue that Plaintiffs' alleged injury is "too remote temporally" to

[3]Importantly, Plaintiffs do not allege that they are *presently* rearranging their finances or incurring any economic harm. Their First Amended Petition contains the following allegation: "[T]here are threatened injuries to Petitioners of having to plan for, invest, save and exhaust the personal resources required as a result of incurring the expense of purchasing health[ ]care insurance or, in the alternative, to pay a significant monetary penalty for disobeying the PPACA." Plaintiffs allege that the threat of the minimum essential coverage provision's enforcement has caused them to suffer "worry, fear and anguish." However, "[i]t is the reality of the threat of . . . injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Los Angeles v. Lyons*, 461 U.S. 95, 107 n. 8, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). Plaintiffs' fears and worry are not "a sufficient basis for an injunction absent a real and immediate threat of future injury." *Id.* While "emotional upset is a relevant consideration in a damages action," Plaintiffs do not seek damages. *Id.* Accordingly, their present "worry, fear and anguish" are not sufficient to create standing.

confer standing. *See McConnell*, 540 U.S. at 226, 124 S. Ct. 619. In response, Plaintiffs contend that the probability of injury – rather than temporal proximity – is the pertinent issue in determining whether an alleged injury is "actual or imminent." *See Lujan*, 504 U.S. at 560, 112 S. Ct. 2130.

It is clear that a threat of future injury may be sufficiently "concrete" or "imminent" to confer standing. For example, in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 331-34, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999), the Supreme Court held that the expected loss of Representative in Congress was sufficient to confer standing on certain plaintiffs to challenge the sampling method to be used in the 2000 census. The suit was filed in February 1998. *See United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp. 2d 76, 82 (D. D.C. 1998). It was clear that if the Census Bureau planned to use the sampling method in the 2000 census, implementation would have to begin in March 1999. *Dep't of Commerce*, 525 U.S. at 332, 119 S. Ct. 765. It was a virtual certainty that if the sampling method was used, the state of Indiana would lose a seat in Congress. *Id.* at 330, 119 S. Ct. 765. Furthermore, it was substantially likely that residents of certain counties in states which employed the federal census numbers would suffer vote dilution in local elections. *Id.* at 333, 119 S. Ct. 765. Therefore, whether the time of injury was the date that implementation of the sampling method was expected to begin (March 1999) or the date of the anticipated effect of its implementation (the first election after voting districts were redrawn to conform with the 2000 census) the plaintiffs had standing based on the threat of a *future* injury.

In *Lujan*, 504 U.S. at 557-59,112 S. Ct. 2130, a group of environmental organizations challenged a regulation promulgated by the Secretary of the Interior which interpreted the Endangered Species Act as applying only to actions within the United States and on the high seas.

The plaintiffs' alleged that the Secretary's failure to regulate activities abroad increased the rate of extinction of certain species and, consequently, adversely affected their ability to observe and enjoy those species in the future. *Id.* at 562-63, 112 S. Ct. 2130. The Court held that the plaintiffs failed to show an "imminent" injury insofar as their intentions to travel abroad to observe endangered species lacked any specific, concrete plans. *Id.* at 564, 112 S. Ct. 2130.

The Court stated: "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* The Court elaborated:

> Although "imminence" is a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is "*certainly* impending." It has been stretched beyond breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.

Id. at 564 n. 2, 112 S. Ct. 2130 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 156-60, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990); *Los Angeles v. Lyons*, 461 U.S. 95, 102-06, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)) (punctuation and internal citations omitted). Therefore, the basis of the Court's decision was not that the injury had not yet taken place. Rather, it was that the threat of injury was not sufficiently certain.

On the other hand, the Supreme Court's decision in *McConnell* appears to support Defendants' position. In that case, a United States senator challenged a certain provision of the Bipartisan Campaign Reform Act of 2002. *McConnell*, 540 U.S. at 225, 124 S. Ct. 619. The provision in question required broadcast stations to sell advertising to candidates for elected office at their "lowest unit charge" during the forty-five days before a primary election or sixty days before

a general election. *Id.* at 224-25, 124 S. Ct. 619. However, the provision denied candidates the benefit of the lower charge unless they complied with certain requirements regarding the content of their advertising. *Id.* at 225, 124 S. Ct. 619. Candidates were not permitted to directly reference their opponents unless they clearly identified themselves in the advertisement and stated that they approved of it. *Id.*

A United States senator argued that he had standing to challenge the provision insofar as he planned to run advertisements critical of his opponents in future elections, as he had done in the past. *Id.* The case was filed on March 27, 2002. *McConnell v. FEC*, 251 F. Supp. 2d 176, 206 (D. D.C. 2003). The senator's current term did not expire until 2009. *McConnell*, 540 U.S. at 226, 124 S. Ct. 619. Therefore, the earliest date that the alleged injury could occur was forty-five days before the Republican party primary election in 2008 – approximately six years from when the case was filed.[4] *Id.* Without elaboration, the Court held: "This alleged injury in fact is too remote temporally to satisfy Article III standing." *Id.* (citing *Whitmore*, 495 U.S. at 158, 110 S. Ct. 1717; *Lyons*, 461 U.S. at 102, 103 S. Ct. 1660).

Accordingly, while it is clear that a future injury may, in some circumstances, be sufficiently certain or imminent to satisfy Article III's standing requirements, it is likewise clear that there is an outer limit as to how far a plaintiff may reach. The Supreme Court offered no explanation for why the alleged injury in *McConnell* was "too remote temporally" to satisfy Article III's requirements. *Id.* As "application of the constitutional standing requirement [is not] a mechanical exercise," this Court doubts that the Supreme Court intended to establish a fixed time limit beyond which no injuries-in-fact may exist. *Pennell*, 485 U.S. at 7, 108 S. Ct. 849. Therefore, the Court concludes that

[4]The Court assesses standing by reference to the date of filing. *Pluet*, 355 F.3d at 385.

temporal remoteness is but one factor to consider in the broader inquiry of whether a plaintiff's alleged injuries are sufficiently certain and/or imminent.[5]

In this vein, Defendants argue that Plaintiffs' alleged injuries are not certainly impending insofar as they are based on mere speculation. Defendants note that, within the next four years, Plaintiffs may find employment in which they receive health insurance as a benefit, qualify for Medicare or Medicaid, decide to purchase a health insurance policy, or qualify for one of the provision's exemptions. Therefore, Defendants argue, the degree of temporal separation is relevant insofar as a longer period of time makes it more likely that Plaintiffs' circumstances will change and no injury will occur.

The Court is not persuaded by this argument for the same reasons stated by the United States District Court for the Northern District of Florida. *See Florida,* 716 F. Supp. 2d at 1147. If hypothetical changes in circumstance were sufficient to compromise the certainty of an alleged future injury, then no plaintiff could ever challenge a law based on the threat of future injury. It is *always* possible to conceive of a circumstance in which a law may not apply to a particular plaintiff.[6]

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[5] *See also Whitmore*, 495 U.S. at 158, 110 S. Ct. 1717 ("Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact."); *Babbitt*, 442 U.S. at 298, 99 S. Ct. 2301 ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But '[one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.'"); *United States v. SCRAP*, 412 U.S. 669, 688-89, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) ("A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens . . . .").

[6] Indeed, if the United States Supreme Court shared Defendants' reasoning, the plaintiffs in *Babbitt* would not have had standing to challenge aspects of a farm labor statute, as they might

Therefore, the proper consideration in a motion to dismiss for lack of standing based solely on the face of the complaint is *what the plaintiff has alleged*, rather than what might conceivably occur between the date of filing and the date of injury. *Lujan*, 504 U.S. at 561, 112 S. Ct. 2130 (the elements of standing must be assessed in the manner appropriate to the stage of litigation).

This principle cuts both ways, though. If the Court may not imagine circumstances that would deprive a plaintiff of standing, it likewise may not imagine circumstances that would confer standing upon a plaintiff. If a plaintiff desires to challenge the constitutionality of a law, it must be clear from the allegations of the plaintiff's complaint that the law will certainly be enforced upon the plaintiff. *See FW/PBS, Inc.*, 493 U.S. at 231, 110 S. Ct. 596 (if a plaintiff fails to make the necessary allegations to show elements of standing, he does not have standing). The Court finds that the allegations of Plaintiffs' First Amended Petition are insufficient to show a "certainly impending" injury, and, therefore, insufficient to establish their standing to challenge the minimum essential coverage provision of the PPACA.

At this stage in the proceedings, the Court is required to "consider the allegations in the [plaintiffs'] complaint as true." *Williamson*, 645 F.2d at 412. The Court must assess the complaint to determine whether Plaintiffs have plead sufficient facts to establish a "certainly impending" injury. *Whitmore*, 495 U.S. at 158, 110 S. Ct. 1717; *Prestage Farms, Inc. v. Bd. of Supervisors*, 205 F.3d 265, 268 (5th Cir. 2000). Plaintiffs' alleged injuries are 1) the economic harm of having to

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have decided that they had no desire to participate in union elections, or that they no longer wished to be farm laborers. *See Babbitt*, 442 U.S. at 298-301, 99 S. Ct. 2301 (union members had standing to challenge election procedures that frustrated their ability to participate). Likewise, the plaintiffs in *Pennell* would not have had standing to challenge a rent control ordinance, as they might have decided to sell their rental properties or convert them to some other function. *Pennell*, 485 U.S. at 8, 108 S. Ct. 849. It is unnecessary for the Court to provide further examples, as the potential absurdity of this line of reasoning is apparent.

purchase health insurance, 2) the economic harm of having to pay a tax penalty in the event they do not purchase health insurance, or 3) the economic harm of having to arrange their financial affairs to prepare for such expenditures. Therefore, if it is not certain – based solely on the allegations of Plaintiffs' First Amended Petition – that they will be forced to purchase insurance or, alternatively, to pay a tax penalty, they do not have standing to challenge the provision.

Plaintiffs' First Amended Petition contains insufficient allegations to establish that they will certainly be "applicable individuals" who must comply with the minimum coverage provision. 26 U.S.C. § 5000A(a), (d). For example, Plaintiffs did not allege any facts which, if true, would certainly establish that they would not be subject to the provision's religious exemptions. 26 U.S.C. § 5000A(d)(2). Plaintiffs simply alleged that they will be subject to the minimum essential coverage provision – a bare legal conclusion which the Court may not accept as true. *Wells v. Ali*, 304 F. App'x 292, 294 (5th Cir. 2008) (citing *Fernando-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)). They did not include any factual allegations – other than their citizenship – to establish that they will be considered "applicable individuals" according to the provision's terms.

Furthermore, it is not certain from Plaintiffs' allegations that, in the event they were considered "applicable individuals," they would incur the tax penalty for non-compliance. Their First Amended Petition contains insufficient allegations to establish that they will not be subject to one of the exemptions to the penalty. 26 U.S.C. § 5000A(e). For example, Plaintiffs have not plead that they will certainly be able to afford coverage. 26 U.S.C. § 5000A(e)(1). Further, Plaintiffs have not plead that their income will certainly be above the filing threshold. 26 U.S.C. § 5000A(e)(2). Accordingly, Plaintiffs' factual allegations are insufficient to show that they will certainly be subject to the tax penalty.

For all of the reasons stated above, the Court finds that the ten primary Plaintiffs have not plead sufficient facts to establish that they have standing to challenge the Constitutionality of the minimum essential coverage provision of the PPACA.

2. Plaintiff Bryant

According to the First Amended Petition, Plaintiff Bryant has employer-provided health insurance as an employee of the state of Mississippi. Therefore, the factual allegations of the First Amended Petition are not sufficient to show that he will certainly suffer economic harm by being forced to purchase health insurance or by the assessment of a tax penalty. However, Plaintiff Bryant claims that he will be injured because the state of Mississippi will be forced to offer health insurance plans which conform to the PPACA's requirements, thereby forcing state employees such as himself to choose from health insurance options that they may not desire. This allegation has two possible meanings: 1) that state employees will be forced to have health insurance when they do not desire it at all, or 2) that state employees will be forced to accept health insurance with coverage options that they do not desire.

As stated above, Plaintiff Bryant must allege sufficient facts to show that an injury is "certainly impending." *Lujan*, 504 U.S. at 564 n.2, 112 S. Ct. 2130. The First Amended Petition contains no factual allegations regarding 1) the health insurance options currently available to state employees; 2) the specific requirements of the PPACA to which state-sponsored employee health insurance will purportedly have to conform; 3) the health insurance options that will be available to state employees once those requirements become effective; 4) how those options will differ from the options currently available; or 5) whether Plaintiff Bryant will, in fact, be a state employee at the time that these alleged requirements are imposed. Therefore, Plaintiff Bryant has not pled

sufficient facts to show that he will certainly be injured by any purported limitations placed on the health insurance options available to state employees by the PPACA.

Plaintiff Bryant also claims that he will be injured because he will not be able to drop his health insurance without incurring the tax penalty outlined in the provision. For the same reasons cited in the Court's analysis of the other ten Plaintiffs' standing, the Court finds that Plaintiff Bryant likewise alleged insufficient facts to show that he will certainly be subject to the tax penalty. Additionally, Plaintiff Bryant alleged insufficient facts 1) to show that he certainly will not have health insurance by the time the provision goes into effect; 2) to show that any benefit would inure to a state employee from their waiver of employer-provided health insurance coverage, and, hence, that an injury would result from the proscription of such waiver; or 3) to show that Mississippi even allows its employees to waive their health insurance coverage.

To whatever extent Plaintiff Bryant alleges an injury to the sovereign interests of the state of Mississippi, he does not have standing to air such grievances insofar as he appears in his "private and individual capacity." *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474,102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."); *Flast v. Cohen*, 392 U.S. 83, 105, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) (plaintiff who claimed federal statute invaded province reserved to the States by the Tenth Amendment "was attempting to assert the States' interest in their legislative prerogatives"); *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144, 59 S. Ct. 366, 83 L. Ed. 543 (1939) (private citizens, absent their states or officers thereof, have no standing to raise Tenth Amendment claims); *United States v. Johnson*, 652 F. Supp. 2d 720, 726 (S.D. Miss. 2009)

(private citizen, acting on his own behalf and not in an official capacity has no standing to raise a Tenth Amendment claim); *Virginia*, 702 F. Supp. 2d at 606 (private citizens do not have standing to raise Tenth Amendment claims); *United States v. Doyle*, No. 3:10-CR-42-DCB-LRA, 2010 U.S. Dist. LEXIS 73094, at *15 (S.D. Miss. July, 2010).[7]

For all of the reasons stated above, the Court finds that Plaintiff Bryant alleged insufficient facts to establish that he has standing to challenge the Constitutionality of the minimum essential coverage provision of the PPACA.

III. CONCLUSION

The allegations of Plaintiffs' First Amended Petition are insufficient to show that they have standing to challenge the minimum essential coverage provision of the PPACA. Accordingly, the Court does not have jurisdiction over this matter. *See* U.S. CONST. art. III, § 2, cl. 2; *Lujan*, 504 U.S. at 559-60, 112 S. Ct. 2130. However, it is generally appropriate to permit plaintiffs an opportunity to correct jurisdictional defects in their complaint. *See* 28 U.S.C. § 1653; *Save Ourselves, Inc. v. U.S. Army Corps of Eng'rs*, 958 F.2d 659, 662 (5th Cir. 1992); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 n. 6 (11th Cir. 1993). Indeed, this Court commonly allows such amendments. *See, e.g. Hall v. Newmarket Corp.*, No. 5:09-CV-41-DCB-JMR, 2010 U.S. Dist. LEXIS 103712, at *18 (S.D. Miss. Sept. 29, 2010); *Dear v. Mason*, No. 3:08-CV-548-WHB-LRA,

[7]Even if Plaintiff Bryant, in his private and individual capacity, had standing to assert the Tenth Amendment interests of the State of Mississippi, he would still be required to allege sufficient facts to show that he will certainly suffer an actual injury. *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) ("[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.") (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)). As noted above, he has not done so.

2010 U.S. Dist. LEXIS 31317, at *7 (S.D. Miss. Mar. 31, 2010); *Britton v. Anderson*, No. 3:06-CV-374-WHB-JCS, 2006 U.S. Dist. LEXIS 81959, at *13 (S.D. Miss. Nov. 8, 2006).

Therefore, for the reasons stated above, the Court **grants in part** Defendants' Motion to Dismiss [13]. Plaintiffs' First Amended Petition is dismissed without prejudice for lack of subject matter jurisdiction. However, if Plaintiffs so desire, they may file a Second Amended Petition within thirty (30) days of the entry of this Memorandum Opinion and Order. If Plaintiffs do not file a Second Amended Petition within the time allowed, this matter will be closed.

SO ORDERED AND ADJUDGED this 3rd day of February, 2011.

s/Keith Starrett
UNITED STATES DISTRICT JUDGE