IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity, Defendant.	Civil Action No. 3:10-cv-188-HEH

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF THE CASE

The federal Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010) (PPACA), was signed into law on March 23, 2010. It provides for an individual mandate requiring all families without employer-provided health insurance to purchase a health insurance policy that complies with all of the mandated benefit and coverage requirements established or authorized under the PPACA. The Defendant Secretary in this matter routinely refers to this mandate as requiring a minimum level of health insurance coverage. But policies providing for that "minimum" coverage are now projected to cost at least $15,000 per year by 2016. *E.g.*, John Goodman, *Four Trojan Horses,* Health Alert, National Center for Policy Analysis (Apr. 15, 2010).

Also in 2010, the Commonwealth of Virginia enacted the Health Care Freedom Act, Va. Code § 38.2-3430.1:1. That Act states,

> No resident of this Commonwealth … shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding.

The PPACA is in direct conflict with this Health Care Freedom Act over the issue of the individual mandate.

On March 23, 2010, Virginia Attorney General Kenneth T. Cuccinelli filed this action on behalf of the Commonwealth of Virginia alleging that the individual mandate of the PPACA is unconstitutional, and seeking declaratory and injunctive relief. The U.S. Constitution delegates to the federal government only certain specified, enumerated powers, with all others reserved to the states, or to the people, as specified in the Tenth Amendment. Among these enumerated powers is the Commerce Clause, which states, in Article I, Section 8 of the Constitution, that

"The Congress shall have power … To regulate Commerce with Foreign Nations, and among the several states, and with the Indian tribes."

Virginia alleges that the individual mandate of the PPACA is not authorized by this power to regulate interstate commerce, or any other enumerated power of the Constitution. That is because an uninsured individual is not participating in interstate commerce in health insurance. The individual mandate, therefore, is not regulating interstate commerce; rather, it is compelling an individual to participate in that commerce, which is not authorized by the Commerce Clause power to regulate interstate commerce.

Virginia argues that the PPACA's individual mandate is consequently unconstitutional, and since the PPACA does not contain a severability clause, and even the Defendant Secretary admits that the individual mandate is essential to the entire statutory scheme, and that Congress would not have passed the Act without it, the entire PPACA must be struck down as unconstitutional.

On May 24, 2010, Defendant Kathleen Sebelius, Secretary of the Department of Health and Human Services charged with administering the PPACA, filed a Motion to Dismiss for failure to state a claim upon which relief may be granted. The Secretary argued that as a matter of law, even assuming as true all the Plaintiff Commonwealth of Virginia has alleged, the individual mandate is authorized by established interpretations of the Commerce Clause, and, therefore, is constitutional.

On August 2, 2010, this Court denied Defendants' Motion to Dismiss, concluding in its Memorandum Opinion,

> No reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce. Given the presence of some

> authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this stage that the Complaint fails to state a cause of action.

(Slip Op. at 31). The parties then both moved for summary judgment on September 3. On October 4, *amicus curiae* American Civil Rights Union moved for leave to file this *amicus* brief.

SUMMARY OF ARGUMENT

The delegated, enumerated power in the Commerce Clause to regulate interstate commerce does not include compelling participation in interstate commerce by requiring purchase of government-designated products and services by those who otherwise choose not to do so. The uninsured are not participating in interstate commerce in health insurance. So it is not regulation of interstate commerce to compel them to participate by buying the health insurance the government decides they must have.

Extending the Commerce Clause this far would leave the federal government's power under the clause unlimited, which was never intended by the framers or the American people. It would effectively create a national police power for the federal government to regulate to enforce any vision of the general welfare, leaving no distinction between federal and state power.

Moreover, the individual mandate compels individuals and families to purchase health insurance that is sold only within completely intrastate markets by law, and so does not involve regulation of interstate commerce for this reason as well.

By its plain terms, the Necessary and Proper Clause broadens all the other powers delegated to the federal government under the Constitution. But it does not constitute an additional, independent ground for any federal power. Any federal action must first be grounded in some other enumerated power. But if the action is not grounded in any underlying enumerated power at all, then it cannot be independently justified by the Necessary and Proper Clause as necessary to carry out any enumerated power.

Therefore, if a federal regulation is not related to regulation of interstate commerce under the Commerce Clause, then it cannot be considered justified as necessary and proper to carry out the power delegated in the Commerce Clause. In the present case, since the individual mandate does not regulate interstate commerce, but rather compels uninsured individuals who are not otherwise participating in interstate commerce in health insurance to buy government-approved and -designated health insurance from a government-approved and -designated health insurance provider, the individual mandate cannot be constitutionally justified as necessary and proper to carrying out the Commerce Clause.

The Secretary argues repeatedly throughout her brief that the individual mandate is necessary for the entire regulatory scheme of the PPACA to work, or even function, without the Act's regulatory requirements for guaranteed issue and community rating causing intractable, spiraling increases in insurance premiums. Without the individual and employer mandates, the Secretary argues, those who would remain uninsured would substantially affect the interstate market for health insurance, by allowing the remaining regulatory requirements to cause soaring health insurance premiums through the above process and ultimately a financial death spiral.

But aside from the problems that the individual mandate unconstitutionally applies to uninsured individuals who are not involved in interstate commerce, and that there is no interstate market or commerce in the health insurance that the individual mandate compels individuals to buy, the individual mandate will ultimately not solve the problems that the Secretary correctly identifies, and, therefore, the argument that it is necessary and proper under the PPACA is further in dispute.

The Secretary argues further that the individual mandate is necessary and proper because the uninsured do not always pay for their care, leaving the cost of such uncompensated care

shifted to others. But such uncompensated care amounts to less than 2% of all health expenditures. The federal government's own underpayments to doctors and hospitals under Medicaid and Medicare produces more than twice as much cost-shifting as a result. Moreover, the PPACA vastly increases such cost-shifting by expanding Medicaid to cover 50% more beneficiaries, and sharply slashing the payments to doctors and hospitals under Medicare by trillions.

If the PPACA is making a much bigger cost-shifting problem so much worse, then how can the individual mandate be necessary to address the far more minor private uncompensated care problem? In any event, the individual mandate once again cannot be constitutionally justified by the Necessary and Proper Clause on these grounds because it is still not based on an enumerated power of the federal government, as discussed above.

The individual mandate is not a tax under the federal government's taxation powers, but a regulatory requirement that individuals purchase required health insurance with the benefits and other coverage provisions specified by the government. Nor can the penalty imposed for violating the regulatory requirements of the individual mandate turn it into a tax. Otherwise, every unconstitutional regulation that does not satisfy the requirements of the Commerce Clause could be transformed into a constitutional tax merely by exacting a penalty for violating the regulation.

Finally, Congress can achieve all of the social goals meant to be achieved through the individual mandate through alternative means that are not unconstitutional. So no one needs to be left suffering without access to essential health care, or with excessive unfair costs due to cost-shifting, if the Court does agree that the individual mandate is unconstitutional.

ARGUMENT

I. THE INDIVIDUAL MANDATE REGULATES INDIVIDUALS NOT PARTICIPATING IN INTERSTATE COMMERCE FOR HEALTH INSURANCE.

The individual mandate compels the uninsured who are not participating in the interstate market for health insurance to purchase comprehensive health insurance complying with all of the benefit mandates and other requirements of the PPACA from insurance companies validated by the federal government as providing the required insurance. The Defendant Secretary relies upon the Commerce Clause as the enumerated power supposedly delegating authority to the federal government for this regulatory compulsion.

As the Supreme Court stated in the seminal case of *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), up until now the reach of the Commerce Clause has been limited to delegating the power to regulate (1) "use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce"; and (3) "activities that substantially affect interstate commerce." But an uninsured individual is not using the channels of interstate commerce for health insurance, is not involved with any instrumentality of interstate commerce in regard to health insurance, and is not engaged in any "activity" at all in regard to health insurance. Therefore, the Commerce Clause does not delegate the power to impose the individual mandate to enter the market and purchase health insurance.

This Court recognized as much in denying Defendant's motion to dismiss, saying in regard to the individual mandate, "Never has the Commerce Clause and associated Necessary and Proper Clause been extended this far." (Slip op. at 25.) The Court reiterated, "No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so." (Slip Op. at 24.)

The individual mandate goes beyond the previous outer limits of Commerce Clause jurisprudence in *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzalez v. Raich*, 545 U.S. 1 (2005). The farmer in *Wickard* affirmatively acted in the voluntary activity to farm and produce wheat that was part of the national, and therefore interstate, stock of wheat. The aggregate of all farmers such as Filburn who consumed their own grown wheat consequently substantially affected the interstate commerce in wheat under the economic laws of supply and demand. Indeed, part of Filburn's "consumption" of his own wheat was to feed it to his farm animals, who produced milk, poultry, and eggs that he sold in interstate commerce. 317 U.S. at 114. Moreover, the parties in *Wickard* stipulated that such consumption by farmers of their own home-grown wheat amounted to more than 20% of domestic U.S. consumption of wheat. *Id.* at 125, 127.

Similarly, in *Raich*, the defendant affirmatively acted to grow and produce marijuana, which was part of the total interstate stock of the drug. The majority accepted similar Congressional findings that the aggregate supply of home-grown marijuana substantially affected interstate commerce in the drug under the immutable economic laws of supply and demand.

But the individual mandate compels and regulates entirely uninsured individuals who have taken no voluntary, affirmative act at all in regard to health insurance. This was recognized by the Congressional Budget Office (CBO) in considering the budget treatment of the individual mandate in the Clinton Administration's health care proposals. The CBO said at the time,

> A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Secondly, it would require people to purchase a specific service that would be heavily regulated by the federal government.

The Budgetary Treatment of an Individual Mandate to Buy Health Insurance, CBO Memorandum, at 1 (Aug. 1994). Similarly, the opinion of the Congressional Research Service regarding the individual mandate of the PPACA, provided in response to a request from the Senate Finance Committee, stated,

> Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this Clause to require an individual to purchase a good or service.

Cong. Research Serv., *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, at 3 (2009).

Indeed, to extend the Commerce Clause as far as the Defendant Secretary seeks would leave no principled limit to the federal government's power to regulate under the Commerce Clause. If Congress can compel an individual who is not even participating in interstate commerce in the good or service at issue to purchase the good or service from another citizen or business, which purchase it then regulates in great detail, where is the limit? The federal government could then require individuals to purchase cars from auto companies it has bailed out, or nationalized. It could require individuals to purchase insurance from companies who contributed to the President's reelection campaign. It could require individuals to purchase goods or services from companies that are unionized by the President's supporters. It could mandate that individuals buy and take certain vitamins or nutritional supplements.

That is several roads too far from the original Commerce Clause power, which, as James Madison explained,

> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

2 *The Founders' Constitution*, Art. I, § 8, cl. 3 (Commerce). That is why the Supreme Court in *Lopez* has already rejected this notion of unlimited Commerce Clause power, holding that it will strike down regulation under the Commerce Clause which leaves no principled limit to federal power under the Clause. The Court said, "[T]he Constitution's enumeration of powers does not presuppose something not enumerated and that there will never be a distinction between what is truly national and what is truly local." 514 U.S. at 567–68. Justice Kennedy added further in concurrence in *Lopez*, in terms quite apt for the present case, "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or another level of Government has tipped the scales too far." *Id.* at 578 (Kennedy, J., concurring).

Indeed, the unlimited Commerce Clause power the Secretary seeks here would be indistinguishable from a national police power, with the federal government authorized to regulate and enforce order to advance any vision of the general welfare, morals, health, and safety. As the Court indicated in *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006), "protection of the lives, limbs, health, comfort and quiet of all persons" falls within state police power. Historically, that has encompassed commands to act to achieve these ends, such as vaccinations and school attendance laws, which are precisely analogous to the individual mandate at issue in the present case.

But if the federal government were considered to hold such a national police power, then the concept of enumerated, delegated powers to the federal level, with traditional government powers otherwise remaining with the states, would be obliterated. That is why the Supreme Court held in *United States v. Morrison*, 529 U.S. 598, 618–19 (2000), "We *always* have rejected

readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." (emphasis in original).

II. THE INDIVIDUAL MANDATE COMPELS INDIVIDUALS TO PURCHASE HEALTH INSURANCE SOLD ONLY WITHIN COMPLETELY INTRASTATE MARKETS BY LAW, AND SO DOES NOT INVOLVE REGULATION OF INTERSTATE COMMERCE FOR THIS REASON AS WELL.

Lawyers not steeped in health policy will not recognize how jarring the idea that the individual mandate involves regulation of the "interstate market in health insurance" will seem to those actually engaged in the business of such insurance. The individual mandate again involves a requirement that individuals and families without employer-provided health insurance purchase the mandated health insurance directly in the market. *But there is no interstate market in such health insurance* for individuals and families.

By law, individuals and families seeking health insurance on their own, rather than through their employers, operate in what is called the individual insurance market. In that market, such individuals and families can only buy health insurance authorized, issued, and regulated within their state. Such individuals and families cannot under current law buy health insurance across state lines. *See Testimony of J. Robert Hunter, Director of Insurance, Consumer Federation of America, Before the Committee on the Judiciary of the United States Senate* (Oct. 14, 2009); *Letter of Richard J. Hillman, Director, Financial Markets and Community Investment, Government Accountability Office (GAO), to Michael G. Oxley, Chairman, Committee on Financial Services, House of Representatives* (July 28, 2005); Chris Sagers, *Much Ado About Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort*, 28 YALE L. & POLICY REV. 325 (2010).

Those who live in New Jersey, for example, cannot buy the much less expensive health insurance sold in Pennsylvania. Those who live in Texas cannot buy health insurance sold in

Oklahoma. Those who live in California can fly to Las Vegas to gamble in the casinos there, but they cannot buy health insurance sold in Nevada while they are there.

That is why the statement, "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause," *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), does not apply to the health insurance that the individual mandate compels individuals and families to buy. The individual mandate compels individuals and families to purchase health insurance that is sold only within completely intrastate markets by law, and so does not involve regulation of interstate commerce for this reason as well.

Multistate employers providing insurance to their workers either through a health insurer or through self-insurance under ERISA do cross state lines in the business of insurance. The examples of federal regulation the Defendant Secretary cites generally involve this interstate employer health insurance market.

III. THE NECESSARY AND PROPER CLAUSE DOES NOT PROVIDE AN INDEPENDENT CONSTITUTIONAL GROUND FOR THE INDIVIDUAL MANDATE.

The Necessary and Proper Clause follows the enumerated powers in Article I, Section 8. It grants Congress the further power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

By its plain terms, this Necessary and Proper Clause broadens all the other powers delegated to the federal government under the Constitution. But it does not constitute an additional, independent ground for any federal power. Any federal action must first be grounded in some other enumerated power. The full scope of that federal action may then be justified as necessary and proper to carry out the underlying enumerated power. But if the action is not

grounded in any underlying enumerated power at all, then it cannot be independently justified by the Necessary and Proper Clause as necessary to carry out any enumerated power. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *United States v. Comstock*, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010).

As Alexander Hamilton explained in 1791,

> [A] criterion of what is constitutional, and of what is not so ... is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority.

3 *The Founders' Constitution*, Art. I, § 8, cl. 18, doc. 11 (Opinion on the Constitutionality of the Bank, Feb. 23, 1791). But the end must be clearly comprehended within one of the specified powers to be justified under the Necessary and Proper Clause. The Court said the same thing in *McCulloch*, when it stated, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. at 421. But the end must be legitimate, and within the scope of the constitution, meaning it must fall within one of the enumerated powers. *Comstock*, 130 S. Ct. at 1956.

For example, if a federal regulation is not related to regulation of interstate commerce under the Commerce Clause, then it cannot be considered justified as necessary and proper to carry out the power delegated in the Commerce Clause. In the present case, since the individual mandate does not regulate interstate commerce, but rather compels uninsured individuals who are not otherwise participating in interstate commerce in health insurance to buy government-approved and -designated health insurance from a government-approved and -designated health insurance provider, the individual mandate cannot be constitutionally justified as necessary and

proper to carrying out the Commerce Clause. Therefore, the individual mandate cannot be considered constitutionally justified as authorized by the Necessary and Proper Clause, because it cannot be rooted in the Commerce Clause.

The Secretary argues repeatedly throughout her brief that the individual mandate is necessary for the entire regulatory scheme of the PPACA to work, or even function. That is because of the Act's regulatory requirements for guaranteed issue and community rating.

The Act requires all insurers to cover all pre-existing conditions and issue health insurance to everyone who applies, no matter how sick they are when they first apply or how costly they may be to cover. PPACA §§ 2702, 2704, 2705. This is what is known as guaranteed issue. The Act also prohibits insurers from varying their rates based on the medical condition or illnesses of applicants. Insurers can only vary rates within a limited range for age, geographic location, and family size. PPACA § 2701. This regulatory requirement is known as modified community rating.

Under these regulatory requirements, younger and healthier people delay buying insurance, knowing they are guaranteed coverage at standard rates after they become sick. Sick people show up applying for an insurer's health coverage for the first time with very costly illnesses such as cancer and heart disease, which the insurer must then cover and pay for. This means the insurer's covered risk pool includes more costly sick people and fewer less costly healthy people, so the costs per person covered soar. The insurer then has to raise rates sharply just to be sure to have enough money to pay all of the policy's benefits.

Those higher rates encourage even more healthy people to drop their insurance, leaving the remaining pool even sicker and more costly on average, which requires even higher premiums, resulting in a financial death spiral for the insurers and the insurance market.

The PPACA tries to counter this problem with the individual and employer mandates, seeking to require everyone to be covered and contributing to the pool at all times. Without these mandates, the Secretary argues, those who would remain uninsured would substantially affect the interstate market for health insurance, by allowing the remaining regulatory requirements to cause soaring health insurance premiums through the above process and ultimately a financial death spiral. That is why, under the Secretary's argument, the individual mandate, as well as the employer mandate, is necessary and proper to the Act's overall regulatory scheme for the interstate health insurance markets.

But aside from the problems that the individual mandate unconstitutionally applies to uninsured individuals who are not involved in interstate commerce, and that there is no interstate market or commerce in the health insurance that the individual mandate compels individuals to buy, the individual mandate will ultimately not solve the problems that the Secretary correctly identifies, and, therefore, the argument that it is necessary and proper under the PPACA is further in dispute.

The PPACA under its own terms and language does not sufficiently enforce the mandates for them to work to solve the fundamental problem with the PPACA's regulatory requirements. Individuals who violate the mandate are required to pay $695 per family member, up to a maximum of $2,085 per family. PPACA §§ 1501, 1502. The penalty for employers is $2,000–$3,000 per worker. PPACA §§ 1511, 1513. But qualifying health insurance coverage will cost $15,000 per year by 2016, much more even than the $12,000 or more per year that is a typical cost for employer provided coverage today. Goodman, *supra*.

Workers and employers can save too much by just foregoing the coverage and paying the penalty, if they are caught and forced to pay it. Moreover, the Act expressly states that criminal

penalties will not apply for failing to pay the fine, and it cannot be enforced by imposing liens on the taxpayer's property, so the penalties are not even enforceable. PPACA § 1501. But such individuals can still buy insurance after they or a member of their family gets sick.

This is why the American Academy of Actuaries warned, in regard to the PPACA's mandates,

> [T]he financial penalties associated with the bill's individual mandates are fairly weak compared to coverage costs…. In particular, younger individuals in states that currently allow underwriting and wider premium variations by age could see much higher premiums than they face currently (and may have chosen to forego). The premiums for young and healthy individuals would likely be high compared to the penalty, especially in the early years, but even after fully phased in, thus likely leading to many to forgo coverage.

American Academy of Actuaries, *Letter to the Honorable Nancy Pelosi and the Honorable Harry Reid, Re: Patient Protection and Affordable Care Act (H.R. 3590) and Affordable Health Care for America Act (H.R. 3962)*, at 4–5 (Jan. 14, 2010).

This is also why studies concluded that insurance premiums would rise sharply under the PPACA's regulatory requirements. PriceWaterhouseCoopers, *Impact Potential of Health Reform on the Cost of Private Health Insurance Coverage* (Oct. 2009); Wellpoint, Inc., *Impact of Health Reform on Premiums* (Oct. 2009); Merrill Matthews, *"Should We Abandon Risk Assessment in Health Insurance,"* Issues and Answers No. 154, Council for Affordable Health Insurance (May 2009); Cong. Budget Office, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, Letter to the Honorable Evan Bayh (Nov. 30, 2009); Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended* (Apr. 22, 2010).

Further confirmation that the mandates will not work is shown by the experience of Massachusetts. As the Secretary suggests, Massachusetts adopted reforms quite similar to the PPACA in 2006, with guaranteed issue, community rating, and individual and employer mandates. Since then health insurance premiums in Massachusetts have accelerated faster than the national average, and the state now suffers the highest health insurance costs in the nation. Grace Marie Turner & Tara Persico, *Massachusetts' Health Reform Plan: Miracle or Muddle?*, Galen Institute (July 2009); Michael Tanner, *Massachusetts Miracle or Massachusetts Miserable: What the Failure of the "Massachusetts Model" Tells Us about Health Care Reform*, Cato Institute Briefing Papers No. 112 (June 9, 2009); Greg Scandlen, *Three Lessons from Massachusetts*, National Center for Policy Analysis, Brief Analysis No. 667 (July 28, 2009); Sally C. Pipes, *Mass Health Meltdown Is Your Future*, Pacific Research Institute (May 25, 2010); Aaron Yelowitz & Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain, Policy Analysis No. 657*, Cato Institute (Jan. 2010).

Harvard-Pilgrim, one of the top insurers in Massachusetts, reported that between April 2008 and March 2009, about 40% of its new enrollees dropped their coverage in less than five months, but incurred about $2,400 in monthly medical expenses, about 600% higher than normal. *"The Massachusetts Health Mess,"* The Wall Street Journal (July 11, 2009). This indicates that many in the state are waiting until they need expensive medical care to buy insurance, then dropping it after the insurer pays the costs, knowing they can always get coverage later when they need further expensive care. *See also* Grace Marie Turner, *"The Failure of RomneyCare,"* The Wall Street Journal (Mar. 17, 2010) ("There is growing evidence that many people are gaming the system by purchasing health insurance when they need surgery or other expensive medical care, then dropping it a few months later.").

Consequently, the individual mandate will not work to solve the problems caused by the regulatory framework of the PPACA. That mandate, therefore, is not necessary and proper to the overall regulatory scheme of the PPACA. In any event, the individual mandate again cannot be constitutionally justified by the Necessary and Proper Clause because it is not based on an enumerated power of the federal government, as discussed above.

The Secretary argues further that the individual mandate is necessary and proper because while the uninsured forego health insurance, they do not forego medical care. Too often, however, they are unable to pay for that care. The cost of that uncompensated care is then shifted to others, either to the public through higher insurance premiums, or to the federal government through programs to help hospitals cover these losses. The Secretary reports that the cost of such uncompensated care amounted to $43 billion in 2008. (Memorandum in Support of Defendant's Motion for Summary Judgment, at 1.)

This issue needs to be put in context. Total annual health expenditures in the U.S. run at $2.5 trillion per year. Sally C. Pipes, *The Truth About Obamacare*, at 23 (2010). The cost-shifting the Secretary argues is so troubling runs at about 2% of those total expenditures.

A far bigger source of cost-shifting is the federal government itself. Medicaid payments to doctors and hospitals serving the poor under the program are so meager that many face great difficulty in even finding essential care. Pipes, *The Truth About Obamacare*, *supra*, at 76–79. Medicare payments are so low that in 2008, two-thirds of hospitals were already losing money on Medicare patients. Office of the Actuary, Centers for Medicare and Medicaid Services, *Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Providers*, at 7 (Aug. 5, 2010). A study conducted by one of the nation's top actuarial firms, Milliman, Inc., concluded that cost-shifting to private insurance due to the low

compensation paid to doctors and hospitals by Medicaid and Medicare raised the cost of private health insurance by $88.5 billion per year, or $1,788 for an average family of four. Will Fox, FSA, MAAA, & John Pickering, FSA, MAAA, *Hospital and Physician Cost Shift: Payment Level Comparison of Medicare, Medicaid, and Commercial Payers* (Dec. 2008). That is twice the amount of cost-shifting due to uncompensated care from the uninsured that the Secretary says the individual mandate is necessary to stop.

Moreover, the PPACA greatly increases that cost-shifting arising from Medicaid and Medicare underpayments in two ways. First, it sharply expands Medicaid to 24 million new beneficiaries by 2015, an increase of over 50%. Foster, *supra*. That will result in far more Medicaid underpayments to be cost-shifted.

Secondly, the PPACA sharply cuts the payments to doctors and hospitals even further, to the tune of nearly $3 trillion at least over the first 20 years of full implementation. Senate Budget Committee, Minority Staff, *Budget Perspective: The Real Deficit Effect of the Democrats' Health Package,* (Mar. 23, 2010). The ACRU's calculations, based on the 2009 Annual Report of the Medicare Board of Trustees, are even higher. Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, *The 2010 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds* (Aug. 5, 2010). Such compensation reductions would shatter all records in cost-shifting.

If the PPACA is making a much bigger cost-shifting problem so much worse, then how can the individual mandate be necessary to address the far more minor private uncompensated care problem? In any event, the individual mandate once again cannot be constitutionally

justified by the Necessary and Proper Clause on these grounds because it is still not based on an enumerated power of the federal government, as discussed above.

Finally, Congress can fully address both of these problems, the problem of pre-existing conditions it tries to address through guaranteed issue and community rating along with the individual and employer mandates to make it all work, and the problem of cost-shifting due to uncompensated care, through alternative means that are fully constitutional, as discussed below. Arguably, those alternatives would serve the public even better. So no one needs to be left suffering without access to essential health care, or with excessive unfair costs due to cost-shifting, if the Court does agree that the individual mandate is unconstitutional.

IV. THE INDIVIDUAL MANDATE IS NOT A TAX UNDER THE FEDERAL GOVERNMENT'S TAXATION POWERS.

Another enumerated power delegated to the federal government in the Constitution, besides the power to regulate interstate commerce under the Commerce Clause, is the power of taxation granted in Article I, Section 8, Clause 1, which provides for the "Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

Congress itself in the PPACA referenced the power to impose the individual mandate as stemming from the Commerce Clause, not this Taxation Clause. PPACA §§ 1501, 10106(a). Moreover, the President ridiculed on national television the idea that the individual mandate is a tax. "Obama's Nontax Tax," *The Wall Street Journal* (Sept. 21, 2009).

Now the Secretary argues that the individual mandate is constitutional because it is simply an exercise of the federal government's power to tax. But the Supreme Court has already ruled out such attempted rewriting of what Congress has done after the legislation has passed. In

Board of Trustees of the University of Illinois v. United States, 289 U.S. 48, 58 (1933), the Court said, regarding a similar situation,

> But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power.

As a matter of plain English, as well as Supreme Court precedent, the individual mandate is in no way a tax. "A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government," the Supreme Court recognized in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 841 (1995). The individual mandate, by contrast, is a regulatory requirement that individuals purchase required health insurance with the benefits and other coverage provisions specified by the government. It has nothing to do with the legal definition of a tax. It is a regulation of conduct, which is why the Congress specified that it was regulation of interstate commerce.

Nor can the penalty imposed for violating the regulatory requirements of the individual mandate turn it into a tax. Regulatory requirements are often enforced with penalties exacted for their violation. That does not transform the regulations into taxes. We would not say that the traffic regulation mandating a stop at red lights is a tax because it is enforced by a fine. Otherwise, every unconstitutional regulation that does not satisfy the requirements of the Commerce Clause could be transformed into a constitutional tax merely by exacting a penalty for violating the regulation. The Supreme Court has already rejected that game. In *United States v. LaFranca*, 282 U.S. 568, 572 (1931), the Court said,

> The two words [tax v. penalty] are not interchangeable.… No mere exercise of the art of lexicography can alter the essential nature of an act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That

> the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled….

Accord United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996) ("[A] tax is an enforced contribution to provide for the support of government; a penalty … is an exaction imposed by statute for punishment of an unlawful act."). The penalty in the PPACA is precisely an exaction imposed by statute for punishment of an unlawful act.

Addressing the concerns targeted in the PPACA through a tax rather than a regulation would involve raising revenue through an actual tax to be used to pay for the health care needed by the uninsured with pre-existing conditions for which they cannot obtain new insurance in the marketplace. That is what Medicare does to pay for the health care of senior citizens through the payroll tax. And it is what Medicaid does to pay for the health care of the poor through income taxes.

Another alternative is to exact a real tax to pay the excess costs of obtaining new insurance coverage for the uninsured with pre-existing conditions in the market. That is similar to what the Children's Health Insurance Program does in contributing to insurance coverage for lower income children through income taxes. A specific example of how that could be done for the health care and coverage of the uninsured with pre-existing conditions is discussed below.

V. CONGRESS CAN ACHIEVE ALL THE SOCIAL GOALS MEANT TO BE ADDRESSED THROUGH THE INDIVIDUAL MANDATE THROUGH ALTERNATIVE MEANS THAT ARE FULLY CONSTITUTIONAL.

Congress cannot use unconstitutional means to achieve desirable social goals in any event. But when Congress has a choice between alternative policies to achieve desirable ends, one of which is constitutional and the other not, it does not have policy discretion. It can only choose the constitutional course. In the present case, Congress can choose alternative means to achieve all the social goals meant to be addressed through the individual mandate. So even if the

individual mandate is unconstitutional, that does not mean that anyone has to suffer without essential health care.

For example, each state can set up a high risk pool for the uninsured in the state who have become too sick to obtain new health insurance in the marketplace. Individuals who cannot purchase private health insurance as a result would obtain coverage from the risk pool. They would each pay what they reasonably can for such coverage based on their income. The pools would be subsidized by the general taxpayers to cover remaining costs. J.P. Wieske & Merrill Matthews, *Understanding the Uninsured and What to Do About Them*, Council for Affordable Health Insurance (2007); NASCHIP, *Comprehensive Health Insurance for High-Risk Individuals: A State-by-State Analysis* (22d ed., 2008).

This solution would not produce the unstable markets and soaring insurance premiums of guaranteed issue and community rating. Yet the true needs of the uninsured would be covered, at only a fraction of the costs of the PPACA's policies. Several states have already experimented with such risk pools. NASCHIP, *supra*. And the PPACA actually sets up a version of them to provide essential coverage for those in need before the Act's much more costly individual mandate, guaranteed issue, and community rating go into effect. Such risk pools can be designed to serve all the needs of the uninsured who become uninsurable, and fully funded to the extent necessary, without violating the Constitution.

Superior alternative solutions within constitutional bounds can also be devised for the problem of cost-shifting due to uncompensated care. The federal government can provide grants to states to establish low cost, quick, collection procedures to enable doctors and hospitals to efficiently collect more of their legitimate charges from those who do have the resources to pay them. New garnishment laws can be established to allow slower, more feasible payment of

medical debts over time. The medical costs for the uninsured who cannot make any significant contribution towards their expenses are a general social responsibility, and should be subsidized out of general taxes to the extent the costs are greater than doctors and hospitals can reasonably be expected to absorb as an accommodation to the needy who become sick.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully urges this Court to grant Plaintiff's Motion for Summary Judgment and to deny Defendant's Motion for Summary Judgment.

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Respectfully Submitted,

/s/_____
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