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 (Electronically Filed)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTERESTS OF *AMICI CURIAE*

The interests of *amici* are more fully set forth in their accompanying motion for leave to file this brief. The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states, including Virginia. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF litigates in support of efforts to ensure a strict separation of powers—both among the three branches of the federal government and between federal and state governments—as a means of preventing too much power from being concentrated within a single governmental body.

The remaining *amici* are all legal academics whose teaching, research, and published scholarship focus on constitutional law and related fields. Their substantial legal expertise bears directly on many of the core issues in this lawsuit. *Amici* include Jonathan Adler, Professor of Law and Director, Center of Business Law and Regulation, Case Western Reserve University School of Law; George Dent, Schott-van den Eynden Professor of Law, Case Western University School of Law; Michael Distelhorst, Professor of Law, Capital University Law School; James W. Ely, Jr., Milton R. Underwood Professor of Law Emeritus, Vanderbilt University Law School; Elizabeth Price Foley, Professor of Law, Florida International University College of Law; David Kopel, Research Director of the Independence Institute and Adjunct Professor of Law, University of Denver Sturm College of Law; Kurt Lash, Alumni Distinguished Professor of Law and Co-Director of the Program on Constitutional Theory, History and Law, University of Illinois College of Law; David N. Mayer, Professor of Law and History, Capital University Law School; Andrew Morriss, H. Ross and Helen Workman Professor of Law and Business, University of Illinois at Urbana-Champaign College of Law;

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Amici believe that the Framers of the Constitution sought to maintain a balance of power between federal and state governments as a means of reducing the risks of tyranny and abuse by governments at every level. They are concerned that the federal government is upsetting that balance by seeking to regulate Americans' economic *inactivity*—an individual's decision *not* to purchase health insurance—which is far afield from the enumerated powers assigned to the federal government under Article I of the Constitution. *Amici* further fear that, if Congress's power under Article I is construed to include the authority to command Americans to purchase health insurance or pay a penalty, then the congressional power will become virtually indistinguishable from a national police power.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "first principles" of the Constitution are that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST NO. 45). "As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *Id.* The federal government, Madison emphasized, is not granted "an indefinite supremacy over all persons and things." THE FEDERALIST NO. 39. These foundational principles are imperiled by the federal legislation

challenged in this case.

Section 1501 of the Patient Protection and Affordable Care Act (PPACA), which seeks to compel most Americans (under threat of monetary penalty) to purchase health insurance by 2014, goes well beyond any previous exercise of federal power. *See* §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). If upheld by the courts, the individual mandate would amount to a declaration of virtually unlimited congressional power.

The Secretary claims that the individual mandate is authorized by the Commerce Clause, the Tax Clause, and the Necessary and Proper Clause. But even the broadest Supreme Court precedents interpreting these clauses do not give Congress the authority to force Americans to purchase a product they do not want. As this court recognized in its memorandum opinion denying the Secretary's motion to dismiss, "[n]o 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." Dkt. 84 at 31.

According to the Supreme Court, the Commerce Clause gives Congress the power to regulate "economic activity" and "noneconomic activity" when controlling the latter is "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561; *see also United States v. Morrison,* 529 U.S. 598, 610 (2000) (quoting *Lopez*). But nothing in the Court's Commerce Clause precedents gives Congress the power to force private citizens to engage in economic transactions they would prefer to avoid.

Similarly, the Court's precedents under the Tax Clause give Congress broad authority to tax income and various commercial transactions in order to generate revenue. But they do not give it the power to use monetary fines to force people to purchase products they do not want. Allowing Congress to use fines re-labeled as taxes to regulate conduct that it could not otherwise

reach would effectively gut all remaining limits on federal power. The federal government could use this authority to compel citizens to do virtually anything, punishing violators with monetary penalties misleadingly labeled as taxes.

Even if the monetary penalty imposed by the individual mandate is a tax, it is still not permitted by the Constitution because it does not fall under any of the categories of taxes that Congress is authorized to impose. It is neither an income tax, nor an excise tax, nor an import duty, nor a "direct tax" apportioned among the states by population.

Finally, the Court's Necessary and Proper Clause precedents give Congress wide latitude to determine what kinds of regulations are "necessary" to the implementation of Congress's other enumerated powers. *See, e.g., M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-15 (1819) (ruling that such measures need not be "absolutely necessary," but merely "useful" or "convenient" to the execution of other powers). But they do not give Congress the kind of sweeping power asserted by the Secretary in this case. Indeed, the individual mandate runs afoul of at least three standards in the five part test for evaluating Necessary and Proper Clause cases recently established by the Supreme Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010). *Comstock* cited five factors in justifying its decision to uphold a claim of congressional power under the Necessary and Proper Clause: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965. A majority of these criteria weigh against the mandate.

The individual mandate also violates the Necessary and Proper Clause's requirement that legislation authorized by it must be "proper." Historical evidence suggests that "proper"

legislation at the very least must not upset the constitutional balance of power between the federal and state governments by giving Congress virtually unlimited authority. The logic of the Secretary's argument for the individual mandate does just that.

ARGUMENT

I. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY CONGRESS'S POWERS UNDER THE COMMERCE CLAUSE.

The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I § 8 cl. 3. The Supreme Court currently divides Congress's Commerce Clause powers into three categories: (1) regulation of "the use of the channels of interstate commerce"; (2) "[r]egulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "regulat[ion] [of] . . . those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *Morrison*, 559 U.S. at 609.

The individual mandate clearly does not fall under either the first or second of these headings. The decision not to purchase health insurance does not involve "the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. Indeed, even the purchase of insurance across state lines is forbidden by a combination of state and federal law.[1] Similarly, the mandate is not an example of "[r]egulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* An individual's mere status as uninsured is neither an instrumentality of interstate commerce, such as a road or airport,

[1] *See* Henry Butler & Larry Ribstein, *The Single License Solution*, REGULATION, Winter 2008-2009, at 36 (describing the current regulatory structure under which the federal government exempts health insurance companies from federal antitrust law and states forbid interstate insurance purchases).

nor—under current law—is being uninsured a person or thing that travels in interstate commerce. Significantly, the Secretary does not even try to assert that the mandate can be upheld under either of these categories.

The Secretary's Commerce Clause argument instead focuses almost entirely on the third category—regulation of "activities that substantially affect interstate commerce." *See* Dkt. 91 at 18-27. The fatal flaw in the Secretary's position is that none of the Supreme Court's precedents interpreting this category permit Congress to force individuals to engage in commercial activity. Even the most expansive of them permit regulation of only preexisting activity.

A. Existing Commerce Clause Precedents Do Not Give Congress The Power To Regulate Mere Inactivity.

Even the broadest judicial interpretations of the Commerce Clause do not give Congress the power to regulate inactivity. Instead, they strictly limit Congress's authority to regulation of "economic activity" and noneconomic activity whose restriction is necessary for the implementation of a regulatory scheme aimed at controlling interstate commercial transactions.

1. *Gonzales v. Raich*.

The Supreme Court's most expansive Commerce Clause precedent to date, *Gonzales v. Raich*, 545 U.S. 1 (2005), illustrates this point well.[2] *Raich* was the first case in which the Court upheld the regulation of intrastate, noncommercial activity under the Commerce Clause. *Raich* ruled that Congress's power to regulate interstate commerce could justify a federal ban on the possession of medical marijuana that had never been sold in any market, and that had never left

[2] For discussion of the ways in which *Raich* interpreted the Commerce Clause power more expansively than previous precedents, see, *e.g.*, Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB. POL'Y 507, 513-26 (2006), and Jonathan H. Adler, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005).

the state where it was grown. *Id.* Respondents Angel Raich and Diane Monson grew marijuana solely for personal consumption for medical purposes. *Id.* at 7.[3] Despite the lack of any direct involvement in commerce, the Supreme Court ruled that the Commerce Clause gave Congress the power to forbid this activity. The Secretary relies heavily on *Raich* in making the government's case. *See* Dkt. 91 at 3, 18-20. Yet the case fails to justify the individual mandate.

Raich interprets Congress's Commerce power expansively in three ways: by allowing Congress broad authority to regulate "economic activity"; by permitting regulation of noneconomic activity as part of a broader regulatory scheme aimed at interstate commercial activity; and, by applying a "rational basis" test. But none of these three features of *Raich* provides support for the argument that the Commerce Clause authorizes congressional regulation of an individual's decision not to engage in commercial activity.

a. The individual mandate does not regulate "economic activity."

The *Raich* Court reaffirmed that Congress has the power to regulate "economic activity." It adopted a broad definition of "economics," which "refers to 'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Expansive as this definition may be, an individual's mere status of being uninsured does not qualify. Choosing not to purchase health insurance involves neither production, nor distribution, nor consumption of a single commodity. Indeed, an individual who chooses not to purchase insurance has chosen *not* to consume or distribute the commodity in question. Obviously, he or she is also not "producing" any commodity by refusing to purchase insurance. By contrast, the *Raich* defendants *were* engaged in "economic activity" since they were both producing *and* consuming marijuana. *Id.* at 7, 25-26.

[3] Some of the marijuana was also provided to them by "caregivers" who grew and delivered it free of charge. *Id.*

The individual mandate also does not qualify as economic activity under the relevant Fourth Circuit precedent binding on this court. For example, *Gibbs v. Babbit,* 214 F.3d 483 (4th Cir. 2000), a case relied on by the Secretary, ruled that the "taking" of red wolves qualifies as an economic activity because "[t]he protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." *Gibbs,* 214 F.3d at 492. In other words, the taking of wolves was part of the farmers' and ranchers' ongoing commercial enterprises. *Cf.* § I.A.2, *infra* (discussing how the growing of wheat for home consumption qualified as economic activity in *Wickard v. Filburn*, 317 U.S. 111 (1942), because it was part of a commercial enterprise). By contrast, the status of not having health insurance is not an element of a broader commercial enterprise. And unlike the taking of wolves, which requires aggressive positive action, being uninsured is not really an activity at all.

b. The individual mandate cannot be upheld as a regulation of noneconomic activity necessary to implement a broader regulatory scheme.

Like *United States v. Lopez* and *United States v. Morrison* before it, *Raich* indicates that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37; *see also Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. But as all three cases indicate, the Commerce Clause power applies only to the regulation of "noneconomic *activity.*" *Id.* This power does not cover regulation of inactivity or the refusal to engage in economic transactions. Angel Raich and Diane Monsen had not been inactive or merely refused to engage in some transaction. To the contrary, they were actively involved in the production and consumption of homegrown medical marijuana.

If *Raich* were interpreted so broadly as to permit regulation of mere inactivity, Congress would have the power to compel any citizen to help enforce its regulatory schemes. It could

force individuals to purchase General Motors cars in order to assist the struggling auto industry, or purchase financial products from banks that received federal bailout funds. By the same token, Congress could require individuals to purchase products from any industry with political clout. Similarly, Congress could require individuals to purchase memberships in exercise clubs in order to increase their physical fitness, which in turn would increase their economic productivity and stimulate interstate commerce. *See* John H. Kerr & Marjolein C. H. Vos, *Employee Fitness Programmes, Absenteeism, and General Well-Being*, 7 WORK & STRESS 179 (1993) (providing evidence that employee physical fitness reduces absenteeism and increases productivity).

In sum, there is no limit to the intrusive regulatory authority Congress could claim under the Secretary's boundless interpretation of the Commerce Clause. The federal government would have the power to force citizens to engage in any activity that might conceivably affect commerce in some way. This is precisely the kind of unconstrained power that the Court has expressly rejected. "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566.

c. *Raich's* rational basis test does not apply to this case.

Raich applied a deferential "rational basis" test to the government's claims, ruling that "[w]e need not determine whether [defendants'] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22. The Secretary now claims that the rational basis test should be applied in the present case as well. *See* Dkt. 91 at 3 & n.1.

Although *Raich* explicitly noted that the rational basis test applied to the government's regulation of Raich and Monsen's "*activities*, taken in the aggregate," *Raich*, 545 U.S. at 22 (emphasis added), the Court never indicated that the test applies in a case, such as this one,

where the government seeks to regulate inactivity, as opposed to some sort of positive action.

The Secretary appears to assume that Congress's mere assertion of Commerce Clause authority is enough to trigger application of the rational basis test. But neither *Raich* nor any previous Supreme Court precedent states any such thing. To the contrary, *Raich* applied the standard only to a regulation of "activity."

Lopez and *Morrison* did not apply the deferential rational basis test, despite the government's invocation of the Commerce Clause. In *Morrison,* the Court struck down the challenged section of the Violence Against Women Act (VAWA) despite the fact that the claim of a substantial impact on interstate commerce was "supported by numerous [congressional] findings" that would almost certainly have been more than enough to pass muster under the rational basis approach. *Morrison*, 529 U.S. at 614. Although *Morrison* did not explicitly reject the rational basis test, the majority's failure to apply the test and their explicit imposition of a considerably higher standard of scrutiny strongly suggested that, at the very least, rational basis analysis does not apply to regulations of intrastate noneconomic activity such as gun possession in a school zone (the regulated activity in *Lopez*) or sexual violence (*Morrison*).

Indeed, both *Lopez* and *Morrison* emphasized that "'simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Lopez*, 514 U.S., at 557 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 311 (1981)) (Rehnquist, J., concurring in judgment)); *see also Morrison,* 529 U.S. at 614 (quoting identical language from *Lopez*). Had the *Lopez* and *Morrison* Courts applied the rational basis test, these decisions would likely have come out the other way. In *Morrison,* Congress had compiled extensive evidence of possible effects of gender-based violence on interstate commerce. *Morrison*, 529 U.S. at 614. In *Lopez,* Justice

Stephen Breyer's dissent indicated a variety of ways in which there was a rational basis for believing that gun possession in school zones might have such effects. *Lopez,* 514 U.S. at 618-24 (Breyer, J., dissenting). As Justice Breyer pointed out, if we "ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce . . . the answer to this question must be yes." *Id.* at 618. If the rational basis test does not apply to regulation of noneconomic intrastate activity (as in *Lopez* and *Morrison*), it surely also cannot apply to attempts to reach mere inactivity.

It is important to emphasize that the test should not be applied to *any* of the Secretary's claims—not just the assertion that refusing to purchase health insurance has an effect on interstate commerce, but also the claim that it counts as "economic activity" and that the Commerce Clause gives Congress the power to regulate inactivity.[4]

2. Other Commerce Clause precedents do not support the Secretary's position.

Pre-*Raich* Supreme Court Commerce Clause precedent provides even less support than *Raich* for the Secretary's position. As the Court pointed out five years before *Raich* in *Morrison*, "in every case" where the Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor" and had a "commercial character." *Morrison*, 529 U.S. at 611 & n.4.

Wickard v. Filburn, a case repeatedly cited by the government (Dkt. 91 at 19-20), was one of the Supreme Court's broadest-ever interpretations of Congressional power under the

[4] Even if the Secretary can successfully demonstrate that refusal to purchase health insurance substantially affects interstate commerce under a less deferential standard of proof, that would fall far short of resolving the case in her favor. She would still have to show that the Commerce Clause gives Congress the power to regulate *inactivity* by forcing individuals to purchase products they do not want.

Commerce Clause. Yet its facts differed radically from those of the present case. *Wickard* upheld the application of the 1938 Agricultural Adjustment Act's restrictions on wheat production as applied to Roscoe Filburn, an Ohio farmer who produced wheat for consumption on his own farm. *Wickard*, 317 U.S. at 115, 121-27. The Court noted that restriction of home-grown, home-consumed wheat was a necessary component of Congress's scheme to "raise the market price of wheat" because in the absence of regulation, home-grown wheat could serve as a substitute for wheat sold in the market and depress demand for the latter. *Id*. at 127-29.

Unlike the instant case, *Wickard* addressed a regulation of clearly economic activity. Roscoe Filburn sold "a portion of [his wheat] crop" on the market and "fe[d] part to poultry and livestock on the farm, some of which is sold." *Id.* at 114. Filburn's wheat production was unquestionably part of a commercial enterprise that sold goods in interstate commerce.[5] As Court noted in *United States v. Lopez*, *Wickard* "involved economic activity in a way that possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560.

Until *Gonzales v. Raich*, all of the Court's other post-New Deal decisions sustaining exercises of congressional power under the Commerce Clause addressed regulations of economic activity involving the sale or production of goods or services.[6] Unlike the individual mandate at issue here, these laws clearly regulated preexisting commercial activity rather than commercial inactivity (even Filburn was not punished by the government for failing to grow wheat).

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[5] For details on Filburn and the commercial nature of his farm, see Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003), and Jim Chen, *Filburn's Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249 (1997).

[6] *See, e.g.*, *Hodel*, 452 U.S. at 276-280 (upholding regulation of commercial mining); *Perez v. United States*, 402 U.S. 146 (1971) (upholding regulation of commercial loan sharking); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (upholding regulation of price of milk); *United States v. Darby*, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act regulation of employment conditions); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act regulation of employment relations).

Nor is the individual mandate analogous to those cases upholding civil rights statutes that ban racial discrimination by motels and restaurants. *See Katzenbach v. McClung,* 379 U.S. 294 (1964) (upholding regulation of discrimination against customers of a commercial restaurant); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) (upholding federal ban on discrimination against customers of a hotel serving interstate travelers).[7] Such federal antidiscrimination laws apply only to preexisting businesses already engaged in commercial activity in the regulated industry. By contrast, uninsured individuals are, by definition, *not* participating in the insurance business. Nor does the health insurance mandate purport to regulate the insurance industry. As the Secretary freely admits, "[t]he provision applies only to individuals." Dkt. 22 at 1. Thus, the individual mandate provision is actually analogous to a statute that requires individuals to patronize a restaurant or hotel even if they had no previous intention of doing so. *See* Ilya Somin, *The Individual Health Insurance Mandate and the Constitutional Text,* ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY PRACTICE GROUPS, Vol. 11, No. 1 (March 2010), at 49.

Similarly off-base is the Secretary's claim that the health insurance mandate is analogous to cases upholding the constitutionality of the Child Support Recovery Act (CSRA), which requires parents to pay child support across state lines. *See* Dkt. 91 at 36. As the Fourth Circuit explained in its decision upholding the Act, the CSRA enforces only a preexisting economic "obligation created by state-court child support orders." *United States v. Johnson*, 114 F.3d 476, 480 (4th Cir. 1997). Indeed, the obligation in question arises primarily from the duties assumed by couples when they agree to have children. For this reason, the Fourth Circuit ruled that "such

[7] For an example of the claim that these cases justify the constitutionality of the PPACA's individual mandate, see Erwin Chemerinsky, *Health Care Reform is Constitutional,* POLITICO, Oct. 23, 2009, *available at* http://www.politico.com/news/stories/1009/28620.html

orders are 'functionally equivalent to interstate contracts,' . . . subject to regulation to 'prevent their non-fulfillment.'" *Id.* (quoting *United States v. Bongiorno*, 106 F.3d 1027, 1031-32 (1st Cir. 1997)).

No such preexisting state law economic obligation exists in the present case, much less a voluntarily accepted one. Moreover, the CSRA ultimately was upheld by lower courts because child support payments that move across state lines are "thing[s] in interstate commerce" that fall under the second category of Commerce Clause authority outlined in *United States v. Lopez*—the power to regulate "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* at 480 (citing *Lopez*, 514 U.S. at 558); *see also Bongiorno*, 106 F.3d at 1031 (same). Other federal statutes cited by the Secretary all similarly regulate preexisting economic transactions or enforce voluntarily assumed obligations.[8]

B. The Text and Original Meaning of the Commerce Clause Undercut the Secretary's Case.

The text and original meaning of the Commerce Clause also cut against the government's position. The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I § 8 cl. 3. In ordinary usage, the word "commerce" generally refers to the active exchange of goods or services, not to any and all activity that might have an effect on such exchange. *See, e.g.*, THE RANDOM HOUSE DICTIONARY 176 (1984) (defining "commerce" as "an interchange of goods"). The leading American legal dictionary similarly defines "commerce" as "[t]he exchange of goods, productions or property of any kind; the buying, selling, or exchanging of articles."

[8] *See* Dkt. 91 at 36-37 (citing statutes imposing obligations on owners of property in flood zones, interstate motor carriers, firms operating in a national marine sanctuary, surface coal mining and reclamation operators, uranium enrichment facility operators, aerospace vehicle developers, and employers of railroad workers).

BLACK'S LAW DICTIONARY 285 (8th ed. 2004).

The original meaning of the Commerce Clause is consistent with this common-sense interpretation of the text. In every instance where the word "commerce" was used at the Constitutional Convention, the ratification debates, and in the *Federalist Papers,* it was used in the narrow sense of trade or exchange. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause,* 68 U. CHI. L. REV. 101, 112-25 (2001). Even Alexander Hamilton, one of the Founders most committed to a broad interpretation of federal power, repeatedly construed the meaning of "commerce" in this narrow, limited fashion. *Id.* at 116.

Later Supreme Court decisions have gone beyond the text and original meaning and "greatly expanded the previously defined authority of Congress under th[e] Clause." *Lopez,* 514 U.S. at 556. But the Court also recognizes that the "first principles" of the Founding remain relevant to sound constitutional interpretation, and that courts must still consider the limitations on federal power "'adopted by the Framers to ensure protection of our fundamental liberties.'" Id. at 552 (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991)). Courts should follow the text and original meaning of a constitutional provision in cases where "nothing in our precedents forecloses . . . adoption of the original understanding." *Dist. of Columbia v. Heller*, 128 S.Ct. 2783, 2816 (2008).

Choosing to avoid an economic transaction is the quintessential opposite of engaging in trade or exchange. Thus, the inactivity forbidden (and punished) by the individual mandate is far from the sort of activity that Congress was empowered to regulate under the text and original meaning of the Clause. In this case, no contrary precedent exists to prevent the court from following the original understanding that Congress's Commerce Clause powers do not extend so far as to allow it to force individuals to engage in commercial transactions.

II. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE TAX CLAUSE.

The Tax Clause of the Constitution gives Congress "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." U.S. CONST. art. I, § 8, cl. 1. This Clause does not authorize the individual mandate for two reasons. First, the mandate is not a tax but a penalty intended to force compliance with a regulation. Second, even it if were a tax, it is not one of the several types of taxes authorized by the Constitution.

A. The Individual Mandate Is A Regulatory Penalty, Not A Tax.

1. The mandate fits the Supreme Court's definition of a "penalty."

Supreme Court precedent distinguishes between a tax defined as a revenue-raising measure and a monetary penalty designed to regulate behavior. Under the Court's approach, "'[a] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.'" *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906) and *United States v. New York*, 315 U.S. 510, 515 (1942)). By contrast, "a penalty . . . is an exaction imposed by statute as punishment for an unlawful act." *United States v. La Franca*, 282 U.S. 568, 572 (1931).

Of course, "if an exaction [is] clearly a penalty it cannot be converted into a tax simply by calling it such." *Id.* Simply put, the government cannot redefine a penalty as a tax through clever labeling. As the Supreme Court explains, "[n]o mere exercise of the art of lexicography can alter the essential nature of an act or a thing… if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *Id*; *see also Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (holding that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere

penalty with the characteristics of regulation and punishment"); *Dep't. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (same).

In the 1996 case of *United States v. Reorganized CF&I Fabricators of Utah*, the Supreme Court explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *Reorganized CF&I Fabricators*, 518 U.S. at 225. Although *Reorganized CF&I* was a case interpreting the federal bankruptcy statute, it relied on Tax Clause precedent in reaching its decision, and made no legal distinction between the two contexts. *See id.* at 224-25 (relying on Tax Clause precedent such as *United States v. La Franca*, 282 U.S. 568 (1931)).

Reorganized CF&I addressed a federal statute "requiring pension plan sponsors to fund potential plan liability according to a complex statutory formula . . . [and] employers who maintain a pension plan to pay the Government 10 percent of any accumulated funding deficiency." *Id.* The court noted that "[i]f the employer fails to correct the deficiency . . . , the employer is obligated to pay an additional 'tax' of 100 percent of the accumulated funding deficiency." *Id.*. Despite the fact that the government described this framework as a "tax," the Court ruled that it was in fact a penalty because it constituted a "punishment for an unlawful omission." *Id.* at 224. The omission in question was the employer's failure to adequately fund its pension plan, and the "penalty" was a fine equal to 100% of the accumulated deficiency. *Id.* (interpreting 26 U.S.C. §§ 4971(a-b), 4982).

The individual mandate is very similar in structure to the statute addressed by the Court in *Reorganized CF&I.* Like the latter, Section 1501 of the PPACA creates a "punishment for an unlawful act or omission." *Id.* at 225. The text of the Act itself defines the fine imposed on those who fail to obey the individual mandate "a penalty with respect to the individual" who fails

to obey the requirement that he or she purchase health insurance. *See* PPACA § 1501(b).

2. This court need not inquire into Congress's "hidden motives" in order to conclude that the mandate is a penalty.

As the Secretary notes, "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937). Courts should "not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution." *Id.* at 514. In this case, however, there is no need for any "collateral" research or "inquiry into hidden motives." The penal nature of the statute is evident from its face, since it is unambiguously described as a "penalty" in the statutory text itself.

Far from hiding their purposes, the supporters of the PPACA repeatedly and publicly emphasized that the statute was not a tax, but only a regulatory measure designed to compel individuals to purchase health insurance. For example, President Barack Obama stated publicly in September 2009 that "for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase." *See* Somin, *Individual Health Insurance Mandate*, *supra* at 50; *see also* Dkt. 89 at 18-20 (citing related statements by others). In fact, it was only after Congress enacted the PPACA and several States challenged the individual mandate that the government adopted the position that the individual mandate is a tax. *See* Dkt. 89 at 18-20.

Even if the Commonwealth is precluded from relying on evidence of "hidden motives" to prove that the individual mandate is not a tax, *Sonzinsky*, 300 U.S. at 513-14, "this principle cuts both ways": the Supreme Court has never allowed the government to cite "hidden motives" after the fact to prove that what the statute unambiguously describes as a penalty is actually a tax after all. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance*

Mandate is Unconstitutional, NYU J.L. & LIBERTY (forthcoming), at 24, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680392.

3. The mandate is not a tax merely because it might raise some revenue for the federal government.

The Secretary contends that the individual mandate should be considered a tax merely because it may end up raising some revenue for the federal government. Dkt. 91 at 41-42. If adopted by the courts, this position would negate all restraints on Congress's taxing power and completely eliminate the longstanding distinction between a tax and a regulatory penalty. Any penalty enforced by a fine is likely to raise at least some revenue, so long as even one violator is forced to pay the fine.

Under this approach, Congress would have the power to use monetary penalties to compel citizens to engage in whatever activities it might desire. For example, it could use the threat of fines to force citizens to purchase General Motors cars in order to assist the auto industry. It could use also use fines to force individuals to exercise every day in order to increase their overall health and economic productivity. The greater the fine and the resulting degree of compulsion, the greater the potential revenue that might be generated. In this way, the more coercive and punitive Congress's penal fines become, the more likely they are to qualify as "taxes" under the Secretary's interpretation of the Tax Clause.

As with the Secretary's effort to advance a comparably unlimited construction of the Commerce Clause (see *supra*, § I.A.), such reasoning would give Congress a virtually unlimited police power. But the Supreme Court has "*always* . . . rejected readings of the Commerce Clause and the scope of Federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618 (emphasis in original).

None of the precedents cited by the Secretary compels any such result. For example, she

repeatedly cites *United States v. Kahriger*, 345 U.S. 22 (1953), *rev'd in part on other grounds*, *Marchetti v. United States*, 390 U.S. 39 (1968). *See, e.g.*, Dkt. 91 at 40-41. Nowhere does *Kahriger* conclude or even suggest that the mere fact that a penalty might generate revenue automatically makes it a tax. To the contrary, it reiterates the principle that "[p]enalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid." *Id.* at 31. It is true that the Court recognized that "a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed." *Id.* at 28. But the validity of the tax in question turned not only on the fact that it generated revenue but that it was an "excise tax" that applied to a particular type of commercial transaction—gambling wagers. *Id.* at 23. Excise taxes are specifically authorized as an independent category of congressional taxing authority in the Constitution. *See* U.S. CONST. art. I, § 8, cl. 1. By contrast, there is no preexisting commercial activity for the government to tax in the present case.

Similarly, *Sonzinsky v. United States* reaffirmed the rule that courts must strike down a "statute [that] contains regulatory provisions related to a purported tax in such a way . . . that the latter is a penalty resorted to as a means of enforcing the regulations." *Sonzinsky*, 300 U.S. at 514. *Sonzinsky* also ruled that the courts must uphold a statute that "[o]n its face . . . is only a taxing measure" without considering Congress's "hidden motives." *Id.* at 513-14. In the present case, however, the statute "on its face" is a penalty and the penal motive is anything but hidden.

4. Congress may use non-tax financial penalties to enforce its other enumerated powers, but not to regulate activities that it cannot otherwise reach.

Congress may use financial penalties that do not qualify as taxes in order to enforce its other enumerated powers, such as those provided by the Commerce Clause. "Congress may impose penalties in aid of the exercise of any of its enumerated powers." *Sunshine Anthracite*

Coal Co. v. Adkins, 310 U.S. 381, 393 (1940); *see also United States v. Butler*, 297 U.S. 1, 61 (1936) (finding that a penalty is "constitutional when . . . there is a power of legislative regulation."). But it may not use such penalties to regulate behavior that it cannot otherwise reach under its own powers. If it could, Congress would enjoy essentially unlimited authority. It could then use the threat of monetary penalties to compel individuals to do virtually anything. *See supra* § II.A.3.

As this court recognized in its memorandum opinion denying the Secretary's motion for dismissal, "the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause—it must be in aid of an enumerated power." Dkt. 84 at 27.

B. Even If It Is A Tax, The Individual Mandate Is Not A Tax Authorized By The Constitution.

The Constitution gives Congress the power to enact several types of taxes. Excise taxes, duties, and imposts are authorized by the Tax Clause. *See* U.S. CONST. art. I, § 8, cl. 1. Income taxes are authorized by the Sixteenth Amendment. *See* U.S. CONST. amend. XVI. In addition, all direct taxes must be apportioned among the states in proportion to population. *See* U.S. CONST. art. I, §§, 2, 9.

The Secretary does not even attempt to argue that the individual mandate is a duty or an impost. If it is to be constitutional, therefore, the individual mandate must be either an excise tax, an income tax, or a direct tax apportioned among the states. But it does not satisfy the definition of any of these.

1. The mandate is not an income tax.

The Supreme Court has stated that it is "essential to distinguish between what is and what is not 'income,' as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form." *Eisner v. Macomber*, 252 U.S. 189,

206 (1920). In *Comm'r of Internal Revenue v. Glenshaw Glass Co.*, the leading case interpreting the definition of "income" under the Sixteenth Amendment, the Court defined income as encompassing "accessions to wealth, clearly realized and over which the taxpayers have complete dominion." *Comm'r of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). *Glenshaw Glass* refined and expanded the definition of income adopted in *Eisner v. Macomber*, where the Court ruled that "[i]ncome may be defined as the gain derived from capital, from labor, or from both combined." *Macomber*, 252 U.S. at 207.

The individual mandate does not qualify as an income tax because it does not target any "gain" or "accession to wealth" realized by individuals from their labor, property, or indeed any other source. It "does not appear to tax income [because it] refers to no gains, receipts, accruals, or accessions to wealth, other than to an arguably unimportant algebraic function of income for some taxpayers." Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 187 (2010).

It is true that the mandate exempts individuals with income below the federal poverty line, and reduces the size of the penalty imposed on other lower-income taxpayers. *See* PPACA § 1501, §§ 5000(A)(d-e). But the mere fact that there are income-based exemptions does not suggest that the tax targets income as such. Otherwise, the government could convert virtually any regulatory penalty into an income tax simply by exempting low-income citizens (or for that matter high-income ones). *See* Willis & Chung, *Constitutional Decapitation*, *supra* at 190-93 (discussing this point in detail).

2. The mandate is not an excise tax.

If the mandate is not an income tax, it is even more clearly not an excise tax. Excise taxes "apply to activities, transactions, or the use of property. They do not apply to nothing—that

is, they do not apply directly to individuals for being individuals or on land or chattel merely because it is on land and or chattel or because the owner owns it." *Id.* at 182. This is the definition adopted by standard reference works in both law and finance. *See id.* (citing various examples). Similarly, the Supreme Court has defined an indirect tax (of which excise taxes are a subset) as a "tax laid upon the *happening of an event*, as distinguished from its tangible fruits." *Tyler v. United States*, 281 U.S. 497, 502 (1930).

The penalty established by the individual mandate is not triggered by any activity, transaction, or event. Rather, it is imposed merely on the basis of one's status as not having health insurance, which does not involve any kind of economic transaction or use of property.

3. If the mandate is neither an income nor an excise tax, it is either an unconstitutional direct tax, or no tax at all.

If the individual mandate does not qualify as an income tax, excise tax, duty or impost, it must, by process of elimination, be a direct tax—assuming that it is a tax at all. Direct taxes, however, must be apportioned among the states in proportion to their population. *See* U.S. CONST. art. I, § 9; *see also* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839 (2009).

The individual mandate undeniably fails this requirement, as it includes no provision for apportionment. If the mandate qualifies as a tax, it is therefore an unconstitutional direct tax. *See* Willis & Chung, *Constitutional Decapitation*, *supra* at 193-94.

III. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE.

The Necessary and Proper Clause gives Congress the authority to "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." U.S. CONST. art. I, § 8, cl. 18. The Supreme Court has described the Clause as "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). If the individual mandate cannot be upheld under the Commerce Clause or the Tax Clause, the Necessary and Proper Clause also becomes the Secretary's last, best hope in this case.

The Secretary contends that the individual mandate is permissible under the Necessary and Proper Clause because it is needed to effectuate the PPACA's regulations forcing insurance companies to accept customers with preexisting health conditions, which in turn is an exercise of Congress's authority under the Commerce Clause. In its *amicus* brief opposing the Secretary's motion for dismissal, WLF has already provided a detailed argument against the claim that the Necessary and Proper Clause authorizes the individual mandate. *See* Dkt. 72. *Amici* incorporate those legal arguments by reference here.

Here, we emphasize two critical points: that the individual mandate runs afoul of the standards for Necessary and Proper Clause claims established by the Supreme Court in its recent decision in *United States v. Comstock*, 130 S.Ct. 1949 (2010), and that it fails the requirement that any exercise of federal power under the Clause be "proper" as well as "necessary."

A. The Scope Of The Necessary And Proper Clause.

The Necessary and Proper Clause is not a free-standing grant of power. Instead, it gives Congress only the authority to enact legislation that "carr[ies] into Execution" other powers granted to the federal government by the Constitution. U.S. CONST. art. I, § 8, cl. 18. The Supreme Court recently reiterated this principle, emphasizing that "every . . . statute" authorized by the Necessary and Proper Clause "must itself be legitimately predicated on an enumerated power." *Comstock*, 130 S. Ct. at 1964; *see also Kinsella v. Singleton*, 361 U.S. 234, 247-48

(1960) (noting that the Necessary and Proper Clause "by itself, creates no constitutional power").

But even if a statute does help execute an enumerated power, it still may not be authorized by the Necessary and Proper Clause. In its famous ruling in *M'Culloch v. Maryland*, the Supreme Court outlined several constraints on Congress's power under the Necessary and Proper Clause:

> 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.

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

This passage outlines four constraints on the range of statutes authorized by the Necessary and Proper Clause: (1) the "end" pursued must be "legitimate" and "within the scope of the constitution"; (2) the means must be "appropriate" and "plainly adapted to that end"; (3) the means must "not [be] prohibited" elsewhere in the Constitution; and, finally (4) the means must be "consist[ent] with the letter and spirit of the Constitution." A statute that is "improper" in nature can be rejected as inconsistent "with the letter and spirit of the Constitution" or because it is "inappropriate."

B. The Individual Mandate Fails The Five-Part Test Adopted By The Supreme Court In *United States v. Comstock*.

In *United States v. Comstock*, the Supreme Court held that Section 4248 of the Adam Walsh Act was valid under the Necessary and Proper Clause. *See Comstock*, 130 S.Ct. at 1956-67. That provision gave federal prison officials the power to detain "sexually dangerous" federal prisoners after the completion of their sentences. *See* 42 U.S.C. § 4248. The Court cited five factors justifying its decision to uphold Section 4248: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for

the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965.

A majority of these criteria weigh against the individual mandate: the lack of a deep history of federal involvement, the failure of the PPACA to accommodate state interests, and the statute's extraordinarily broad scope. A fourth factor (the possible lack of "sound reasons" for the statute's enactment) is potentially ambiguous. The fifth—"the breadth of the Necessary and Proper Clause"—is a constant that does not vary from case to case. *See* Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 CATO SUP. CT. REV. 239, 260-67 (assessing implications of *Comstock* for the present case).

1. No deep history exists of the federal government's compelling individuals to purchase insurance products against their will.

As this court emphasized in its opinion denying the Secretary's motion for dismissal, the "congressional enactment under review . . . literally forges new ground." Dkt. 84 at 18. There is no history of comparable federal regulation. Although the federal government has adopted numerous previous statutes regulating health care, it has never compelled ordinary citizens to purchase health insurance or other health care products. It has never forced citizens to purchase products of any kind merely as a consequence of their status as residents of the United States. *See* Dkt 89 at 10-12. Nor have the courts ever previously sustained such a statute.

Comstock relied on a 155 year history of federal involvement in the relevant field. *See Comstock*, 130 S. Ct. at 1958-59 (tracing the relevant history of federal involvement back to 1855). There is no similarly extensive history of previous federal regulation remotely comparable to the individual mandate. Indeed, the Supreme Court denied Congress the power to regulate insurance policies (for health care or otherwise) until it overruled longstanding

precedents forbidding such regulation in 1944. *See United States v. S.E. Underwriters*, 322 U.S. 533 (1944). Until the last few decades, there was very little federal regulation of health care of any kind. "Federal involvement in health is a fairly new occurrence in U.S. history." JENNIE JACOBS KRONENFELD, THE CHANGING FEDERAL ROLE IN U.S. HEALTH CARE POLICY 67 (1997).

2. The individual mandate does not accommodate state interests.

Section 4248 accommodated state interests by giving states the option of confining the "sexually dangerous" former prisoners themselves. *Comstock*, 130 S. Ct. at 1962-63. Indeed, it even let states assume custody of the former prisoners and then release them. *Id.* at 1963. The federal government could only confine a "sexually dangerous" former federal inmate if the state government consented to it. The state can, if it wishes, assume custody of the inmate in question and immediately set him free. *Id.*

In stark contrast, the PPACA's individual mandate applies throughout the country, even in the many areas where democratically elected state governments oppose it and would prefer a different system of health insurance regulation. Moreover, states are not given any right to avoid the mandate or exempt any of their citizens from it. Significantly, twenty-one states have now filed suit[9] to challenge the constitutionality of the mandate, a strong indication that many state governments believe the PPACA runs counter to their interests. Far from "requir[ing] *accommodation* of state interests," the individual mandate runs roughshod over them. *Comstock*, 130 S.Ct. at 1962 (emphasis in the original).

3. The individual mandate is extremely broad in scope.

Comstock upheld Section 4248 in large part because of its "narrow scope." *Id.* at 1965.

[9] These include the Commonwealth of Virginia, the plaintiff in the present case, and twenty states who are among the plaintiffs in a parallel case filed in the U.S. District Court for the Northern District of Florida. *See Florida v. Dep't. of Health & Human Serv.*, No. 3:10-cv-0091-RV-EMT (N.D. Fla. 2010).

It emphasized the fact that the statute "has been applied to only a small fraction of federal prisoners." *Id.* at 1964. In marked contrast, the individual mandate is extraordinarily broad. It forces millions of people to purchase insurance products against their will. As the text of PPACA itself indicates, "[t]he requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market." PPACA § 1501(a)(2)(C).

The individual mandate clearly fails at least three prongs of the five-part test laid out in *Comstock*. The other two do little to strengthen it. Whether Congress enjoyed "sound reasons" for enacting the mandate is at the very least debatable. Many economists believe that it is possible to provide coverage for preexisting conditions without resorting to compulsion on the massive scale undertaken by the PPACA. *See, e.g.,* John H. Cochrane, *What to Do About Preexisting Conditions*, WALL ST. J., Aug. 14, 2009. At the very least, the "sound reasons" underlying the mandate are not nearly as clear as those supporting Section 4248 in *Comstock*.

The final consideration outlined in *Comstock* is the "breadth of the Necessary and Proper Clause." *Comstock*, 130 S.Ct. at 1965. This factor, however, is present in every case. It cannot by itself justify upholding a statute. If it could, the other four considerations would be superfluous.

In sum, a majority of the factors outlined in the five-part *Comstock* test weigh heavily against the mandate. A fourth is ambiguous at best. And the final factor never varies from case to case, and therefore cannot be the basis for upholding legislation on its own.

B. The Individual Mandate Is Not "Proper."

In order to be a valid exercise of congressional power under the Necessary and Proper Clause, a statute must be "proper" as well as "necessary." The Supreme Court has provided very little guidance on the definition of "proper." But evidence from the Founding era suggests that a

proper statute must, at the very least, not depend on a constitutional rationale that gives Congress virtually unlimited power to legislate in areas traditionally reserved to the states.[10] As James Madison explained in *Federalist No.* 39, the Constitution does not give the federal government "an indefinite supremacy over all persons and things." THE FEDERALIST NO. 39.

The Secretary's interpretation of the Clause threatens to do just that. Remarkably, she contends that any "provision that is rationally related to the exercise of an enumerated power must be sustained [under the Necessary and Proper Clause] unless it violates an independent constitutional prohibition." Dkt. 91 at 30. But virtually any imaginable regulatory measure is "rationally related" to some enumerated power in some way. For example, a federal statute requiring citizens to exercise every day might be rationally related to Congress's power to raise and support armies. *See* U.S. CONST. Art. I, § 8, cl. 12. Citizens who exercise regularly might make more effective draftees. Similarly, a statute requiring individuals to wake up early might increase their economic productivity by ensuring that they get to work earlier, and would thereby be "rationally related" to Congress's power to regulate interstate commerce.

The Secretary claims that such a sweeping interpretation of the Necessary and Proper Clause was adopted by the Court in *Comstock*. *See* Dkt. 91 at 28 (quoting *Comstock*, 130 S.Ct. at 1956-57). *Comstock* did indeed indicate that "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we

[10] *See* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 215-20 (2003) (discussing the relevant evidence); Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) (arguing that the evidence shows that "proper" means that laws "must be consistent with principles of separation of powers, principles of federalism, and individual rights"); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 921 (2008) (citing evidence that the original meaning of the Constitution precludes any reading of the Necessary and Proper Clause that has "the effect of completely obliterating the people's retained right to local self government").

look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S.Ct. at 1956-57. But the fact that courts must "look to" the presence or absence of a "rational relationship" does not mean that this is the only relevant consideration. The Court also indicated that assertions of federal power under the Necessary and Proper Clause are subject to the five-factor test described above. If a rational relationship were sufficient in and of itself, Congress would have "a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the court grant Plaintiff's motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send a notification of such filing (NEF) to the following persons who are registered users of this Court's CM/ECF system:

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