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.	)	**No. 3:10-cv-00188-HEH**
KATHLEEN SEBELIUS Secretary of the Department of Health and Human Services, in her official capacity,	)	
Defendant.	)	

BRIEF AMICUS CURIAE OF LANDMARK LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Table of Contents……2
Table of Authorities……2

Argument……7

I. OVERVIEW……7

II. THE PPACA'S INDIVIDUAL INSURANCE MANDATE IS AN UNPRECEDENTED AND UNCONSTITUTIONAL POLICE POWER IMPERMISSIBLE UNDER EITHER THE COMMERCE CLAUSE OR THE NECESSARY AND PROPER CLAUSE……8

A. The Individual Mandate Violates Constitutional Limitations On Congressional Power To Regulate Interstate Commerce……..8

B. The Supreme Court's Commerce Clause And Necessary And Proper Clause Jurisprudence Does Not Support The Proposition That Congress May Compel Private Individuals To Engage In Commerce……10

1. The Decision To Forego Insurance Constitutes Inactivity Beyond The Reach Of The Commerce Clause……...11

2. The Individual Mandate Cannot Survive Commerce Clause Scrutiny……..13

3. The Individual Mandate Empowers The Executive Branch With Limitless Authority Not Enumerated In The Constitution……14

4. The Individual Mandate Does Not Satisfy The Necessary And Proper Clause……14

a. The Necessary And Proper Clause Is Restrained……15

b. *United States v. Comstock* Reaffirms Limits On Necessary And Proper Clause……..16

c. The Individual Mandate Fails *Comstock's* Five Part Test……...17

III. SECTION 5000A OF THE PPACA ESTABLISHES AN UNCONSTITUTIONAL TAX……..19

A. The Federal Government Cannot Justify The Penalty Provision As A Permissible Excise Tax……20

B. The Federal Government Cannot Justify The Penalty Provision As A Permissible Income Tax……..23

C. Article I, § 9 Cl. 4 Prohibits The Issuance Of Capitation Or Direct Taxes Unless Apportioned Among The States……25

D. The Penalty Provision Constitutes An Impermissible Direct Tax Because The Federal Government Has Failed To Apportion It Among The States……26

IV. Conclusion……27

TABLE OF AUTHORITIES

Page:

Cases:

Brennan v. Titusville, 153 U.S. 289 1894)……..10

Bromley v. McCaughn, 280 U.S. 124 (1929)……21, 22

Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955)……24

Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203 (1990)……24

Eisner v. Macomber, 252 U.S. 189 (1920)……..23, 24

Gonzales v. Raich, 545 U.S. 1 (2005)…….*passim*

McCullough v. Maryland, 4 Wheat. 316 (1819)…….*passim*

Murphy v. I.R.S., 493 F.3d 170 (D.C. Cir. 2007)……...…22

New York v. U.S., 505 U.S. 144 (1992)……..…15

Nurad Inc. v. William E. Hooper, 966 F.2d 837 (4th Cir. 1992)……12

Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895)……...…25, 26

Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895)……...25, 26

Printz v. U.S., 521 U.S. 898 (1997)……...….15

Railroad Co. v. Fuller, 84 U.S. (17 Wall.) 568 (1873)……...…10

Steward Machine Co. v. Davis, 301 U.S. 548 (1937)……...21, 23

Stratton's Independence, Ltd. v. Howbert, 231 U.S. 3999 (1913)……...…21

Thomas v. U.S., 193 U.S. 363 (1904)……...…...23

United States. v. Comstock, 560 U.S. ___ (2010), 2010 LEXIS 3879)……..*passim*

United States v. Darby, 312 U.S. 100 (1941)……14

United States v. Gould, 568 F.3d 459 (4th Cir. 2009)……12

United States v. Johnson, 114 F.3d 476 (4th Cir. 1997)……..……12

United States v. Lopez, 514 U.S. 549 (1995)……*passim*

United States v. Morrison, 529 U.S. 598 (2000)……..passim

United States v. Sage, 92 F.3d 101 (2nd Cir. 1996)…….……..…12

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942)……..……8

Wickard v. Filburn, 317 U.S. 111 (1942)……*passim*

Constitution:

U.S. Const. art. I, § 8 Commerce Clause……..…*passim*

U.S. Const. art. I, § 8 Necessary and Proper Clause……*passim*

U.S. Const. art. I, § 9 Apportionment Clause……..*passim*

U.S. Const. Amend. XVI……..*passim*

Statutes:

26 U.S.C. 5000A……*passim*

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Section 5000A…..…*passim*

Legislative Materials:

Joint Comm. On Taxation, 111th Cong., *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 1020," as amended, in Combination with the "Patient Protection and Affordable Care Act"* 31 (Mar. 21, 2010, Errata published May 4, 2010)……...20

Miscellaneous:

Black's Law Dictionary (5th Ed. 1984)……..…9

Michael Barone, *Gangster Government Stifles Criticism of Obamacare,* The Washington Examiner, Sep. 12, 2010……..17

Matthew Sturdevant, *A Battle On Rates is Brewing; Insurers Cite Need to Cover New Benefits; The Price of Reform,* Hartford Courant, Sep. 19, 2010……17

Robert H. Bork and Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce,* 25 Harv. J.L. & Publ. Pol'y 849 (2002)……9

Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare*, 2010 TNT 133-6, July 13, 2010……..21, 26

ARGUMENT

I. OVERVIEW

Amicus Curiae Landmark Legal Foundation ("Amicus Curiae" or "Landmark") respectfully submits this brief in support of Plaintiff Commonwealth of Virginia's Motion for Summary Judgment.[1] Landmark urges the Court to accept this brief, which presents a unique and valuable perspective not found in the Parties' briefs.

For reasons set forth below, the Court should award summary judgment in favor of the Commonwealth. The federal government's memorandum in support of its motion for summary judgment eviscerates 230 years of constitutional understanding and Supreme Court Commerce Clause jurisprudence. The Executive Branch also misapprehends the Necessary and Proper Clause and improperly asserts authority to issue the Patient Protection and Affordable Care Act ("PPACA") under the General Welfare Clause.

The PPACA's individual mandate provision and penalty provision are evidence of congressional power run amok.[2] The mandate compels the individual citizen to take affirmative action for simply living and breathing. The penalty provision penalizes an individual who has taken no voluntary action nor realized any benefit or economic gain.

Congress can tax interstate commerce, it can regulate interstate commerce, it can even prohibit certain types of interstate commerce, but it cannot compel an individual to enter into a legally binding private contract against the individual's will and interests. There is nothing in the history of this nation, let alone the history of the Constitution and the Commerce Clause in particular, that endorses such a radical departure from precedent, law, and logic.

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[1] This amicus curiae brief is filed upon motion for leave to file. Plaintiff consents to Movant's participation. Defendant takes no position on Movant's motion for leave to file amicus brief.

[2] The federal government attempts to justify the PPACA's penalty provision as a permissible tax. As elaborated in Section III, *infra*, this provision fails qualification as any constitutionally permissible form of taxation.

Moreover, arguing in the alternative, the federal government urges this Court to embrace a congressional effort to bootstrap, through the Necessary and Proper Clause, an impermissible national police power under the guise of a "comprehensive regulatory program." As demonstrated below, the Necessary and Proper Clause rests on the fact that the power must be reasonably related to the implementation of a constitutionally enumerated power. *See Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942). The federal government cannot use the Necessary and Proper Clause as justification when Congress never had the authority to regulate the issue in the first instance.

Finally, even assuming that the penalty provision constitutes a "tax," the PPACA's penalty provision runs afoul of constitutional limitations on Congress's power to levy taxes, which, contrary to the Executive Branch's argument, cannot be justified under the General Welfare Clause. As demonstrated in this brief, the federal government ignored important constitutional restrictions on taxation. These restrictions prevent Congress from levying the type of penalty contemplated in the PPACA.

II. THE PPACA'S INDIVIDUAL INSURANCE MANDATE IS AN UNPRECEDENTED AND UNCONSTITUTIONAL POLICE POWER IMPERMISSIBLE UNDER EITHER THE COMMERCE CLAUSE OR THE NECESSARY AND PROPER CLAUSE.

A. The Individual Mandate Violates Constitutional Limitations On Congressional Power To Regulate Interstate Commerce.

Article I, Section 8 of the Constitution provides that "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8. At the time, the Constitution and its Commerce Clause were drafted and ratified, "'commerce' consisted of selling, buying, and bartering, as well as

transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J. concurring.) Not only was the customary meaning of "commerce" well understood, the Framers' usage of the term is well documented. And, as Robert H. Bork and Daniel E. Troy concluded very clearly from a comprehensive review of the relevant historical record, "'commerce' does not seem to have been used during the founding era to refer to those acts that *precede the act of trade*. Interstate commerce seems to refer to interstate trade – that is, commerce is 'intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities between the . . . citizens of different States." Robert H. Bork and Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce,* 25 Harv. J.L. & Publ. Pol'y 849, 864 (2002) (internal citations omitted; emphasis added in part).

Of course, each of these concepts constitutes *interactions* consisting of *activity* freely engaged in by individuals in the marketplace. Moreover, these interactions must *follow* the act of trade rather than *precede* trade as the federal government argues in this case.

Modern definitions for commerce are no less dependent on active marketplace intercourse. For example, Black's Law Dictionary defines "commerce" as "[t]he exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles; Intercourse by way of trade and traffic between different peoples or states and the citizens or habitants thereof, including not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on and transportation of persons as well as of goods by land and sea." Black's Law Dictionary (5th Ed. 1984) (citing *Brennan v. Titusville*, 153 U.S. 289 (1894)); *Railroad Co. v. Fuller*, 84 U.S. (17 Wall.) 568 (1873)). Webster's II New Riverside Dictionary likewise

defines commerce as "the buying and selling of goods: business." (Houghton Mifflin Company, 1996).

Each of these definitions still convey what in the Framers' day – and in the modern day -- was well understood: commerce requires marketplace *activity* and does not extend to marketplace *inactivity*. The individual mandate urged by the government takes market place inactivity one step further into absurdity in that it seeks to *compel* an individual to engage in a private, legally binding activity against his will and interests. The federal government's definition of "commerce" is preposterous.

B. The Supreme Court's Commerce Clause and Necessary And Proper Clause Jurisprudence Does Not Support The Proposition That Congress May Compel Private Individuals To Engage In Commerce.

The federal government declares that the Supreme Court's decision in *Gonzales v. Raich* grants Congress broad authority, allowing it to "regulate activities that substantially affect interstate commerce." Memorandum In Support Of Defendant's Motion For Summary Judgment, Doc. # 91, p. 18 (citing *Raich*, 545 U.S. at 16-17). However, where there is literally no commerce, there is nothing to regulate. Moreover, by applying the Supreme Court's "substantial effects on commerce" test in boilerplate fashion to the wrong "activities," the federal government simply dismisses the Supreme Court's recent limitation on the Commerce Clause in *United States v. Lopez* and *United States v. Morrison* as not bearing on Virginia's complaint because the underlying legislation in each of those cases did not regulate "economic activity." Memorandum In Support Of Defendant's Motion For Summary Judgment, Doc. #91, p. 20-21. The irony of this position is lost on the federal government, which now asks this Court to re-write the Commerce Clause to define the individual mandate as commerce when, in fact, there is

no commerce but for the government unconstitutionally compelling individuals to enter into private, legally-binding contracts against their will.

In any event, the federal government's analysis ignores the Supreme Court's admonition that "[i]n assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation." *Raich,* 545 U.S. at 15. "Recitation without explanation is misleading and incomplete." *Id.* at 34 (Scalia, J. concurring).

1. The Decision To Forego Insurance Constitutes Inactivity Beyond The Reach Of The Commerce Clause.

The federal government's conception of health care is not one where millions of citizens each exercise their constitutional right to make separate and rational decisions on how to manage their own particular health and welfare. *See,* Memorandum In Support Of Defendant's Motion For Summary Judgment, Doc. # 91, p. 33 (where the federal government states, "Health insurance is not an independent consumer product, but a means of managing the risks inherent in a market for health care services in which all inevitably participate."). This is not Plato's *Republic*, Thomas More's *Utopia*, Thomas Hobbes's *Leviathan*, or Karl Marx's *Worker's Paradise*. It is a constitutional republic where individuals are free to decide for themselves whether to participate in commerce or not.

The individual who foregoes purchasing health insurance has made a decision *not* to engage in commerce. Congressional power to regulate commerce does not extend to an individual making a personal choice to refrain from commerce. The federal government disingenuously relies on several cases as standing for the principle that a "failure to act" alone can be subjected to regulation under the Commerce Clause. Memorandum In Support Of Defendant's Motion For Summary Judgment, Doc. # 91, p. 36. In these cases, the individual was mandated to take an action as a result of an external obligation. For example, in *United States v.*

Sage, 92 F.3d 101 (2d Cir. 1996), and *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1997), the individual was under a court-ordered obligation to make child support payments. There, the Child Support Recovery Act addressed "an obligation to make payments in interstate commerce" as one that substantially affected interstate commerce and could thus be subject to regulation. *Sage*, 92 F.3d at 107.

The federal government also mistakenly relies on *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009), a case involving a challenge to the Sex Offender Registration and Notification Act ("SORNA"). Memorandum In Support Of Defendant's Motion For Summary Judgment, Doc. # 91, p. 36. There, the Fourth Circuit noted that, to satisfy the SORNA's "commerce component," an offender "must have been convicted of a qualifying sex offense and, after conviction, traveled to another State *and* failed to register or maintain his registration." *United States of America v. Gould*, 568 F.3d 459, 471 (4th Cir. 2009). To pass muster under the Commerce Clause, "[t]here must be a conviction that gives rise to the registration requirement, subsequent interstate travel, and a failure to register." *Gould*, 568 F.3d at 471. Contrary to the federal government's assertions, the Commerce Clause requires *more* than simply a "failure to act" or "failure to register."

The federal government's reliance on *Nurad Inc. v. William E. Hooper*, 996 F.2d 837 (4th Cir. 1992), is also misplaced. This case involved a property owner who sought reimbursement from prior owners of funds the owner spent removing hazardous storage tanks and their contents. *Nurad Inc. v. William E. Hooper*, 966 F.2d 837 (4th Cir. 1992). Nowhere in *Hooper* is interstate commerce discussed or relevant to the Fourth Circuit's decision. The decision did not involve the compelled purchase of insurance coverage for a potential future act or expense, and it is not about regulating interstate commerce.

These cases in no way advance the federal government's position that the Commerce Clause permits regulation over "inactivity." In each of these cases, there are external considerations at play, none of which are present here, that permit regulation over the given behavior.

2. The Individual Mandate Cannot Survive Commerce Clause Scrutiny.

The Commerce Clause analysis urged by the federal government in this case is whether an individual's decision not to purchase health insurance substantially affects interstate commerce. *See Raich*, 545 U.S. at 16 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)). But, in *Raich* and *Wickard*, individuals actually produced or possessed a tangible product for which there was a market, legal or illegal. In the instant matter, the individual is not creating a product or producing a service. In fact, he is not doing anything at all. In *Wickard,* the farmer grew wheat, which he withheld from interstate commerce. The Court rationalized in *Wickard*, and later in *Raich,* that withholding wheat from interstate commerce disrupted the federal price scheme and thus was subject to regulation. *See Raich*, 545 U.S. at 19. The current matter has nothing to do with *Wickard* or *Raich*. It is the insurance company that creates the product or service, much like the farmer who grows wheat. No one disputes that insurance companies are subject to reasonable regulation. But the individual who is the target of the federal government's mandate is not providing any service or good. The federal government's argument confuses the individual for an insurance company in a manner that renders the decisions in *Raich* and *Wickard* entirely inapposite.

3. The Individual Mandate Empowers The Executive Branch With Limitless Authority Not Enumerated In The Constitution.

The questions that necessarily must be posed to the Court in light of the federal government's position are legion. If the Commerce Clause empowers Congress to compel a private citizen to purchase health insurance from a private entity, what are the limits, if any, to such a congressional power? Can the federal government compel an individual to purchase certain fruits and vegetables that are said to be healthy in order to limit the federal treasury's exposure to health-care related costs? Having so thoroughly contorted the Commerce Clause, the federal government must provide some explanation to the contours of this new authority it claims.

4. The Individual Mandate Does Not Satisfy The Necessary And Proper Clause.

Apart from these unanswered questions, the analysis must next turn to the federal government's misapplication of the Necessary and Proper Clause. *Raich,* 545 U.S. at 36 (Scalia, J. concurring.) ("As we implicitly acknowledged in *Lopez*, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directly against economic activities that have a substantial effect on interstate commerce.") The relevant question for analyzing the individual mandate under the Necessary and Proper Clause is whether the mandate is "'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Id.* at 37 (citing *United States v. Darby*, 312 U.S. 100, 118-19 (1941)). What constitutes a "reasonably adapted" means – and the potential for congressional mischief in asserting federal power under the Necessary and Proper Clause – has been a recurring concern since the Framing.

In his defense of the Necessary and Proper (and Supremacy) Clause found in Federalist No. 33, Alexander Hamilton explained the Framers' repugnance for the kind of federal power grab embodied in the PPACA:

> These two clauses have been the sources of much virulent invective, and petulant declamation, against the proposed constitution. They have been held up to the people in all the exaggerated colours of misrepresentation; as the pernicious engines by which their local governments were to be destroyed, and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane, and yet, strange as it may appear, after all this clamour, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constitution a federal government, and vesting it with certain specific powers. This is so clear a proposition that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity.

Id. at 172. Today the federal government argues for exactly the kind of power Hamilton mockingly insisted was never granted under the Necessary and Proper Clause.

a. The Necessary And Proper Clause Is Restrained.

Throughout its history, the Supreme Court has made clear that there are restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCullough v. Maryland*, even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. Moreover, these means may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." These phrases are not merely hortatory. For example, cases such as *Printz v. United States,* 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), affirm that a law is not "'proper for carrying into Execution the Commerce Clause'" "[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz, supra,* at 923-924; *see also New York*, *supra*, at 166; *Raich,* 545 U.S. at 39 (Scalia, J. concurring.).

Thus, the question for this Court is whether it is appropriate and plainly adapted to an enumerated federal power for the federal government to require an individual to purchase a good or service from another individual or private entity *for any purpose* regardless of whether or not that purpose is necessary for carrying into execution a broad federal government program. It is clear that Congress had myriad constitutional ways to legislate a health care regime that would have achieved its intended purposes. The individual mandate was not one of them. Rather than damage permanently our constitutional construct by unleashing both intended and unintended consequences that fundamentally alter the nature of our system of government, Congress must be required to consider legislative alternatives that do no violence to the Constitution, yet still advance its policy and political objectives.

b. *United States v. Comstock* Reaffirms Limits On Necessary And Proper Clause.

The federal government points to the Supreme Court's recent Necessary and Proper Clause examination in *United States v. Comstock*, 560 U.S. __, 2010 LEXIS 3789 (2010), as justification for its actions. It cites *Comstock*'s declaration that "'[i]f it can be seen that the means adopted are *really calculated to attain the end*, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.'" Memorandum In Support Of Defendant's Motion For Summary Judgment, Doc. # 91, p. 29 (emphasis added).

What the federal government cannot utterly fails to account for in its statement of undisputed material facts, is that many healthy individuals who currently have "overwhelmingly strong incentives to forego insurance coverage" will still have overwhelmingly strong incentives

to forego insurance coverage and simply pay the government's fine under the PPACA.[3] Insurance costs will still "skyrocket, and the larger system of reforms will fail." Clearly, the mandatory coverage requirement is not really or even reasonably calculated to accomplish the federal government's claimed purpose.

The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. *See Comstock,* 2010 LEXIS 3879 at * 45 (Kennedy, J. concurring). The case for this program was built on cost analyses that changed nearly daily, much of it driven by politics, and the various federal agencies and offices involved in crunching numbers often issuing conflicting predictions. The federal government's memorandum does not (and cannot) provide an empirical demonstration to support its sweeping generalizations about who will be required to buy insurance or, in the alternative, pay a fine. Indeed, the federal government's program continues to incentivize individuals not to buy insurance, undermining the supposed premise of the program, *i.e.*, effectively addressing the issue of uncompensated health care. The federal government fails to overcome the significant constitutional obstacles before it, and certainly should not be awarded summary judgment without some reliable evidence to support its position.

c. The Individual Mandate Fails *Comstock*'s Five Part Test

While *Comstock* establishes a five-part test for evaluating the Necessary and Proper Clause question in that case, the Supreme Court still looks to *McCullough v. Maryland*, 4 Wheat. 316 (1819), to define the scope of the Necessary and Proper Clause: "Let the end be legitimate,

[3] News reports indicate that health insurance premiums have already increased in anticipation of the increased cost of compliance. This is coupled with Secretary of Health and Human Service Kathleen Sebelius's questionable efforts to silence health insurance companies who attribute this increase to the PPACA. Matthew Sturdevant, *A Battle On Rates is Brewing; Insurers Cite Need to Cover New Benefits; The Price of Reform,* Hartford Courant, Sep. 19, 2010, at A1; Michael Barone, *Gangster Government Stifles Criticism of Obamacare,* The Washington Examiner, Sep. 12, 2010, at 12.

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 consistent with the letter and spirit of the constitution, are constitutional. *Comstock*, 2010 LEXIS 3879, at *15 (quoting *McCullough,* 4 Wheat. at 421).

Applying the "means-ends" rational relationship principle developed by the Supreme Court's Necessary and Proper Clause cases, the *Comstock* Court used a five-part test to evaluate a federal civil commitment statute, which the Supreme Court upheld. However, when applied to the PPACA's mandatory insurance purchase provision, the federal government fails the *Comstock* test.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. While Amicus Curiae rejects strongly the propriety of federalizing the health care system, that issue is not before this Court. Second, the *Comstock* civil commitment statute constituted a "modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id*. at *20. Of course, in this case the government is proposing to exercise a radically new police power, one the Constitution does not grant. Third, "Congress reasonably extended its longstanding civil commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody . . . ." *Id.* at *28. Again, here the Congress creates an unprecedented, entirely new coercive power. Fourth, the statute properly accounts for state interests. *Id.* at *31. Not so here. In fact, an unprecedented number of states are challenging the constitutionality of the statute in defense of its citizens. Fifth, the links between the civil commitment statute and "an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope." *Id.* at *34-35. Here the link

between the mandatory individual insurance provision, which creates a sweeping unprecedented power, and any enumerated power is non-existent.

The PPACA fails the Necessary and Proper Clause tests set forth both in *McCullough v. Maryland* and *Comstock.* As Justice Kennedy explained in his *Comstock* concurrence, when the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links, but the strength of the chain. *Id.* at *42. In this case, the link is illusory and violates the Constitution. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at *45 (citing *Lopez*).

III. SECTION 5000A OF THE PPACA ESTABLISHES AN UNCONSTITUTIONAL TAX.

With its Commerce Clause argument having collapsed, the federal government hopes to convince the Court that a penalty is a "tax." The federal government asserts that it has the power to lay a tax on the individual for *not* taking any action. Its tax argument relies solely on its authority under the General Welfare Clause. It makes no effort to attempt to analyze and/or justify Section 5000A of the PPACA ("Penalty Provision") within the Constitutional constraints set forth in Article I, § 9, cl. 4 (prohibition on the issuance of capitation or direct taxes unless apportioned among the states) or the Sixteenth Amendment (income tax). The federal government also makes no attempt to justify this provision as a permissible excise tax (Article I, § 8). As demonstrated below, the Penalty Provision fails qualification as any constitutionally permissible form of taxation.

The Penalty Provision specifies a per–adult annual penalty for individuals who fail to maintain minimal essential coverage. This penalty is equal to the greater of a flat dollar amount or a percentage of income. Specifically, the flat dollar amounts phase in beginning in 2014 with

a penalty of $95, $325 for 2015, and $695 for 2016 and succeeding years. PPACA, 26 U.S.C. § 5000A(c)(3)(A). The percentage of income penalty phases in as follows: 1 percent for 2014, 2 percent for 2015, and 2.5 percent for 2016 and succeeding years. PPACA, 26 U.S.C. § 5000A(c)(2)(B)(i)-(iii).

Since this Penalty Provision exceeds congressional power under the Commerce Clause, the federal government seeks to justify this provision as proper under congressional authority to lay and collect taxes. Briefly summarized, the federal government argues Congress may use its "extensive" authority under the Constitution's General Welfare Clause to lay a "tax" upon individuals who purchase no product, realize no gain on investment, or receive no income from their labors. Memorandum In Support Of Defendant's Motion For Summary Judgment, Doc. # 91, p. 40.

Amicus Curiae in no way concedes that the Penalty Provision constitutes a "tax," as that term is used in the Constitution. Assuming *arguendo*, however, this premise, a careful analysis of congressional power to lay and collect taxes under the Constitution and relevant case law provides no support for Section 5000A. The federal government's arguments that this provision constitutes a permissible exercise of Congress's taxation authority fail under all established precedents and should be rejected by the Court.

A. The Federal Government Cannot Justify The Penalty Provision As A Permissible Excise Tax.

Any attempt to characterize or justify the Penalty Provision as an excise tax fails.[4] Excise taxes require some sort of action or activity on the part of the individual to be assessed.

[4] The Joint Committee on Taxation ("JCT") labels the Penalty Provision an "Excise Tax on Individuals." *See* Joint Comm. On Taxation, 111th Cong., *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in Combination with the "Patient Protection and Affordable Care Act"* 31, Errata For JCX-18-10, 2 (Mar. 21, 2010, Errata published May 4, 2010). As demonstrated in this brief, simply labeling the Provision an excise is not enough to pass constitutional muster.

Professor Steven J. Willis and Mr. Nakku Chung cogently describe an excise tax in the following manner, "[an excise tax] involves something an obligor chose to do: purchase a product or service, use a product or service, transfer property, or conduct commercial activity." Steven J. Willis and Nakku Chung, "*Constitutional Decapitation and Healthcare*,"128 Tax Notes 169, 133-6 (July 13, 2010).

Traditionally, excise taxes flow from the funds or income derived from a particular business activity. The Supreme Court, in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), upheld, as a valid excise tax, employers' Social Security contributions based partly on the rationale that "employment is a business relation, if not itself a business." *Id.* at 581 Accordingly, a tax on the proceeds from the sale of a mining property is considered an excise because the income derived flowed from the operation of a specific business. "The very process of mining is, in a sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction in indubitably 'business' . . . ." *Stratton's Independence, Ltd. v. Howbert*, 231 U.S. 399, 415 (1913).

There are instances where courts have gone beyond the business activity threshold and considered additional transactions as justifiably subject to excise taxes. However, in these instances, the excise always originated when the individual or entity engaged in some sort of action or activity. This common theme of action or activity thus proves vital to determining whether a tax is a valid excise.

For example, in *Bromley v. McCaughn,* the Supreme Court concluded that a tax levied upon the maker of a gift constituted a viable excise tax. The Court concluded that where an individual *exercised* a power to give property to another, he or she could be subject to excise taxes. "[The Supreme Court] has consistently held, almost from the foundation of the

government, that a tax imposed upon a *particular use* of property or the *exercise of a single power* over property incident to ownership [can justifiably be categorized as an excise]." *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929). Similarly, in *Murphy v. I.R.S.*, an en banc panel of the D.C. Circuit held that a tax on an individual's award of compensatory damages was a valid excise tax on the basis that the award was incident to the exercise of a particular right. *Murphy v. I.R.S.*, 493 F.3d 170 (D.C. Cir. 2007).

In *Murphy*, the court considered whether the tax on compensatory damages for mental pain and suffering was "more akin, on the one hand, to a capitation or a tax upon one's ownership of property, or, on the other hand, more like a tax upon a use of property, a privilege, an activity or a transaction." *Murphy*, 493 F.3d at 184. Concluding the tax applied only after the individual engaged in a transaction, which occurred in this case at the time she received a compensatory award, the Court considered whether the tax could be justified as an excise. Noting the individual didn't receive her damages "pursuant to a business activity," the Court looked to whether the individual exercised a power "incident to ownership." *Id.* at 185. The individual was "taxed only after she received a compensatory award which makes the tax seem to be laid on a transaction." *Id.* at 184. The taxation of proceeds received from an award of compensatory damages could be favorably compared to a situation where the individual *exercised* a statutory right or a privilege. This exercise of a right or privilege was crucial to the Court's ultimate conclusion that the gift tax passed constitutional muster.

Further reinforcing the principle that action or activity is a necessary component to an excise, the Supreme Court has stated, "[excise taxes] were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and the sale of certain commodities, privileges, particular business transactions, vocations, occupations and the

like." *Steward Machine Co.*, 301 U.S. at 581 (*quoting Thomas v. United States*, 192 U.S. 363, 370 (1904)).

The Penalty Provision does not fall within this framework. Section 5000A imposes a penalty upon the individual who elects not to purchase health insurance. The common thread and rationale in this precedent is that, in all of these cases, an individual engaged in some sort of affirmative action. Excise taxes are permissible when the individual sells a business, purchases a product, exercises a power over property or exercises a given right. A tax cannot be properly qualified as an excise when it involves the absence of action.

Simply labeling the Penalty Provision an excise tax does not suffice and efforts to characterize it as a valid excise must be rejected.

B. The Federal Government Cannot Justify The Penalty Provision As A Permissible Income Tax.

The Sixteenth Amendment authorizes taxation upon income without apportionment: "The Congress has the power to lay and collect taxes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. This conferral vests Congress with broad authority to determine what constitutes "income." However, this power is not absolute. In order to be qualified as "income," an individual or entity must realize a gain.

Instructive in any analysis and application of the Sixteenth Amendment is the seminal case *Eisner v. Macomber*, 252 U.S. 189 (1920), where the Supreme Court, when considering the constitutionality of an income tax on stock dividends, stated, "it becomes 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." *Id.* at 206. The Court continued, "Congress cannot by any definition it may adopt conclude the matter, since it cannot

by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." *Eisner*, 252 U.S. at 206. The Sixteenth Amendment did not "extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income." *Eisner,* 252 U.S. at 206.

The Amendment's language specifies that, to be subject to its mandates, the tax must originate from: (1) a "source" and (2) it must be "derived." *Id.* The Penalty Provision taxes no income or gain. In fact, there is no *source* of income and income is not *derived*. Consider the language of Chief Justice Earl Warren when he described income as "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.* 348 U.S. 426, 431 (1955). In this case, the Supreme Court concluded that, to be considered income and hence subject to taxation under the Sixteenth Amendment, there must be some sort of realization event. The income had to be "clearly realized." *Id.*

Similarly, in *Commissioner v. Indianapolis Power & Light Co.*, the Supreme Court determined that a loan did not constitute income. "The economic benefit of a loan, however, consists entirely of the opportunity to earn income on the use of the money prior to the time the loan must be repaid. And in that context our system is content to tax these earnings as they are realized." *Commissioner v. Indianapolis Power & Light Co.*, 493 U.S. 203, 208 (1990). The Court continued: "We recognize [Indianapolis Power & Light] derives an economic benefit from these deposits. But a taxpayer does not realize taxable income from every event that improves his economic condition." *Indianapolis Power & Light Co.*, 493 U.S. at 214.

Under Section 5000A, the federal government argues that a tax will be incurred for electing *not* to purchase health insurance. For income tax purposes, there is no realization event

and there is no derived income. The individual has not taken any affirmative action to realize any gain. His or her economic situation may improve as a result of electing not to purchase health insurance, but there is no realization event and hence no quantifiable income.

C. Article I, § 9 Cl. 4 Prohibits The Issuance Of Capitation Or Direct Taxes Unless Apportioned Among The States.

Article I, § 9 Cl. 4 of the Constitution prohibits the levying of capitation or direct taxes unless apportioned among the states, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. Const. art. I, § 9 Cl. 4. The Apportionment Clause was codified as an impediment to congressional attempts to establish income taxes by statute and not constitutional amendment. The Supreme Court relied on this limitation on direct taxation when it invalidated an income tax on real estate and taxes on the income of personal property. *See Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895).

In a subsequent decision, *Pollock v. Farmers' Loan and Trust Co. II*, the Supreme Court recognized the power of Congress to lay taxes *apportioned* among the states, holding that: "The power to lay direct taxes apportioned among the several states in proportion to their representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden." *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601, 618 (1895). The Court then discussed the constitutional prohibition upon direct taxes – absent apportionment: "The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration." *Pollock*, 158 U.S. at 621.

It is universally recognized that the *Pollock* decisions help spur the issuance and passage of the Sixteenth Amendment. *See* Steven J. Willis and Nakku Chung, supra, at 133-6. After the Sixteenth Amendment's ratification, direct taxes, levied without apportionment, were constitutionally permissible; however, income had to originate from a source and had to be derived.

Consider the recent case of *Murphy v. I.R.S.*, 493 F.3d 170 (D.C. Cir. 2007). An en banc panel of the D.C. Circuit refused to adopt the federal government's arguments that "only 'taxes that are capable of apportionment in the first instance, specifically, capitation taxes and taxes on land,' are direct taxes." *Id.* at 182. In short, the government argued that Article I, § 9 Cl. 4 has been supplanted by the Sixteenth Amendment. The Court concluded otherwise when it stated, "[N]either need we adopt the Government's position that direct taxes are only those capable of satisfying the constraint of apportionment. In the abstract, such a constraint is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states." *Murphy*, 493 F.3d at 184. As stated earlier in this brief, the Court looked to whether the tax at issue was more "akin" to a direct tax or "more like a tax upon a use of property, a privilege, an activity, or a transaction." *Murphy*, 493 F.3d at 184. The Court concluded the tax at issue (a tax on compensatory damages for mental pain and suffering) qualified as a justifiable *excise tax*. It didn't determine whether this tax would have passed muster as justifiable *direct tax*. However, by relying on the principles espoused in *Pollock*, the Court indicated the constitutional constraints imposed by Article I, § 9 Cl. 4 continue to be valid.

D. The Penalty Provision Constitutes An Impermissible Direct Tax Because The Federal Government Has Failed To Apportion It Among The States.

The Penalty Provision does not pass muster as either an excise tax or an income tax. The only remaining possibility is a successful justification of the provision as a direct tax. However,

there has been no effort to apportion the Penalty Provision among the states. It therefore fails this constitutional mandate. The fact remains that if Congress wanted to impose a tax, it would have done so – as it has myriad times throughout history. It chose not to, yet the Executive Branch argues the contrary.

If the Court were to justify the Penalty Provision by determining it constitutes a valid tax, the federal government's taxation power would be without limits. In essence, the government is taxing an individual who has taken no action. He has not purchased a good or service. He has not realized an economic gain. He has not received anything. He has not produced anything. The federal government's lawyers seek refuge in the General Welfare Clause, but the constitutional constraints of Article I, § 9 Cl. 4, the Sixteenth Amendment, and existing case law expose them. See Mem. In Support of Def's Mot. For Summary Judgment, Doc. 91 p. 40. As demonstrated above, the Penalty Provision fails to qualify as constitutional tax under these provisions, and the federal government's efforts to justify the Penalty Provision as a permissible tax should be rejected.

CONCLUSION

The provisions of the PPACA discussed at length in this brief represent an enormous and unprecedented attempt to expand federal power over American citizens. If these provisions are upheld as constitutional, the federal government's authority to regulate citizen activity (or inactivity) under the Commerce Clause and it authority to levy taxes under the General Welfare Clause will be limitless. The hypotheticals boggle the mind.

Landmark respectfully requests the Court declare the PPACA unconstitutional, deny the federal government's motion for summary judgment, and award summary judgment in favor of the Commonwealth.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2010, I electronically filed the foregoing Amicus Curiae Landmark Legal Foundation's Brief In Support of Plaintiff Commonwealth of Virginia's Motion For Summary Judgment with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to:

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