Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II v. Sebelius Doc. 149 Att. 1

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.	)

MEMORANDUM OF *AMICI CURIAE*, FORMER UNITED STATES ATTORNEYS GENERAL WILLIAM BARR, EDWIN MEESE, AND DICK THORNBURGH, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Pursuant to this Court's order, former United States Attorneys General William Barr, Edwin Meese, and Dick Thornburgh hereby submit this memorandum as *amici curiae* in support of the Commonwealth of Virginia's Motion for Summary Judgment.

ARGUMENT

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . . To regulate Commerce with foreign Nations, and among the several States . . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

U.S. CONST., art. I, § 8, cl. 18.

Notwithstanding the vast expanse of federal regulation today pursuant to the above provisions, and the breadth of judicial precedent upholding such regulation, the individual insurance mandate contained in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 143 (2010) ("Act"), stands alone. As an assertion of federal power, it is without foundation in the text of these clauses and without precedent, legislative or judicial.

Specifically, the government cannot show that the individual mandate is "necessary" (under any view of that word's scope) for "carrying into Execution" any regulation of interstate commerce; and, even if it could, the individual mandate is not a "proper" means to any such end. Likewise, the government's attempt to save the individual mandate by recharacterizing that regulation as an exercise of the Taxing power is inconsistent with both common understandings of a "tax" and judicial precedent. More broadly, as *amici* show, the government's novel arguments in support of such extreme regulation would reduce these clauses to mere drafting rules and eliminate any hope of retaining a federal government of enumerated powers.

I. A LAW THAT DOES NOT DIRECTLY REGULATE INTERSTATE COMMERCE MUST BE "NECESSARY AND PROPER FOR CARRYING INTO EXECUTION" THE REGULATION OF INTERSTATE COMMERCE.

The government's difficulty in justifying the individual mandate is telling given the

multiple and broad grounds that the Supreme Court has allowed to the government since the 1930s for regulating pursuant to the Commerce Clause and the Necessary and Proper Clause. During the "new era" that began then, the Court has allowed Congress's power to extend to three broad types of regulation. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

First, Congress may invoke the Commerce Clause directly to regulate the use of the channels of interstate commerce, even if the intent of the regulation is to affect purely intrastate conduct. *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 114-16 (1941). Second, Congress also may rely on the Commerce Clause to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *United States v. Lopez*, 514 U.S. 549, 558 (1995). Third, under the Necessary and Proper Clause, Congress may regulate an expansive range of intrastate activities where doing so is "necessary and proper for carrying into Execution" its power to regulate interstate commerce. *Raich*, 545 U.S. at 22; *see id.* at 39 (Scalia, J., concurring in the judgment).

In this third category, the Court has effectively allowed Congress two (somewhat overlapping) ways of regulating intrastate activities. *First*, Congress may regulate intrastate activities if they are within a class of activities that, in the aggregate, "substantially affect interstate commerce." *Lopez*, 514 U.S. at 559.[1] The Court's rationale in such cases has been that, "'[w]here the *class of activities* is regulated and that *class* is within the reach of federal

[1] As Justice Scalia explained in *Raich*, the only coherent basis for this authority is the Necessary and Proper Clause, because, "unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as th[e] Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72 (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." 545 U.S. at 34. The majority opinion did not dispute Justice Scalia's doctrinal explanation. *See id.* at 22.

power, the courts have no power to excise, as trivial, individual instances of the class.'" *Raich*, 545 U.S. at 23 (2005) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971) (emphasis in *Perez*)); *see also Darby*, 312 U.S. at 121 ("A familiar . . . exercise of power [under the Necessary and Proper Clause] is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."). For example, the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), applied this principle to allow a federal restriction on the amount of wheat a farmer could grow, even though the wheat was never placed in interstate commerce. Congress had sought to support the price of wheat in interstate commerce, and could not accomplish that regulation if it did not also regulate the production of wheat for personal consumption (thereby prompting farmers to purchase wheat). Likewise, in *Perez*, the Court upheld the application of a federal ban on "[e]xtortionate credit transactions" even where the specific transaction in question had not occurred in interstate commerce. 402 U.S. at 154-55.

This broad power nonetheless remains "subject to outer limits"—most notably that the "activities" in question must be "economic." *Lopez*, 514 U.S. at 556-57. Thus, the Court in *Lopez* struck down a law banning possession of a gun near a school because such possession was in no sense an "economic" activity. *Id*. at 559-61. The Court in *United States v. Morrison*, 529 U.S. 598 (2000), again rejected the government's attempt to regulate non-economic activity based on its "substantial effect." In so holding, the Court disavowed the dissent's efforts to "downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis" and noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity [based on its substantial effects] only where that activity is economic in nature." *Id.* at 610, 613.

Second, Congress may regulate even a "non-economic" intrastate activity if it can show that it is a necessary and proper "means" of implementing a valid regulation of commerce. That is, Congress may reach non-economic intrastate activity if doing so is "an essential part of a larger regulation of economic activity, in which *the regulatory scheme could be undercut* unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561 (emphasis added); *see Raich*, 545 U.S. at 36-38 (Scalia, J., concurring in the judgment) (explaining applicability of Necessary and Proper Clause apart from the "substantial effects" test). Correspondingly, this rule does not allow the regulation of purely intrastate conduct that is *not* necessary to implement a valid scheme regulating interstate commerce. If such regulations were allowed, it would be "difficult to perceive any limitation on federal power." *Lopez*, 514 U.S. at 564. This result is untenable, the Court added, because the government's power under the Commerce and Necessary and Proper Clauses "'must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). That is, if the federal government is to remain one of enumerated powers, there must be *some* outer limit to its ability to reach intrastate conduct in the guise of carrying out the commerce power, and the Court will not accept a law purportedly based on that power that can be justified only by a rationale that lacks any logical limit.

The rule that Congress may only reach non-economic intrastate activity if it implements interstate commerce regulation is required by the plain language of the Necessary and Proper Clause and the Court's long-standing interpretation of that language. That Clause by its terms authorizes only those measures that are "necessary and proper" to "carr[y] into Execution" an enumerated power. U.S. CONST., art. I, § 8. That is, Congress may rely on the Necessary and

Proper Clause to implement, enforce, or otherwise accomplish its regulation of interstate commerce. To determine whether Congress has done so, Chief Justice Marshall's canonical formulation amplifies and expounds the clause's text:

> 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.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

Where the "legitimate end" is to regulate interstate commerce, the Court has restated Marshall's formulation as allowing Congress to regulate "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them *appropriate* means to *the attainment of a legitimate end*." *Darby*, 312 U.S. at 118-19 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421) (emphases added); *see id.* at 121 (noting that "legislation has often been sustained" when the means chosen were "deemed appropriate aids *to the accomplishment of some . . . admitted power* of the national government.") (emphasis added); *United States v. Comstock*, 130 S. Ct. 1949, 1962 (2010) (noting "the Constitution's insistence that a federal statute represent a rational means for *implementing* a constitutional grant of legislative authority") (emphasis added).

In short, under this precedent, Congress may regulate an "activity," even if it is intrastate, if it is within a "class of activities" that substantially affect interstate commerce or if it is necessary to accomplish the regulation of interstate commerce.

II. BECAUSE THE INDIVIDUAL MANDATE IS NOT A DIRECT REGULATION OF COMMERCE, IT MUST BE BOTH "NECESSARY AND PROPER FOR CARRYING INTO EXECUTION" A REGULATION OF INTERSTATE COMMERCE, BUT IT IS NEITHER.

As shown above, the Supreme Court has for over seventy years granted the federal government a wide field of action in the regulation of interstate commerce. That the individual

mandate does not readily fall into any region of that broad map of precedent is telling, and conclusive if there is to be any limit to federal power.

The government does not seriously try to justify the individual mandate as one of the two types of direct regulation of interstate commerce discussed above (channels; or instrumentalities, persons, or things in interstate commerce). Nor could it, because no amount of wordplay can convert the *failure* to engage in commerce into commerce, much less interstate commerce. The decision *not* to buy insurance is *not* a transaction in insurance, health care, or any other commerce. Put differently, there is no argument that the government could impose the individual mandate in a vacuum. Thus, the government is left with trying to justify the mandate as "necessary and proper for carrying into Execution" the power to regulate interstate commerce—that is, in this context, necessary and proper to carry into execution *other* portions of the Act. U.S. CONST., art. I, § 8, cl. 18. It cannot do that, either under the special "substantial effects" test or on a more straightforward application of the text of the Clause.

A. The Individual Mandate Cannot Be Justified Based On the "Substantial Effects" Test Because It Does Not Regulate "Activity," Much Less "Economic Activity."

Attempting to define the individual mandate as part of a class of activities "within the reach of federal power," *Raich*, 545 U.S. at 23, the government tries to reframe the *failure* to buy insurance to pay for health care as part of a broader class of "decisions" regarding how to pay for healthcare. Mem. Supp. Def.'s Mot. Summ. J. 31-39 ("U.S. Mem."). It contends that virtually everyone will eventually require healthcare, so not purchasing it is a "decision about how to finance health care consumption during a particular time period." *Id.* at 34. The aggregate of millions of such decisions creates a "substantial effect" on interstate commerce that the government supposedly may regulate. This argument defies both precedent and logic.

First, the failure to buy insurance is not part of an economic "class of activities [that] is

within the reach of federal power." Rather, it is *in*activity that is *beyond* the federal power. *Raich*, 545 U.S. at 23 (internal quotation marks omitted). The Commonwealth here is not asking the Court to "excise, as trivial, individual [intrastate] instances of [a] class" of activity within Congress's commerce power. *Id.* (internal quotation marks omitted); *see also United States v. Malloy*, 568 F.3d 166, 180 (4th Cir. 2009) (upholding the ban on child pornography as applied to pornography produced for personal use as part of "an economic class of activities that have a substantial effect on interstate commerce") (internal quotation marks omitted). Since the failure to buy health insurance is not *any* form of economic activity, it cannot be part of any "class of activit[y]" within Congress's Commerce power. The Supreme Court has emphasized that, "thus far in our Nation's history [it has] upheld Commerce Clause regulation of intrastate activity [under the substantial effects test] only where that activity is economic in nature." *Morrison*, 529 U.S. at 613. All the more does that outer limit apply when, as here, there is no activity at all, much less economic activity.

Second, the government's attempt to redefine regulation of "activities" as including regulation of any "decisions" defies logic and knows no bounds. Congress has the authority to regulate *transactions* in health care and insurance if and when such transactions occur. And if Congress were to regulate such transactions, it could likely do so without excising the intrastate components of the exchange. *Raich*, 545 U.S. at 23. But the individual mandate cannot be justified simply by pointing to the aggregate effects of the *absence* of economic activity. Such an approach would be inconsistent with the Court's refusal to aggregate non-economic activity in *Morrison*. 529 U.S. at 613. More broadly, there is no limit to a theory by which the government may regulate *inaction* because it predicts that at some future, undefined date, the regulated party may act. That is as true of myriad other activities as it is of purchasing health insurance (or

health care). If those who fail to buy insurance, or a car, or a house, do enter interstate commerce at some point in the future, the government may regulate their commercial transactions then. But the government's say-so in predicting future economic activity never has been thought to transform the decision not to act into an activity, nor could it without doing violence to language and to the Constitution's system of enumerated powers.

B. More Generally, The Individual Mandate Is Neither "Necessary" Nor "Proper" for Carrying into Execution any Regulation of Interstate Commerce.

The government's remaining attempt to invoke the Necessary and Proper Clause is based on the claim that the individual mandate is "necessary and proper to the valid exercise of Congress's Commerce Clause power" because, in the absence of the mandate, the Act's prohibition on *insurers*' discriminating based on pre-existing conditions would create "strong incentives" for *individuals* "to forego insurance coverage, knowing that they could obtain coverage later if and when they become ill." U.S. Mem. at 25-30. Having validly exercised its Commerce authority to regulate the interstate market in health insurance, the government argues, Congress may impose the individual mandate as a "necessary and proper" means of counteracting the downstream effects of that regulation. *See id*. at 18-30.

The actual words of the Necessary and Proper Clause, and the Supreme Court precedent applying those words, make clear that the government's argument fails for two independent reasons. First, the law is in no coherent sense "necessary" for "carrying into Execution" Congress's underlying regulation of interstate commerce in health insurance, but instead depends on a distortion of that Clause that would leave Congress with unlimited power. Second, even if the individual mandate did carry into execution the parts of the Act that regulate interstate commerce, the unprecedented individual mandate—in compelling individuals to enter into private commercial transactions—is not a "proper" means for doing so.

1. The individual mandate is not "necessary" to "carry[ ] into Execution" Congress's regulation of commerce here, but instead rests on the limitless principle of *counteracting* the effects of executing such regulation.

Where a regulation does serve to *implement* a regulation of commerce, the courts must grant Congress substantial deference under the Necessary and Proper Clause. *See Comstock*, 130 S. Ct. at 1956 ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the *implementation* of a constitutionally enumerated power.") (emphasis added); *Darby*, 312 U.S. at 121 ("Congress, having . . . exclude[ed] from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, . . . may choose the means reasonably adapted *to the attainment* of the permitted end . . . .") (emphasis added). But this truism in no way suggests that the Necessary and Proper Clause authorizes Congress to regulate *non-commercial* activity (and even *inactivity*) as a purported means of *counteracting* the *downstream effects* of that regulation, rather than actually implementing that regulation.

In regulating those effects, Congress is in no way implementing, enforcing, or executing its regulation of interstate commerce. On the contrary, it is taking the implementation of commercial regulation as a given, and pointing to the *consequences* of those regulations as a pretext for reaching any persons who might feel those consequences. The basis of its argument assumes implementation. The government in such case is thus not adopting a "means" to "attain[ ]" the "permitted end" of regulating interstate commerce—for Congress has already accomplished that end (and now seeks to regulate non-commerce as a counter-weight). *Darby*, 312 U.S. at 121. As Justice Kennedy put it in *Comstock*, the usual question in assessing whether a law is a "necessary" means to a legitimate end is "the strength of the chain" between means

and end. 130 S. Ct. at 1966 (Kennedy, J., concurring in the judgment). But here there is *no* chain connecting the individual mandate to *regulation* of commerce.

Such regulation therefore stands in stark contrast to the forms of regulation deemed necessary and proper in the past. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256-58 (1964) (upholding prohibition of racial discrimination in local public accommodations as means of eliminating effects of discrimination in interstate travel); *Darby*, 312 U.S. at 121 (upholding minimum wage and maximum hours requirements a means of implementing "the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards"). The Court's decision in *Comstock* illustrates this distinction. The Court reasoned that the post-sentence detention of prisoners with dangerous mental illnesses was a necessary means of implementing a federal prison system, which was in turn a necessary means of enforcing federal criminal laws based on Congress's enumerated powers. 130 S. Ct. at 1958. Therefore, the issue for the majority was "simply whether the means chosen are *reasonably adapted* to the attainment of a legitimate end." *Id.* at 1957 (internal quotation marks omitted) (emphasis added). The majority concluded that the civil detention scheme satisfied this deferential standard of review given the longstanding precedent for federal civil detention, the sound reasons for the statute, the statute's accommodation of state interests, and its narrow scope. *Id.* at 1965. At the same time, the Court reaffirmed that the Constitution "insist[s] that a federal statute represent a rational means for *implementing* a constitutional grant of legislative authority." *Id.* at 1962 (emphasis added).

Chief Justice Marshall himself recognized this truism in the wake of *McCulloch*. In a pseudonymous letter defending his opinion, he argued:

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, *or any means whatever*, to be employed in

> collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or "conducive to" the end. The passage of such an act would be an attempt on the part of Congress, "under the pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted to the government."

John Marshall, "A Friend to the Union" Essays, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphasis added).

In this case, the government's justification for the individual mandate has nothing to do with its being an appropriate means, or any means whatever, of ensuring the implementation or avoiding the under-cutting of any other provisions of the Act. The government does not argue, for example, that the mandate on *individuals* is necessary to ensure that *insurance companies* comply with the pre-existing conditions provisions. Nor does it point to any other provision of the Act that is "carr[ied] into Execution" by the individual mandate. On the contrary, the government's rationale for the individual mandate assumes compliance by the insurance companies, because it is that compliance that creates the individual incentives that the government, in turn, wishes to counteract with another regulation. In some sense, then, the government's justification for the individual mandate is the *opposite* of the usual, and required, justification for a law as "necessary" to a legitimate, enumerated end.

Thus, the government's "end," toward which the individual mandate is a "means," is not at all the regulation of interstate commerce. To be sure, the Necessary and Proper Clause allows an extended chain of causation, and broad deference on "means," to accomplish the end of regulating commerce. But where the end is not "legitimate" as "within the scope of the Constitution," one does not even reach the question of whether it is "plainly adapted to" the end that the government offers. *McCulloch*, 17 U.S. (4 Wheat.) at 421. Where, as here, Congress's *end* is not within its enumerated authorities, the Necessary and Proper Clause can never justify

the means, no matter how closely they are related to that illegitimate end. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) ("Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed.") (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 421).

The above analysis is merely a straightforward application of text, history, and precedent under the Necessary and Proper Clause. But were there any doubt, it would be confirmed by the consequences of the government's position in destroying any notion of the federal government's being one of limited, enumerated powers. If one does not apply the Necessary and Proper Clause according to its meaning, the government could claim virtually any power simply by citing one of the myriad federal laws that—*by being carried out*—affects the economy, and then claiming that it wishes to force individuals to participate in a certain fashion in the economy to adjust for the consequences of those laws. Thus, the government could force every American to purchase a car (or a General Motors car) on the rationale that pervasive regulation of the auto industry has altered incentives regarding transportation decisions (or that it will ameliorate the taxpayer burden caused by the GM bailout). Or the government could force every American with sufficient assets to take out a mortgage on the rationale that the vast government participation in the mortgage markets has altered incentives regarding housing decisions. The possibilities for both novel and broad regulations of private behavior of law-abiding citizens are endless.

The government attempts to distinguish these possibilities from the individual mandate here by claiming that "the health care market is unique in that no one can guarantee that they [sic] will not participate in that market." U.S. Mem. at 33. But the government's trick of treating the failure to buy insurance as inevitable participation in "the health care market" can be played with any number of everyday goods and services. No one can say that he will never

participate in some fashion in the market for transportation or housing—and certainly not in the food or clothing markets. Thus, on the government's theory, Americans could indeed be required to buy a car or a home as "necessary" to those background regulations. In short, the government offers no justification for the individual mandate that would not "'effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Lopez*, 514 U.S. at 557 (quoting *NLRB*, 301 U.S. at 37).

The individual mandate therefore cannot be justified as "necessary" to "carr[y] into Execution" a regulation of interstate commerce.

2. Forcing an individual to engage in private commerce, as the individual mandate does, is in any event not a "proper" means of executing a regulation of commerce.

Even if the government could somehow show that the individual mandate is a means to carry into execution a regulation of interstate commerce, the mandate would nonetheless founder on the additional requirement that a necessary means to a legitimate end be "proper." Forcing an individual to engage in private commerce is not a "proper" means of carrying into execution a regulation of interstate commerce.

The word "proper" in the Necessary and Proper Clause is "not merely hortatory." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment). It requires that, in executing its Commerce Clause authority, Congress use only those means that are consistent with the limited role of the federal government in our federal system, in relation both to the States and to the people, to both of whom the Tenth Amendment reserves powers. *See generally* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993) (exhaustively documenting why the term "proper" requires that federal "laws not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals.") (favorably cited in

Printz v. United States, 521 U.S. 898, 924 (1997)).

As Chief Justice Marshall famously put it, the Necessary and Proper Clause allows only those regulations that are "appropriate," "not prohibited," and "consistent with the letter and spirit of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421. Thus, for a law to be a "proper" means it must not only conform to express constitutional provisions (the "letter" and "prohibit[ions]"), but also to constitutional assumptions regarding the structure and place of the federal government ("[ ]propri[ety]" and "spirit"). This principle was affirmed more recently by the Supreme Court in *Lopez*, 514 U.S. at 557, when it emphasized that "the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government'" (quoting *NLRB*, 301 U.S. at 37); and in *Printz*, 521 U.S. at 898, when the Court invalidated provisions that "commandeered" state officials to enforce the Brady Handgun Violence Prevention Act. *See also Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring in the judgment) ("[T]he precepts of federalism embodied in the Constitution inform which powers are *properly* exercised by the National Government in the first place.") (emphasis added); *United States ex rel. Toth v. Quarles*, 350 U. S. 11, 21-22 (1955) (holding that the court martial of a former service member following his honorable discharge could not be justified as "Necessary and Proper" to Congress's regulation of the armed forces because "we are not willing to hold that power to circumvent [the procedural protections offered by the federal courts] should be inferred through the Necessary and Proper Clause").

Printz is particularly on point. The Court held unconstitutional the provisions of the Brady Act that "commandeered" state officials into enforcing it—even though the Court could point to no express provision in the Constitution barring Congress from doing this, and even

though having state officials enforce the law was obviously a means of carrying that regulation of interstate commerce into execution (indeed, a quite direct means).

In considering the question, the Court reviewed both early statutes and later enactments and found "no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization." 521 U.S. at 905-910, 916. The Court then turned to "other sources we have usually regarded as indicative of the original understanding of the Constitution." *Id.* at 910. Reviewing portions of *The Federalist*, the Court found no implication that the Founders would have believed Congress could commandeer state officials without their consent. *Id.* at 911. In addition to "constitutional practice," the Court examined the structure of the Constitution, "to see if [it could] discern among its essential postulate[s], a principle that controls the present cases." *Id.* at 918 (internal citation and quotation marks omitted). After examining the limited role the federal government was intended to play vis-à-vis both States and citizens, the Court doubted that this role would survive if "the Federal Government . . . were able to impress into its service—and at no cost to itself—the police officers of the 50 States." *Id*. at 922.

Finally, the Court turned to "the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Id.* at 923. That Clause did not save the commandeering provisions, because "[w]hen a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . mentioned earlier, it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Id.* at 923-24.

The Court has used such reasoning in other cases as well. *See, e.g.*, *Alden v. Maine*, 527

U.S. 706, 732-33 (1999) (applying *Printz* to hold that it was not a "proper" exercise of federal authority to subject non-consenting States to private suits for damages in state courts, notwithstanding that text of Eleventh Amendment did not prohibit this); *New York v. United States*, 505 U.S. 144, 166 (1992) (similar to *Printz*, and explaining: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *Myers v. United States*, 272 U.S. 52 (1926) (limiting Congress's power to restrict President's removal of officers, notwithstanding lack of express constitutional prohibition on Congress's determining conditions of removal and dissents arguing that Necessary and Proper Clause empowered Congress to do so).

McCulloch, in upholding the congressionally chartered national bank, employed similar reasoning to *Printz* and reinforces its mode of analysis. In asking whether Congress's use of the corporate form was an appropriate means to carry out the enumerated powers that the bank furthered, Chief Justice Marshall looked to history and concluded that the ability to incorporate was not such a great or remarkable power that one would expect it to be listed in the Constitution as an enumerated power, rather than left to implication as a means: "The power of creating a corporation . . . is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers." 17 U.S. (4 Wheat.) at 411. Rather, given the history of corporations and their use in England, there was "no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this." *Id.* at 421. By contrast, the "means" of commandeering state officials is one that is so remarkable one would have expected it to be specified. Because it was

not, *Printz* held that it was not a proper means.

So also the individual mandate's compulsion of individuals to engage in private commerce. Such remarkable authority is likewise a "usurpation" and cannot be treated as "proper" for carrying into execution the power to regulate interstate commerce power.

All available evidence shows that, at the time of ratification, it would have appeared too obvious to warrant mention that the federal government could not affirmatively compel an individual to engage in a commercial transaction for the benefit of another private party. Anglo-American law reflects an ancient distinction between prohibitions of and conditions on conduct (on the one hand), which were considered normal incidents of government, and affirmative requirements to act (on the other), which required special justification. Indeed, this was a "premise[ ] inherent in the common law." *See* Note, *Failure to Rescue: A Comparative Study*, 52 Colum. L. Rev. 631, 632 (1952) ("Judicial reluctance to require positive action was a concomitant of the individualistic premises inherent in the common law: not only was a person considered capable of taking care of himself, but the imposition of criminal or civil liability for the purpose of encouraging beneficent action or redistributing loss seemed an unwarranted limitation on personal freedom."); *cf. Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[T]he right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men."). As Blackstone put it in the famous first chapter of his *Commentaries*: "Let a man, therefore, be ever so abandoned in his principles, or vitious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws." St. George Tucker, 2 *Blackstone's Commentaries* *124 (photo. reprint 1996) (1803) ("*Blackstone*").

This is not to say that at the time of the Founding the broad police power of the States did

not include some authority to require affirmative action—but the duty was *of the citizen to the state* and was *rooted in tradition*. Thus, on the basis of "ancient usage and the unanimity of judicial opinion," the Court upheld against a challenge under the Thirteenth Amendment a state law requiring the yearly labor of able-bodied adult males to maintain *public* roads in their counties. *Butler v. Perry*, 240 U.S. 328, 330-31 (1916).

Conversely, the imposition of an affirmative duty to *private parties* raises constitutional concerns even where that duty is voluntarily assumed and supported by longstanding tradition. In *Robertson v. Baldwin*, 165 U.S. 275 (1897), the Court considered whether a law criminalizing desertion by a sailor violated the Thirteenth Amendment. The Court noted that sailors willingly contract to provide services for an entire voyage and emphasized the longstanding rule that sailors were not permitted to leave a ship mid-voyage. Even then, however, the Court upheld the law only after noting the general rule that "[t]he breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors and possibly some others, nor would public opinion tolerate a statute to that effect." *Id.* at 281-82. *See also Clyatt v. United States*, 197 U.S. 207, 218 (1905) ("Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, *or at least the control of the labor and services of one man for the benefit of another*, and the absence of a legal right to the disposal of his own person, property and services.") (emphasis added). Beyond that, the Court held in *Bailey v. Alabama*, 219 U.S. 219 (1911), that it would violate the Thirteenth Amendment to make it a crime to break a contract to work, regardless of whether the contract was voluntarily entered into.

In the light of this general picture, it is not surprising that longstanding federal practice also reflects the extraordinary nature of laws requiring affirmative conduct. The federal

government does impose affirmative duties on its citizens, but only in limited circumstances. As one would expect, such duties have been both directed to the state and based either on explicit constitutional recognition or longstanding tradition (both of which were, as discussed, lacking in *Printz*). *See Selective Draft Law Cases*, 245 U.S. 366, 386-88 (1918) (reviewing the historical pedigree of the military draft and noting that it is "sanctioned . . . by the text of the Constitution"); *Blair v. United States*, 250 U.S. 273, 281 (1919) (noting that in light of the Fifth Amendment, early statutes, and "the general law upon the subject," it "is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform"); U.S. CONST., art. I, § 8, cl. 1 (Tax power). These narrow examples in fact confirm that the federal government has never been understood to hold a *general* power to require affirmative conduct, particularly affirmative conduct toward private parties.

This analysis accordingly establishes that the individual mandate in the Act is not a "proper" means of implementing the Act. The affirmative obligation that it imposes lacks either the express constitutional recognition or the longstanding tradition that would be needed to support such a novel and broad power, even if the mandate compelled conduct of citizens toward the federal government rather than a private party. In fact, it appears to have taken over 200 years before federal officials even thought to impose such an obligation. *See* Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994) ("The government has never required people to buy any good or service as a condition of lawful residence in the United States.").

Moreover, the individual mandate is particularly suspect because, unlike the fundamental duties of citizenship described above, it imposes an obligation not to the government, but to a

private party. Such a power would have been even further afield from the federal authority contemplated at the founding. *See Eastern Enter. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion) ("'It is against all reason and justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes property from A. and gives it to B'") (quoting *Calder v. Bull*, 3 Dall. 386, 388 (1798) (opinion of Chase, J.)); *see also id.* at 537 (invalidating a requirement that a former coal company pay for the health benefits of former coal miners, because "unrelated to any commitment that the employers made or to any injury they caused," and therefore "implicat[ing] fundamental principles of fairness underlying the Takings Clause"); *id.* at 549-50 (Kennedy, J., concurring in the judgment) (similar, applying Due Process Clause).

While the government invokes several instances in which the federal government has supposedly imposed affirmative obligations on private parties, these examples are not remotely analogous to the individual mandate. U.S. Mem. at 36-37 & n.6. Each one is merely a *condition* on government *benefits* or *participation* in an underlying market. *See* 42 U.S.C. § 4012a(a), (b), (e) (conditioning federal financial assistance and loans from federally regulated lending institutions on the existence of flood insurance); 49 U.S.C. § 13906(a)(1) (conditioning the registration of a federal motor carrier on the purchase of liability insurance); 42 U.S.C. § 9601 *et seq*. (creating strict liability for engaging in pollution of one's property or purchasing polluted property). In all of these instances, an individual is under no obligation if he avoids the underlying commercial activity being regulated. By contrast, the individual mandate places a novel, unavoidable obligation based solely on an individual's residence in the United States.[2]

[2] The government's citation of *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996), is also readily distinguishable. U.S. Mem. at 36. The law at issue "enforce[d] Sage's obligation to send money from one State to another," an obligation that was *not* created by Congress but rather by the States in the exercise of their police power. 92 F.3d at 105. Likewise, that the federal government may engage in eminent domain is also not remotely analogous to the individual

That these examples are the best the government can do only confirms the unprecedented nature of the individual mandate. Indeed, the provisions at issue suggest a conscious effort on the part of previous Congresses to avoid the sort of naked mandate embodied in the Act. For example, rather than directly requiring that anyone owning a home in a flood zone purchase flood insurance, the National Flood Insurance Program places an obligation on mortgage lenders to "notify the borrower under the loan that the borrower should obtain [flood insurance] at the borrower's expense"; and if the borrower does not do so within 45 days after notification, it requires that the lender must "purchase the insurance on behalf of the borrower and may charge the borrower for the cost of premiums and fees incurred." 42 U.S.C. § 4012a(e). Congress's choice to use this convoluted mechanism to increase the purchase of flood insurance strongly indicates that it had insurmountable doubts about the propriety of the far more direct method: an individual mandate to purchase insurance.

As in *Printz*, the "utter lack of statutes" exercising the sort of power now claimed by the government "suggests an assumed *absence* of such power." 521 U.S. at 907-08. Indeed, and again as in *Printz*, the "almost two centuries of apparent congressional avoidance of the practice" is all the more remarkable given "the attractiveness of that course to Congress." *Id.* at 918, 908. To take *Wickard* as an example, it seemingly did not occur to anyone in the 1930s that the federal government might have supported the price of wheat simply by commanding all Americans to buy wheat, even though that would be a quite direct way of raising the price. And with good reason. Even by comparison to the restriction on wheat growing that the Court upheld in *Wickard*, which is at the outer bounds of federal power, such a course would have been

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mandate. U.S. Mem. at 38. Even if the "*tak[ing]* of property" followed by "just compensation" were academically re-conceptualized as a forced sale, the practice is recognized by an express constitutional provision and is grounded on ancient tradition. U.S. CONST. amend. V (emphasis added); 2 *Blackstone* at *139.

extreme, far from "proper."

Thus, like the commandeering of state officers deemed not "proper" in *Printz*, the commandeering of individuals to drive down the overall price of health insurance is inconsistent with the fundamental limits on federal authority that the Constitution assumes. *See* U.S. CONST., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*.") (emphasis added). Because the power to force every citizen to purchase a product from a third party could not have been within the original understanding of the powers given to the federal government, and would "'effectually obliterate the distinction between what is national and what is local,'" *Lopez*, 514 U.S. at 557 (quoting *NLRB*, 301 U.S. at 37), such power cannot be a "proper" means of implementing the Commerce Clause.

III. THE TAXING POWER DOES NOT AUTHORIZE THE MANDATE EITHER.

If this court concludes that Congress lacks authority to impose the individual mandate and associated penalty under the Commerce and Necessary and Proper Clauses, the government cannot revive those measures by re-characterizing them as an exercise of the Taxing Power.

A. Governing Principles.

It is true that the federal government may tax activity that it may not regulate. But it is also true that it may not regulate activities the Constitution prohibits it from regulating by the expedient of labeling as a "tax" a provision that, in form and substance, is a regulation. *See Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *United States v. Constantine*, 296 U.S. 287, 294 (1935); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (the "*Child Labor Tax Case*"). In differentiating between legitimate tax statutes on the one hand, and impermissible federal efforts to usurp state regulatory authority on the other, the Supreme Court has relied on two corollary principles.

The first principle is that mere taxation of activity, standing alone, does not constitute improper regulation. As the Supreme Court has noted, all taxes tend to discourage people from engaging in the activity taxed. This incidental suppressive effect is not, by itself, sufficient to give a tax the character of regulation. Accordingly, the Court has consistently held that, where a statute on its face simply applies a tax to voluntary commercial activity—*and does nothing more*—then (1) the incidental suppressive effect (inherent in all taxes) is not enough to invalidate a tax, *see Sonzinsky*, 300 U.S. at 513, and (2) the Court will not go behind the statute to examine the extent to which Congress may have had a collateral purpose of bringing about the incidental effect. *See e.g.*, *id.* at 514; *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

The second principle comes into play where a statute does more than just levy a tax: Congress cannot evade constitutional limitations on its power by expressly incorporating into a purported "tax" statute a set of requirements which are, on their face, substantive regulations it could not lawfully promulgate. By nature, a regulation has two components—an explicit set of requirements mandating a course of conduct, coupled with a penalty for not complying with the requirements. That is the essence of a regulation. Thus, in assessing whether something labeled a "tax" is in fact an impermissible regulation, the Supreme Court has looked for the combination of these features on the face of the statute. Where Congress incorporates into a statute (1) an explicit set of requirements imposing rules governing activity it has no power to regulate, *and* (2) a financial penalty on persons who fail to comply with the stated requirements, the Court has consistently concluded that the combination of these provisions is, in form and substance, impermissible regulation. *E.g.*, *Child Labor Tax Case*, 259 U.S. at 39; *Hill v. Wallace*, 259 U.S. 44, 67-68 (1922); *United States v. Butler*, 297 U.S. 1, 70-71 (1936).

These principles were applied by Chief Justice Taft in the *Child Labor Tax Case*, where

the statute specified permissible work hours for minors and imposed a "tax" on businesses that failed to comply. The Court noted that if the statute had done nothing more than levy a tax on commercial activity it would not be deemed impermissible regulation. However, the Court found—on the face of the statute—that it went beyond this and effectuated an express regulation. The Court pointed to two features: (1) The statute contained an explicit set of requirements governing the employment of minors—a subject Congress had no power to regulate; and (2) the "tax" was exacted as a penalty for violation of the requirements. The Court concluded that the combination of these features was, in form and substance, a regulation. 259 U.S. at 38-39.

Sonzinsky used the same analysis 15 years later in upholding an excise tax on gun dealers. The Court stressed that, unlike the statute struck down in the *Child Labor Tax Case,* the gun dealer law contained no requirements concerning dealing in guns and there was nothing else in the statute to suggest it was anything but a tax. 300 U.S. at 514 (finding that the tax was "not attended by an offensive regulation.") It simply imposed a classic excise tax on the gun-dealing trade. Later cases upholding federal tax statutes against challenges that they constitute impermissible regulation share *Sonzinsky's* core features: (1) The statute simply imposes an excise tax on voluntary commercial activity; (2) it contains no set of rules purporting to control the conduct of the activity being taxed; (3) the tax is triggered by engaging in the activity, not as a penalty for violating a requirement; and (4) the only regulatory effect of the tax is the suppressive effect common to all taxes. *See, e.g.*, *United States v. Kahriger*, 345 U.S. 22, 31 (1953) ("All the provisions of this excise are adapted to the collection of a valid tax.").

B. The Mandate and Related Penalty Constitute Impermissible Regulation.

The substance of the Act's mandate must be ascertained from the face of the statute – the language, design and manifest purpose of the provisions as written by Congress. Under the principles set forth in the *Child Labor Tax Case*, *Sonzinsky*, and their progeny, the Act's

individual mandate and associated penalty clearly constitute impermissible regulation.

First, the statute contains express "requirements" purporting to govern activity that Congress does not have the power to regulate. *See* Pub. L. No. 111-148, § 1501(a). When an exaction is imposed based on failure to obey the rule, it manifests a clear purpose that the exaction serve as a penalty to coerce compliance with a rule.

Second, the exaction imposed on someone who "fails" to purchase the coverage is both in form and substance a "penalty." Not only does the statute identify it as a "penalty," but the trigger for the exaction is failure to comply with the prescribed rules, which is the essence of a penalty. *Id.* § 10106(b). The government's efforts to re-characterize it as a "tax" are frivolous. The fact that the penalty is collected on a tax return or included among tax provisions does not make it a "tax" rather than a penalty. The fact that the *amount* of the penalty varies according to income (typical of many fines) does not make it an income tax or change its character as a penalty. The critical fact is that the liability arises not from engaging in a particular *transaction* (as with an excise tax) but from failing to comply with a *requirement*. Indeed, the government does not even deny it is a "penalty," but weirdly tries to characterize it as a "tax penalty." But, of course, a "tax penalty" is not a tax; it is a *penalty*—for *not paying taxes*. And in any event, the Act's penalty is not imposed for failing to pay income taxes (which Congress clearly has power to require) but is a penalty for failing to buy insurance (which Congress has no power to require).

Third, while Congress's overarching regulatory purpose is manifest just from the features discussed above, there are two specific aspects of the Act that leave no room for doubt that Congress is imposing a penalty to enforce a regulation. First, as noted, the mandate has been defended as a legitimate *regulation* under the Commerce Clause, as an integral part of a comprehensive regulatory scheme. But the logic advanced to support the Commerce power

claim is incompatible with the government's new-found Taxing power claim, and belies any notion that the penalty is intended as a bona fide revenue measure. If the legislation generates revenue instead of compliance, its explicit goal is frustrated. "[T]he Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct . . . merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure." *Kahriger*, 345 U.S. at 38 (Frankfurter, J., dissenting).

The second distinctive aspect of this statute that gives it a regulatory character far more palpable than anything previously encountered is its uniqueness. This is the only "tax" in American history to be levied directly on persons for their *failure* to affirmatively engage in activity mandated by the government. It is a tax on *inactivity*. However, except for "direct taxes" (capitation taxes on persons, and property taxes), *all* other taxes are necessarily taxes on *transactions or activity*. *See Murphy v. Internal Revenue Service*, 493 F.3d 170 (D.C. Cir. 2007) (collecting cases). In the case of an "excise tax," the government selects a discrete category of economic activity—such as the conduct of a particular trade, or the production of particular goods—and taxes that activity to capture revenue from those transactions, as well as perhaps secondarily to discourage them. When the government thus carves out a particular kind of transaction to tax, the citizen can, at least in theory, avoid the tax by not engaging in the particular activity, and also remains free to engage in alternatives, as well as all the other activities in life not burdened by the tax. That is, when the government taxes particular *activity*, the coercive effect of the tax is modulated because the range of taxed activity is bounded, and the citizen must voluntarily put himself within that range.

The Act totally inverts these principles. Here, everyone is taxed *unless* he affirmatively engages in the particular activity dictated by the government. Unlike a tax on discrete activity,

which people can avoid by remaining passive, this is a tax *on passivity*, which people can only avoid by taking the mandated action. Such a "tax" is far more coercive and regulatory. People cannot be left alone: They either do what the government directs or pay a penalty. The only conceivable reason for imposing a penalty is regulatory—to compel persons to do what the government wants. The regulatory effect is thus paramount, not incidental to revenue raising, and indeed the notion that such a penalty is a revenue measure is sheer sophistry. In short, the unprecedented structure of this "tax" leaves no room for doubt that it is impermissible regulation.

C. The Government's Arguments Are Untenable.

The government claims that a tax is any exaction paid into the Treasury and, citing *Sonzinsky*, asserts that it has carte blanche to impose such exactions to achieve "regulatory purposes" beyond its Commerce powers. Neither *Sonzinsky* nor any of its progeny supports such sweeping power. Those cases upheld the taxes in question precisely because they were simply taxes on commercial transactions (with no mandate in the statute other than to pay taxes or comply with procedures related to the collection of taxes). They specifically distinguished such bona fide taxes from cases, like this one, where the regulatory effect inheres in the government's seeking to mandate a set of requirements through the exaction of a penalty. *See Sonzinsky*, 300 U.S. at 514; *Sanchez*, 340 U.S. at 45 (holding tax on transfer of marijuana "a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect"). The government has not cited, and cannot cite, any case upholding a statute that contains what *Sonzinsky* referred to as "regulatory provisions related to a purported tax." 300 U.S. at 513.

The government's formulation is untenable. If granted, it would remove all limits on federal power. As Chief Justice Taft observed:

> [A]ll that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with,

> and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it.

Child Labor Tax Case, 259 U.S. at 38.

The government's attempt to equate the penalty in this case with penalties for failure to comply with the income tax laws is meritless. When the government penalizes someone for failure to satisfy a requirement to take certain action, the first question is: Where does the power to impose that requirement come from? In the examples cited by the government, the power to require people to pay income taxes comes from the Sixteenth Amendment. Penalties for failure to comply are simply necessary and proper enforcement measures to aid in implementing that enumerated power. But where the government penalizes someone for not obeying a directive to buy a car or an insurance policy, the question is: Where does the government get the power to oblige people to buy that product? If the government has no authority to directly impose the obligation, then it cannot effectively create the obligation by exercising some plenary power to impose penalties on people for not doing what the government wants. In other words, instead of the existence of a prior lawful obligation justifying a penalty, the government is claiming a plenary authority to impose penalties that allows it to impose any obligation it chooses—including requirements the Constitution prohibits it from imposing. Nonsense.

The government asserts that the Supreme Court has abandoned the principles set forth in the *Child Labor Tax Case*, citing a footnote in *Bob Jones University v. Simon*, 416 U.S. 725, 741 n.12 (1974). That is plainly untrue. While the meaning of that footnote—clearly dicta—is opaque, it cites *Sonzinsky*, which itself embraces the principles articulated in the *Child Labor Tax Case*. *Id.* Obviously, the expansion of the federal government's Commerce power over the intervening years has made it less necessary until now to apply those limitations, but that does

not mean that they have fallen into desuetude. In policing constitutional limits, it is the courts' role to ascertain the substance of congressional action. In the tax realm this has frequently required the Court to examine whether something labeled a "tax" is in substance a "penalty." Recently the Supreme Court quoted the *Child Labor Tax Case* with approval and reconfirmed 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 v. Kurth Ranch*, 511 U.S. 767, 779 (1994); *see also Constantine*, 296 U.S. at 296.[3]

D. The "Tax" Is Not Authorized By the Constitution As a "Direct Tax."

If the individual mandate were in fact a tax, it would still present a grave question of first impression under the Taxing power. The Constitution only authorizes the federal government to levy "direct taxes" that can be apportioned among the States. U.S. CONST., art. I, § 2. A "direct tax" is an exaction imposed *directly on persons* (or property). In contrast, "indirect taxes" (which need not be apportioned) are taxes *on transactions*. They are "indirect" because persons are left undisturbed unless they voluntarily engage in the transaction being taxed.

Here the government imposes a "tax" directly on persons *unless* they affirmatively engage in the transaction required by the government. That is not a tax on a transaction, it is tax *on the person* who does not engage in the transaction. A tax imposed on a person because he remains passive is a "direct tax" on the person – simply a capitation tax with an exemption for

[3] The government claims that a penalty must be oppressively high to be found regulatory. Not so. While the heft of the penalty may be a factor, the crucial factor is whether the payment is triggered by violation of a rule. *Child Labor Tax Case*, 259 U.S. at 40. More fundamentally, if the government is now claiming that the amount of the penalty is not enough to coerce purchase of coverage, then the rationale for the entire mechanism collapses. In any event, the penalty is a continuing annual liability to pay up to the full cost of a health insurance policy. That amount is clearly substantial. Indeed, if this were a revenue measure, there would be no reason to set the amount of the penalty at precisely the same level as the price of the product you are trying to force people to buy. That calibration evinces a patent regulatory purpose.

people who complied with the rule. Such a tax cannot be apportioned and is thus not authorized by the Constitution.

CONCLUSION

For the foregoing reasons, the Commerce Clause, the Necessary and Proper Clause, and the Taxing power provide no authority for Congress's enactment of the individual mandate in the Act. For this reason, as well as those provided by the Commonwealth, this Court should grant summary judgment for the Commonwealth.

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Respectfully submitted,

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I hereby certify that on the 8th day of October, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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