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

MEMORANDUM OF THE CATO INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, AND PROF. RANDY E. BARNETT AS *AMICI CURIAE* SUPPORTING PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable Judges and Magistrate Judges to evaluate possible disqualifications or recusal, the undersigned counsel for the Cato Institute ("Cato") and the Competitive Enterprise Institute ("CEI") in the above captioned action, certify that there are no parents, trusts, subsidiaries and/or affiliates of Cato or CEI that have issued shares or debt securities to the public.

Pursuant to Fourth Circuit Local Rule 26.1, Cato Institute and CEI each declare that they are nonprofit public policy research foundations dedicated in part to the defense of constitutional liberties secured by law. Cato and CEI each state that they have no parent corporation. CEI issues no stock, while Cato has issued a handful of shares that are privately held by its directors. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato or CEI.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Founding Documents

Constitutional Provisions

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*. It also files amicus briefs with the courts, including in cases focusing on the Commerce Clause and the Necessary and Proper Clause such as *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Comstock*, 560 U.S. __, 176 L.Ed.2d 878 (2010). The present case centrally concerns Cato because it represents, without exaggeration, the federal government's most egregious attempt to exceed its constitutional powers.

The Competitive Enterprise Institute ("CEI") is a public interest group founded in 1984 and dedicated to free enterprise, limited government, and civil liberties. It studies and publishes on a wide range of regulatory issues, including those involving health and safety, drugs, biotechnology, and medical innovation—as well as the regulation of insurance markets. CEI attorneys have argued or participated as *amicus curiae* in numerous constitutional cases before the Supreme Court and other federal courts. Senior Attorney Hans Bader was also co-counsel in *Morrison*, the last Supreme Court decision to strike down a law as beyond Congress' Commerce Clause powers.

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[1] This *amici curiae* brief is filed upon motion for leave to file. The Plaintiff has consented to the participation of movants as *amici* in this case. The Defendant, when contacted through counsel, stated that she takes no position on movants' motion for leave.

Prof. Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center. Prof. Barnett has taught constitutional law, contracts, and criminal law, among other subjects, and has published more than ninety articles and reviews, as well as eight books. His book, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004), and other scholarship concerns the original meaning of the Commerce and Necessary and Proper Clauses and their relationship to the powers enumerated in the Constitution. His constitutional law casebook, *Constitutional Law: Cases in Context* (Aspen 2008), is widely used in law schools throughout the country. In 2004 he argued *Gonzales v. Raich* in the Supreme Court. In 2008, he was awarded a Guggenheim Fellowship in Constitutional Studies.

SUMMARY OF ARGUMENT

The new health care law is unprecedented—quite literally, without legal precedent—both in its regulatory scope and its expansion of federal authority over states and individuals. As the Congressional Budget Office said in 1994, "The government has never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994). Indeed, nor has it ever said that every man, woman, and child faces a civil penalty for declining to participate in the marketplace. And never before have courts had to consider such a breathtaking assertion of raw power—not even during the height of the New Deal, when the Supreme Court ratified Congress' regulation of wheat grown for home consumption on the awkward theory that such behavior, when aggregated nationally, affected interstate commerce.

Even in that case, *Wickard v. Filburn*, 317 U.S. 11 (1942), the federal government did not claim the power to *mandate* that people become farmers or enter into commercial transactions.

In other words, this case presents the Court with "the arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments." The Federalist No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). At issue is the constitutionality of the individual health insurance mandate—the requirement that individuals obtain a government-approved health insurance policy or pay a penalty—and potentially, given the lack of a severability clause, the entire health care reform scheme. Congress identified the Commerce Clause as the source of its authority, a position the Government now asserts in its Motion to Dismiss. Because Virginia and other *amici* persuasively refute that argument, we confine ourselves here to explaining the fundamental flaws in the Government's fall-back positions on the Necessary and Proper Clause and taxing power.

Neither of the Government's cursory arguments—comprising 9 pages of a 40 page brief that mainly relies on jurisdictional and Commerce Clause claims—legitimizes the individual mandate. The Necessary and Proper Clause is not an independent source of congressional power; instead, it enables Congress to carry out its enumerated powers or ends by means that are "appropriate" (Chief Justice Marshall's term for "necessary") and "plainly adapted to a [constitutional] end" (his definition of "proper"). *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Forcing someone to buy a product from a third party is not an "appropriate" or "proper" method "for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. Even for matters within the scope of an enumerated power, Congress may not enact laws that are not "plainly adapted" to further an enumerated end, or that do so at the expense of the rights

reserved to the States or the people under the Tenth Amendment. The Supreme Court enforced such limits in *Printz v. United States*, 521 U.S. 898 (1997), and should enforce such limits here, too.

Similarly, the individual mandate is not a tax—its non-compliance penalty is a civil fine—but if it were, it would be unconstitutional because it is neither apportioned (if a direct tax) nor uniform (if an excise tax). Moreover, Congress cannot use the taxing power as a backdoor means of regulating an activity unless such regulation is authorized elsewhere in the Constitution. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37-38 (1922).

As the Supreme Court recognized almost 150 years ago, "[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole," than the Government's unconstitutional assertion of power against its own citizens. *Ex Parte Milligan*, 71 U.S. 1, 118-19 (1866) (granting *habeas corpus* petition). The motion to dismiss this lawsuit must be denied.

ARGUMENT

I. Every Act of Congress Must Have a Constitutional Source

The federal government is one of delegated, enumerated, and thus limited powers:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

United States v. Lopez, 514 U.S. 549, 552 (1995) (citations and quotations omitted). *See also M'Culloch*, 17 U.S. at 405 ("This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."). After all, when the Constitution was drafted, our nation had recently declared independence because "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these states." The Declaration of Independence, para. 2 (U.S. 1776).

In response to this "long train of abuses and usurpations," our forefathers found it their "duty" not only "to throw off such government," but also "to provide new guards for their security." *Id.* The Constitution was that safeguard. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

To ensure that these fundamental limits are applied, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Article I begins: "All legislative powers *herein granted* shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). For the reasons discussed by Virginia and other *amici*, the Commerce Clause does not grant Congress the power to enact the individual health insurance mandate. For the reasons discussed below, neither the Necessary and Proper Clause nor the taxing power provide that authority either.

II. The Individual Mandate Is Not a Legitimate Exercise of the Necessary and Proper Clause

The Government argues that the individual mandate is "essential" to the overall health care reform. Def. Mot. at 30-33. That may or may not be true,[2] but it begs the question of whether Congress has the power in the first place to do what it is doing. That a statutory provision may be "essential" to some end is irrelevant to the question of whether the end itself is constitutional. As other *amici* note, "*Raich* does *not* stand for the broad proposition that Congress is free to pass otherwise unconstitutional laws by somehow connecting them to a larger regulatory program." Br. *Amici Curiae* ACLJ et al. at 22 n.7. Instead, Congress' ability to regulate commerce—using the Necessary and Proper Clause to execute Commerce Clause powers—extends to intrastate non-economic *activity* only insofar as failure to regulate such activity would undercut a broad federal regulatory scheme. *Gonzales v. Raich*, 545 U.S. 1, 17-18 (2005). *See also Lopez*, 514 U.S. at 558-59 ("Congress' commerce authority includes the power to regulate those activities . . . that substantially affect interstate commerce."). Neither *Raich* nor *Wickard* authorized Congress to regulate non-activity. "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 in the congressional-power chain but on the strength of the chain." *Comstock*, 560 U.S. __, 176 L.Ed.2d at 900 (Kennedy, J., concurring, slip op. at 1).

Here Congress is not merely attempting to regulate local economic activity that, in the aggregate, substantially affects commercial markets nationwide. Instead, it claims the authority

[2] Even supporters of the health care reform see alternatives to the individual mandate. *See, e.g.*, *States Argue the Feds Can't Force Purchase of Health Insurance*, Wash. Post, Mar. 25, 2010, at A20 ("[W]hile the goal of the mandate is crucial to reform, the mandate isn't the only way to achieve that goal.").

to force individuals *not* engaged in economic activity to become engaged. Assuming *arguendo* that this Court declines to find that authority in the Commerce Clause, the Necessary and Proper Clause is not a suitable backup.

A. The Necessary and Proper Clause Limits Congressional Power

The Necessary and Proper Clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. In order to guard against tyranny, the Clause limits congressional power in five ways: (1) it permits judicial review by stating that the limits specified by the Clause "shall be"; (2) it requires that laws be "necessary"; (3) it requires that laws be "proper"; (4) it permits within its scope only those laws that actually carry into execution those powers; and (5) it limits the scope of the Clause, which applies only to "Powers vested by the Constitution."

1. "Shall Be"

Chief Justice Marshall explained that the Necessary and Proper Clause creates a basis for judicial review to circumscribe congressional action:

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

M'Culloch, 17 U.S. at 423. The requirement that the laws "shall be necessary and proper," does not permit Congress to decide for itself what is necessary and what is proper, but instead

provides a basis for judicial review. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 276 (1993) ("Lawson"), *cited in Printz*, 521 U.S. at 924; Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 208-15 (2003) ("Barnett").

The frequently quoted test for such review is: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch*, 17 U.S. at 421. Courts must thus evaluate whether legislation is both necessary and proper. *See* Barnett at 215-20; Lawson at 307-08, *citing* Andrew Jackson, *Veto Message, reprinted in* 3 *The Founders' Constitution* 263 (Philip B. Kurland & Ralph Lerner eds., 1987) ("This privilege . . . is not 'necessary' to enable the bank to perform its public duties, nor in any sense 'proper,' because it is vitally subversive of the rights of the States.").

When required, the Supreme Court has in fact relied upon the Necessary and Proper Clause to determine that a congressional act "was not the law of the land." *See Printz*, 521 U.S. at 923-24 (Brady Act was not "proper" because it violated state sovereignty in executing the Commerce Clause).

2. "Necessary"

While "necessary" does not mean "absolutely necessary," it certainly imposes limits. Barnett at 203-15. Courts ask whether legislation was really enacted to further the end on which its constitutionality was purportedly based. J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 622 (2002). "The legislature must

utilize means 'really calculated to' effect an end entrusted to its care, and may not use its constitutional powers as a 'pretext' for achieving other ends." *Id*. at 612 (citing *M'Culloch*, 17 U.S. at 423). The term "necessary" "requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress." *Comstock*, 560 U.S. at __, 176 L.Ed.2d at 904 (Alito, J., concurring, slip op. at 4).

3. "Proper"

In addition to being necessary, laws must also be proper. Proper regulation limits its own scope. *See Comstock*, 560 U.S. at __, 176 L.Ed.2d at 897 (Breyer, J., slip op. at 18) ("Neither is the statutory provision too sweeping in its scope."). *Accord* Lawson at 271 ("[T]he word 'proper' serves a critical . . . constitutional purpose by requiring executory laws to be *peculiarly within Congress's domain or jurisdiction* . . . by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe upon the retained rights of the state or of individuals.") (italics in original).

4. "For Carrying into Execution"

The Necessary and Proper Clause may be used to carry into effect only certain powers: "It is never the end for which other powers are exercised, but a means by which other objects are accomplished." *M'Culloch*, 17 U.S. at 411. Moreover, "no matter how 'necessary' and 'proper' an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than 'carrying into execution' one or more of the federal Government's enumerated powers." *Comstock*, 560 U.S. at __, 176 L.Ed.2d at 906 (Thomas, J., dissenting, slip op. at 3) (citing U.S. Const. art. I, § 8, cl. 18).

5. “Powers Vested by this Constitution”

The plain language of the Clause applies, by its own terms, first to “the foregoing powers,” and, second to “all other Powers vested by this Constitution.” The “foregoing powers” apply to those in Article I, Section 8, Clauses 1-17. The “other Powers vested by this Constitution” must be found within the Constitution itself because “[t]he 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.” U.S. Const. amend. X.

Notwithstanding the text of the Clause, during the ratification debate, the “Antifederalists” expressed concern about a broad reading of it (akin to that advanced by the Government today):

> To the argument that no Bill of Rights was necessary because the Constitution was one of enumerated powers . . . the Antifederalists . . . pointed out the implications of the “necessary and proper” clause in combination with these broadly defined powers. If Congress had the power to make war, and decided that curtailment of freedom of the press was necessary and proper to this end, what was to prevent Congress from passing a law to this effect?

The Antifederalists, at 1xx (Cecelia M. Kenyon, ed., 1985).

For example, the thirteenth letter of “Agrippa,” dated January 14, 1788, argued that, based on the Necessary and Proper Clause, “By sect. 8 of article 1, Congress are to have the unlimited right to regulate commerce, external and internal, and . . . . They have indeed very nearly the same powers claimed formerly by the British parliament.” *Id*. at 142-43. Based upon this fear, the Antifederalists argued for adoption of the Bill of Rights, to clearly and unambiguously limit congressional power.

Addressing these concerns, Alexander Hamilton explained that the Necessary and Proper Clause did not expand Congress’ powers beyond those enumerated in Article I, Section 8.

Hamilton asked rhetorically: "What are the proper means of executing such a power but necessary and proper laws?" The Federalist No. 33, at 202. James Madison argued that the Clause was redundant because, even without it, Congress would enjoy the same powers by "unavoidable implication." The Federalist No. 44, at 285.

Hamilton thus reasoned that any reasonable fears of federal power could stem only from Congress' enumerated powers: "If there be anything exceptionable, it must be sought for in the specific powers upon which this general declaration [the Clause] is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless." The Federalist No. 33, at 203.

Thomas Jefferson, as president, similarly ridiculed the chain of inferences offered to sustain expansion of Congress' powers:

> Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines are necessary for copper; a company is necessary to work mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built?" Under such a process of filiation of necessities the sweeping clause makes clean work.

Barnett at 191 n.50 (citation omitted); *Comstock*, 560 U.S. at__, 176 L.Ed.2d at 900 (Kennedy, J., concurring, slip op. at 1) (adopting Jefferson's analogy). The Government's arguments here resonate with what Jefferson disparaged as a "filiation of necessities"; it must instead seek justification for the individual mandate in Hamilton's "specific powers."

B. The Individual Mandate Cannot Be Based Solely on the Necessary and Proper Clause Because That Clause Does Not Grant Any Independent Constitutional Power

As a consequence of its own textual limitations, the Necessary and Proper Clause is "not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry

out the specifically granted 'foregoing' powers." *Kinsella v. Singleton*, 361 U.S. 234, 247-48 (1960). In other words, the Clause is an *instrumental* power, dependent on Congress' other powers, not an *independent* power in and of itself.

Scholars have held this view for over 200 years. *See* Barnett at 212-13, *citing* St. George Tucker, Appendix, *in* 1 William Blackstone, *Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 287 (1803) ("The plain import of the clause is, that congress shall have all the incidental or instrumental powers, necessary and proper for the carrying into execution all the express powers; . . . It neither enlarges any power specifically granted, nor is it a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant."). *Accord* Lawson at 275 (with citations).

Because the Necessary and Proper Clause is not an independent source of Congressional power, it cannot on its own support the individual mandate. The Government must instead rely on the Commerce Clause, or the taxing power, or some heretofore unidentified (but constitutionally enumerated) source of authority.

C. The Individual Mandate Cannot Be Predicated on Congress' Power to Regulate Interstate Health Insurance Markets Because the Necessary and Proper Clause Cannot *Mandate* Economic Activity

"The Necessary and Proper Clause does not give Congress *carte blanche*." *Comstock*, 560 U.S. at __, 176 L.Ed.2d at 904 (Alito, J., concurring, slip op. at 4). The Government, in the two pages it devotes to the issue, contends that the individual mandate is justified under the Necessary and Proper Clause because it is "essential to Congress's overall regulatory reform of

the interstate health care and health insurance markets." Def. Mot. at 34. Even if regulation of the interstate health insurance market is a valid exercise of Congress' Commerce Clause power, it does not necessarily follow that the *particular* exercise here of that *general* authority is "proper." Indeed, *never*, under any constitutional provision, has any U.S. court sustained a *mandate* to engage in economic activity.

What is more, while Congress may comprehensively regulate certain industries, the Supreme Court has rejected the argument that it may regulate every activity that may affect those industries. *See, e.g.*, *Morrison*, 529 U.S. at 615 (noting that such a "method of reasoning" should be "rejected as unworkable if we are to maintain the Constitution's enumeration of powers"). Such logic applies *a fortiori* here: the failure to perform an act "affects" interstate commerce only in the self-evident but ultimately meaningless way that, for example, the failure to sell one's house "affects" the real estate market. The "substantially affects" test has always been aimed at activity and never at inactivity. Extending this test to inactivity would permit Congress to require people to purchase any product on the ground that a failure to do so would affect the regulated industry.

To be sure, there are exceptional situations in which the federal government may mandate individual activity. It can require registration for a military draft. *Selective Draft Law Cases*, 245 U.S. 366 (1918). It can require people to serve on juries. U.S. Const. art. III, § 2; *id*., amend. VI; *id*., amend. VII. It can require people to pay income taxes and file tax returns. *Id.* amend. XVI; *Brushaber v. Union Pacific R.R.*, 240 U.S. 1 (1916) (upholding income tax laws and accompanying procedures). But these duties go to the heart of American citizenship. The draft relates to Congress' explicit power "to raise and support armies." U.S. Const. art. I, § 8, cl. 12. Jury duty and income taxation similarly relate to explicit constitutional provisions. The

existence of these duties of citizenship does not support a conclusion that Congress, for the first time in history, may properly impose mandates as a means of exercising its commerce power.

Of course, Congress under its commerce power routinely mandates *how* business is conducted. For example, Congress can require hoteliers and restaurateurs to serve all patrons. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). But nobody has to operate a hotel or restaurant—and individuals are not commercial enterprises. Congress has never claimed the power to mandate that private persons open their homes and kitchens to feed and house the public. "Even during World War II, the federal government did not mandate that individual citizens purchase war bonds." Randy E. Barnett, *Can the Constitution Stop Health Care Reform?*, Wash. Post., Mar. 21, 2010, at B2.

In none of the cases cited by the Government did the Necessary and Proper Clause do anything other than prohibit certain activities or regulate activities that people already engage in. *See Raich*, 545 U.S. 1 (2005) (prohibition on growing marijuana); *Sabri v. United States*, 541 U.S. 600 (2004) (proscribing bribery of state, local and tribal officials); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (regulating coal mining); *Burroughs v. United States*, 290 U.S. 534 (1934) (criminalizing election-related corruption); *M'Culloch*, 17 U.S. 316 (affirming Congress' implied power to operate national bank, with which no state can interfere).

In the end, the federal government has no authority to mandate the purchase of private health insurance. Yet here Congress has enacted a law "for the accomplishment of objects not intrusted to the [federal] government," and, for this reason, it is "the painful duty of this tribunal, . . . to say, that such an act [is] not the law of the land." *M'Culloch*, 17 U.S. at 423. It is not for

a District Court to allow Congress to expand its power beyond where the Supreme Court limited it.

III. The Individual Mandate Is Not a Legitimate Exercise of Congress' Taxing Power Because It Is Either a Regulation, an Unconstitutional Tax, or Must Be Justified Through Some Other Enumerated Power

The Supreme Court has never held that Congress can force individuals to engage in commerce so their actions can then be regulated under the Commerce Clause (as executed by the Necessary and Proper Clause). There is no controlling precedent for such regulatory bootstrapping. That's why the Government had to devise the fallback position that the penalty for not buying health insurance is authorized under Congress' power to "lay and collect taxes." *See, e.g.*, Randy E. Barnett, *The Insurance Mandate in Peril*, Wall St. J., Apr. 29, 2010, at A19. The Government's invocation of Congress' taxing power in the last few pages of its memorandum, however, fails on three counts:

First: The penalty for violating the mandate is not a tax; it's a fine. President Obama said as much by reaffirming his "vow not to raise taxes on middle-income Americans to deal with rising budget deficits or pay for an overhaul of the U.S. health-care system." Nicholas Johnston & Kate Anderson Brower, *Obama Standing Firm on No Middle Class Tax Increase, Gibbs Says*, Bloomberg.com, Aug. 4, 2009, http://www.bloomberg.com/apps/news?pid=20601070&sid=axjWiIM9Wbb0. *See also* George Stephanopoulos, *Obama: Mandate is Not a Tax*, ABC News, Sept. 20, 2009, http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html.

In the legislation itself, Congress justified the individual mandate under the Commerce Clause: "The individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)." Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119 (2010). Paragraph (2) then begins: "The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." *Id.* § 1501(a)(2)(A). As Virginia points out, Pl. Mem. at 31, Congress levied "taxes" elsewhere in the legislation—for example, on "high cost" employer-sponsored insurance plans (the so-called "Cadillac plans") and on "indoor tanning services"—so it presumably understands the distinction. Although a report by the Joint Committee on Taxation released two days before the president signed the legislation dubs the mandate an "Excise Tax on Individuals Without Essential Health Benefits Coverage," the statute never describes the "penalty" it imposes for violating the mandate as an "excise tax"—expressly calling it a "penalty." Staff of 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"* 2 (Comm. Print 2010).

Furthermore, Congress listed all the revenue provisions of the health care reform for purposes of calculating how much revenue the legislation would generate but declined to include the penalty for failing to comply with the mandate. PPACA §§ 9001-17. Yet, for an exaction to be a true tax, it has to be a genuine revenue-raising measure. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995) ("'A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the

Government.'") (quoting *Butler v. United States*, 297 U.S. 1, 61 (1936)). When the courts have upheld taxes with a regulatory purpose—like the cigarette tax—it was because revenue-generation was still a key objective. *See, e.g.*, *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (When Congress uses its power constitutionally, it is well settled "that a tax does not cease to be valid *merely* because it regulates, discourages, or even definitely deters the activities taxed.") (emphasis added).

By contrast, the individual mandate exists solely to coerce people into acquiring health care coverage. Congress never mentions the taxing power with respect to the individual mandate and none of its eight findings mention raising any revenue with the penalty. *See* PPACA § 1501(a). Indeed, if the mandate were to work perfectly—ensuring that everybody owned an insurance policy—it would raise exactly zero revenue. Congress simply did not enact the mandate pursuant to its taxing power. To the contrary, the statute expressly says that the mandate "regulates activity that is commercial and economic in nature." *Id*. § 1501(a)(2)(A).

In *United States v. Kahriger*, 345 U.S. 22, 28 (1953), the Supreme Court upheld a punitive tax on gambling by saying that "[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." In other words, the Court in *Kahriger* declined to look behind Congress' assertion that it was exercising its taxing power to see whether a measure was really a regulatory penalty. But this principle cuts both ways: Neither can courts look behind Congress' inadequate assertion of its commerce power to speculate as to whether a measure was "really" a tax.

Moreover, while inserting the mandate into the Internal Revenue Code, Congress expressly severed the penalty from the tax code's normal enforcement mechanisms. The failure to pay the penalty "shall not be subject to any criminal prosecution or penalty with respect to

such failure." PPACA § 5000A(g)(2)(A). Nor shall the IRS "file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section," or "levy on any such property with respect to such failure." *Id.* § 5000A(g)(2)(B).

In short, the "penalty" is explicitly justified as a regulation of economic activity and not as a tax. While Congress need not specify what power it may be exercising, there is simply no authority for courts to recharacterize a regulation as a tax when doing so is contrary to Congress' express and actual regulatory purpose. Never before has the Court looked behind Congress' unconstitutional assertion of its commerce power to see if a measure could have been justified as a tax. For that matter, never before has a "tax" penalty been used to mandate, rather than discourage or prohibit, economic activity.

The taxing power is, therefore, irrelevant because the individual mandate is a civil regulation with a civil fine for noncompliance.

Second: If the penalty for noncompliance is nevertheless deemed to be a tax, it's an unconstitutional one. The Constitution allows for three types of federal taxation, depending on the event that triggers their incidence: income, direct, and excise. Here, income is merely one of many factors that affect the amount of the individual mandate penalty—along with age, family size, geographic location, and smoking status—and not the tax trigger. Thus the penalty is not an income tax.

Next, the Supreme Court has defined a direct tax as one "which falls upon the owner merely because he is the owner, regardless of his use or disposition of the property." *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945). "Only three taxes are definitely known to be direct: (1) a capitation . . . , (2) a tax upon real property, and (3) a tax upon personal property." *Murphy v.*

Internal Revenue Serv., 493 F.3d 170, 181 (D.C. Cir. 2007). The new penalty is not a capitation—a fixed tax levied on each person within a jurisdiction—because it is neither fixed (the amount differs based on the above-listed factors) nor levied on each person. It can be characterized most charitably as a negative tax on property, the triggering event being the non-ownership of an insurance policy. *See* Robert A. Levy, *The Taxing Power of Obamacare*, National Review Online, Apr. 20, 2010, http://article.nationalreview.com/431915/the-taxing-power-of-obamacare/robert-a-levy?page=1. But the Constitution requires that direct taxes be apportioned by population as determined by the census, U.S. Const. art. I, §§ 2, 9: First, decide the total revenue to be raised; second, allocate that amount among the states according to population; third, divide each state's allocation by its population to compute an individual tax rate. Obviously, the individual mandate penalty is not calculated in this way. If the penalty is a direct tax, it is unconstitutional because it is not and cannot be apportioned.

Finally, as the Government notes, certain other taxes, such as the Social Security payroll tax, have been classified as excises, which are levied on the performance of an act or the enjoyment of a privilege. *Helvering v. Davis*, 301 U.S. 619, 645 (1937). Although the term "excise" now covers virtually every internal revenue tax except the income tax, the individual mandate penalty (unlike Social Security) is not a tax on employment or other action—it "taxes" inaction. Nonetheless, even if it is an excise, the Constitution demands that "Excises shall be uniform throughout the United States," U.S. Const. art. I, § 8, cl. 1, meaning taxed at the same rate throughout the country. The individual mandate penalty can depend in part on the cost of health insurance offered in the particular market. PPACA § 1501(b). That cost will depend in part on rating areas applicable within each state. PPACA § 1201. Thus, the individual mandate

penalty can vary by location and, for that reason, would be unconstitutional as an excise tax for lack of uniformity.

Third: Even if the penalty is considered a tax and somehow survives the test for apportionment or uniformity, Congress cannot use the taxing power as a backdoor means of regulating (as opposed to taxing) an activity unless the regulation is authorized elsewhere in the Constitution. While the Government is correct to point out that the taxing power is "extensive," one of the few times the Supreme Court struck down a federal tax is instructive as to its limits. In the 1920s, when Congress wanted to prohibit activity that was then deemed to be solely within states' police powers, it tried to penalize the activity using its tax power. The Supreme Court struck down such a penalty, saying, "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." *Bailey v. Drexel Furniture Co.*, 259. U.S. 20, 38 (1922). Noting that that law's "prohibitory and regulatory effect and purpose are palpable," the Court held the penalty to be not a tax but rather a regulation of child labor. *Id*. at 37-38.

In anticipation of the above argument, the Government cites, most strongly, *Kahriger*, 345 U.S. 22. But there the Court also cited *Bailey* with approval and rejected the proposition "that Congress, under the pretense of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act." *Id*. at 24. *See also Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937) ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."). Thus, as stated above, this Court has no power to look behind Congress' assertion of its commerce power and speculate as to whether the individual mandate was "really" a tax. The

mandate is a regulatory tool explicitly designed to compel the purchase of health insurance. Tax penalties imposed for a regulatory purpose—as here, if the mandate penalty is considered a tax—must be authorized under an independent enumerated power.

All roads lead to the Commerce Clause. And requiring all citizens to enter into a contract with a private company is an improper means of regulating interstate commerce.

CONCLUSION

Virginia's challenge to the health care reform boils down to Congress' authority to require people to buy private insurance. Finding the mandate constitutional would be the first interpretation of the Necessary and Proper Clause or the taxing power to permit the regulation of inactivity—in effect requiring an individual to engage in an economic transaction. "The federal government would then have wide authority to require that Americans engage in activities of its choosing, from eating spinach and joining gyms—in the health care realm—to buying cars from General Motors." Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded In Law—And Pose Serious Challenges*, 29 Health Affairs 1229, 1232 (June 2010). The constitutional limits imposed on the federal government must stand for something.

Amici respectfully request that the Court deny the Defendant's Motion to Dismiss.

Respectfully submitted this 17th day of June, 2010,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,328 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 12 point font.

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Dated: June 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 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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