No. 11-398

In The Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS ON THE INDIVIDUAL MANDATE (Minimum Coverage)

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights.[1] Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the lower courts' decisions striking down the individual mandate and its penalty provision.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about individual liberty, state sovereignty and federalism. Indeed, whether there remain any limits on the power and reach of the federal government is the fundamental question before this Court. The federal government's defense of the individual

[1] The parties have filed blanket consents to the filing of *Amicus Curiae* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel, party or any person other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

insurance mandate,[2] if accepted, requires the Court to disregard more than 220 years of Commerce Clause application and Supreme Court precedents, fundamentally misapply the Necessary and Proper Clause and disregard the Constitution's requirements for the laying and collection of taxes. The heavy-handed demands of temporary politicians seeking to fundamentally and permanently change the relationship between the citizen and government – in a manner that no past Congress or Executive have undertaken and which the Constitution does not allow – must not be given this Court's imprimatur.

The Commerce Clause, Article I, Section 8 of the Constitution, provides that: "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Congress can tax interstate commerce, regulate interstate commerce, and even prohibit certain types of interstate commerce. The federal government portrays the individual insurance mandate as a run-of-the-mill exercise of an enumerated power. There is nothing in the history of the Constitution and the Commerce Clause empowering the federal government to compel an individual to enter into a legally binding private contract against the individual's will and interests simply because the individual is living and breathing. Such a sweeping

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[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Section 1501, 124 Stat. 119 (2010) ("PPACA").

departure from precedent, law, and logic has never been contemplated, let alone imposed upon, the American people.

The federal government's flagship case, *Wickard v. Filburn*, 311 U.S. 111 (1942) has nothing in common with the PPACA's individual mandate. In fact, it underscores its unconstitutionality. In that case, the government did not mandate a farmer to grow wheat. It sought to regulate the wheat the farmer, by his own free will, chose to grow. Moreover, the government did not compel the consumer to purchase wheat, whereas in the instant case it compels the consumer to purchase insurance. There would seem to be few limits on federal power where individuals are ordered to produce things and individuals are ordered to purchase things. To assert a constitutional basis to justify such an unprecedented seizure of authority by the federal government is simply nonsense.

Once unleashed, what are the limits to this new, unconstitutional assertion of power? Having so thoroughly contorted the Commerce Clause, what are the discernable limitations on congressional power? The Court should be mindful that the past Congress and current administration seek nothing less than to fundamentally change the relationship between the citizen and the federal government. Perhaps this Court will inquire of the federal government the contours of this new authority it claims.

The federal government also invokes the Necessary and Proper Clause to defend what is indeed an

unprecedented national police power. The Necessary and Proper Clause, however, does not create any additional congressional power, nor does it expand any enumerated power. *See* Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Washington, D.C.: Regnery, 1986), Section 208. The individual mandate is not "a discrete and narrow exercise of authority over a small class of persons already subject to . . . federal power." *United States v. Comstock,* 130 S.Ct. 1949, 1968 (2010) (Kennedy, J., concurring). Accordingly, the Necessary and Proper Clause does not justify the individual mandate as Congress never has had the authority to compel private parties to engage in private economic activity based solely on the fact of living.

Finally, although never considered a "tax" prior to this litigation, the federal government's defense of the individual mandate's penalty provision as a tax fails to satisfy every test for a tax permitted by the Constitution under the Apportionment Clause as well as the taxing power of Article I, Section 8 and the 16th Amendment. As with their determination that the individual mandate was unconstitutional, the lower courts' conclusion that the penalty provision is likewise unconstitutional should also be upheld.

ARGUMENT

I. THE PPACA'S INDIVIDUAL INSURANCE MANDATE IS AN UNPRECEDENTED AND UNCONSTITUTIONAL NATIONAL POLICE POWER PERMISSIBLE NEITHER UNDER THE COMMERCE CLAUSE NOR THE NECESSARY AND PROPER CLAUSE.

A. The Commerce Clause in Historical Context Contemplates Voluntary Commercial Interactions.

"Commerce," at the time the Constitution was drafted and ratified, "consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). Not only was the customary meaning of "commerce" well understood, the Framers' usage of the term is well documented.

As Robert H. Bork and Daniel E. Troy have observed from the historical record, "'*commerce*' *does not seem to have been used during the founding era to refer to those acts that precede the act of trade*. Interstate commerce seems to refer to interstate trade – that is, commerce is 'intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities between the . . . citizens of different States.'" Bork and Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce,* 25 Harv. J.L. & Pub. Pol'y 849, 864 (2002) (internal citations omitted; emphasis added in part).

Giles Jacob, *New Law Dictionary* (10th Ed. 1782) – the Black's Law Dictionary of the Framers' day – defined "commerce" as "traffic, trade or merchandize in buying and selling of goods." (Available at http://galenet.galegroup.com/ezproxy.mnl.umkc.edu/servlet/ECCO.) These concepts contemplate *interactions* consisting of *activity* freely engaged in by individuals in the marketplace.

In short, the Framers understood that there needed to be a unified national authority for regulating the interstate flow of goods in private commerce. The Supreme Court's historic 1824 Commerce Clause decision, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), confirmed that this was the Commerce Clause's purpose.

B. *Gibbons v. Ogden* Requires Reasonable Application of Commerce Clause.

Gibbons v. Ogden is the preeminent Commerce Clause decision of the founding era. The Eleventh Circuit's holding – that the power to *regulate* commerce has never been understood to include the power to *compel* commerce – is fully supported by *Gibbons* and warrants emphasis.

The issue in *Gibbons* was whether the Commerce Clause power included the power to regulate navigation. The case, which became known as "the emancipation proclamation for American commerce," raised the question whether individual states could grant monopolies for access to their navigational waters.

Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, Inc. 1996), 474. New York, New Jersey and Connecticut were on the brink of civil war over New York's refusal to allow any ships or other navigational transports access to the state's ports or harbors other than those owned by New York's designees. The result was escalating transport fees to neighboring states, confiscation of unlicensed vessels and dangerously heightened tensions between New York and its neighboring states. *Gibbons*, 22 U.S. (9 Wheat.) at 184-185.

A national crisis, if not civil war, was averted by the Supreme Court's application of the Commerce Clause, which was straightforward, logical, and obvious:

> All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The Convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

Id. at 190.

Gibbons teaches that the Constitution, including the Commerce Clause, must be read plainly and in its proper historical context. In *Gibbons,* Chief Justice John Marshall demonstrated that the Commerce Clause viewed in proper context stands for the principle of open commerce between and among the states. *Gibbons,* 22 U.S. at 190. The notion that *Gibbons* supports the proposition that an individual can be compelled by the federal government to initiate undesired private commerce, however, is well beyond any contemplated historical boundary for Commerce Clause power. *See Ogden v. Saunders*, 25 U.S. 606, 652 (1827) (Marshall, C.J., dissenting).[3] *See also* Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010), 313 n.5.

C. The Supreme Court's Modern Jurisprudence Does Not Sustain The Individual Mandate.

The federal government argues that the individual mandate is permissible under the Supreme

[3] "[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and conferred by the act of the parties. This results in the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it." 25 U.S. at 652.

Court's analysis in *Gonzales v. Raich,* 545 U.S. 1 (2005), recognizing Congress's broad authority to "regulate activities that substantially affect interstate commerce." Petitioner's Brief, 22 (citing *Raich*, 545 U.S. at 16-17). Where there is literally no commerce, however, there can be nothing to regulate. Moreover, by applying in this case the Supreme Court's "substantial effects on commerce" test in boilerplate fashion to individuals who decide not to purchase a policy from an insurance company, the federal government focuses on the wrong actors and "activities." In so doing, it sidesteps limits on the Commerce Clause recognized in *Lopez* and *United States v. Morrison,* 529 U.S. 598 (2000) as well as in *Raich*. The federal government asserts these cases support the PPACA because the underlying legislation in *Lopez* and *Morrison* did not regulate economic activity. Petitioner's Brief, 45. The irony of its own position is lost on the federal government, which now asks this Court to re-write the Commerce Clause to define the individual mandate as commerce when, in fact, there is no commerce but for the government unconstitutionally compelling individuals to enter into private, binding contracts against their will.

1. The Individual Mandate Cannot Survive Commerce Clause Scrutiny.

a. Inactivity is *not* activity.

Petitioner's Commerce Clause analysis is dependent on this Court accepting that an individual's

decision not to purchase health insurance, i.e., inactivity, substantially affects interstate commerce. Petitioner's Brief, 50 (citing *Raich*, 545 U.S. at 16 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942))). But in *Raich* and *Wickard*, individuals actually produced or possessed an actual product for which there was a national market, legal or illegal. In the instant matter, the individual who is compelled to purchase private health insurance is neither creating a product nor providing a service. He is not doing anything. Therefore, the individual is withholding nothing from commerce because he is producing nothing.

In *Wickard,* the farmer grew wheat, which he withheld from interstate commerce. The Court rationalized in *Wickard,* and later reinforced in *Raich,* that withholding wheat from interstate commerce disrupted the federal price scheme and thus was subject to regulation. *See Raich*, 545 U.S. at 19 (Introducing a legal supply of marijuana into the national market would inevitably affect market prices.). The current matter has nothing to do with *Wickard* or *Raich*. It is the insurance company that creates the product or service, much like the farmer who grows wheat in his field or the criminal who grows marijuana in her basement. No one disputes that insurance companies are subject to reasonable regulation. But the individual who is the target of the federal government's mandate is not providing any service or producing any good; he is merely existing. In neither *Wickard* nor *Raich* did the federal

government attempt to compel an individual to purchase or grow wheat or marijuana.

b. The decision to forego insurance constitutes inactivity.

The federal government's conception of health care is not one where millions of citizens each exercise their individual judgment to make separate and rational decisions on how to manage their own particular health and welfare. Rather, the federal government sees Americans as "groups" and "classes" to be regulated. However, this is not Plato's *Republic*, Thomas More's *Utopia*, Thomas Hobbes's *Leviathan*, or Karl Marx's *Workers' Paradise*. It is a constitutional republic where individuals are free to decide for themselves whether to participate in commerce or not. By any objective standard, the individual who foregoes purchasing health insurance has made a decision *not* to engage in commerce.

2. The Individual Mandate Is Not Saved By The Necessary And Proper Clause.

a. The Necessary And Proper Clause is restrained.

Early on, the Supreme Court made clear that the Necessary and Proper Clause does not expand Congressional power. As Chief Justice Marshall explained in *McColloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), the first inquiry must be whether a legislative end is constitutional and legitimate,

i.e., whether it flows from an enumerated power. *McColloch*, 17 U.S. at 421. Next, the means must be "appropriate" and "plainly adapted" to that enumerated end. Moreover, these means may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." These phrases are not merely fluff, as demonstrated in *Printz v. United States,* 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992). *Printz* affirmed that a law is not "'proper for carrying into Execution the Commerce Clause'" "[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz, supra,* at 923-924; *see also New York*, *supra*, at 166; *Raich,* at 39 (Scalia, J., concurring).

The question for this Court is not whether compelling an individual to purchase an insurance policy as required by the PPACA is necessary to the successful implementation of the PPACA. Rather, the question is whether it is appropriate and plainly adapted to an enumerated federal power for the federal government to require an individual to purchase a good or service from another individual or private entity *for any private purpose* regardless of whether or not that purpose is necessary for carrying into execution a broad federal government program.

The relevant standard for evaluating the individual mandate under the Necessary and Proper Clause is whether the mandate is "'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Raich,* at 37 (citing *United States v. Darby*, 312 U.S. 100, 118-119 (1941)). What constitutes a

"reasonably adapted" means – and the potential for congressional mischief in asserting federal power under the Necessary and Proper Clause – has been a recurring concern since the Framing.

It is clear that Congress had and still has myriad constitutional ways to legislate a health care regime that would have achieved its intended purposes. The individual mandate is not one of them. This Court should not permit Congress to permanently damage our constitutional construct by unleashing both intended and unintended consequences that irrationally and fundamentally alter the nature of this Republic. If this Court strikes down the PPACA, Congress must simply consider legislative alternatives that do no violence to the Constitution while advancing its policy and political objectives.

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

Petitioner points to the Supreme Court's recent Necessary and Proper Clause examination in *United States v. Comstock* as justification for the individual mandate. (Petitioner's Brief, 22.) *Comstock* employed a five-part test for evaluating legislation under the Necessary and Proper Clause. This Court, however, still looks to *McColloch v. Maryland* to "define the scope of the Necessary and Proper Clause." It stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which

are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Comstock*, 130 S.Ct. at 1956 (quoting *McColloch,* 17 U.S. at 421).

Applying the "means-ends" rational relationship principle developed by the Supreme Court's Necessary and Proper Clause cases, the *Comstock* Court used a five-part test to evaluate a federal civil commitment statute, which the Supreme Court upheld. However, application of the *Comstock* test in this case correctly led the lower courts to the conclusion that the individual mandate is unconstitutional.

First, the Necessary and Proper Clause confirms Congress's broad authority to enact federal legislation. While *Amicus Curiae* strongly rejects the propriety of nationalizing the health care system, that issue is not before this Court. Second, the *Comstock* civil commitment statute constituted a "modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id*. at 1958. In this case, Congress is proposing to exercise a radically new national police power, one the Constitution does not grant. Third, "Congress reasonably extended its longstanding civil commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody. . . ." *Id.* at 1961. Again, here Congress creates an unprecedented, entirely new coercive power. Fourth, the statute properly accounts for state interests. *Id.* at 1962. Not so here. In fact, the unprecedented number of states challenging the constitutionality of the statute in the instant

action speaks volumes. Fifth, the links between the civil commitment statute and "an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope." *Id.* at 1963. Here the link between the mandatory individual insurance provision, which creates a sweeping unprecedented power, and any enumerated power is non-existent.

The PPACA thus fails the Necessary and Proper Clause tests set forth both in *McColloch v. Maryland* and *Comstock*. As Justice Kennedy explained in his *Comstock* concurrence, when the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links, but the strength of the chain. *Id.* at 1966. And in *Comstock,* Justice Kennedy concluded that the links were sufficiently strong, that it did not involve a case

> in which the National Government demands that a State use its own governmental system to implement federal commands. It is not a case in which the National Government relieves the States of their own primary responsibility to enact laws and policies for the safety and well being of their citizens. Nor is it a case in which the exercise of a national power intrudes upon functions and duties traditionally committed to the State.

130 S.Ct. at 1968.

To the contrary, Justice Kennedy upheld the enactment in *Comstock* because he found it to be "a

discreet and narrow exercise of authority over a small class of persons already subject to federal power." *Id.* The PPACA and its insurance mandate are the antithesis of the limited federal power exercised in *Comstock*. The PPACA requires states to implement a wide range of federal commands; it deprives states of their primary responsibility to enact laws and policies for the safety and well-being of their citizens; and it is aimed in unprecedented fashion at a broad sweep of Americans.

D. The Individual Mandate Is An Unconstitutional National Police Power.

The insurance mandate provision and its penalty provision establish the kind of national police power that this Court has always rejected. "[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power." *United States v. Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (citing *New York v. United States*, 505 U.S. 144, 155 (1992)).

"By assigning the Federal Government power over 'certain enumerated objects only,' the Constitution 'leaves to the several States a residuary and inviolable sovereignty over all other objects.' The Federalist No. 39 (J. Madison). The purpose of this design is to preserve the 'balance of power between the States and the Federal Government . . . [that]

protect[s] our fundamental liberties.'" *United States v. Comstock*, 130 S.Ct. at 1982 (Thomas, J., dissenting) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

The federal government's arguments twist a pretzel out of the enumerated interstate commerce power – one where marketplace *inactivity* becomes marketplace *activity* in order to justify the exercise of an obvious police power to compel individual, private conduct. As such, the government seeks not the appropriate use of its power but, instead, unfettered police power, the limits of which the government itself cannot even define.

NEVER in this country's history have these "certain enumerated objects" included the power to command individuals *solely because of their status as human beings* to buy any good or service from another individual or entity.

American history is replete with government efforts to influence the free market through a laundry list of incentives and disincentives. It has become a common practice largely upheld by the courts. Taxes, surtaxes, excise taxes, tax credits, tax deductions, tax abatements – all designed to influence commerce while funding government operations. Myriad federal and state regulations, county and municipal zoning ordinances, and a variety of other government influences affect private market decisions Americans make literally millions of times every day.

Importantly, they do not mandate that private citizens enter into legally binding contracts to purchase goods or services from other private citizens or entities. This further demonstrates the radical departure from history and law demanded by the federal government in this case.

Moreover, it should be emphasized that even where the federal government has required citizens to pay a portion of their earnings into government run benefit programs such as Social Security and Medicare, the payments have been in the form of defined taxes. *See Helvering v. Davis*, 301 U.S. 619, 635 (1937). Here, as explained below, and for whatever reason, Congress made the judgment to specifically avoid a constitutionally sound route for imposing this tax.

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

The individual mandate's penalty provision in 26 U.S.C. Section 5000A (2011) cannot be justified as a permissible tax under any Constitutional test. Arguments proffered by the federal government that this provision constitutes a permissible exercise of Congress's taxation authority fail under all established precedents and should be rejected by the Court.

Had Congress determined the penalty provision constituted a tax, it would have labeled it a tax and statements by members of Congress and President Obama made concurrently with its passage would

have reflected as much. The federal government's latest brief concedes the point without realizing it, referring repeatedly to Section 5000A as a "penalty." *See* Petitioner's Brief, 53, 60. Yet even if this Court assumes that Section 5000A is a tax, it still fails to satisfy the constitutional restrictions on taxes set forth in Article I, Section 9, Clause 4 (prohibition on the issuance of capitation or direct taxes unless apportioned among the states), the 16th Amendment (income tax) and the limitations set forth by this Court as applicable to other Article I, Section 8 taxes such as excises.

Section 5000A fails as a constitutionally permissible excise because there is no action on the part of the individual at the time the penalty is imposed. It fails as an income tax because the individual realizes no gain when electing not to purchase insurance. It most closely resembles a direct tax and must be apportioned among the states. As Congress did not take any steps to apportion the penalty, the federal government cannot rely on arguments that it constitutes a valid exercise of congressional authority to raise taxes.

Simply labeling the penalty provision or relying on inapposite case law does not justify the exaction from a constitutional standpoint. The provision must pass scrutiny under the various precedents set forth by this Court. The cursory reasoning provided by the federal government does not justify a levy that exacts a tax for *not* taking any action.

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

The penalty provision fails the Constitution's excise tax requirements.[4] Excise taxes require some sort of action or activity on the part of the individual to be assessed. Professor Steven J. Willis and Mr. Nakku Chung cogently describe an excise tax in the following manner, "[an excise tax] involves something an obligor chose to do: purchase a product or service, use a product or service, transfer property, or conduct commercial activity." Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare,* 2010 TNT 133-6, July 13, 2010.

Traditionally, excise taxes flow from the funds or income derived from a particular business activity. This Court, in *Steward Machine Co. v. Davis*, upheld, as a valid excise tax, employers' Social Security contributions based partly on the rationale that "employment is a business relation, if not itself a business." *Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937).

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[4] The Joint Committee on Taxation labels the penalty provision an "Excise Tax on Individuals." *See* Joint Comm. On Taxation, 111th Cong., Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in combination with the "Patient Protection and Affordable Care Act" 31, Errata For JCX-18-10, 2 (Mar. 21, 2010, Errata published May 4, 2010). Simply labeling it an excise is not the test for constitutionality.

Accordingly, a tax on the proceeds from the sale of a mining property is considered an excise because the income derived flowed from the operation of a specific business. "The very process of mining is, in sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction is indubitably 'business'. . . ." *Strattons Independence, Ltd. v. Howbert*, 231 U.S. 399, 415 (1914).

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

For example, in *Bromley v. McCaughn*, this Court concluded that a tax levied upon the maker of a gift constituted a viable excise tax. This Court concluded that where an individual exercised a power to give property to another, he or she could be subject to excise taxes. "The Supreme Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use or property or the exercise of a single power over property incident to ownership can justifiably be categorized as an excise." *Bromely v. McCaughn*, 280 U.S. 124, 136 (1929). Similarly, in *Murphy v. I.R.S.*, an en banc panel of the D.C. Circuit held that a tax on an individual's award of compensatory damages was a valid

excise tax on the basis that the award was incident to the exercise of a particular right. *Murphy v. I.R.S.,* 493 F.3d 170 (D.C. Cir. 2007).

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

Further reinforcing the principle that action or activity is a necessary component to an excise, this Court has stated, "[Excise taxes] were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and the

sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." *Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937) (quoting *Thomas v. United States*, 192 U.S. 363, 370 (1904)).

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

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

B. Rationales Proffered By Petitioner And Lower Courts That The Penalty Provision Constitutes A Justifiable Tax Are Untenable And Should Not Be Adopted By The Court.

No lower court has upheld the penalty provision under the rationale that it constitutes a valid exercise of congressional power to lay and collect taxes. However, at least one judge has erroneously concluded that the provision would be upheld under the plenary

taxing power. In *Liberty University v. Geithner*, writing in concurrence of the circuit court's decision to uphold the constitutionality of the individual mandate, Judge Wynn states that he would uphold the mandate provisions as "independently authorized" under Article I, Section 8, Clause 1. *Liberty University v. Geithner*, No. 10-2347, 2011 U.S. App. LEXIS 18618, *54 (4th Cir. Sept. 8, 2011) (Wynn, J., concurring), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011).

The federal government cites Judge Wynn's test as providing sound constitutional footing. Brief for Petitioner at 53. This reliance, however, is misplaced as Judge Wynn's analysis misconstrues this Court's standards in determining whether a levy passes constitutional muster.

Concluding that the pertinent inquiry is whether something that operates as a tax is "authorized under Congress's taxing power," Judge Wynn sets forth a three part analysis for determining whether a given tax is constitutional. *Id.* at *65-*66. The tax must bear "some reasonable relation" to raising revenue, it must "be imposed for the general welfare," and the tax "must not infringe upon another constitutional right." *Id.* Judge Wynn assembles crucial elements for the test from two of the cases involving *excise taxes*. As explained earlier, the penalty provision cannot be justified as a valid excise tax.

Judge Wynn incorrectly relies on two cases for the proposition that a tax is constitutional provided it

bears some relation to raising revenue.[5] *Id.* These cases, *United States v. Doremus* and *Sozinsky v. United States*, involve challenges to taxes placed on the sale of coca leaves and the sale of firearms respectively. *United States v. Doremus*, 249 U.S. 86 (1919); *Sozinsky v. United States*, 300 U.S. 506 (1937). Like the facts in the excise tax cases referenced above, each scenario involved levies placed upon actions or activity. These fact patterns are readily distinguishable from the present scenario. Under the PPACA, the individual has taken no action, nor engaged in any business activity.[6]

In addition to relying on cases involving clear excise taxes that are not comparable to the present case, Judge Wynn fundamentally misapprehends this Court's criteria for evaluating the constitutional validity of a tax. Specifically, in *Doremus*, this Court stated, "If the legislation enacted has *some reasonable relation to the exercise of the taxing authority conferred by the Constitution*, it cannot be invalidated because of the supposed motives which induced it." *Doremus*, 249 U.S. at 93. Following the dictates of

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[5] Furthermore, the penalty provision's purpose is to act as an incentive to compel healthy individuals to purchase insurance to offset costs *not* to raise revenue. *See* 42 U.S.C. Section 18091(a)(2)(C)-(I).

[6] *See Doremus*, where the court focuses on the test for evaluating the constitutionality of an excise, "The only limitation upon the Congress to levy *excise taxes* of the character now under consideration is geographical uniformity throughout the United States." *Doremus*, 249 U.S. at 93 (emphasis added).

Doremus, the statute in question must not bear some reasonable relation to raising revenue, it must bear a reasonable relation to the taxing authority conferred by the Constitution. The propriety of a tax should therefore be analyzed within a constitutional framework. It is not enough to conclude that a given tax raises revenue. It must comport with constitutional constraints.

The liberties taken by Judge Wynn regarding the dictates of this Court also extend to his reliance on language proffered by the Court in *Sozinsky*. He relies on this case as standing for the proposition that a tax "*must simply* be 'productive of some revenue.'" *Liberty University,* 2011 U.S. App. LEXIS 18618, at *66. However, the modifier "simply" never appears in the decision. Judge Wynn inserts the term when in actuality, this Court states, "Here, the annual tax of $200 is productive of some revenue." *Sozinsky*, 300 U.S. at 514. The term "simply" indicates that, provided the legislation results in some type of revenue event, it will be considered a viable tax. Judge Wynn never engages in any type of constitutional analysis. For example, he does not examine what type of taxation was in question in the cases he relies upon. He also misapplies the criteria utilized in *Doremus* and *Sozinsky* to create an incorrect test for determining whether a tax is constitutional.

Respectfully, Judge Wynn's analysis is of no useful guidance to this Court.

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

The 16th Amendment authorizes taxation upon income without apportionment, "The Congress has the power to lay and collect taxes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. Admittedly, this conferral vests Congress with broad authority to determine what constitutes "income." However, this power is not absolute. In order to be qualified as "income," an individual or entity must realize a gain.

Instructive in any analysis and application of the 16th Amendment is the seminal case *Eisner v. Macomber* where the Supreme Court, when considering the constitutionality of an income tax on stock dividends, stated, "it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form." *Eisner v. Macomber*, 252 U.S. 189, 206 (1920). The Court continued, "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." *Eisner*, 252 U.S. at 206. The 16th Amendment did not "extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among

the States of taxes laid on income." *Eisner*, 252 U.S. at 206.

The Amendment's language specifies that, to be subject to its mandates, the tax must originate from (1) a "source" and (2) it must be "derived." The penalty provision taxes no income or gain. In fact, there is no source of income and income is not derived. Consider the language of Chief Justice Earl Warren when he described income: "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426, 431 (1955). In that case, the Supreme Court concluded that, to be considered income and hence subject to taxation under the 16th Amendment, there must be some sort of realization event. The income had to be "clearly realized."

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

Under Section 5000A, the federal government argues a tax will be incurred for electing not to purchase health insurance. For income tax purposes, there is no realization event and there is not any derived income. The individual has not taken any affirmative action to realize any gain. His or her economic situation may improve as a result of electing not to purchase health insurance, but there is not a realization event and hence no quantifiable income.

Moreover, the penalty provision's floor and ceiling components support the contention it is not an income tax. Certain individuals who elect not to purchase health insurance will either pay the flat dollar amount or their income will be such that they pay the amount capped by the cost of bronze level coverage.[7] In many instances, the tax will not be indexed to income but will be a predetermined flat rate.

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[7] *See* Erik M. Jensen, *The Individual Mandate and the Taxing Power*, Case Research Paper Series in Legal Studies, Working Paper 2010-33, September 2010, where Professor Jensen provides the following: "Uninsured persons with incomes of $500,000, $1 million, $10 million, $100 million, and $1 billion will have to pay exactly the same penalty – the cost of bronze-level coverage. If that is a 'tax on incomes,' I will eat my insurance card."

D. The Penalty Provision Is Readily Distinguishable From The Social Security Act.

Efforts to justify the penalty provision as constitutionally permissible under the rationale used to uphold the Social Security Act fail for a number of reasons. First, many individuals subject to the penalty provision pay a flat amount whereas individuals who pay the Social Security or FICA tax pay a percent of earnings. Second, the FICA tax is directly linked to wages and earnings where the penalty provision is simply measured by household income. There is no reference in the statute to what is being taxed. Thus, unlike the FICA tax, there is no specific type of income being taxed. Third, and most importantly, the penalty provision provides the individual with nothing whereas the FICA tax provides income when the individual reaches a predetermined age or becomes disabled. *See* Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare*, 2010 TNT 133-6, July 13, 2010. As explained by Professor Willis and Mr. Chung, those who pay the amounts dictated by the penalty provision "receive no insurance in exchange for their payments. Indeed, no one subject to the [penalty provision] receives anything other than the guarantee that when they become ill, they can purchase insurance despite having a preexisting condition." *Id*. Further, the penalty provision, unlike the FICA tax, is not indexed to any level of benefits. Under the Social Security Act, those who pay larger amounts receive greater

benefits. The penalty provision does not provide any additional benefit (nor can it) to those who are penalized in larger amounts. *Id*.

These characteristics are indicative of a capitation or direct tax rather than an income tax. Although the penalty provision is tied to the income tax – i.e., its rates are partially tied to income – many, if not most individuals will pay either the floor amount or the ceiling. This flat rate component indicates the penalty provision constitutes a direct tax. Such a tax is prohibited unless apportioned among the states.

E. Article I, Section 9, Clause 4 Prohibits The Issuance Of Capitation Or Direct Taxes Unless Apportioned Among The States.

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

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

Whereas indirect taxes such as excises involve activity and, as such, are avoidable, direct taxes are imposed directly on the individual. The individual has no option in avoiding the exaction.[8] Thomas Cooley, writing in 1876, provided a cogent distinction that resonates in the modern context:

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[8] Some commentators suggest the penalty provision can be avoided by purchasing health insurance. Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 Yale L.J. Online 407 (April 5, 2011). In either scenario, purchasing health insurance or paying the penalty for not purchasing health insurance, an exaction has occurred as a result of government coercion.

> Taxes are direct, when they are levied upon and collected from those who were expected to pay them, and indirect, when they are levied upon and collected from one class of persons, with the understanding and expectation that they will be ultimately paid by the consumer or user of the things or property taxed, under the guise of an increase in the price of the property so taxed." Thomas M. Cooley, *A Treatise on the Law of Taxation* 5 (Chicago, Callaghan and Co. 1876) *quoted in* Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?* 97 Colum. L. Rev. 2334, 2419 (1997).

It is universally recognized that the *Pollock* decisions help spur the issuance and passage of the 16th Amendment. *See* Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare,* 2010 TNT 133-6, July 13, 2010, *see also* Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?* 97 Colum. L. Rev. at 2336. After the 16th Amendment's ratification, direct taxes, levied without apportionment, were constitutionally permissible; however, income had to originate from a source and had to be derived. Certain modern commentators believe the 16th Amendment essentially invalidated Article I, Section 9, Clause 4 but recent case law continues to recognize its constraints.

Consider the recent case of *Murphy v. I.R.S.* An en banc panel of the D.C. Circuit Court of Appeals refused to adopt the federal government's arguments that "only 'taxes that are capable of apportionment in

the first instance, specifically, capitation taxes and taxes on land,' are direct taxes." *Murphy v. I.R.S.*, 493 F.3d 170, 182 (D.C. Cir. 2007). In short, the government posited arguments that Article I, Section 9, Clause 4 has been supplanted by the 16th Amendment. The Court concluded otherwise when it stated, " . . . [N]either need we adopt the Government's position that direct taxes are only those capable of satisfying the constraint of apportionment. In the abstract, such a constraint is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states." *Murphy*, 493 F.3d at 184. As stated earlier in this brief, the Court looked to whether the tax at issue was more "akin" to a direct tax or "more like a tax upon a use of property, a privilege, an activity, or a transaction." Murphy, 493 F.3d at 184. The Court concluded the tax at issue (a tax on compensatory damages for mental pain and suffering) qualified as a justifiable excise tax. It did not determine whether this tax would have passed muster as a justifiable direct tax. However, by relying on the principles espoused in *Pollock II*, the Court indicated the constitutional constraints imposed by Article I, Section 9, Clause 4 continue to be valid.[9]

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[9] *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334, 2345 (1997) concluding that "A repudiation of *Pollock* is at most a rejection of the Court's conclusion that a tax on income from property is a direct tax; it speaks not at all to other levies that might be direct taxes."

Under the current statutory scheme, many individuals who have taken no action (not purchasing health insurance) will be obligated to pay a flat amount. This is strong evidence that the penalty provision is a direct tax, rather than an income or excise.

F. The Penalty Provision Constitutes An Impermissible Direct Tax Because It Is Not Apportioned Among The States.

The penalty provision does not pass muster as either an excise tax or an income tax. By elimination, the only safe harbor available is a successful justification of the provision as a direct tax. However, there has been no effort to apportion the penalty provision among the states. It therefore fails this constitutional mandate.

If the Court were to justify the penalty provision by determining it constitutes a valid tax, the federal government's taxation power would be without limits. In essence, the government is attempting to constitutionally justify a tax upon an individual who has taken no action. He has not purchased a good or service. He has not realized an economic gain. He has not received anything. He has not produced anything. The penalty provision fails to qualify as a constitutional tax under any scenario.

CONCLUSION

The federal government asks this Court to ignore the history of the Commerce Clause, Supreme Court precedent relating to the Commerce Clause, and both logic and common sense respecting the nature of commerce itself.

The provisions of the PPACA discussed at length in this brief represent an enormous and unprecedented attempt to expand federal power over American citizens. If these provisions are upheld as constitutional, the federal government's authority to regulate citizen activity (or non-activity) under the Commerce Clause and its authority to levy taxes will be limitless. If Congress wishes to reform health care, it is still free to do so, as long as it does so in compliance with the Constitution and this Court's precedents.

Respectfully submitted,

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