Nos. 11-1057 & 11-1058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
in his official capacity as Attorney General of Virginia,
Plaintiff-Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health
and Human Services, in her official capacity,
Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, strict construction of the Constitution and individual rights. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the district court's improper application of federal preemption and facial constitutional challenge standards and improper application of statutory construction principles.

This brief is filed with the consent of the parties.

ARGUMENT

I. OVERVIEW

This case is about individual liberty, state sovereignty and federalism. The federal government's arguments supporting the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Section 1501, 124 Stat. 119 (2010) (PPACA)'s individual mandate eviscerates more than 220 years of constitutional understanding and Supreme Court Commerce Clause jurisprudence, fundamentally misapprehends the Necessary and Proper Clause and misapplies the General Welfare Clause. Amicus Curiae Landmark Legal Foundation ("Landmark") urges this Court to accept this brief, which presents a unique and valuable perspective not found in the Parties' briefs.

The Commerce Clause is written in uncomplicated, plain English: 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 can even prohibit certain types of interstate commerce. There is nothing in the history of this nation, let alone the history of the Constitution and the Commerce Clause, however, permitting the federal government to compel an individual to enter into a legally binding private contract against the individual's

will and interests. Such a radical departure from precedent, law, and logic has never been contemplated, let alone imposed upon, the American people.[1]

The federal government urges this Court in the alternative to embrace Congress's attempt to bootstrap an impermissible national police power disguised as a "comprehensive regulatory program" under the Necessary and Proper Clause. 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. As demonstrated herein, the federal government cannot use the Necessary and Proper Clause as justification for the individual mandate when Congress has never had the authority to compel private

[1] The federal government's flagship case, *Wickard v. Filburn*, 311 U.S. 111 (1942) in no way supports 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. Herein lays the obstacle the government cannot overcome. Under the federal government's logic, what would stop the government from compelling a farmer to grow wheat or to grow corn or to raise livestock or to undertake some other activity he has no intention of pursuing? Indeed what would stop the federal government from compelling an individual to participate in agricultural activities or any other private activities? And once unleashed, what are the limits to this new, unconstitutional grant of power? Can the federal government compel an individual to purchase certain fruits and vegetables that are said to be healthy in order to limit the federal treasury's exposure to health-care related costs? Having so thoroughly contorted the Commerce Clause with its specious reasoning that it would swallow the Constitution and fundamentally change the relationship between the citizen and the federal government, should not the federal government provide some explanation respecting the contours of this new authority it claims? Perhaps this Court will make such an inquiry of the government.

parties initiate private economic activity as a condition for living and breathing. *See Gonzales v. Raich*, 545 U.S. 1, 36 (Scalia, J., concurring in the judgment, quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. at 118-19).

Finally, the PPACA's penalty provision runs afoul of constitutional limitations on Congress's power to levy taxes, which, contrary to the Executive Branch's argument, cannot be justified under the General Welfare Clause. As demonstrated in this brief, the federal government ignored fundamental constitutional restrictions on taxation, which prohibit Congress from levying the type of penalty contemplated in the PPACA.

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

A. The Commerce Clause and Necessary and Proper Clause in Historical Perspective.

In the wake of the Revolutionary War the nation was on the brink of financial disaster. The central government was largely without substantive authority and in disarray. With the Articles of Confederation ineffective in practice, leaders from the several states gathered in Philadelphia at the Federal Convention of 1787 to address the Articles' many defects. Chief among their concerns was dealing with the Confederacy's inability to effectively construct a stable national economy.

> The want of [the] power to regulate commerce was . . . a leading defect of the Confederation. In the different States, the most opposite and conflicting regulations existed; each pursued its own real or supposed local interests; each was jealous of the rivalry of its neighbors; and each was successively driven to retaliatory measures, in order to satisfy public clamor, or to alleviate private distress. In the end, however, all their measures became utterly nugatory, or mischievous, engendering mutual hostilities, and prostrating all their commerce at the feet of foreign nations. It is hardly possible to exaggerate the oppressed and degraded state of domestic commerce, manufactures, and agriculture, at the time of the adoption of the Constitution.

Story, "A Familiar Exposition," at Section 163.

James Madison noted that the predatory and retaliatory taxation visited on some states by their neighbors resulted in "New Jersey, placed between Philadelphia & N. York, [being] likened to a cask tapped at both ends; and N. Carolina, between Virginia & S. Carolina to a patient bleeding at both arms." James Madison, "Notes of Debates in the Federal Convention of 1787," (Athens, OH: Ohio University Press, 1985) p. 7. Prior to adoption of the new constitution, this issue "never ceased to be a source of dissatisfaction & discord . . .." Id.

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

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).

"Commerce" was defined in Giles Jacob's "New Law Dictionary," (10th Ed. 1782) (available at http://galenet.galegroup.com/ezproxy.mnl.umkc.edu/servlet/ECCO) -- the Black's Law Dictionary of the Founders' day -- as "traffic, trade or merchandize in buying and selling of goods." Of course, each of these concepts constitutes *interactions* consisting of *activity* freely engaged in by individuals in the marketplace. In short, the founders understood that there needed to be a unified national authority for regulating the flow of goods. That understanding was solidified by the Supreme Court in 1824.

B. The Supreme Court's Landmark *Gibbons v. Ogden* Squarely Supports the District Court's Decision.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) is the preeminent Commerce Clause decision of the founding era. The federal government and some of its amicus curiae supporters rely on this case for the proposition that Congress has plenary power to regulate under the Commerce Clause. In its proper historical and legal context, however, the decision is squarely supportive of the District Court's holding that the power to *regulate* commerce does not include the power to *compel* commerce.

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," involved the question as to whether individual states could grant monopolies to their navigational waters. See 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 other than those owned by Robert Fulton and Robert Livingston access to the state's ports or harbors. The result was escalated transport fees to neighboring states, confiscation of unlicensed vessels and rising tensions between New York and its neighboring states.

During oral argument, Attorney General William Wirt warned that "if the state of things which has already commenced is to go on; if the spirit of hostility which already exists in three of our states, is to catch contagion, and spread among the rest, as, from the progress of the human passions, and the unavoidable conflict of interests it will too surely do, what are we to expect. . .. Here are three states almost on the eve of war." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 184-185.

The crisis was averted by the Court through a plain reading of the Commerce Clause -- "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 stands for the principle of open commerce between and among the states. *Not* for the proposition that an individual can be compelled by the federal government to participate in private commerce. The fact that the government relies on *Gibbons* for the wrong proposition exposes the incoherence of its position.

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

The federal government asserts that the Supreme Court's decision in *Gonzales v. Raich* grants Congress broad authority, allowing it to "regulate activities that substantially affect interstate commerce." Appellant's Brief, 34 (citing *Gonzales v. Raich*, 545 U.S. 1, 16-17). However, where there is literally no commerce, there is nothing to regulate. Moreover, by applying the Supreme Court's "substantial effects on commerce" test in boilerplate fashion to the wrong "activities," the federal government attempts to crudely evade the Supreme Court's more recent reading of the Commerce Clause set forth in *United States v. Lopez* and *United States v. Morrison*. It claims they have no bearing on Virginia's complaint because the underlying legislation in each of those cases did not regulate "economic activity." Appellant's Brief, 51. The irony of this position is lost on the federal government, which now asks this Court to re-write the Commerce Clause to define the individual mandate as commerce when, in fact, there is no commerce but for the government unconstitutionally compelling individuals to enter into private, legally binding contracts against their will.

In any event, the federal government's analysis ignores the Supreme Court's admonition that "[i]n assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation." *Raich,* 545 at 15.

"Recitation without explanation is misleading and incomplete." *Raich*, 545 U.S. at 34 (Scalia, J. concurring).

1. The Individual Mandate Cannot Survive Commerce Clause Scrutiny.

a. Inactivity in *not* activity.

The Commerce Clause analysis urged by the federal government in this case is whether an individual's decision not to purchase health insurance substantially affects interstate commerce. *See Raich*, 545 U.S. at 16 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)). But in *Raich* and *Wickard*, individuals actually produced or possessed a tangible product for which there was a market, legal or illegal. In the instant matter, the individual is not creating a product or producing a service. He is not doing anything. Therefore, the individual is withholding nothing from commerce because there is no commerce involving the individual.

In *Wickard,* the farmer grew wheat, which he withheld from interstate commerce. The Court rationalized in *Wickard* and later reinforced by *Raich,* that withholding wheat from interstate commerce disrupted the federal price scheme and thus was subject to regulation. *See Raich*, 545 U.S. at 19. The current matter has nothing to do with *Wickard* or *Raich*. It is the insurance company that creates the product or service, much like the farmer who grows wheat. No one disputes that insurance companies are subject to reasonable regulation. But the individual who is the target of the federal government's mandate is not providing any service

or good; he is merely existing. In neither *Wickard* nor *Raich* did the federal government attempt to compel any individual to purchase wheat or marijuana.

b. The decision to forego insurance constitutes inactivity beyond the reach of the Commerce Clause.

The federal government's conception of health care is not one where millions of citizens each exercise their 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.

The individual who foregoes purchasing health insurance has made a decision *not* to engage in commerce. Congressional power to regulate commerce does not extend to an individual making a personal choice to refrain from commerce. The federal government's citations to cases such as *Nurad Inc. v. William E. Hooper,* 966 F.2d 837 (4th Cir. 1992) fail utterly to support the argument that Congress can regulate the choice not to initiate a private transaction.

In *Nurad*, a corporate landowner was forced to clean up and remove underground storage tanks and their hazardous contents. Under the

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Court found that a prior owner of the property, which had run a textile finishing plant on the site, was liable to the current owner for costs. CERCLA created strict liability for a facility owner/operator at the time hazardous substances had been disposed. The federal government has conflated an individual citizen's complete inactivity in the marketplace with a large manufacturer's passive, but harmful, polluting.

With the insurance mandate, the citizen is regulated for merely existing, while the corporation in *Nurad*, obviously engaged in the stream of commerce, is regulated for *leaking pollutants*. Rather than an example of congressional regulation of inactivity, *Nurad* falls within the proper confines of the Commerce Clause.

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

The relevant question for analyzing the individual mandate under the Necessary and Proper Clause is whether the mandate is "'reasonably adapted' to the attainment of a legitimate end under the commerce power." *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.

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

> These two clauses have been the sources of much virulent invective, and petulant declamation, against the proposed constitution. They have been held up to the people in all the exaggerated colours of misrepresentation; as the pernicious engines by which their local governments were to be destroyed, and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane, and yet, strange as it may appear, after all this clamour, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constitution a federal government, and vesting it with certain specific powers. This is so clear a proposition that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity.
> *Id.* at 172.

Today the federal government argues for exactly the kind of power Hamilton mockingly insisted it was never granted under the Necessary and Proper Clause -- a federal enactment that is indeed a hideously monstrous federal power grab with jaws fully capable of devouring any remnant of state sovereignty and individual liberty.

a. The Necessary And Proper Clause Is Restrained.

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

Thus, the question for this Court is not whether a private individual's inactivity evidenced by not purchasing health insurance is "commerce" or even "substantially affects commerce" under the Commerce Clause as the government wrongly argues. And the question 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. 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 purpose* regardless of whether or not that purpose is necessary for carrying into execution a broad federal government program. It is clear that Congress had myriad constitutional ways to legislate a health care regime that would have achieved its intended purposes. The individual mandate is not one of them. Rather than damage permanently our constitutional construct by unleashing both intended and unintended consequences that fundamentally alter the nature of this Republic, Congress must be required to consider legislative alternatives that do no violence to the Constitution yet advance its policy and political objectives.

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

The federal government points to the Supreme Court's recent Necessary and Proper Clause examination in *United States v. Comstock* as justification for the individual insurance mandate, citing *Comstock*'s holding that the relevant inquiry is whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power. Appellant's Brief, 40.

While *Comstock* establishes a five-part test for evaluating the Necessary and Proper Clause question in that case, the Supreme Court still looks to *McColloch v. Maryland*, 4 Wheat. 316 (1819), to "define the scope of the Necessary and Proper Clause": "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which

are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Comstock*, 2010 LEXIS 3879, at *15 (quoting *McColloch,* 4 Wheat. at 421).

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

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. While Amicus Curiae rejects strongly the propriety of federalizing the health care system, that issue is not before this Court. Second, the *Comstock* civil commitment statute constituted a "modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id*. at *20. Of course, in this case the government is proposing to exercise a radically new police power, one the Constitution does not grant. Third, "Congress reasonably extended its longstanding civil commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody . . . ." *Id.* at *28. Again, here the Congress creates an unprecedented, entirely new coercive power. Fourth, the statute properly accounts for state interests. *Id.* at *31. Not so here. In fact, an unprecedented number of states are challenging the

constitutionality of the statute in defense of its citizens. Fifth, the links between the civil commitment statute and "an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope." *Id.* at *34-35. Here the link between the mandatory individual insurance provision, which creates a sweeping unprecedented power, and any enumerated power is non-existent.

The PPACA fails the Necessary and Proper Clause tests set forth both in *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 *42. In this case, the link is illusory and violates the Constitution. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at *45 (citing *Lopez*).

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

Concerned that its Commerce Clause argument has collapsed, having insisted that no commerce is commerce, the federal government hopes to convince the Court that a penalty is a tax. The federal government asserts that it has the power to lay a tax on the individual for *not* taking any action. Its tax argument

relies solely on its authority under the General Welfare Clause. It makes no effort to attempt to analyze and/or justify Section 5000A of the PPACA ("penalty provision") within the Constitutional constraints set forth in Article I, § 9, cl. 4 (prohibition on the issuance of capitation or direct taxes unless apportioned among the states) or the 16th Amendment (income tax). The federal government also makes no attempt to justify this provision as a permissible excise tax (Article I, § 8). As demonstrated below, the penalty provision fails qualification as any constitutionally permissible form of taxation.

Since this penalty provision exceeds congressional power under the Commerce Clause, the federal government seeks to justify this provision as proper under congressional authority to lay and collect taxes. Briefly summarized, the federal government argues Congress may use its "comprehensive" authority under the Constitution's General Welfare Clause to lay a "tax" upon individuals who purchase no product, realize no gain on investment, or receive no income from their labors. See Appellant's Brief, 58-59**.**

A careful analysis of congressional power to lay and collect taxes under the Constitution and relevant case law provides no support for Section 5000A. The penalty provision lays outside the scope of congressional authority and should be declared invalid. The federal government's arguments that this provision

constitutes a permissible exercise of Congress's taxation authority fail under all established precedents and should be rejected by the Court.[2]

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

Any attempt to characterize or justify the penalty provision as an excise tax fails.[3] 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.

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[2] It is interesting to note that the federal government does no more than label the penalty provision as a "tax." The federal government does not attempt to characterize it as an excise, income or apportionment because, as demonstrated below, any of these characterizations would fail constitutional scrutiny. Instead, the federal government simply slaps the penalty provision with the label "tax" and hope said label sticks.

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

Traditionally, excise taxes flow from the funds or income derived from a particular business activity. The Supreme 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).

Accordingly, a tax on the proceeds from the sale of a mining property is considered an excise because the income derived flowed from the operation of a specific business. "The very process of mining is, in a sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction in indubitably 'business'…" *Stratton's Independence, Ltd. v. Howbert*, 231 U.S. 399, 415 (1913).

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

For example, in *Bromley v. McCaughn,* the Supreme Court concluded that a tax levied upon the maker of a gift constituted a viable excise tax. The Court concluded that where an individual *exercised* a power to give property to another,

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

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

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

B. 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 this 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 isn't any derived income. The individual hasn't 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 isn't a realization event and hence no quantifiable income.

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

Article I, § 9 Cl. 4 of the Constitution prohibits the levying of capitation or direct taxes unless apportioned among the states, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. Const. art. I, § 9 Cl. 4. The Apportionment Clause was 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).

In a subsequent decision, *Pollock v. Farmers' Loan and Trust Co. 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.

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. 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, § 9 Cl. 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, § 9 Cl. 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 didn't determine whether this tax would have passed muster as justifiable *direct tax*. However, by relying on the principles espoused in *Pollock*, the Court indicated the constitutional constraints imposed by Article I, § 9 Cl. 4 continue to be valid.

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

The penalty provision does not pass muster as either an excise tax or an income tax. 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. The fact is that if Congress wanted to impose a tax, it would have done so – as it has myriad times throughout history. It chose not to, yet the Executive Branch argues the contrary.

If the Court were to justify the penalty provision by determining it constitutes a valid tax, the federal government's taxation power would be without limits. In essence, the government is taxing an individual who has taken no action. He has not purchased a good or service. He has not realized an economic gain. He has not received anything. He has not produced anything. The federal government's lawyers seek refuge in the General Welfare Clause, but the constitutional constraints of Article I, § 9 Cl. 4, the 16th Amendment, and existing case law expose them. As demonstrated above, the penalty provision fails to qualify as constitutional tax under these provisions and the federal government's efforts to justify it as a permissible tax should be rejected.

IV. CONCLUSION

In sum, 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 it authority to levy taxes under the General Welfare Clause will be limitless. The hypotheticals boggle the mind.

The heavy-handed demands of temporary politicians who seek to change fundamentally and permanently the relationship between the citizen and government in a manner that no past Congress or Executive have undertaken and which the Constitution clearly does not allow must not be given the Court's imprimatur.

Landmark respectfully requests that the District Court's decision be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing amicus curiae brief was electronically submitted on April 4, 2011, to the Office of the Clerk for the United States Court of Appeals for the Fourth Circuit via the court's CM/ECF system, which will generate and send by e-mail a Notice of Docket Activity to all CM/ECF registered attorneys participating in this case. Counsel for appellants and appellees are registered CM/ECF users.

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