

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION**

**LT. GOV. PHIL BRYANT, in his
private and individual capacity, on behalf
of himself and others similarly situated
RYAN S. WALTERS,
MICHAEL E. SHOTWELL and
RICHARD A. CONRAD, ET AL., on behalf
of themselves and others similarly situated**

PLAINTIFFS

VS.

NO.2:10-cv-76

**ERIC H. HOLDER, JR., in his official
capacity as Attorney General of the United
States; UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
KATHLEEN SEBELIUS, in her official
capacity as the Secretary of the United States
Department of Health and Human Services;
UNITED STATES DEPARTMENT OF
THE TREASURY; TIMOTHY F.
GEITHNER, in his official capacity as the
Secretary of the United States Department
of the Treasury; UNITED STATES
DEPARTMENT OF LABOR; and HILDA
L. SOLIS, in her official capacity as Secretary
of the United States Department of Labor**

DEFENDANTS

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I. INTRODUCTION.

This case is about the continuing vitality of our longstanding federalist system. The Patient Protection and Affordable Care Act¹ (“PPACA” or “the Act”) represents an unprecedented intrusion on the sovereignty of the States and the freedom of their citizens. As such, it threatens to destroy our traditional system of dual sovereignty - our compound republic - under which the federal government is to exercise only those limited powers conferred upon it by the Constitution, with all other powers reserved to the States or the people. *See New York v. United States*, 505 U.S. 144, 155-56 (1992). This system, as Justice Kennedy explained in *United States v. Lopez*, 514 U.S. 549, 575 (1995) (concurring), “was the unique contribution of the Framers to political science and political theory.” It was designed to achieve a “healthy balance of power between the States and the Federal Government [to] reduce the risk of tyranny and abuse from either front[.]” by empowering both governments so that each “will control [the] other” *Printz v. United States*, 521 U.S. 898, 921-22 (1997). In enacting the PPACA, Congress upends that balance, usurping powers denied it and thereby inflicting the very harm warned of in *Printz*.

Specifically, Petitioners are profoundly affected by § 1501 of the PPACA, the “individual mandate” (called the “minimum coverage provision” in Defendant’s motion), which dictates that Americans purchase a healthcare insurance policy for themselves and their families or be penalized. Thus, for the first time in American history, Congress is requiring that Americans enter a marketplace and purchase a product, whether it is wanted or not. The individual mandate will go into effect after December 31, 2013, and Petitioners have no intention of abiding by its

¹ Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (“HCERA”).

unconstitutional demand to purchase insurance or to pay a penalty for their inactivity.

Without question, the individual mandate is manifestly unconstitutional. No enumerated power of Congress permits this assertion of top-down centralized economic power; nor can the Necessary and Proper Clause expand congressional power to support the mandate. Congress's commerce power extends to regulation of *activities* having a substantial relation to interstate commerce, but does not allow it to compel *inactive* individuals to enter a marketplace against their will. Likewise, Congress's power to tax does not authorize it to compel persons to purchase specific insurance products. By exerting such sweeping authority over individual decisions, Congress has seized powers denied it under the Tenth Amendment, in violation of the Constitution's federalist structure and individual rights under the Fifth and Ninth Amendments.

For the sake of our republic, the constitutional limits imposed on the federal government must stand for something. To find that the mandate is constitutional would be the first-ever interpretation of the Commerce power, the Necessary and Proper Clause or the taxing power to permit the regulation of *inactivity* – commanding an individual to affirmatively engage in an economic transaction. If allowed, “[t]he federal government would then have wide authority to require that Americans engage in activities of its choosing, from eating spinach and joining gyms – in the health care realm – to buying cars from General Motors.” Ilya Shapiro, *State Suits Against health Reform Are Well Grounded in Law – And Pose Serious Challenges*, 29 *Health Affairs* 1229, 1232 (June 2010). A dismissal of the Amended Petition would grant Congress unlimited power to regulate, prohibit, or mandate any or all activities in the United States. Such a doctrine would abolish any limit on federal power and forever alter the fundamental relationship of the national government to the states and the people.

Americans repeatedly have expressed concern and opposition to the health care law, and a

large-and-still-growing majority say they want it repealed. In the historic elections of November 2, 2010, the well-respected Rasmussen Reports conducted exit polls and found that 59% of those who voted on Election Day favor repealing the PPACA - numbers that have been pretty consistent since the troubling health care measure was passed in March 2010. Rasmussen Reports, Nov. 2, 2010. The day before the election, Rasmussen wrote in the Wall Street Journal:

Central to the Democrats' electoral woes was the debate on health-care reform. From the moment in May 2009 when the Congressional Budget Office announced that the president's plan would cost a trillion dollars, most voters opposed it. Today 53% want to repeal it. Opposition was always more intense than support, and opposition was especially high among senior citizens, who vote in high numbers in midterm elections.

Scott Rasmussen, Wall Street Journal, Nov. 1, 2010. The byline to this opinion article states: *"Voters don't want to be governed from the left, right or center. They want Washington to recognize that Americans want to govern themselves."* Indeed, self-government is a quintessentially American idea, and the desire to govern ourselves is a defining characteristic of our nation. A major reason that the PPACA is so unpopular is the liberty-robbing individual mandate. Americans recognize that there is something quite un-American with a government dictating to citizens that they must buy government approved health insurance whether they want it or not.

Defendants' memorandum is replete with political arguments about why the health insurance reforms in the Act were both necessary and a good idea, but such arguments as to whether or not reform was needed (or whether the Act is even capable of delivering on its promises) are completely beside the point. Americans cherish liberty, and we live in the freest nation on earth because the people have reserved power to the states and to themselves, granting only a limited amount of power to the federal government. *Unless a power is specifically*

enumerated in the United States Constitution, it is not a power that the federal government possesses. The power to dictate to the people that they *must* purchase a government-approved health insurance plan cannot be found in all of the Constitution. To allow the individual mandate to stand would be to afford Congress unlimited power and destroy the limitations our founding fathers imposed on the government.

ARGUMENT

II. PLAINTIFFS HAVE STANDING TO CHALLENGE THE INDIVIDUAL MANDATE, AND THEIR CHALLENGE IS RIPE.

A motion to dismiss under rule 12(b)(6) “is viewed with disfavor and is rarely granted.” *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982). Rule 12(b) (6) must be read in conjunction with Rule 8(a), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court must not dismiss a complaint for failure to state a claim unless the plaintiff has failed to plead “enough facts to state a claim for relief that is plausible on its face.” *Twombly*, 550 U.S. at 570; *Sonnier v. State Farm*, 509 F.3d 673, 675 (5th Cir. 2007). In ruling on motion to dismiss pursuant to Rule 12(b)(6), the district court “accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 204 (5th Cir. 2007). The reviewing court must also “resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff.” *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

A. Petitioners have standing.

To establish standing, a plaintiff must demonstrate (1) “injury in fact”; (2) a casual relationship between the injury and the challenged conduct; and (3) harm that will be “redressed by

a favorable decision.” *Lujan Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The latter elements plainly are met, since when a plaintiff is the object of governmental action, “there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it.” Indeed, Defendants concede the latter elements by disputing only Petitioners’ injuries-in-fact.

“The ‘essence’ of standing is ‘whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.’” *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008). In order to have standing, “a plaintiff must show: (1) it has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the defendant’s conduct; and (3) a favorable judgment is likely to redress the injury.” *Id.* “An injury in fact is an invasion of a legally protected interest which is ‘actual or imminent, not conjectural or hypothetical.’” *Id.* The individual mandate by its terms applies to individual Petitioners. Am. Pet. ¶¶ 21-28. As shown below, the mandate causes Petitioners concrete, actual, and imminent injury. No further administrative action is required to trigger the mandate’s facially coercive effects, and the court’s assessment of its constitutionality *vel non* will not be assisted by any actual experience with its application.

Defendants make factual arguments as to whether any plaintiffs will suffer an injury, however, in this 12(b)(6) motion to dismiss, the court may not weigh evidence or engage in speculation. Instead, the allegations of the amended petition must be accepted as fact, and “‘mere allegations of injury’ are sufficient to withstand a motion to dismiss based on lack of standing.” *State of Florida v. U.S. Dept. of Health and Human Svcs.*, - F. Supp. 2d -, 2010 WL 4010119 (N. D. Fla.), quoting *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329, (1999). Petitioners have alleged that the individual mandate will require Petitioners to apply for and

purchase qualifying healthcare insurance, even though they do not have it and do not want it. Am. Pet. ¶¶ 25, 26. Thus, they are forced either to enter into an economic transaction they want no part of or be penalized monetarily. Since Petitioners allege direct economic harm from the PPACA's impending mandate, standing to assert their claims clearly exists. *See, e.g., Okpalobi v. Foster*, 190 F.3d 337, 350 (5th Cir. 1999). Plainly, their alleged economic injuries are "distinct and palpable." These are not mere "generalized grievances" about how tax dollars may be spent, or based on infringement of a broad right to constitutional government, as asserted in *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 342-43 (2006), and similar cases on which Defendants rely. Def. Mem. 8-11.

The plaintiffs have numerous allegations in the amended petition that are relevant to the standing issue. Indeed, Petitioners have not merely *alleged* that they have no intention of either abiding by the individual mandate or paying the penalty, they have strongly *promised* that they will resist the statute. Given this fact alone, the ripeness inquiry is satisfied:

Related to the standing requirement is the question of ripeness. In the [constitutional] context involving a pre-enforcement challenge, the ripeness inquiry focuses on how imminent the threat of prosecution is and *whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute* in order to ensure that the fear of prosecution is genuine and the alleged infringement on [constitutional] rights is concrete and credible as opposed to being speculative or imaginative.

Trimble v. City of New Iberia, 73 F. Supp. 2d 659, 664 (W. D. La. 1999) (First Amendment freedom of speech case) (emphasis added).

B. The individual mandate's future effective date, which is definite, does not deprive Petitioners of standing or violate the requirement of ripeness.

The crux of Defendants' standing arguments are that Petitioners' injuries are too "indefinite" or too far in the future to support standing, Def. Mem. 8-11, but courts repeatedly have

found standing to pursue a pre-enforcement constitutional challenge where the alleged harm will occur in the future. *See, e.g., Massachusetts v. EPA*, 549 U.S. at 521-23 (standing based on rise in sea levels *by the end of this century*); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925) (standing to challenge education act before effective date; while the Supreme Court did not quantify the “lead time,” the lower court had identified it as at least two years and five months at 296 F. 928, 933 (D. Or. 1924)); *Dep’t of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 332 (1999) (standing in February 1998 to challenge sampling method for 2000 Census); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (standing to contest fees not collectible for 13 years).

Standing “depends on the *probability of harm*, not its temporal proximity.” *See 520 S. Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006) (emphasis added). As discussed *infra*, Defendants concede the “probability of harm” by stating that millions of people will pay billions in penalties, yet they argue that the enforcement date is so far away that there is no “immediacy.” As the Eleventh Circuit has held, “immediacy requires only that the anticipated injury occur with some fixed period of time in the future, *not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months.*” *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (emphasis added). Individual Petitioners *must* comply with the individual mandate after December 31, 2013. PPACA § 1501(b). That date is fixed in the law and is certain to occur; it is a statutory certainty.

Defendants’ reliance on *Whitmore v. Arkansas*, 495 U.S. 149 (1990), and similar authorities is misplaced. The issue in those cases was not passage of time, but the contingent and thus uncertain nature of the alleged injuries. *Whitmore* involved a prisoner’s challenge to procedures that would not affect him unless he could secure federal *habeas* relief from his conviction and sentence. *See also McConnell v. FEC*, 540 U.S. 93, 226 (2003) (U.S. Senator

would not be affected by challenged provisions unless he chose to run for reelection five years later); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (no standing to seek injunction prohibiting police from potential future use of "choke holds"); *Lujan*, 504 U.S. at 564 (plaintiff expressed only vague intention "some day" to return to Sri Lanka to observe endangered species); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 343 n.19 (2d Cir. 2009) (confirming Petitioners' reading of *McDonnell*).

State of Florida v. U.S. Dept. of Health and Human Svcs. is a case that is "on all fours" with the instant matter, since it was brought by the Attorney General of the State of Florida alleging that the individual mandate is unconstitutional. In that case, the court recently held that "the injury alleged in this case will not occur at 'some indefinite future time.' Instead, the date is definitively fixed in the Act and will occur in 2014, when the individual mandate goes into effect and the individual plaintiffs are forced to buy insurance or pay the penalty." *State of Florida v. U.S. Dept. of Health and Human Svcs.*, 2010 WL 4010119 at *18. That holding is entirely consistent with the holding of this court in *Illinois Cent. R. Co. v. Fordice*, where the plaintiff argued that it had suffered past economic harm and "is threatened with future economic losses." *Illinois Cent. R. Co. v. Fordice*, 30 F. Supp. 2d 945, 951 (S. D. Miss. 1997). Judge Wingate held that "the threat of *future harm* to the plaintiff and its employees is real and immediate," reasoning that if the court "determine[d] the state statute under which the defendants were acting is null and void, plaintiff will not be subjected to such intrusions again and, therefore, will not suffer the same economic injuries." *Id.* (emphasis added).

C. Defendants' own research about what the future will hold disproves their assertion that the threat plaintiffs face is "imaginary or speculative."

In a variation of their temporal proximity argument, Defendants argue that the "threat"

plaintiffs' face is "imaginary or speculative" merely because the individual mandate penalty will not start being collected until 2015 (thus disingenuously ignoring the entire year of 2104, when the mandate goes into effect). Def. Mem. 9. However, there is nothing speculative or contingent about Petitioners' claims: the mandate *will* take effect on January 1, 2014, and *will* apply to individual Petitioners. Petitioners do not now have qualifying coverage, and have no intention of changing their status in this regard. Am. Compel ¶¶ 27, 28. Their injuries are not contingent upon further act or decision on their part. The only speculation here is by Defendants. Def. Mem. 8-11.²

Defendants have provided us with ample proof that *millions* of people will not only be subject to a potential penalty, but will actually be forced to pay penalties under the Act. Based upon a CBO report, Defendants have asserted that the penalty will raise about "\$4 billion in annual revenue." Def. Mem. 43. The CBO and JCT (Joint Committee on Taxation) have calculated that "[i]n total, about 4 million people are projected to pay a penalty because they will be uninsured in 2016 (a figure that includes uninsured dependents who have the penalty paid on their behalf)."³ Thus, instead of demonstrating that these penalties are imaginary or speculative, Defendants have actually calculated that millions of individuals who are in fact subject to the individual mandate will fail to comply with its dictates, thus violating the law and incurring penalties of billions of

² Petitioners need only show that their injury is probable, not that it is absolutely certain. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) ("probability" that landlord's rent would be reduced by law "sufficient threat of actual injury" to satisfy Article III); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (standing where "realistic danger of sustaining a direct injury as a result of the statute' operation or enforcement"); *ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1195-97 (11th Cir. 2009) (standing to challenge library's ban of book plaintiff intended to check out later that year).

³ *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act*, April 22, 2010 at 2 (emphasis added).

dollars in aggregate.

Of course, even one single Petitioner's standing affords yet another basis by which the court can consider the constitutionality of the individual mandate. *Massachusetts v. EPA*, 549 U.S. at 518 ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (declining to bother to adjudicate a labor union's standing where a union member alleged an injury-in-fact); *Prejean v. Foster*, 83 Fed.Appx. 5, 8 (5th Cir. 2003) ("In cases with multiple plaintiffs, the presence of at least one party with standing makes the case justiciable."). Importantly, the figure of 4 million people is just the people who will be *paying the penalty* - obviously, the number of people who will be subject to the individual mandate and who will let themselves be coerced into involuntarily purchasing insurance will be even higher. Defendants thus admit that the threat is "certainly impending," and by actually calculating the number of people who will be subject to the penalty and the amount in aggregate that they will pay, Defendants have shown that the threat of future enforcement is not speculative in the least.

D. Petitioners' claims challenging the individual mandate are ripe.

Ripeness turns on two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). As Defendants must admit, a "conspicuous overlap" exists between standing and ripeness inquiries in pre-enforcement challenges to statutes like the PPACA, where ripeness often turns on "whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision-making by the court." *Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006); *see also Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th

Cir. 2009) (purely legal claim is “presumptively ripe for judicial review” because no developed factual record needed). Here, all Petitioners allege that the individual mandate will cause them actual, concrete, and imminent injury. Am. Comp. ¶¶ 21-28.

Defendants cannot rely on the mandate’s effective date being in the future, because injury to Petitioners is inevitable and, “[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect.” *Blanchette v. Ct. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974). If “the enforcement of a statute is certain, a pre-enforcement challenge *will not be rejected on ripeness grounds.*” *Browning*, 522 F.3d at 1164 (emphasis added); *See also Fla. League of Prof’l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir. 1996) (lobbying group’s prospective challenge to law’s constitutionality was ripe where group was faced with choice to “refrain from engaging in protected First Amendment activity or risk civil sanction for alleged unethical conduct”); *Abbott Labs.*, 387 U.S. at 152-53 (challenge to regulation was ripe where it was directed at plaintiffs, required them to change business practices, and subjected them to civil penalties for noncompliance). This is particularly true where, as here, the challenge mainly raises questions of law. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201-03 (1983) (case ripe where “predominantly legal” question raised).

Nor is there any “uncertainty” about whether the mandate will apply to Petitioners. Unlike *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 163-64 (1967), and cases like it, the individual mandate as written will impact Petitioners, regardless of any additional administrative action. Defendants’ cases, Def. Mem. 13-14, are inapposite. They involve either injuries contingent on

further agency action (ruling by arbitration tribunal in *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 577-78 (1985), completion of site selection process in *Nevada v. Burford*, 918 F.2d 854, 857 (9th Cir. 1990), additional FDA determinations in *Toilet Goods*)), or provisions forbidding conduct where no violation or desire to engage in the conduct was alleged (interference with voting rights in *South Carolina v. Katzenbach*, 383 U.S. 301, 317 (1966), deprivation of rights by officials in *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 17-18 (D.D.C. 2001)). And unlike the FDA regulation at issue in *Toilet Goods*, the mandate's validity does not turn on factors (*e.g.*, practical enforcement problems) such that the "judicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application" of the challenged provision. *Id.* at 164. Congress itself has established the individual mandate's metes and bounds. Its practical application by the agencies enforcing it will not illuminate the legal issues now raised. This case is fully ripe for adjudication. *See Virginia v. Sebelius*, Mem. Op. at 15-17 (Aug. 2, 2010) (State's challenge to the individual mandate is ripe).

III. THE ANTI-INJUNCTION ACT DOES NOT APPLY AND THEREFORE DOES NOT DEPRIVE PETITIONERS OF STANDING.

The President, Congress and the PPACA all agree that the mandate is a "penalty" and that it is definitely not a tax. However, in an attempt to shoehorn the mandate in under the protection of the Anti-Injunction Act, Defendants now enthusiastically embrace the "tax" label. At least one court has criticized this "shift in position" as a blatant attempt to avoid accountability:

In other words, the members of Congress would have reaped a *political advantage* by calling and treating it as a penalty while the Act was being debated [], and then reap a *legal advantage* by calling it a tax in court once it passed into law. *See* Def. Mem. at 33-34, 49 (arguing that the Anti-Injunction Act bars any challenge to the penalty which, in any event, falls under Congress's "very extensive" authority to tax for the general welfare). This should not be allowed, and I am not aware of any reported case where it ever

has been.

State of Florida v. U.S. Dept. of Health and Human Svcs., - F. Supp. 2d -, 2010 WL 4010119 at *15 (N.D. Fla.) (Roger Vinson, J.), 106 A.F.T.R. 2d 2010-676 (internal citations omitted). This distasteful political maneuvering, however, ultimately does nothing to avail the defendants, since the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA") applies only to "taxes," and the individual mandate is clearly not a tax.

Whether the individual mandate penalty is a tax is an important question that not only implicates jurisdiction (*vis-a-vis* the Anti-Injunction Act), but it also goes to the merits of the individual mandate-related challenges of whether the penalty can be justified by, and enforced through, Congress's taxing power, or whether the penalty must be analyzed instead under the more limited Commerce Clause authority. The federal court for the Northern District of Florida has considered virtually identical arguments by the Defendants in the similar case against the PPCA filed there, and ruled that the individual mandate is not a "tax," but rather is a "penalty" that does not fall under the Anti-Injunction Act: "[I]t is obvious that Congress did not pass the penalty, in the version of the legislation that is now 'the Act,' as a tax under its taxing authority, but rather as a penalty pursuant to its Commerce Clause power." *State of Florida v. U.S. Dept. of Health and Human Svcs.*, *supra*.

The mandate, which requires persons to have coverage, cannot be a tax subject to the AIA, because its stated purpose is not to raise revenue but to create "effective health insurance markets." See *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) (citing *Head Money Cases*, 112 U.S. 580 (1884)) (a regulation "will not constitute a tax unless the real purpose and effect of the statute and regulations . . . is to raise revenues for the general support of the government."); *Cities Serv. Co. v. Fed. Energy*

Admin., 529 F.2d 1016, 1029 (Temp. Emer. Ct. App. 1975) (same); *see also* Def. Mem. 5 (quoting PPACA §§ 1501(a)(2)(I), 10106(a)). Indeed, the Individual mandate itself raises *no* revenue, and significantly, in enacting the mandate, Congress expressly relied on its commerce power. Thus, the Act's corresponding enforcement penalty also is not a tax. As with the mandate itself, Congress grounded the penalty in the Commerce Clause, not in its taxing or spending powers. It designed and denominated the penalty as a means to enforce the Individual mandate. PPACA § 1501 at § 5000A(b)(1). By contrast, where Congress levies taxes, it identifies them as such – as it did in at least five other sections of the Act. *See, e.g.*, PPACA §§ 9001, 9004, 9015, 9017 and 10907.

Although his interpretation is not dispositive, it also bears noting that President Obama "strongly and emphatically denied that the penalty was a tax. When confronted with the dictionary definition of a 'tax' during a much publicized interview widely disseminated by all of the news media, and asked how the penalty did not meet that definition, the President said it was "absolutely not a tax" and, in fact, "[n]obody considers [it] a tax increase." *State of Florida v. U.S. Dept. of Health and Human Svcs.*, 2010 WL 4010119 at *36 fn.5, citing *Obama: Requiring Health Insurance is Not a Tax Increase*, CNN, Sept. 29, 2009; *see also* George Stephanopoulos, *Obama: Mandate is Not a Tax*, ABC News, Sept. 2009. To date, the President has not backed down from his position that the mandate is not a tax; petitioners are thus in the unusual position of agreeing with the President while his representatives in court are taking a position opposite to him.

Defendant argues that the mandate must be a tax because the penalty provision references the Internal Revenue Code. Neither the Mandate's placement in the Internal Revenue Code, nor its inclusion in "Subtitle D – Miscellaneous Excise Taxes," may give rise to an inference or presumption of legislative construction. *See United States v. Reorganized CF&I Fabricators of*

Utah, Inc., 518 U.S. 213, 222 (1996); 26 U.S.C. § 7806(b) (providing that no inferences or implications can be made based on the penalty's placement). "Although the penalty is to be placed in the Internal Revenue Code under the heading 'Miscellaneous Excise Taxes,' the plain language of the Code itself states that this does not give rise to any inference or presumption that it was intended to be a tax." *State of Florida v. U.S. Dept. of Health and Human Svcs.*, 2010 WL 4010119 at *9, citing *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 222-23 (1996) (citing to 26 U.S.C. § 7806(b), which provides that: "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title").

If we were to follow Defendants' assertion that this provision is a tax, we are presented with the logical question, what is it a tax upon? For example, the Act contains a section stating: "There is hereby *imposed on* any indoor tanning service a tax." Excise Tax on Indoor Tanning Services, § 10907 (emphasis added). It is therefore clear that Congress imposed a tax upon the sale of tanning services; likewise, the Act also states that "[t]here is hereby *imposed on* the sale of any taxable medical device by the manufacturer, producer, or importer a tax," which it labeled as "Excise Tax on Medical Device Manufacturers," § 1405 (emphasis added). So, with regard to the individual mandate, what is being taxed? It is not a tax imposed on something that one buys, but on something that one refuses to buy; it is not a tax upon economic activity, but a so-called "tax" upon the refusal to engage in an economic activity. Ergo, if it were a tax, it would be a *tax on inactivity* which, logically, is a tax on nothing at all. This result demonstrates the absurdity of trying to characterize as a "tax" what is by definition a penalty.

The individual mandate's penalty was not enacted as a "tax" and this is dispositive. *Freemanville Water Sys. Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1209 (11th Cir.

2009) (“[W]here Congress knows how to say something but chooses not to, its silence is controlling.”). Defendants treat “the statutory label of the provision as a ‘penalty’” as inconsequential, Def. Mem. 30 n.12. But it is well settled that “when Congress uses different language in similar sections it intends different meanings.” *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004).

Even Defendants characterize the penalty as generating only “some revenue,” Def. Mem. 30, and then only as an incident to some persons’ failure to obey the law. *See Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943) (if regulation is statute’s primary purpose, “the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.”). Indeed, when this so-called “tax” operates as intended, it raises no revenue at all, because it forces people to engage in an economic activity that is then not taxed.

The Act itself refers to the individual mandate’s penal enforcement mechanism as a “penalty” repeatedly. Congress specifically called this provision a “penalty” eighteen different times in Section 5000A alone; not one time in over 2,700 pages did Congress ever refer to it as a “tax.” *Contemporaneous* legislative history confirms that Congress enacted a “penalty” and not a “tax.” Congress’s Joint Committee on Taxation (“JCT”), which analyzes the effects of proposed taxes,⁴ and on which Defendants rely, Def. Mem. 30, consistently refers to the penalty as a “penalty” in its technical explanation of the law.⁵ The JCT also conspicuously *fails to* estimate

⁴ *See* JCT, *Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation* (JCX-1-05), February 2, 2005, at 2. Defendants admit that the JCT staff is “closely involved with every aspect of the legislative process” Def. Mem. 51 n.24.

⁵ *See* JCT, *Technical Explanation of the Revenue Provisions of the “Reconciliation*

any revenue from the penalty – whereas it dutifully scored the PPACA’s numerous other provisions imposing true taxes. Defendants, of course, cite Congressional Budget Office (“CBO”) estimates, but the CBO “has responsibility for scoring the budget effects of *non-tax* legislation.” *See* JCX-1-05, at 16. Congress enacted a penalty, as it clearly intended and understood, and not a “tax.”

As the October 14, 2010 opinion in *State of Florida v. U.S. Dept. of HHS* also points out, Congress’s failure to call the penalty a “tax” is especially significant in light of the fact that the Act itself imposes a number of taxes in several other sections. 2010 WL 4010119 at *8. “This shows beyond question that Congress knew how to impose a tax when it meant to do so. Therefore, the strong inference and presumption must be that Congress did not intend for the “penalty” to be a tax.” 2010 WL 4010119 at *8, citing *Hodge v. Muscatine County*, 196 U.S. 276 (1905) (where the statute uses “tax” in one section and “penalty” in another, courts “cannot go far afield” in treating the exaction as it is called; to do otherwise “would be a distortion of the words employed”), and (“It is well settled that ‘[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’). As the Fifth

Act of 2010, as amended, in combination with the “Patient Protection and Affordable Care Act” (JCX-18-10), March 21, 2010, at 31-34. (The JCT fails to call the penalty a “penalty” only in a heading.) Not surprisingly, weeks after a number of states filed lawsuits to challenge the PPACA, the JCT amended this Technical Explanation, in *Errata for JCX-18-10* (JCX-27-10), May 4, 2010, at 2, only then referring to the penalty as a “new excise tax.” Such after-the-fact “legislative history” is not indicative of the Congressional intent. *See, e.g., Gustafon v. Alloyd Co.*, 513 U.S. 561, 579 (1995) (“Material not available to the lawmakers is not considered, in the normal course, to be legislative history. After-the-fact statements . . . are not a reliable indicator of what Congress intended when it passed the law.”); *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 407 (1987) (Supreme Court gives little weight to legislative history entered 10 days after enactment of legislation); *Cobell v. Nortoh*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (“post-enactment legislative history is not only oxymoronic but inherently entitled to little weight”).

Circuit has put it:

“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”. [Citations omitted]. Congress, by requiring remand in subpart (d)(3), obviously knew how to require it for (d)(2); it did not do so. *That silence is deafening for purposes of our analysis.*

Garcia v. United States, 88 F.3d 318, 324 (5th Cir. 1996) (emphasis added); *see also Duncan v. Walker*, 533 U.S. 167, 173, (2001) (stating that this rule of statutory construction "is well settled"). Likewise, Congress clearly knew how to characterize the enforcement mechanism as a tax, if it had wanted to. Congress's silence - i.e., its complete failure to ever refer to the mandate enforcement mechanism as a "tax" in over two thousand pages of text - is deafening indeed, utterly drowning out Defendant's argument that the mandate enforcement mechanism is anything other than what Congress called it eighteen times: a "penalty."

Indeed, cases cited by Defendants do not support their spurious suggestion that the penalty is a tax. Def. Mem. 28-31. Both *Barr v. United States*, 736 F.2d 1134, 1135 (7th Cir. 1984), and *Warren v. United States*, 874 F.2d 280, 281 (5th Cir. 1989), involved efforts to enjoin collection of penalties directly assessed for failing properly to pay an undisputed *tax*: falsely claiming a withholding exemption in *Barr*, and refusing to sign a federal tax return in *Warren*. Those penalties were essential to the collection of revenue (*see United States v. Kahriger*, 345 U.S. 22, 31-32 (1953), *overruled in part on other grounds by Marchetti v. United States*, 390 U.S. 39 (1968)), not extraneous to the government's tax needs (*Id.* at 31), and clearly "supportable as in aid of a revenue purpose" (*Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)). Here, however, the penalty is not incidental to collecting a tax, but is a "means of enforcing . . . regulations" that are "extraneous to any tax need." *See Sonzinsky*, 300 U.S. at 513; *Kahriger*, 345 U.S. at 31. This

distinction is critical - as the courts often have recognized. *See, e.g., United States v. La Franca*, 282 U.S. 568, 572 (1931) (“notwithstanding they are called taxes, [they] are in their nature also penalties . . . the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law”); *Bailey v. Drexel Furniture Co. (The Child Labor Tax Case)*, 259 U.S. 20, 36 (1922) (a tax may involve an incidental regulatory restraint but a penalty actually regulates). *Rodgers*, 138 F.2d at 994 (if primary purpose is regulatory, incidental revenue does not “make the imposition a tax”); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) (allowing challenge to penalties under Prohibition Act); *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 391-92 (1922) (same); *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361 (11th Cir. 2003) (analyzing whether provision was penalty or tax for AIA purposes).

Defendants also cite the *Head Money Cases*, 112 U.S. 580 (1894) and *Bd. of Trustees v. United States*, 289 U.S. 48 (1933), arguing that the Constitution’s apportionment requirements do not apply to penalties enacted under the commerce power. Def. Mem. 55-57. Of course, such penalties were not subject to apportionment because they were not taxes *at all*. In the *Head Money Cases*, Congress did not exercise its taxing power, but penalized “incident to the regulation of commerce.” 112 U.S. at 595. In *Bd. of Trustees*, the Supreme Court held that “customs duties” were not subject to tax-limiting doctrines, because they also were imposed pursuant to the Commerce Clause. 289 U.S. at 58-59. The *Rodgers* Court held that revenues derived from penalties aimed at regulating interstate commerce “do not divest the regulation of its commerce character and render it an exercise of the taxing power.” 138 F.2d at 995. Defendants’ argument demonstrates precisely why the mandate’s penalty is not a tax subject to the Anti-Injunction Act.

Defendants' reliance on *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974), also is misplaced. Def. Mem. 12,30. That case did not involve the critical distinction between a "tax" and a "penalty" at issue here, but rather whether the AIA applied to a challenge involving the withdrawal of an entity's tax-exempt status. The Court itself noted that the suit was "aimed at the imposition of federal income, FICA and FUTA taxes which clearly are intended to raise revenue." *Id.* In contrast, the individual mandate is neither a regulatory or a revenue-raising tax at all, but a regulation enforced by a non-tax penalty.

In short, Petitioners believe that the President of the United States, Congress and even the text of the Act itself are all correct: the penalty is a penalty, not a tax. Of course, the clearly established fact that the mandate is not a tax is important not only to standing under the Anti-Injunction Act, it also shows that the mandate is not valid as an exercise of Congress's power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." We address that particular question in more depth *infra*.

IV. THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S POWERS AND VIOLATES THE NINTH AND TENTH AMENDMENTS AND CORE PRINCIPLES OF FEDERALISM.

By enacting the individual mandate, Congress has exceeded its legislative authority under Article I. Neither its commerce and taxing powers, nor the Necessary and Proper Clause, affords Congress the power to coerce citizens – under threat of penalty – into the stream of commerce, thereby subjecting them to its regulation. This unprecedented assertion of unbridled authority usurps powers reserved to the States by the Tenth Amendment, disparages the rights of other

citizens protected by the Ninth Amendment, and completely obliterates this Nation's unique system of dual sovereignty.

Because Article I provides no authority to Congress to enact the individual mandate, the power to make such individual healthcare insurance decisions rests with the States or individuals themselves. As the Supreme Court has observed, the "United States is entirely a creature of the Constitution" and "it can only act in accordance with all the limitations imposed by the Constitution." *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (Black, J.) (plurality opinion). Whatever authority the people refused to delegate to the federal government remained with them or their States. This basic principle is enshrined in the Tenth Amendment, which declares that all powers neither delegated to the federal government nor prohibited to the States "are reserved to the States respectively, or to the people." Thus, as the Court noted in *New York v. United States*, the Constitution's structures creates "essentially a tautology The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 157.

The Ninth Amendment complements recent cases recognizing limits on federal power, and itself calls into question the constitutionality of the individual mandate and other PPACA provisions. The Supreme Court has recognized that the Ninth Amendment "unambiguously refer[s] to individual rights." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790 (2008). Here, the mandate clearly denies or disparages individual rights retained by the people, including their right to self-government through the States. The Guarantee Clause further complements the "dual sovereignty" in our constitutional system by directing the federal government to "guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. This

guarantee operates alongside the Constitution's principle of federalism to preserve the States and their independence from the federal government. Each State "is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 752 (1999). "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). While the question of whether Guarantee Clause claims are justiciable was briefly noted in *New York*, 505 U.S. at 185, the Supreme Court nevertheless proceeded to analyze the challenged federal legislation under the clause, concluding that the clause was not violated there because "Congress offers the States a legitimate choice rather than issuing an unavoidable command." *Id.* The same cannot be said here of the PPACA.

The PPACA violates this constitutional system of dual sovereignty and federalist principles by eliminating the ability of individuals to make critical healthcare decisions for themselves (or through their States). Because systemic safeguards in the Tenth Amendment, Article I, and the Guarantee Clause protect the States from precisely the kind of federal incursion attempted with the individual mandate and corresponding mandates on the States, the Act cannot be upheld.

A. Every Act of Congress Must Have a Constitutional Source.

The federal government is one of delegated, enumerated, and thus limited powers, as eloquently explained by the Supreme Court in *United States v. Lopez*:

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

tyranny and abuse from either front.

United States v. Lopez, 514 U.S. 549, 552 (1995) (citations and quotations omitted). *See also McCulloch*, 17 U.S. at 405 (“This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.”). It is axiomatic that “our Constitution establishes a system of dual sovereignty between the states and the federal Government.” *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Supreme Court recognized and affirmed this fundamental principle from the earliest days of the Republic, as Chief Justice Marshall famously observed: “The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Our system of dual sovereignty is reflected in numerous constitutional provisions, and not only those, like the Tenth Amendment, that speak to the point explicitly. In fact, the concept of state sovereignty is implicit in the Constitution’s conferral upon Congress of not all governmental powers, but only the few, discrete and enumerated ones contained in Article I, Section 8.

It is an implication rendered express by the Tenth Amendment’s assertion that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Tenth Amendment affirms the undeniable notion that under our Constitution, the federal government is one of enumerated, hence limited, powers. *See, e.g., McCulloch v. Maryland*, 4 (Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers”). Powers not delegated to the federal government are reserved to the states or to the people.

The structure of the Constitution reflects the federalist values of the document’s framers

and is inconsistent with any interpretation of the Commerce Clause that would grant Congress unlimited power. The framers rejected the concept of a central government that would act upon and through the states and instead designed a system in which the state and federal governments would exercise concurrent authority over the people, who were, in Alexander Hamilton's words, "the only proper objects of government." Accordingly, the federal government may act only where the Constitution authorizes it to do so. *See, e.g., New York v. United States*, 505 U.S. 144 (1992). To ensure that these fundamental limits are applied, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Article I begins: "All legislative powers *herein granted* shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). The Commerce Clause obviously does not grant Congress the power to enact the individual health insurance mandate.

B. The individual mandate is impermissible under the Commerce Clause.

Congress's power to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, has been the subject of litigation for close to two centuries. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Gonzales v. Raich*, 545 U.S. 1 (2005). What is clear from recent cases, however, is that, "even under our modern, expansive interpretation of the Commerce Clause, Congress's regulatory authority is not without bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000). Further, in order for an activity to be the subject of regulation under the Commerce Clause, "it must be some sort of economic *endeavor*," *id.* at 611 (emphasis added), not merely an economic *decision*.

The Supreme Court has held that Congress may regulate the use of the channels of

interstate commerce, the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though they may come only from intrastate activities, and Congress may even regulate activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). The vast array of economic activities subject to regulation have always been just that – activities. The Court has *never* held that the Commerce Clause empowers Congress to regulate inactivity. The PPACA does not merely purport to regulate how people buy health insurance, or the price they pay, or the terms of the contracts. Instead, it does what Congress has never before dared to do – it mandates that individuals affirmatively engage in economic activity where they might otherwise choose not to.

If the individual mandate of the PPACA is allowed to stand, it will open the door to a sweeping expansion of federal power. In the future, Congress will not only be able to dictate the terms under which individuals purchase health insurance or health care services, but also details of a patient's care, including preventative health procedures such as regular exercise and vitamin supplements. If Congress can compel one sort of economic activity that is seen as desirable for the public good, why not another? Ultimately, if Congress were deemed to have Constitutional power to compel the purchase of goods and services, there could be no principled limit to such a power.

It is axiomatic Constitutional law that Congress has only specific, enumerated powers, and that the police power is reserved to the states. *Lopez*, 514 U.S. at 567; *see also United States v. Comstock*, 560 U.S. ____, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010). In order to find § 1501 to be within the bounds of Congress's powers under the Commerce Clause, it would be necessary to depart from this settled principle of law, and “[p]ile inference upon inference that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort

retained by the States.” *Lopez*, 514 U.S. at 567.

Interestingly, both the Petitioners and the Defendants rely on the Supreme Court’s most recent Commerce Clause case, *Gonzales v. Raich*, 545 U.S. 1 (2005). *Raich* provides no support for the Defendants’ position and in fact demonstrates that Congress’s power under the Commerce Clause is limited to the regulation of voluntary economic activity.

In *Raich* the Supreme Court considered whether Congress had the power under the Commerce Clause to regulate the purely local cultivation and use of marijuana. *Id.* at 5. Distinguishing *Lopez* and *Morrison*, the Court held that in those cases, the activities which Congress had impermissibly sought to regulate (possession of firearms near a school in *Lopez* and gender-motivated violence in *Morrison*) were fundamentally non-economic in nature and thus outside the scope of the Commerce Clause. *Id.* at 24-25. In contrast, the Court concluded that the cultivation of marijuana was in fact economic in nature, and thus local cultivation and consumption were subject to regulation where it was part of a larger scheme to regulate interstate commerce. *Id.* at 22. (“That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.”)

Yet the Defendants make an unprecedented inferential leap from the conclusion in *Raich* to the conclusion that Congress can compel Petitioners to purchase a package of goods and services they neither want nor need. Def. Mem. 25-26. Such an inference is untenable. It is undoubtedly true that the purchase of health insurance and other goods and services related to health care are economic activity as contemplated by *Raich*. There is nothing in *Raich*, however, nor in any other precedent, to support the radical proposition that Congress may *compel* anyone to engage in such economic activity.

Defendants contend that individuals who choose to remain rationally uninsured while young and healthy are “free riders,” because they choose not to engage in the economic activity of purchasing health insurance they do not believe they need. This accusation betrays Constitutional infirmity of the PPACA. Congress seeks to legislate far beyond its rightful Constitutional authority in order to compel rational economic actors – individual citizens – to behave in a manner they have concluded is not in their best interests. Fortunately, the Constitution provides limits on the powers of the national government and a means of enforcing those limits.

Defendants’ position that the individual mandate is a valid exercise of Congress’s commerce power depends entirely upon the incredible contention that *inactivity* – the failure to have healthcare insurance – constitutes economic *activity* in the form of a “volitional economic decision” itself subject to federal regulation. Def. Mem. 27-28. But no court ever has upheld so sweeping an assertion of federal power. To do so would arm Congress with unbridled top-down control over virtually every aspect of persons’ lives, as consumers and producers, and destroy this nation’s defining legacy of dual sovereignty, thereby transforming our federal government from one of limited, enumerated powers into one of limitless authority over states and their citizens. Nowhere in the historical record is there any indication whatsoever that the Framers of the Constitution ever contemplated the federal government having the power under the Commerce Clause – or any other clause – to compel a citizen to purchase a good or service from another citizen or private entity.

The mandatory insurance purchasing provision and enforcement mechanism at issue in this matter establish the kind of national police power the United States Supreme Court has always rejected. “As the courts have always recognized, the text of the Constitution does not grant

Congress a general ‘police power’ to pass any legislation it may deem to be in the public interest. Instead, the Constitution confines Congress to its enumerated powers and allows it to execute those powers by means of laws that are ‘necessary and proper.’” Randy E. Barnett, *Is the Rehnquist Court an “Activist Court? The Commerce Clause Cases*, 73 U. Colo. L. Rev. 1275, 1281 (2002). See *United States v. Lopez*, 514 U.S. 549, 584 (Thomas, J. concurring.) (“Although we supposedly applied the substantial effects test for the past 60 years, we *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,” citing *New York v. United States*, 505 U.S. 144, 155 (1992)) (emphasis added).

“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*, 560 U.S. ____, 130 S. Ct. at 1982 (Thomas J., dissenting) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (Powell, J. dissenting)).

To reach its conclusion that the individual mandate scheme is permissible and that the Petitioners’ complaint should be dismissed outright, Defendants twists 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, Defendants seeks not the appropriate use of its police power but, instead, unfettered police power, the limits of which Defendants themselves cannot even define.

C. Congress's Commerce power does not reach inactivity.

The Constitution gives Congress the power “[t]o regulate Commerce with foreign nations, and among the several States, and with Indian Tribes[.]” U.S. Const., Art. I, § 8, effectively allowing it to superintend the Nation’s commercial and economic activities. However, its power to regulate activity does not permit Congress to forbid *inactivity*. Congress may not order inactive Americans to buy, sell, manufacture, grow, or distribute any product or service against their will. According to the CBO, no federal court ever has upheld such a limitless exercise of the commerce power: “The government has never required people to buy any good or service as a condition of lawful residence in the United States.” Robert Hartman & Paul Van de Water, “The Budgetary Treatment of an individual mandate to Buy Health Insurance,” CBO Memo., at 1, August 1994.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Court identified three broad categories of *activities* that Congress may regulate under its Commerce Clause power:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’s commerce authority includes the power to regulate those *activities* having a substantial relation to interstate commerce

Id. at 558-59 (emphasis added). Applying these principles, the Court held that “[t]he possession of a gun in a local school zone is in no sense an economic *activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567 (emphasis added).

Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the Court applied the same three-category analysis and struck down the challenged provision of the Violence Against Women Act because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic

activity. *Id.* at 613 (emphasis added). It concluded; “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal *conduct* based solely on that *conduct’s* aggregate effect on interstate commerce.” *Id.* at 617 (emphasis added).

It bears emphasizing that the conduct at issue in *Lopez* and *Morrison*, although non-economic and unreachable under the Commerce Clause, was nonetheless activity voluntarily engaged in by the parties. In this key respect, the inactivity which Congress here seeks to regulate is even further removed from its legitimate commerce power.

Defendants rely heavily on *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942). However, both cases upheld regulation of *economic activity*. In *Raich*, the Court’s most recent Commerce Clause decision, it upheld application of the federal Controlled Substances Act (CSA) to the intrastate manufacture and possession of marijuana for medical purposes because those activities were economic in character and, at least in the aggregate, had a substantial effect on interstate commerce:

Our case law firmly establishes Congress’ power to regulate purely local *activities* that are part of an economic “class of *activities*” that have a substantial effect on interstate commerce. . . . As we stated in *Wickard*, ‘even if appellee’s *activity* be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce’ When Congress decides that the ‘total incidence’ of a *practice* poses a threat to a national market, it may regulate the entire class.

Id. at 26 (emphasis added) (citing *Wickard*, in which the Court held that the *activity* of growing wheat for personal consumption was subject to regulation). The *Raich* Court, in discussing how the CSA “directly regulates economic, commercial activity,” defined the term “economics” to refer to “the production, distribution, and consumption of commodities.” 545 U.S. at 17. In every respect – whether one is making, transferring, or using a good of service – economics refers to

activity, not inactivity. Indeed, in the absence of activity, the term would be devoid of meaning.

In fact, the “substantial economic effect” Commerce Clause cases since *Jones & Laughlin Steel* consistently refer *only* to “activities.” See, e.g., *NLRB v. Jones & Laughlin Steel*, 301 U.S. at 37 (“intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control”); *Darby*, 312 U.S. at 118 (“those *activities* intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end”); *United States v. Wrightwood Dairy*, 315 U.S. 110, 119 (1942) (“intrastate *activities* which in a substantial way interfere with or obstruct the exercise of the granted power”); *Wickard*, 317 U.S. at 125 (“even if appellee’s *activity* be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”); *Perez*, 402 U.S. at 150 (“*activities* affecting commerce”); *Lopez*, 514 U.S. at 558 (“three broad categories of *activity* that Congress may regulate under its commerce power”); *Morrison*, 529 U.S. at 698 (“three broad categories of *activity*”) (quoting *Lopez*); *Raich*, 545 U.S. at 17 (“*activities* that substantially affect interstate commerce.”). Consequently, in order to render conduct unlawful under the Commerce Clause, Congress must be regulating interstate commerce, not merely inactivity. Congress cannot, under the guise of regulating interstate commerce, legislate beyond its delegated authority. And Congress’s regulation of intrastate activity must reach activity that has a real and “substantial economic effect on interstate commerce.” See *Perez*, 402 U.S. at 152 (quoting *Wickard*, 317 U.S. at 125). The individual mandate to purchase insurance, discussed *infra*, goes well beyond the bounds of the Commerce Clause.

Ironically, Defendants cannot help but use the words “activities,” “activity,” and “conduct,”

Def. Mem. 16-19; 24-28, in searching for support. They completely misread *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Daniel v. Paul*, 395 U.S. 298 (1969), as supporting their position. But both cases involved commercial establishments offering goods or services to the public: an inn “serv[ing] interstate travelers” in *Heart of Atlanta*, 379 U.S. at 261; a restaurant “offer[ing] . . . food [that] has moved in commerce” in *Daniel*, 395 U.S. at 304. As stated in *State of Florida v. U.S. Dept. of Health and Human Svcs.*, neither case fairly can be read to permit Congress to require activity by someone who is inactive. In both instances, the defendants could have opted *not to engage in any commerce*; it was their own commercial activity which subjected them to congressional regulation:

There are several obvious ways in which *Heart of Atlanta* and *Wickard* differ markedly from this case, but I will only focus on perhaps the most significant one: the motel owner and the farmer were each involved in an activity (regardless of whether it could readily be deemed interstate commerce) and each had a choice to discontinue that activity. . . . Those cases, in other words, involved activities in which the plaintiffs had chosen to engage. All Congress was doing was saying that if you choose to engage in the activity of operating a motel or growing wheat, you are engaging in interstate commerce and subject to federal authority

State of Florida v. U.S. Dept. of Health and Human Svcs., 2010 WL 4010119 at *34. Congress was not regulating whether or not to serve food or provide lodging, merely regulating how those activities could be carried out. Thus, the *Lopez* Court itself cited *Heart of Atlanta Motel* as a case “where we have concluded that the *activity* substantially affected interstate commerce.” *Lopez*, 514 U.S. at 557 (emphasis added).

D. The individual mandate does not regulate commerce, it *compels* commerce.

The individual mandate does not regulate economic activity, but compels it by forcing

individuals who lack a congressionally dictated level of healthcare coverage – particularly those who would not qualify for Medicaid even under the Act's greatly expanded eligibility criteria – into the insurance market. In this crucial respect, the mandate is unlike any legislation ever upheld under the Commerce Clause.

Defendants assert that not having insurance is reachable under the commerce power because it is an “economic decision.” But a decision is purely a *mental process* which may, or may not, result in activity (economic or otherwise), *depending on the decision*. A decision to do nothing does not convert nothing to something. Zero multiplied by any number still equals zero. Defendants cannot fill that void with references to congressional concern over “market timing” and “premium spirals.” Def. Mem. 25-26. Under Defendants’ logic, any failure to buy – or sell – particular goods or services is both a regulable prelude to future economic activity and a decision Congress can reach because it impacts the existing marketplace.⁶ Thus, the continued ownership of a home is transformed into a “decision” not to sell, which then can be characterized as an “economic activity,” which Congress therefore can mandate. Such logic, which leads to an infinite commerce power, finds no support in any case decision.⁷

Moreover, Congress’s conclusion “that a particular activity substantially affects interstate commerce does not necessarily make it so” *Lopez*, 514 U.S. at 557 n.2. This is “ultimately

⁶ Defendants cannot settle on a consistent alchemy to transform inactivity into activity. At times, they contend that the decision not to buy insurance is a properly regulable “volitional event,” Def. Mem. 24-28; but at other times they imply that a presumed *later* use of healthcare services renders a *current* failure to buy insurance regulable activity, *Id.* at 24-28. Both positions are nonsensical.

⁷ Indeed, even in industries such as securities trading, where Congress presumably could preempt State regulation, the power to regulate commerce never has been construed to allow Congress to compel inactive individuals to purchase stocks or bonds.

a judicial rather than a legislative question,” *id.*, and the Supreme Court has expressed concern over any instance in which Congress piles “inference upon inference” as a basis “to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* at 567. *See also United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J. concurring) (“The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration.”). Here, Congress only can connect an individual’s lack of healthcare insurance with the supposed need for the mandate to regulate interstate insurance markets through a series of unsubstantiated and unquantifiable inferences and assumptions, some expressed and other implied (even if unacknowledged), about human behavior and its effects.⁸ This attenuated chain simply is too long and fragile to constitute the “substantial relation to interstate commerce” required by *Lopez*.

More fundamentally, accepting Defendants’ position would make it impossible to maintain any outer limits on the commerce power. *See Lopez*, 514 U.S. at 557. It would permit Congress, upon the flimsiest of nexuses, itself to manufacture the basis on which it can regulate anyone at any time. Such a ruling would transform our nation beyond recognition. The Commerce Clause makes no distinction between one type of economic activity and another. Nor does it distinguish between demand (buying) and supply (producing and selling) activities. Every decision individuals make, at some remote level of analysis, can be said to have economic purposes or

⁸ These include assumptions that: (1) everyone at some point in life will consume healthcare services; (2) to save money, some persons who can afford healthcare insurance decide not to buy it; (3) some of these persons will not pay for healthcare services they consume; (4) some of these persons get away without being pursued for payment by their healthcare providers, who instead pass the costs on to other patients, providers, and insurers; (5) this passing on increases the aggregate cost of healthcare services, driving up the cost of insurance premiums; (6) the Act will drive up premium costs (especially by its requirement that insurers ignore preexisting conditions); and (7) the Individual Mandate will reduce premiums costs.

consequences.

If Congress can compel Americans to buy healthcare insurance, then it can compel them to buy – or to make or sell – any good or service, based on a finding that such compulsion will assist its efforts to achieve some desired “economic” result. Congress could force citizens to buy government-acquired manufacturers’ cars and government-rescued banks’ financial instruments, or to work in any industry and on whatever terms it chooses. Even in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), in which the Court abandoned its earlier efforts to restrict New Deal legislation, it warned that a Congress armed with excessive powers under the Commerce Clause would threaten our system of federalism and bring about “a completely centralized government.” *Id.* at 37 (and quoted in *Lopez*, 514 U.S. at 557). The PPACA underscores the prescience of that warning.

V. THE INDIVIDUAL MANDATE IS NOT A LEGITIMATE EXERCISE OF THE CONSTITUTION’S NECESSARY AND PROPER CLAUSE.

Defendants turn to the Necessary and Proper Clause, the “last, best hope of those who defend *ultra vires* Congressional action.” *Printz v. United States*, 521 U.S. 898, 923 (1997). But that clause cannot rescue the individual mandate, because it is not a *means* of implementing a constitutionally enumerated power and it fails under the considerations recently described by the U.S. Supreme Court in *United States v. Comstock*.

A. The power that the individual mandate seeks to harness is simply without prior precedent, and the Necessary and Proper Clause does not create this power in and of itself.

This issue was recently addressed in-depth by the court in *State of Florida v. U.S. Dept. of Health and Human Svcs.* In ruling against the Defendants, the court stated bluntly that “this is not

even a close call." In so doing, the court found:

At this stage in the litigation, this is not even a close call. I have read and am familiar with all the pertinent Commerce Clause cases, from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), to *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). I am also familiar with the relevant Necessary and Proper Clause cases, from *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), to *United States v. Comstock*, - U.S. -, 130 S.Ct. 1949, 176 L.Ed.2d 878 (2010). This case law is instructive, but ultimately inconclusive because the Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent.

State of Florida v. U.S. Dept. of Health and Human Svcs., 2010 WL 4010119 at *34 (N. D. Fla.).

While it is true that the Necessary and Proper Clause grants Congress broad authority to pass laws in furtherance of constitutionally-enumerated powers, it has also been settled since *McCulloch v. Maryland*, 17 U.S. 316 (1819), that the clause may not substitute for powers the Constitution denied Congress, or empower Congress to violate rights otherwise protected by the Constitution, *e.g.*, by the Fifth, Ninth, and Tenth amendments:

Let the end be legitimate, let it be *within the scope* of the constitution, and all means *which are appropriate*, which are *plainly adapted* to that end, which are not prohibited, but consist with the letter and spirit of the constitution, *are constitutional*.

Id. at 421 (emphasis added). *See Raich*, 545 U.S. at 39 (Scalia, J. concurring) (*McCulloch's* limits of Congress's power under the clause "are not merely hortatory").

"[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956 (emphasis added). The clause only allows Congress authority to enact a statute that is "legitimately predicated on an enumerated power[,]" and only so long as the

relationship between the statute as the means and the enumerated power as the end is “not too attenuated.” *Id.* at 1963-64.

The individual mandate does not implement or effectuate any enumerated power. Congress seeks coverage for uninsured Americans by ordering everyone to be covered. The Act’s ultimate goal (universal coverage) and the substance of its mandate (requiring all to get coverage) are the same. The mandate is not a *means* to the exercise of an enumerated power, but an end and a novel exercise of power to compel the American people. Significantly, in those rare instances in which Congress has imposed affirmative obligations on persons based solely upon their being citizens or residents, it has done so *not* by claiming expanded power over commerce or general health and welfare – much less by invocation of the Necessary and Proper Clause – but based on explicit constitutional authority. *See, e.g., Selective Service Cases*, 245 U.S. 366, 383, 390 (1918) (conscription into armed services justified by power “to raise and support Armies” under U.S. Const. art. I, § 8, cl. 12); *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000), *aff’d*, 275 F.3d 45 (5th Cir. 2001), *cert. denied*, 534 U.S. 1135 (2002) (compelling answers to census questions justified by U.S. Const. art. I, § 2, cl. 3). The Necessary and Proper Clause is not an *independent* source of authority for such a policy goal, and therefore cannot validate the individual mandate.

B. The individual mandate fails under the *Comstock* factors.

Comstock clearly underscores that the Necessary and Proper Clause cannot save the mandate. Examination of the five “considerations” relied on by the Court, in determining that the clause permitted the civil commitment of sexually dangerous former federal inmates, confirms that the individual mandate – unlike the law at issue in *Comstock* – is by no means a “discreet and narrow exercise of authority over a small class of persons already subject to the federal power.” 130 S. Ct. at 1968 (Kennedy, J. concurring).

First, the relevant enactment must be a rational means to implement an otherwise proper exercise of an enumerated power, not an end in itself. *Id.* at 1956. But, as explained above, the individual mandate is not a *means* to a proper end. It stands alone as the Act's unseverable centerpiece, from which the other provisions flow.

Second, in sharp contrast to the long federal history (more than 150 years) of enacting and enforcing criminal laws, detaining prisoners, and providing them with mental health services present in *Comstock*, Congress has *no* history of directing Americans' individual healthcare or insurance decisions. Any authority for such requirements resides solely in the States as sovereigns, as part of that general police power "which the State[s] did not surrender when becoming member[s] of the Union under the Constitution." *Jacobson v. Massachusetts*, 197 U.S. 11, 25, (1905).⁹

Comstock turned in large part on the historical fact that the federal role in establishing a prison system in America enjoyed ancient roots. Writing for the majority, Justice Breyer relied on a "longstanding federal statutory framework, which had been in place since 1855." *Comstock*, 2010 WL 1946729, at *10. This deep tradition of federal involvement in establishing a penal system weighed in favor of the statute at issue. Defendants in turn argue that "the Supreme Court has long recognized Congress's power to regulate in this area." Def. Mem. 19-20. The settled historical record, however, is that Congress's involvement in healthcare is rather short compared to the lengthy history of federal involvement at issue in *Comstock*: "Federal involvement in health

⁹ Significantly, past mandates requiring citizens to have insurance have been grounded in the States' police powers. *See Ex parte Poresky*, 290 U.S. 30, 32 (1933) (automobile insurance). This also is true of the individual mandate enacted by Massachusetts – Mass. Gen. Laws ch. 111M, § 2 (2008); *see also Fountas v. Comm'r of Dep't of Rev.*, 2009 WL 3792468 (Mass. Sup. Ct. Feb. 6, 2009), *aff'd*, 922 N.E.2d 862 (Mass. App. Ct. 2009) – which Congress admittedly emulated here. *See* PPACA § 1501(a)(2)(D).

is a fairly new occurrence in U.S. history.” Jennie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy*, 67 (Praeger Publishers, 1997) (emphasis added). “While a few laws and special concerns were passed prior to the twentieth century, the bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years.” *Id.* Indeed, modern healthcare in the United States “occupies a completely different place in the economy, in the mind of the public, and in its impact on the government at all levels than it did 100 years ago, at the beginning of the twentieth century, or at the beginning of the country in the late 1700s, when the U.S. Constitution was adopted.” *Id.* at 1.

Defendants concede that the earliest congressional legislation affecting the “business of insurance” was passed within only the last thirty-six years. Based on this paltry legislative pedigree, Defendants purport to rely on a “history” of federal regulation of the health insurance market. Def. Mem. 19-20. In marked contrast, however, *Comstock* relied on a “longstanding federal statutory framework, which had been in place since 1855,” just threescore and eight years after the constitution was ratified. *Comstock*, 2010 WL 1946729, at *10.

More importantly, § 1501 of the PPACA does not regulate health insurance providers. Instead, as the Defendants must concede, the provision applies only to *individuals*. In other words, the PPACA seeks to regulate uninsured people who, by definition, have *no connection* with health insurance providers. Whatever the recent history of federal regulation of the health insurance industry, the history of the federal government's forcing uninsured Americans to purchase health policies is nonexistent. Consistent with *Comstock*, the lack of any significant or meaningful historical anchor for the novel power attempted by the PPACA weighs heavily against the Defendants' claim of power under the Necessary and Proper Clause.

Third, no sound reason exists for the individual mandate in light of Congress's *lack* of authority to compel commerce, whether in regulating insurance, healthcare, or any other industry or field of endeavor. Compelling activity differs fundamentally from simply regulating a market.

Fourth, the *Comstock* Court made clear that any exercise of power supportable under the Necessary and Proper Clause *must* be consistent with the Constitution's federal architecture, and reaffirmed that the clause does not "confer on Congress a general "police power which the Founders denied the National Government and reposed in the States . . ." *Comstock*, 130 S. Ct. at 1964. But, far from "properly account[ing] for state interests," *id.* at 1962, the individual mandate can only be imposed through exercise of a police power, and it shreds the traditional federalism guaranteed by Tenth Amendment. As shown below, the federal government has no right to compel the States to commit their resources to accommodate the added costs stemming from the individual mandate or from the PPACA's unprecedented expansion of Medicaid, its insurance exchanges and reinsurance requirements, and its expensive employer coverage provisions. *See Printz*, 521 U.S. at 923-24 ("When a law . . . violates the principle of state sovereignty . . . it is not a law . . . proper for carrying into Execution the Commerce Clause."). Thus, the PPACA "invade[s] state sovereignty [and] improperly limit[s] the scope of 'powers that remain with the States.'" *Comstock*, 130 S. Ct. at 1962.

Comstock hinged on the Supreme Court's assurance that the federal statute at issue "properly accounts for state interests." *Comstock*, 2010 WL 1946729, at *11. In its analysis of the federal civil commitment statute, *Comstock* detailed the myriad ways in which the federal government was required to cooperate with and defer to the state during the custody or transfer of each federal prisoner. By requiring federal authorities to relinquish federal authority over the

prisoner whenever a state asserted its own, the statute deferred to the state's desire to take control of the prisoner. *Id.* at *12. Writing for the Court, Justice Breyer emphasized that the statute at issue did not “invade state sovereignty or otherwise improperly limit the powers that remain with the States,” but rather required accommodation of state interests when facilitating the custody and transfer of a federal prisoner. *Id.* at *11-12. In part due to its accommodation of state interests, the statute in *Comstock* was upheld by the Supreme Court as a legitimate exercise of federal power.

Concurring with the majority, Justice Kennedy wrote separately to caution that “[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power *is not one properly within the reach of federal power.*” *Id.* at *18 (Kennedy, J. concurring) (emphasis added). Because the statute at issue did “not supersede the right and responsibility of the States” and “involve[d] little intrusion upon the ordinary processes and powers of the States,” Justice Kennedy agreed that the federal civil commitment statute was a “necessary and proper” exercise of congressional authority.

Unlike the statute at issue in *Comstock*, the PPACA's individual mandate fails entirely to accommodate state interests. The PPACA gives the federal government sole authority to penalize individuals for choosing not to obtain health insurance – in direct contravention of Constitutional authority. Rather than cooperate with or defer to individuals' choices, the PPACA irreconcilably collides with liberty. The PPACA contains neither a severability provision nor a provision allowing individual states to opt out of § 1501. Nor does it authorize the federal government to relinquish control of health insurance coverage over to the states when asked to do so. Accordingly, it cannot be said to accommodate state interests in any way. Consistent with

Comstock, the PPACA's failure to accommodate state interests weighs heavily against Defendants' claim of power under the Necessary and Proper Clause.

Fifth, the individual mandate is not narrow in scope like the law upheld in *Comstock*, but threatens to bring about fundamental and unprecedented change by centralizing top-down economic power in Congress.¹⁰ The Necessary and Proper Clause cannot serve as a bootstrap by which Congress may evade the constitutional limits on its enumerated powers.

In upholding Congress's civil-commitment power, *Comstock* emphasized that the federal statute at issue was a "narrowly tailored means of pursuing the Government's legitimate interest." *Comstock*, 2010 WL 1946729, at *14. Importantly, the *Comstock* statute was "narrow in scope," "applied to only a small fraction of federal prisoners," and its reach was "limited to individuals already in the custody of the Federal Government." *Id.* at *2. Unlike *Comstock*, the PPACA is not "a discrete and narrow exercise of authority over a small class of persons." *Id.* at *19 (Kennedy, J. concurring).

The PPACA cannot possibly be said to be narrowly tailored or "narrow in scope." Rather, the PPACA seeks to force every uninsured American, under pain of monetary penalty, to purchase private health insurance. This sweeping individual mandate applies to the rich and the poor, the young and the old, and the healthy and the sick alike. Defendants insist that healthcare is unique since everyone will need to purchase medical services at some point, Def. Mem. 24-26, but this

¹⁰ Defendants assert a need for such sweeping new power, but ignore other avenues for Congress to achieve universal coverage through legitimate exercise of its enumerated powers, such as tax incentives, or laws encouraging or requiring payment for services rendered, all creating stronger incentives for uninsured persons to *choose* to buy coverage. Moreover, any relation the mandate may have to the exercise of "an enumerated Article I power" is far "too attenuated" for Necessary and Proper Clause purposes. *Id.* at 1963 (quoting *Lopez*, 514 U.S. at 567). As explained above, the mandate is separated by many degrees of speculation and inference from any enumerated power.

argument only further exposes that the PPACA's reach is truly unlimited and not narrowly tailored. Indeed, based on the Defendants' position, there would be absolutely no principled rule by which individuals retain a right to be left alone with respect to any subject susceptible to economic regimentation nor would there be any possible way to say that any power of economic regulation remained to the States to the exclusion of the federal government. Consequently, such a result cannot be rooted in the Constitution.

Defendants argues that the individual mandate is "essential" to the overall health care reform. Def. Mot. at 21-24. That may or may not be true; even supporters of the health care reform see alternatives to the individual mandate. *See, e.g., States Argue the Feds Can't Force Purchase of Health Insurance*, Wash. Post, Mar. 25, 2010, at A20 ("[W]hile the goal of the mandate is crucial to reform, the mandate isn't the only way to achieve that goal."). Regardless, the real question is whether Congress has the power in the first place to do what it is doing. That a statutory provision may be "essential" to some end is irrelevant to the question of whether the end itself is constitutional. *Raich* does *not* stand for the broad proposition that Congress is free to pass otherwise unconstitutional laws by somehow connecting them to a larger regulatory program. Instead, Congress's ability to regulate commerce – using the Necessary and Proper Clause to execute Commerce Clause powers – extends to intrastate non-economic *activity* only insofar as failure to regulate such activity would undercut a broad federal regulatory scheme. *Gonzales v. Raich*, 545 U.S. 1, 17-18 (2005).

Neither *Raich* nor *Wickard* authorized Congress to regulate non-activity. "When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power

chain but on the strength of the chain.” *Comstock*, 560 U.S. ___, 176 L. Ed. 2d at 900 (Kennedy, J. concurring, slip op. at 1). Here Congress is not merely attempting to regulate local economic activity that, in the aggregate, substantially affects commercial markets nationwide. Instead, it claims the authority to force individuals *not* engaged in economic activity to become engaged:

[I]n this case we are dealing with something very different. The individual mandate applies across the board. People have no choice and there is no way to avoid it. Those who fall under the individual mandate either comply with it, or they are penalized. *It is not based on an activity that they make the choice to undertake*. Rather, it is based solely on citizenship and on being alive.

State of Florida v. U.S. Dept. of Health and Human Svcs., 2010 WL 4010119 *35 (emphasis added). Because the power claimed here would alter the federal structure of the Constitution by creating an unlimited power indistinguishable from a national police power, it cannot be a proper use of the Necessary and Proper Clause.

Under the view advanced by the Defendants, the combination of the Commerce Clause and the Necessary and Proper Clause would render the rest of Congress’s enumerated Article I powers superfluous. In contrast to the statute upheld in *Comstock*, the PPACA is simply “too sweeping in its scope.” *Comstock*, 2010 WL 1946729, at *13. Fortunately, the Supreme Court understands that “there are . . . restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCullough v. Maryland*, even when the end is constitutional and legitimate, the means must be “appropriate” and “plainly adapted” to that end. Moreover, they may not be otherwise “prohibited” and must be “consistent with the letter and spirit of the constitution.” These phrases are not merely hortatory. For example, cases such as *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992) affirm that a law is not “proper for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional]

principle of state sovereignty” *Printz, supra*, at 923-924; *see also New York, supra*, at 166; *Raich*, 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 Defendants wrongly argue. Also, 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. Simply put, the real 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 numerous constitutional ways to legislate a health care regime that would have achieved its intended purposes. The individual mandate was *not* one of them. Rather than damage permanently our constitutional construct by unleashing both intended and unintended consequences that fundamentally alter the nature of this Republic, Congress must be required to consider legislative alternatives that do no violence to the Constitution, yet advance its policy and political objectives.

In sum, absent a legitimate anchor to an enumerated congressional power under the Constitution, Defendants cannot rely on the Necessary and Proper Clause to vindicate the individual mandate. Because, after *Comstock*, only narrow, limited, and deeply historical claims of congressional power will be sustained under the Necessary and Proper Clause, § 1501 of the PPACA cannot survive scrutiny. The Necessary and Proper Clause cannot confer on Congress a vast, new power to legislate its desired end whenever it chooses to wave the commerce flag.

VI. THE INDIVIDUAL MANDATE IS IMPERMISSIBLE UNDER THE TAXING AND SPENDING CLAUSE.

Defendants argue in the alternative that even if the mandate to purchase insurance under § 1501 is not a permissible exercise of Congress's power under the Commerce Clause, it is valid as an exercise of Congress's power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8. Def. Mem. 28-31. This argument is unavailing.

A. Congress did not purport to pass the individual mandate pursuant to the Constitution's taxing power.

Importantly, Congress did not purport to pass the mandate to purchase insurance pursuant to the taxing power. The Supreme Court has given weight to what power Congress purports to exercise when it enacts legislation. In *Sozinsky v. United States*, 300 U.S. 506 (1937), the Court considered whether provisions of the National Firearms Act that provided for confiscatory taxation of certain classes of firearms was a valid exercise of the taxing power. Concluding that, on its face, the National Firearms Act appeared to be a valid tax, the Court held that it would not look behind Congress's purported exercise of the taxing power. *Id.* at 513. The import of this case is that courts should not lightly disregard Congress's purported motive in passing a piece of legislation which appears valid on its face. Here, § 1501 does not purport to be a tax. If anything, *Sozinsky* supports the proposition that the Court should not ignore Congress's claim that the mandate is an exercise of power pursuant to the Commerce Clause.

But even if the Court were to conclude that it should analyze the mandate to purchase insurance as if Congress had passed it pursuant to the taxing power, it would still be invalid. Unlike the statute in *Sozinsky*, the statute here is not valid on its face. The Supreme Court's

opinion in the *Child Labor Tax Case*, 259 U.S. 20 (1922), is instructive. There, an employer had been assessed a 10% tax on its annual profits because it had employed a worker younger than fourteen during the year. *Id.* at 34. The Court found that the statute in question was not on its face a valid exercise of the taxing power. *Id.* at 44. The court considered several features of the statute in reaching its conclusion. First, the Court found that it “provides a heavy exaction for a departure from a detailed course of conduct in business.” *Id.* at 36. Next, the Court found it significant that “the amount [was] not to be proportioned in any degree to the extent or frequency of the departures, but [was] to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day.” *Id.* Other factors were the presence of a scienter requirement, where the violation had to be “knowing” and that the factory was subject to inspection by the relevant regulatory authority. *Id.* at 37.

The features of the mandate to purchase insurance under § 1501 are strikingly similar. By calling the mandate a penalty, Congress has made it abundantly clear that its goal is to compel a particular course of conduct. Further, the penalty is not proportional to the measure of the violation – it is a flat penalty. It has no relationship to the cost the citizen would have to pay to purchase the requisite insurance. It is assessed irrespective of the number of months during the year an individual is without insurance. These striking similarities between the statute at issue in the *Child Labor Tax Case* and the insurance mandate of the PPACA demonstrate that the mandate is not a valid exercise of the taxing power on its face.

If Congress could pass a statute which imposes a monetary penalty in the guise of a tax on persons who fail to affirmatively act by purchasing health insurance, what principled limit could then be imposed on such a power? The General Welfare clause would become the new Commerce Clause by which Congress could presumably assess many penalties against Americans

for failing to obtain annual physicals, to take preventative medications, or to undertake virtually any other activity that could potentially interfere with a physician's independent judgment or assessment of a patient. Although Congress's power to "lay and collect taxes" is broad, Congress cannot thwart Article I limitations and broaden that power simply by tucking a penalty into a regulatory law:

If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.

United States v. Butler, 297 U.S. 1, 75 (1936); *see also Dole*, 483 U.S. at 216-17 (O'Connor, J. dissenting) (Taxing and Spending Clause limits in *Butler* "remain sound").

Although taxes may have a regulatory effect, the Court has invalidated "[p]enalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation." *Kahriger*, 345 U.S. at 31 (citing *Bailey*, 259 U.S. at 34, 38). In *Bailey*, the Court struck down, as an improper use of Congress's taxing authority, a regulation incorporated a 10 percent tax on employers for use of child labor. *Id.* at 34. The decision distinguished permissible uses of the taxing power that serve legitimate tax purposes (a strong regulatory aim also may be present) from taxes added to otherwise impermissible regulations as penalties – the "so-called tax as a penalty." *Id.* at 36.¹¹

Sonzinsky, on which Defendants rely, is not to the contrary. Def. Mem. 30. There, the Court upheld an annual federal tax on certain firearms dealers, explaining that "[o]n its face it is

¹¹ Although the Court later upheld *Bailey*-type labor regulations under the Commerce Clause (*see, e.g., Darby*), it has consistently reaffirmed *Bailey's* Taxing and Spending Clause limiting principle. *See, e.g., Kahriger*, 345 U.S. at 31-32.

only a taxing measure” that was not “attended by an offensive regulation.” *Sonzinski*, 300 U.S. at 513-514. The Court refused to infer a nefarious congressional motive to avoid otherwise applicable constitutional limitations on federal power. *Id.* at 514. However, the Court – as if to distinguish the PPACA – made clear that it was not dealing with a case “where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations.” *Id.* at 513.¹²

Similarly, *United States v. Butler* (also relied on by Defendants) makes clear that Congress cannot avoid limits on its powers simply by denominating a penalty, designed to enforce otherwise impermissible regulations, as a “tax.” The Court referenced *Bailey (The Child Labor Tax Case)* and *Hill v. Wallace*, noting that the laws at issue there “purported to be taxing measures,” but really were meant to regulate conduct not otherwise subject to the commerce or any other enumerated power with “the levy of the tax a means to force compliance.” *Butler*, 297 U.S. at 70.¹³ This was

¹² In Defendants’ other cases taxes were sustained because their regulatory mechanisms supported revenue collection. *See United States v. Sanchez*, 340 U.S. 42 (1950) (special taxes imposed on marijuana imports, production, and sales); *United States v. Doremus*, 249 U.S. 86 (1919) (same with respect to opiates and coca derivatives); *License Tax Cases*, 72 U.S. 462 (1866) “license” requirements taxes because federal government lacked power to authorize licensed activity). In all of these cases, the test of a valid tax “is whether on its face the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose.” *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972), *cert. denied*, 409 U.S. 868 (1972), cited in *United States v. Spoerke*, 568 F.3d 1236 (11th Cir. 2009).

¹³ *Butler* also considered and rejected the same argument Defendants advance here based on the General Welfare Clause. *See* 297 U.S. at 68. Although the power to provide for the general welfare is an “independent grant of legislative authority” (*Fullilove v. Klutznick*, 448 U.S. 448, 473-74 (1980), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *see also Buckley v. Valeo*, 424 U.S. 1, 90 (1976)), that authority is limited to the imposition of taxes and spending of revenues.

held “an unconstitutional abuse of the power to tax.” *Id.*¹⁴

Here, as noted, Congress did not even bother to label the mandate’s penalty a “tax,” and expressly relied on the Commerce Clause to support both provisions. *See* PPACA § 1501(a)(2)(A). Neither mandate nor penalty is supported by the Taxing and Spending Clause, a result that also cannot be cured by reliance on the Necessary and Proper Clause (and Defendants conspicuously omit any such reliance).

VII. THE INDIVIDUAL MANDATE IS NOT A LEGITIMATE EXERCISE OF CONGRESS’S TAXING POWER BECAUSE IT IS EITHER A REGULATION, AN UNCONSTITUTIONAL TAX, OR MUST BE JUSTIFIED THROUGH SOME OTHER ENUMERATED POWER.

Congress did not state in the Act that it was exercising its taxing authority to impose the individual mandate and penalty; instead, it relied exclusively on its power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 (“[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”). In what can only be termed *post hoc* rationalization, Defendants now argue that the mandate is justified under Congress’s power to tax. As discussed *supra* and further set forth below, this argument must fail, since the penalty is exactly what Congress called it - a penalty - and not a tax at all.

A. The individual mandate is not a legitimate exercise of Congress’s Taxing Power because it is a regulation and not a tax.

The Supreme Court has never held that Congress can force individuals to engage in commerce so their actions can then be regulated under the Commerce Clause (as executed by the

¹⁴ The Court further noted “that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue” and “that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor.” *Id.* (citations omitted).

Necessary and Proper Clause). There is no controlling precedent for such regulatory bootstrapping. That is, of course, why the Defendants had to devise the fallback position that the penalty for not buying health insurance is authorized under Congress's power to "lay and collect taxes." *See, e.g.*, Randy E. Barnett, *The Insurance Mandate in Peril*, Wall St. J., Apr. 29, 2010, at A19. Defendants' invocation of Congress's taxing power in the last few pages of its memorandum, however, fails on three counts.

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

Second, Congress listed all the revenue provisions of the health care reform for purposes of calculating how much revenue the legislation would generate, *but declined to include the penalty for failing to comply with the mandate*. PPACA §§ 9001-17. Of course, for an exaction to be a true tax, it has to be a genuine revenue-raising measure. *See, e.g. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995) (“A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.”) (quoting *Butler v. United States*, 297 U.S. 1, 61 (1936)). When the courts have upheld taxes with a regulatory purpose – like the cigarette tax – it was because revenue-generation was still a key objective. *See, e.g. United States v. Sanchez*, 340 U.S. 42, 44 (1950). (When Congress uses its power constitutionally, it is well settled “that a tax does not cease to be valid *merely* because it regulates, discourages, or even definitely deters the activities taxed.”) (emphasis added).

In contrast, the individual mandate exists solely to coerce people into acquiring health care coverage. Congress never mentions the taxing power with respect to the individual mandate and none of its eight findings mention raising any revenue with the penalty. *See* PPACA § 1501(a). Indeed, if the mandate were to work perfectly – ensuring that everybody owned an insurance policy – it would raise exactly zero revenue. Congress simply did not enact the mandate pursuant to its taxing power. To the contrary, the statute expressly says that the mandate “regulates activity that is commercial and economic in nature.” *Id.* § 1501 (a)(92)(A).

In *United States v. Kahriger*, 345 U.S. 22, 28 (1953), the Supreme Court upheld a punitive tax on gambling by saying that “[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.” In other words, the Court in *Kahriger* declined to look behind Congress’s assertion that it was exercising its taxing power to see whether

a measure was really a regulatory penalty. But this principle cuts both ways: Neither can courts look behind Congress's inadequate assertion of its commerce power to speculate as to whether a measure was "really" a tax.

Third, while inserting the mandate into the Internal Revenue Code (which does not somehow transform the penalty into a tax, as discussed *supra*), Congress expressly severed the penalty from the tax code's normal enforcement mechanisms. The failure to pay the penalty "shall not be subject to any criminal prosecution or penalty with respect to such failure." PPACA § 5000A(g)(2)(A). Nor shall the IRS "file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section," or "levy on any such property with respect to such failure." *Id.* § 5000A(g)(2)(B). Yet, other than criminal prosecutions or levies, there are no enforcement provisions in the Code. Thus, the location of the penalty enforcement provisions in the Code is - quite literally - meaningless.¹⁵

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

B. Alternatively, if the individual mandate's penalty were to be considered a tax,

¹⁵ It is partially for this reason that Petitioners have asked for a "declaration of Petitioners' rights, duties and obligations under the PPACA; specifically, as to whether Petitioners must purchase healthcare insurance or be required by the federal government to pay a monetary or criminal penalty," in para. 102(b) of the Amended Petition.

then it is an unconstitutional direct, unapportioned tax.

For the sake of argument, if the individual mandate's penalty were to be considered a tax, it would be a direct, capitation (or "head") tax that must be apportioned among the States according to Census data. U.S. Const. Art. I, § 2, cl. 3 & Art. I, § 9, cl. 4. The Constitution allows two broad types of taxation – indirect taxes such as duties, imposts and excises, which must be "uniform throughout the United States," U.S. Const. art. I, § 8, cl. 1; and direct taxes, which must be apportioned. All legitimate taxes must be one or the other. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 557 (1895) ("*Pollock I*"). These requirements cannot be ignored. See *United States v. Mfrs. Nat'l Bank of Detroit*, 363 U.S. 194, 199 (1960) (analyzing the merits of a direct tax challenge); *Knowlton v. Moore*, 178 U.S. 41, 82 (1900) ("The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned").¹⁶

Holding personal property and income taxes to be direct, the Supreme Court also has defined direct taxes to include capitation and real property taxes. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) ("*Pollock II*"); *Pollock I*, 157 U.S. at 558. Contrary to Defendants' claim, Def. Mem. 41, the Court never has suggested that only property taxes are "direct" taxes.¹⁷ In *Knowlton*, the Court simply iterated the holding of *Pollock II* that "no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and that

¹⁶ The court in *State of Florida v. U.S. Dept. of Health and Human Svcs.* did not rule on the issue of whether the mandate would be an unconstitutional direct or capitation tax, but noted that the issue has merit: "Although the argument is not only plausible, but appears to have actual merit, as some commentators have noted, see, e.g., *Steven J. Willis and Nakku Chung, Constitutional Decapitation and Healthcare, Tax Notes* (2010), I need not be concerned with the issue. As previously explained, it is quite clear that Congress did not intend the individual mandate penalty to be a tax; it is a penalty." 2010 WL 4010119 at *31 (N.D.Fla.).

¹⁷ Any contrary suggestion in *Hylton v. United States*, 3 Dall. 175 (1796), was dictum. Its result was based on the reverse logic that only an apportionable tax can be a direct tax.

same tax imposed solely because of his general ownership of personal property.” 178 U.S. at 82. It held that the tax at issue – an estate tax – was an excise tax upon the transfer of property, and thus not an unapportioned direct tax as defined in *Pollock II*.

The individual mandate’s penalty, if it were a tax at all, would be like the direct taxes in *Pollock I* and *II*, being levied *directly* on individuals and not on any specific transaction or event. Thus, it does not qualify as an excise or other direct tax and, as discussed above, its placement among the Internal Revenue Code’s true excise taxes is irrelevant. Excises are imposed upon (1) the manufacture, sale, or consumption of a commodity requiring a taxable event or transaction; or (2) a fee levied for the privilege of transacting business.¹⁸ As the Court explained in *Thomas v. United States* – addressing a stamp tax on stock transfers – imposts, duties, and excise taxes are imposed on “importation, consumption, manufacturing, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.” 192 U.S. at 370. “[A] fundamental characteristic of a typical excise tax” is that it is based on an “act by the person or entity taxed[.]” and such exactions can be avoided “by the simple expedient of refraining from an act that would give rise to the tax.” *In re DeRoche*, 287 F.3d 751, 756 (9th Cir. 2002). *See also Flint v. Stone Tracy Co.*, 220 U.S. 107, 150-51 (1911) (excise taxes may be imposed on the privilege of doing business).¹⁹

Relying on *Tyler v. United States*, 281 U.S. 497 (1930), Defendants make a novel argument

¹⁸*See Fernandez v. Wiener*, 326 U.S. 340, 362 (1945) (excise tax is “a tax imposed upon the exercise of some of the numerous rights of property.”); *Thomas v. United States*, 192 U.S. 363, 370 (1904).

¹⁹ Defendants cannot rely on *Union Electric Co. v. United States*, 363 F.3d 1292 (Fed. Cir. 2004). The tax there was levied on purchasing, not on the refusal to purchase, and does not bring *Pollock II*’s validity into question. That case distinguished *Hylton* because the carriage tax there was an excise on a consumable expense, not a direct tax on personal property.

that a tax predicated on a “decision” is indirect. But *Tyler* involved an estate tax imposed on the transfer of property and only confirms that a tax laid “upon the happening of an event” is an indirect tax. *Id.* at 502. An excise is triggered by an *action*, not by the decision to “wipe out the distinction between direct and other classes of taxes.” *Bromley v. McCaughn*, 280 U.S. 124, 137-138 (1929) (suggesting that a tax on keeping property was direct as no different from a tax on property).

Nor is the mandate’s penalty an “income” tax, exempted from apportionment by the Sixteenth Amendment. The Constitution allows for three types of federal taxation, depending on the event that triggers their incidence: income, direct, and excise. Here, income is merely one of many factors that affect the amount of the individual mandate penalty – along with age, family size, geographic location, and smoking status – and not the tax trigger. Thus, the penalty is not an income tax. Although the penalty amount turns in part on income, an income *tax* is levied on “accessions to wealth.” *Comm’r of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 429, 431 (1955). The Internal Revenue Code defines gross income in the constitutional sense as “all income from whatever source derived.” 26 U.S.C. § 61 (H.R. Rep. No. 1337, 83rd Cong. 2d. Sess., A18 (1954)). Thus, to tax “income” there must be an actual increase in wealth; otherwise, the Sixteenth Amendment is inapplicable and cannot rescue an improper direct tax. *See Eisner v. Macomber*, 252 U.S. 189, 206 (1920) (the Sixteenth Amendment “shall not be extended by loose construction” to repeal or modify a direct tax apportionment requirement).²⁰

The individual mandate’s penalty does not require any accession to wealth, does not tax

²⁰ The penalty also does not meet the constitutional requirement that income taxes be “derived” or “realized,” *Commissioner v. Indianapolis Power & Light Co.*, 493 U.S. 203, 214 (1990), because it is imposed regardless of any realization event.

“income derived,” and thus is not an income tax. It does not tax a transfer of property or the manufacture, sale, or consumption of a commodity, nor does it impose a fee for the privilege of transacting business; thus, it is not an indirect tax. The penalty falls on each American not otherwise excepted. If it is a tax, it is an unconstitutional, unapportioned direct tax and must be invalidated on that account.²¹

The Supreme Court has defined a direct tax as one “which falls upon the owner merely because he is the owner, regardless of his use or disposition of the property.” *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945). “Only three taxes are definitely known to be direct: (1) a capitation . . . , (2) a tax upon real property, and (2) a tax upon personal property.” *Murphy v. Internal Revenue Serv.*, 493 F.3d 170, 181 (D.C. Cir. 2007). The new penalty is not a capitation – a fixed tax levied on each person within a jurisdiction – because it is neither fixed (the amount differs based on the above-listed factors) nor levied on each person. It can be characterized most charitably as a negative tax on property, the triggering event being the non-ownership of an insurance policy.²²

But, as already discussed, the Constitution requires that direct taxes be apportioned by population as determined by the census. U.S. Const. art. I, §§ 2, 9. To satisfy Constitutional scrutiny, the method is not complex: First, decide the total revenue to be raised; second, allocate that amount among the states according to population; and third, divide each state’s allocation by its population to compute an individual tax rate. Obviously, the individual mandate penalty is not

²¹ Defendants’ cases, Def. Mem. 39-41, posited as exempting penalties enacted under the Commerce Clause from the limits on direct taxes, involved penalties not subject to apportionment because they were not taxes *at all*. Like the mandate’s penalty, they were enacted to enforce regulations of commerce, not to raise revenue – however little.

²² See Robert A. Levy, The Taxing Power of Obamacare, National Review Online, Apr. 20, 2010.

calculated in this way. If the penalty is a direct tax, it is unconstitutional because it is not and cannot be apportioned.

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

C. Congress may not use the taxing power as a backdoor means of regulating an activity unless the regulations is authorized by the Constitution.

Even if the penalty is considered a tax and somehow survives the test for apportionment or uniformity, Congress cannot use the taxing power as a backdoor means of regulating (as opposed to taxing) an activity unless the regulation is authorized elsewhere in the Constitution. While the Defendants are correct to point out that the taxing power is “extensive,” one of the few times the Supreme Court struck down a federal tax is instructive as to its limits. In the 1920s, when Congress wanted to prohibit activity that was then deemed to be solely within states’ police powers, it tried to penalize the activity using its tax power. The Supreme Court struck down such a

penalty, saying, “There comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.” *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). Noting that that law’s “prohibitory and regulatory effect and purpose are palpable,” the Court held the penalty to be not a tax but rather a regulation of child labor. *Id.* at 37-38.

Whether Congress describes the payment mechanism contained in the individual mandate a tax or a fine, it cannot so simply circumvent Constitutional proscriptions on its power. Otherwise, it could evade all Constitutional limits on its authority by merely imposing the utilization of “taxes” whenever any individual or entity fails to follow a prescribed course of action. In *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*, 259 U.S. 20 (1922), the Court specifically ruled that Congress could not impose a “tax” in order to penalize conduct – the utilization of child labor – that it could not regulate under the Commerce Clause. In so doing, the Court recognized, “[a]ll that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, *would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it.* To give such magic to the word ‘tax’ would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.” *Drexel*, 259 U.S. at 38 (emphasis added).

In anticipation of the above argument, the Defendants cite, most strongly, *Kahriger*, 345 U.S. 22. But there the Court also cited *Bailey* with approval and rejected the proposition “that Congress, under the pretense of exercising its power to tax has attempted to penalize illegal

intrastate gambling through the regulatory features of the Act.” *Id.* at 24. *See also Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937) (“Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.”). Thus, as stated above, this Court has no power to look behind Congress’s assertion of its commerce power and speculate as to whether the individual mandate was “really” a tax. The mandate is a regulatory tool explicitly designed to compel the purchase of health insurance. Tax penalties imposed for a regulatory purpose – as here, if the mandate penalty is considered a tax – must be authorized under an independent enumerated power.

VIII. THE PPACA’S INDIVIDUAL MANDATE VIOLATES DUE PROCESS.

A. The Amended Petition sufficiently alleges a violation of the liberty guaranteed against federal encroachment by the Fifth Amendment’s Due Process Clause.

Petitioners also state a valid due process claim against the federal government, because the individual mandate unconstitutionally deprives them of recognized liberty interests in the freedom to eschew entering into a contract, to direct matters concerning dependent children, and to make decisions regarding the acquisition and use of medical services, including the personal right not to disclose privileged and confidential medical information to a corporate stranger. *See, e.g., Washington V. Glucksberg*, 521 U.S. 702, 720 (1997); *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S., 261 (1990); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Defendants’ cited authorities do not address recognized liberty interests on a motion to dismiss, but instead analyze the merits of whether a *new* fundamental right or a new application of an existing such right should be recognized. As the Eleventh Circuit explained in *Williams v.*

Alabama, 378 F.3d 1232, 1239 (11th Cir. 2004), that limited sort of analysis “must begin with a careful description of the asserted right[,]” followed by consideration of whether such a right “is one of ‘those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty.’” *Id.* (citations omitted). Petitioners here have alleged Due Process violations arising from long-recognized interests. Am. Pet. ¶ 79-84.

These interests are not diminished by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and its progeny, also relied on by Defendants. Def. Mem. 34. Those cases recognize that the *terms* on which entities and individuals may contract are subject to regulation in appropriate circumstances, but do not speak to the question of whether Congress can *compel* Americans to buy something in the first instance. *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007), and *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427 (11th Cir. 1998), are similarly inapposite. Like *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), they considered regulation of economic activity of those already engaged in the marketplace, per their freely-made choices. For these reasons, the Amended Petition sufficiently alleges a violation of the liberty guaranteed against federal encroachment by the Fifth Amendment’s Due Process Clause.

B. The PPACA Impermissibly Infringes Personal Liberty.

“Political freedom means the absence of coercion of a man by his fellow man. The fundamental threat to freedom is power to coerce, be it in the hands of a monarch, a dictator, an oligarchy, or a momentary majority. The preservation of freedom requires the elimination of such concentration of power to the fullest extent and the dispersal and distribution of whatever power cannot be eliminated – a system of checks and balances. By removing the organization of economic activity from the control of political authority, the market eliminates this source of

coercive power. It enables economic strength to be a check to political power rather than a reinforcement.” Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, p. 15 (2002). With the PPACA, the federal government seeks to remove two checks on its power – individual economic liberty and state sovereignty. Like Friedman, the federal government understands that: “Fundamentally, there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of coercion – the techniques of the army and of the modern totalitarian state. The other is voluntary co-operation of individuals – the technique of the marketplace.” *Id.* at 13. The temporary ruling majority in Congress today may be motivated by admirable motives but that is not enough to justify unconstitutional legislative and regulatory action. More importantly, it is impossible to draw a reasonable distinction between the individual mandate here and a variety of potentially abusive private transaction mandates that might follow in its wake. The Court need not be a fan of the late Dr. Friedman or the free market to recognize the obvious danger inherent in giving its approval to such open-ended federal power over the individual, which the Constitution does not grant to any Congress.

C. The right to be free from governmental coercion is a fundamental right since individuals have a Due Process right to *not* enter into a contract for the purchase health insurance from a corporate stranger.

The citizens of the United States possess a fundamental right to be free of government coercion. Put another way, citizens possess a fundamental right to not be forced against their will to exercise any other right. This freedom from government coercion is both “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Palko v. Connecticut*, 302 U.S. 319 (1937).

Among the fundamental rights recognized by the Supreme Court of the United States are

those explicitly found in the Bill of Rights, including freedom of speech, religious belief, petition and assembly, and freedom of the press. U.S. Const. amend. I. Elsewhere, the constitution prohibits the deprivation of “liberty . . . without due process of law” as against the States. U.S. Const. Amend. XIV, and against the Federal Government by way of the Due Process Clause of the 5th Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

The Supreme Court has also held that beyond the rights expressly granted by the Constitution, the citizens of the United States also possess implicit, fundamental unenumerated rights including the right to travel, *United States v. Guest*, 383 U.S. 745 (1966), the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to live among extended family, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The Due Process Clause of the Fifth Amendment has traditionally protected unenumerated rights from infringement by the federal government. “No person shall . . . be deprived of life, liberty, or property, without due process of law” U.S. Const. amend. V. The Ninth Amendment, in light of its ratification history, grants protection to these unenumerated rights by stating, “The Enumeration in the Constitution, of Certain Rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. Amend. IX.

Additionally, the United States Supreme Court has interpreted the Fifth and Fourteenth Amendments as granting substantive due process rights to American citizens. In this regard, the Supreme Court has concluded that due process protects against the transgression of personal immunities that are “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *see Sotto v. Wainwright*, 601 F.2d 184, 191 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980). Without question, implicit in the concept of ordered liberty is the right of a person to be free from purchasing a good or service the individual does not desire to purchase.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court defined those “liberty” interests protected by the due process clause as follows: “While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer*, 262 U.S. at 399.

Such liberty interests implicit within the substantive parameters of the due process clause include the right of an extended family to share a household, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); the right of a woman to decide whether to have an abortion, *Roe v. Wade*, 410 U.S. 113 (1973); the freedom to marry a person of another race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to vote, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); the right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right of access to the courts, *NAACP v. Button*, 371 U.S. 415 (1963); the right of association, *NAACP v. Alabama*, 357 U.S. 449 (1958); the right to send children to private schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and the right to have children instructed in foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In light of the above, refusal to enter into a contract in the face of an illegitimate demand for a contract is subject to protection under the Fifth and Fourteenth Amendments to the United States Constitution.

D. Petitioners have a fundamental Due Process right to *not* share confidential medical information with a corporate stranger.

Compelling Petitioners to enter into a private contract to purchase insurance from another entity will legally require them to share private and personal information with the contracting party. Specifically, by requiring Petitioners to abide by the Act's individual mandate, Congress is also compelling Petitioners to fully disclose past medical conditions, habits and behaviors. Not only will the insurer be privy to all past medical information, Congress's individual mandate will, by necessity, allow the compelled insurer access to Petitioners' present and future medical information of a confidential nature. If judicially enforceable privacy rights mean anything, then private and confidential medical details certainly merit Constitutional protection. Petitioners should not be forced to disclose the most intimate details of their past, present and future medical information.

Even the Defendants must admit that the individual mandate is a direct affront to our right to be let alone - a right that most Americans regard as sacrosanct:

This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (dissenting opinion). That right includes the privilege of an individual to plan his own affairs, for, "outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."

Doe v. Bolton, 410 U.S. 179 (1971) (Douglas, J., concurring), quoting *Kent v. Dulles*, 357 U.S. 116, 126. Hard on the heels of the right "to be let alone" is "*the freedom to care for one's health and person*, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf." *Id.* The PPACA is a direct affront to our rights to privacy and our freedom to care our own health as we see fit, without governmental intrusion.

The right to medical privacy is not a new idea - like the desire for marital privacy, it predates our nation by millennia. In *Doe v. Bolton*, Justice Douglas wrote in his concurrence that the "questions presented in the present cases . . . involve the right of privacy, one aspect of which we considered in *Griswold v. Connecticut*, 381 U.S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy." He then quoted a passage from *Griswold*, in which the Court recognized that the right of privacy in marriage is very old indeed:

"We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."

Doe v. Bolton, 410 US. 179, quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Similarly, the right to medical privacy is older than our Constitution, in some respects as old as Western Civilization itself. The oldest surviving example of medical privacy in Western civilization is the physicians' duty of confidentiality formulated in the fifth century B.C. by the Hippocratic Oath, by which a physician promised: "[W]hatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things shameful to be holy secret." Robert M. Gellman, *Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy*, 62 N.C. L. REV. 255, 267-68 (1984) (quoting 1 Hippocrates 164-65 (W. Jones trans. 1923), reprinted in *Ethics In Medicine* 5 (S. Reiser et al. eds., 1977)). The influence of this oath continued to prevail among physicians of the Western world into the modern period. The common law first clearly adopted the confidentiality principle for doctors only in 1776, in *Rex v. Duchess of Kingston*, 20 How. State Tr. 355, 572-73 (1776). See Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L.J. 661, 671-72 (1985).

Privacy, like speech and assembly, is a fundamental constitutional right, according to *Roe v. Wade*, 410 U.S. 113 (1973); Adam Freedman, *Roe v. Obamacare*, National Review Online (June 15, 2010). Although the immediate issue in *Roe* was abortion, the Supreme Court's decision created a broad "zone of privacy" that included not only abortion but more generally the right "to care for one's health and person," as Justice Douglas stated in his concurring opinion:

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy - the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment - becomes only a matter of theory, not a reality, when a "multiple physician approval" system is mandated by the State.

Doe v. Bolton, 410 U.S. 179 (1971) (Douglas, J., concurring). Clearly, the PPACA interferes with each person's right to "care for one's health and to seek out a physician of one's own choice" as each individual sees fit. Notice also that Justice Douglas was not just concerned about privacy *outside* of the physician-patient arena (such as when insurance companies receive private medical information), he was concerned that the government not be allowed to impose additional physician-patient relationships on a person. In other words, even forcing a person to divulge private medical information to a *doctor* not of her own choosing was deemed untenable by Justice Douglas - to force a person to divulge private medical information to an insurance corporation certainly is even more untenable from a constitutional standpoint.

The millennia-old desire for medical privacy cuts across many social and ideological lines. The "Coalition for Patient Privacy" is a diverse coalition of three dozen organizations, including Microsoft and the ACLU, together with one Senator and House Member. In a letter to Congress dated January 14, 2009, the Coalition wrote: "Personal health information should not be sold and

shared as a typical commodity. Health information is different; it is extremely sensitive and can directly impact jobs, credit, and insurance coverage. Commercial transfers undermine routine privacy safeguards, including transparency and accountability." Exhibit 1. The indisputable fact that medical information is amongst the most private and sensitive information that anyone has is demonstrated by the following passage from an amicus brief filed in the State of Florida several years ago:

The relationship between a doctor and his or her patient in our society is unique; indeed, the level of trust attendant to that relationship can exceed that between even a husband and a wife. A physician is privy to the most private details of a person's life, details which could be devastating to the patient's personal, social, and professional life if revealed to third parties. The patient's medical records may reveal treatment for depression and details of suicidal thoughts or attempts not otherwise disclosed from a review of the patient's pharmacy records. Treatment for Hepatitis C may disclose past intravenous drug usage. The patient's medical history may disclose the fact that as a young woman the patient received an abortion or had a child out of wedlock which was later put up for adoption. *No one other than the patient and his or her physician should be privy to this information absent consent of the patient.*

Exhibit 2, at 6-7 (emphasis added). This passage illustrates not only some of the reasons why medical privacy is so vital to Americans, but also the universality of our desire to protect our medical privacy. This amicus brief was written by the American Civil Liberties Union of Florida in support of appellant Rush Hudson Limbaugh III, an ideologically conservative political pundit who is a well-known critic of the ACLU. Mr. Limbaugh and the ACLU have their political differences, but they are on the same side of this issue - the side of personal liberty.

In *Planned Parenthood v. Casey*, the Court described *Roe* as a rule of "personal autonomy" that protects all "intimate and personal choices . . . central to personal dignity" in matters "fundamentally affecting a person." *Planned Parenthood of Southeastern Pa. v. Casey*,

505 U.S. 833, 851 (1992). In judging which decisions are constitutionally protected as those “that an individual may make without unjustified government interference,” the Court has set forth two criteria: they must be “personal decisions,” meaning they must primarily involve one's self or one's family, and they must be “important decisions,” which profoundly affect one's development or one's life. *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Tex. 1980), quoting *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977). Consistent with these broad principles, courts have held that the right to privacy includes, for example, the right to refuse even life-saving medical treatment: “The decision to obtain or reject medical treatment, no less than the decision to continue or terminate pregnancy, meets both criteria.” *Id.* at 1046-47. If the right to medical privacy is so broad that it encompasses the right to “obtain or reject medical treatment,” how can it not encompass the right to either purchase or not purchase health insurance as each individual sees fit?

Because the right to privacy is deemed fundamental, any statute that threatens that right is subject to “strict scrutiny” by the courts. It is difficult to see how the individual mandate can survive such scrutiny. After all, if the right to privacy guarantees our liberty to make “intimate,” “personal” decisions relating to “health,” “dignity,” and “autonomy,” it must also protect our right not to apply for or buy health insurance. If the Constitution prohibits government from dictating decisions that “full adult humans” can otherwise make for themselves, how can the same Constitution authorize Congress to force adult citizens to enter into particular private contracts?

The threat to privacy does not end there. Because of the individual mandate, each citizen will be required to divulge, on an ongoing basis, personal medical details to an insurance company. Defendants' brief basically says that Petitioners should not worry about this because they are only being made to disclose this information to insurance companies, which is somehow not the same

as a "public" disclosure. Defendants even compare insurance companies to "government archivists with an 'unblemished record . . . for discretion.'" Def. Mem. at 38. Petitioners, however, do not wish to trust their information with any insurance company, and they are hardly alone in this regard. Defendants contends that petitioners we can trust insurance companies because those corporations must abide by HIPPA. Indeed, an individual who believes that the Privacy Rule is not being upheld can go through the complex process of filing a complaint with the Department of Health and Human Services Office for Civil Rights (OCR), *see* 45 C.F.R. 160.306. However, according to the Wall Street Journal, the OCR has a long backlog and ignores most complaints. "Complaints of privacy violations have been piling up at the Department of Health and Human Services. Between April 2003 and Nov. 30, the agency fielded 23,896 complaints related to medical-privacy rules, but it has not yet taken any enforcement actions against hospitals, doctors, insurers or anyone else for rule violations." Theo Francis *Spread of records stirs fears of privacy erosion*, Wall Street Journal, December 28, 2006. Unfortunately, HIPPA allows bill collectors, fund raisers and marketers to receive our confidential information from our insurers, and the PPACA mandates that we purchase this insurance. *Id.* There is thus a direct link between governmental action (the mandate) and public disclosure of our most private and intimate details.

Defendants heavily speculate that Petitioners might not have to disclose private information to the insurance companies that are forced upon them, though they also admit that they just don't know: "It remains unknown whether plans might be available that specifically address individual privacy concerns." Def. Mem. at 49. It is known, however, that the PPACA does not have any protections at all that would stop insurance companies from requiring disclosure of medical information during the application process, and no one can explain how an insurance

company can then be billed for services without knowing what those services are. Insurance companies will gather immense amounts of medical information simply in the course of paying for diagnostic tests, treatments, routine examinations, etc.²³ Before the PPACA, a person could opt out of this system by simply paying for medical expenses out of pocket - now, people must either apply for and maintain insurance coverage or face a penalty. Clearly, this is an unconstitutional invasion of privacy.

The Act's individual mandate expressly violates Petitioners fundamental rights they enjoy as part of the "liberty" interest under the Fifth Amendment. Fundamental rights such as "the right to make one's own health care decisions," "the right to abstain from entering into a contractual relationship with another private entity" and "the right to not be compelled to divulge private medical information to another private entity" are deeply rooted in American history and tradition and implicated by the imposition of the Act. The Act's individual mandate represents an abuse of Congressional authority and a clear violation of substantive due process protections, since Petitioners benefit from a constitutionally protected interest in making certain kinds of important decisions free from governmental compulsion.

E. Freedom from Government Coercion is Deeply Rooted in This Nation's History.

A plain reading of all of the recognized fundamental rights of the citizens of the United States demonstrates that the freedom from government coercion is a thread common throughout

²³ There is even an occupational field that specializes in gathering medical information and sending it to insurance companies. The Bureau of Labor Statistics has a category for "Medical Records and Health Information Technicians" who "assemble patients' health information including medical history, symptoms, examination results, diagnostic tests, treatment methods, and all other healthcare provider services." Occupational Outlook Handbook, 2010-11 Edition. Currently there are over 172,500 people doing this job; "they often serve as liaisons between healthcare facilities, insurance companies, and other establishments," according to the federal government. *Id.*

the history and traditions of the United States. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Not only do each of the fundamental rights reserved to the people by the Constitution reflect this tradition, but also the express powers and prohibitions to the federal government reflect the cognizance of the Constitution's drafters that the chief notion of liberty protected by the Constitution is *freedom from governmental coercion*.

For example, the fundamental rights protected within the First Amendment include freedom of speech and religion. U.S. Const. amend. I. But along with those rights, the Constitution grants the freedom from giving coerced testimony in the 5th Amendment, and prohibits the Congress from establishing a religion and coercing citizens to participate in it. U.S. Const. amend. V and I. The Constitution mandates that people be free from being coerced by government into allowing police into their homes or searching their person, absent a warrant supported by a showing of probable cause. U.S. Const. Amend. IV.

As a converse, the Constitution limits the ability of government to interfere in the lives of the people who are otherwise living freely and lawfully. As mentioned above, government may search homes, but only when authorized to do so by warrant supported by probable cause. U.S. Const. amend. IV. Congress is forbidden from suspending the writ of *habeas corpus*, which protects the people from being restrained or coerced from moving about freely against their will without just cause. U.S. Const. art. I, § 9. When prosecuting a person in a criminal trial, the government is forbidden from holding a person indefinitely and required to try that person quickly and publicly. U.S. Const. Amend. VI. Likewise, the government may not try a person twice for the same crime. U.S. Const. Amend. V. Read together, these provisions of the Constitution establish that when government regularly exercises its coercive authority over the people, its powers to do so are restrained. The Constitution presumes liberty. In explaining the reasoning

behind its fundamental structure, James Madison wrote “to lay a due foundation for that separate and distinct exercise of the different powers of government, which, to a certain extent, is admitted on all hands *to be essential to the preservation of liberty*, it is evident that each department should have a will of its own . . .” Federalist No. 51. (emphasis added).

Liberty, at its most basic sense, is the “freedom from arbitrary or undue external restraint, especially by a government,” but liberty also includes “the absence of a legal duty imposed on a person.” Black’s Law Dictionary (8th ed. 2004). The PPACA infringes on this second notion of liberty. The Act imposes on the people of the United States, collectively and individually, a new duty to purchase health insurance with required “minimum essential coverage.” Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1501A(b)(1). Crucially, the PPACA does not tax, regulate, or control a person who is engaged in any positive conduct at all, but reaches individuals who are by its very definition engaged in *no* conduct at all. Freedom from this sort of coercion is implicit in any concept of ordered liberty.

At first blush, this “nanny state” use of government coercion may seem benign. After all, Defendants may argue that most people purchase health care insurance on their own or through their employers, and a significant majority of those without insurance would do so were it more affordable. This reasoning is dangerous to all fundamental liberties. Imagine, for example, if Congress passed a law requiring people to purchase “minimum essential” food. After all, what could be more essential than “health,” but healthy food. Under the Act’s logic, most people already purchase their own food and many who cannot, would do so were more food affordable. If there were nothing incongruous with liberty and the Act, then Congress would be permitted to require people to buy the “minimum essential” food it deems appropriate. If Congress is capable under the Constitution of so coercing the people, then it is impossible to fathom any limit to its

powers. This result cannot be countenanced against the Constitution handed down to us by the Framers. Writing on their intent to protect a broader scope of liberty in the Constitution, Justice Brandeis wrote, “They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)

F. The Governmental interest furthered by the individual mandate is insufficiently compelling and not narrowly tailored.

If Congress wishes to abridge the fundamental right to be free from governmental coercion, then such abridgement deserves heightened judicial scrutiny and a narrowing of the “presumption of constitutionality” of the legislation. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938). The burden is on the government to justify an infringement of fundamental rights by demonstrating that the legislation is narrowly tailored to further a compelling governmental interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). After identifying the rising costs of health care, and the problem of people waiting until injury to purchase health insurance, the PPACA identifies the government’s interest in the individual requirement as, “[s]ignificantly increasing health insurance coverage . . . will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.” Is lowering the price of health insurance premiums a sufficiently compelling government interest to justify governmental coercion? Is requiring individuals to purchase health insurance sufficiently narrowly tailored to achieve this interest? When compared to prior Supreme Court precedent, the PPACA fails this high standard.

For example, in *Hirabayashi v. United States*, the Supreme Court held that the plaintiff’s due process rights yielded to the exigencies of war-time emergency and the legitimate application

of Congress's war power. *Hirabayashi v. United States*, 320 U.S. 81 (1943). Likewise, in *Jacobson v. Massachusetts*, the Supreme Court held that the plaintiff's right to refuse medical treatment yielded to the government's interest in preventing a pandemic. The rising cost of health care does not pose such a threat as disease or foreign invasion to justify an infringement of a fundamental right.

Requiring those without health insurance to purchase it does not further a compelling government interest in a narrowly tailored manner. The government compels those without coverage so as to aggregate those purchase with those it seeks to benefit. The requirement of minimum essential coverage does not at its core further the interest of those who fall under the clause's power, but only those who cannot afford insurance. As an alternative, Congress could easily raise revenues via its power to tax and then spend those revenues to subsidizing those who cannot afford to buy health insurance, just as it does for food and education – without infringing on the due process rights of the people. However, as currently written, the PPACA's provision does not conform to well-defined modes of constitutionally permissible taxation. *See Willis and Chung, Of Constitutional De-Capitation of Health Dare*, 127 Tax Notes 9 (2010).

IX. CONCLUSION.

This case presents the Court with “the arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments.” The Federalist No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). The PPACA is unprecedented – quite literally, without any legal precedent – both in its regulatory scope and its expansion of federal authority over states and individuals. As the Congressional Budget office said in 1994, “The government has never required people to buy any good or service as a condition of lawful

residence in the United States.” Cong. Budget office, *The Budgetary Treatment of an individual mandate to Buy Health Insurance* 1 (1994). Never before has it been said that every man, woman and child faces a civil penalty for declining to participate in the marketplace, nor have courts had to consider such a breathtaking assertion of raw power. Even in *Wickard v. Filburn*, 317 U.S. 11 (1942), the federal government did not claim the power to *mandate* that people become farmers or enter into commercial transactions.

At issue is the constitutionality of the individual mandate — the requirement that individuals obtain a government-approved health insurance policy or pay a penalty. Congress specifically and expressly identified the Commerce Clause as the source of its authority, a position the Defendants now assert in its Motion to Dismiss. Because Petitioners persuasively refute that argument, Defendants have been forced to argue alternative grounds for their unconstitutional power-grab, even though the President and Congress were adamant in declaring the mandate to be a *penalty* and *not* a “tax” increase. However, even if the individual mandate were by fiat considered to be a tax, it would still be unconstitutional because it is neither apportioned (if a direct tax) nor uniform (if an excise tax). Moreover, Congress cannot use the taxing power as a backdoor means of regulating an activity unless such regulation is authorized elsewhere in the Constitution. Anglo-American common law (where the Court must look to determine the nature and scope of protected liberty interests) always has disfavored imposition of affirmative obligations absent some duty either willingly undertaken or properly inferred. *See, e.g. Hasenfus v. LaJeunesse*, 175 F.3d 68, 71 (1st Cir. 1999) (“Under common law, inaction rarely gives rise to liability unless some special duty of care exists.”).

As the United States Supreme Court recognized almost 150 years ago, “[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the

whole,” than the Government’s unconstitutional assertion of power against its own citizens. *Ex Parte Milligan*, 71 U.S. 1, 118-19 (1866) (granting *habeas corpus* petition). Either the motion to dismiss this lawsuit must be denied *or* the Constitution must be re-written by judicial fiat. Petitioners therefore respectfully request that Defendants’ Motion to Dismiss be denied.

Respectfully submitted this day of November 15, 2010.

LT. GOVERNOR PHIL BRYANT, RYAN S. WALTERS, MICHAEL E.SHOTWELL AND RICHARD A. CONRAD, ONBEHALF OF THEMSELVES AND OTHERSSIMILARLY SITUATED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served using the Court's ECF system, on Monday, November 15, 2010 to the counsel of record for all Defendants:

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