NO. 10-2388

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

THOMAS MORE LAW CENTER; JANN DEMARS; JOHN CECI; STEVEN HYDER; SALINA HYDER,
PLAINTIFFS-APPELLANTS,

V.

BARACK HUSSEIN OBAMA, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; **KATHLEEN SEBELIUS,** IN HER OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; **ERIC H. HOLDER, JR.,** IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES; **TIMOTHY F. GEITHNER,** IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GEORGE CARAM STEEH
Civil Case No. 10-11156

APPELLANTS' REPLY BRIEF

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INTRODUCTION

After moving beyond Defendants' "parade of horribles" regarding our Nation's healthcare system (Defs.' Br. at 6-16), this court will not find *one* controlling case that stands for the proposition that Congress can stretch its Commerce Clause authority to include the regulation of intrastate *inactivity*, or in effect, mere "existence" within our Nation's borders. What Defendants argue here in support of Congress' passage of the Individual Mandate provision of the Patient Protection and Affordable Care Act ("Act")[1] is quite literally unprecedented.

Accepting Defendants' arguments would effectively remove *any* limits to Congress' power to regulate under the Constitution. Indeed, Defendants' arguments eschew any limiting principle that would cabin the power of Congress, thus seeking in the process to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *See United States v. Lopez*, 514 U.S. 549, 567 (1995).

Defendants claim that Plaintiffs' "real quarrel is not with the distinction between federal and state authority, but with *any* requirement to purchase health insurance, which they decry as 'unprecedented governmental mandates that restrict their personal and economic freedom.'" (Defs.' Br. at 25). Defendants are mistaken.

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

Plaintiffs' "real quarrel" is with Congress violating the Constitution.[2] As Plaintiffs made very clear in their opening brief, "[T]his case transcends the public debate on healthcare. At its core, it is about the constitutional limits of the federal government. And when Congress acts beyond those limits, as here, the judicial branch must exercise its authority as the guardian of our Constitution and enjoin the illicit acts." (Pls.' Br. at 4-5).

Indeed, times of crisis, including ones created by the government, do not justify departure from the Constitution. The essential problems with the healthcare system that the Individual Mandate is allegedly designed to remedy are problems created by the Act itself. As Defendants note, "The [Individual Mandate] provision is instrumental to the [Act's] new insurance regulations that . . . bar insurance companies from denying coverage to persons with a pre-existing medical condition (a

[2] Defendants' assertion that Plaintiffs are advancing a "type of substantive due process claim entertained in the *Lochner* era," (Defs.' Br. at 25, 55), is similarly off the mark. There can be little doubt that as the power of the federal government increases, the liberties of the American people commensurately decrease. Our Founding Fathers were acutely aware of this phenomenon and ensured that our Constitution guarded against it by giving Congress only *limited* and *enumerated* powers. And this is further evidenced by the adoption of the Tenth Amendment. *See* Const. amends. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Defendants would do well to recall how James Madison described our federal system of government—a description that has nothing to do with a *Lochner*-era substantive due process claim: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, *concern the lives, liberties and properties of the people* . . . . *The Federalist* No. 45, at 238 (James Madison) (Carey & McClellan eds., 1990) (emphasis added).

requirement known as 'guaranteed issue') and from charging higher premiums on the basis of a person's medical history (a requirement known as 'community rating')." (Defs.' Br. at 2). So in effect, the Act—and more particularly, the Individual Mandate—shifts costs from a class of persons who are generally unhealthy to a class of persons who are generally healthy by forcing the latter class to engage in a commercial transaction that they either don't want or don't need.[3] Thus, in a transparent effort to appease the insurance companies, whose costs will no doubt increase as a result of these new regulations, Congress decided that the *politically expedient* thing to do would be to expand its authority under the Commerce Clause and force those persons who are not presently in the healthcare insurance market into that market through the Individual Mandate. This would then give the insurance companies more paying customers (customers who are generally healthier and thus paying for a product they will not use, resulting in greater profits) and everyone will be satisfied—except, of course, those American citizens, including Plaintiffs, who are forced by Congress under penalty of law to purchase the unwanted policy. The obvious problem with this solution is that political expediency does not grant Congress an exemption from complying with the Constitution and the limits it

[3] It is not accurate to say that the latter class of persons also includes those who cannot afford to pay for healthcare insurance because the Act provides no incentive for the poor to actually acquire such insurance. (*See, e.g.*, Defs.' Br. at 18) (noting that the penalty for not purchasing insurance does not apply to persons with low income) (citing 26 U.S.C. § 5000A(e)).

imposes upon its power to regulate. In a futile attempt to avoid this inconvenient—indeed fatal—problem, Defendants offer this court an inaccurate and tendentious view of the facts and law.

For example, contrary to Defendants' misrepresentation, Plaintiffs do not "admit . . . that they participate in the market for health care services." (Defs.' Br. at 23). Plaintiffs do not own or operate an insurance company or any other business or commercial entity that actively participates in the healthcare services market such that their *choice to participate in this form of commerce* would potentially subject them to permissible regulation by Congress. *See Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) (holding that the Commerce Clause permitted Congress to require a local motel to rent rooms to black guests); *Katzenbach v. McClung,* 379 U.S. 294 (1964) (holding that the Commerce Clause permitted Congress to require local restaurants to serve black customers). Similarly, Plaintiffs are not involved in the production, distribution, or consumption of any commodity or good at the point of congressional regulation. *See Wickard v. Filburn,* 317 U.S. 111 (1942) (holding that the Commerce Clause permitted Congress to limit the amount of wheat grown on a farm for personal consumption); *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the Commerce Clause permitted Congress to regulate the non-commercial growing of marijuana).

There is simply no constitutional basis for arguing that the Commerce Clause

(or the Necessary and Proper Clause) permits Congress to force Plaintiffs under penalty of federal law to enter into commerce or to engage in economic activity that Plaintiffs would not engage in otherwise. For example, Congress could not force Plaintiffs to open a motel (*Heart of Atlanta Motel, Inc.*) or restaurant (*Katzenbach*), nor could it force them to grow wheat (*Wickard*) or marijuana (*Raich*) and then claim dominion over them as part of some larger regulatory scheme. Moreover, if Congress wants to regulate Plaintiffs at the point in which they become active *consumers* of healthcare services, such as through an excise tax or some other form of permissible regulation, Congress would be free to do so. (*See* note 17, *infra*) (setting forth proposed constitutional excise tax structure to accomplish Congress' goals). But that is not what Congress is doing here. And Defendants' linguistic contortions and metaphysical gymnastics cannot make it so. (*See* Defs.' Br. at 27 (claiming that the Individual Mandate "regulates the *means of payment* for health care services") (emphasis added); Defs.' Br. at 29 (claiming that "Congress's findings and the legislative record leave no doubt that [the Individual Mandate] regulates *economic conduct*") (emphasis added); Defs.' Br. at 29 (claiming that the Individual Mandate "regulates the *practice of obtaining health care without insurance*") (emphasis added)).

In the final analysis, Defendants' arguments can be distilled to this: Congress has the authority to pass the Individual Mandate provision of the Act because it says

so. Defendants are forced into this inconvenient position because even the Supreme Court's most expansive readings of the Commerce and Necessary and Proper Clauses—*Wickard v. Filburn*, *Gonzales v. Raich*, and *United States v. Comstock*[4]—do not support, and indeed reject, Defendants' arguments, which this court must as well.

ARGUMENT

I. Defendants' Application of Controlling Supreme Court Commerce Clause and Necessary and Proper Clause Jurisprudence Is Simply Wrong.

Throughout their brief, Defendants play fast and loose with the facts and law in a desperate attempt to justify their troubling and unprecedented argument that Congress can regulate intrastate *inactivity* by forcing Plaintiffs to engage in "*economic activity*" (i.e., purchasing a healthcare insurance policy) under penalty of federal law. In sum, the Individual Mandate is not a valid exercise of Congress' Commerce Clause power, nor can Congress find refuge for its actions in the Necessary and Proper Clause.

A. The Individual Mandate Does Not Regulate the "Means of Payment" for Healthcare Services.

The Individual Mandate does not regulate the "means of payment" for healthcare services nor does it regulate "economic conduct," as Defendants suggest. (Defs.' Br. at 27, 29). Once again, Defendants must resort to sophistry if they are to fit the round peg of Congress' passage of the Individual Mandate, which regulates

[4] *United States v. Comstock*, 130 S. Ct. 1949 (2010). (*See* Pls.' Br. at 32-36).

intrastate "*inactivity*," into the square hole of Supreme Court precedent, which only permits Congress at the outer bounds of its authority to regulate intrastate "economic *activity*" as part of a broader regulatory scheme. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *see also Raich*, 545 U.S. at 25-26 (defining "economic activity" as the "production, distribution, and consumption of commodities").

In the opening section of their argument, Defendants suggest that this court has no business reviewing (and certainly no right to reject) Congress' findings and its ultimate conclusion that the challenged provision was within its power to regulate pursuant to the Commerce Clause. (Defs.' Br. at 27-29). This argument, however, was rejected by the Supreme Court, and it must be rejected here. As the Court made clear: "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them *is ultimately a judicial rather than a legislative question*, and can be settled finally only by this Court." *Morrison*, 529 U.S. at 614 (citations and quotations omitted) (emphasis added); *see generally Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554 (1895) ("[I]t is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void

accordingly."). In sum, granting the deference that Defendants seek here is akin to granting power to the fox to determine who guards the henhouse.

B. The Individual Mandate Does Not Regulate "the Practice of Obtaining Healthcare Without Insurance."

Here again Defendants seek to transform intrastate "inactivity" to "activity" by linguistic alchemy, claiming that "the practice of obtaining health care without insurance" is somehow akin to purchasing a good or commodity. (*See* Defs.' Br. at 29-33). Once they establish this premise, Defendants then cite various cases for the unremarkable proposition that it does not matter that an individual's personal consumption or production of a good, such as wheat (citing *Wickard*) or marijuana (citing *Raich*), has a "'trivial' impact on the interstate market for those commodities, [t]he important point [is] that such consumption, 'when viewed in the aggregate,' would have had a substantial impact on the interstate markets." (Defs.' Br. at 32). Defendants then take this proposition and assert "that the practice of obtaining health care without insurance, 'viewed in the aggregate,' has 'clear and direct impacts on health care providers, taxpayers, and the insured population who ultimately pay for the care provided to those who go without insurance,'" (Defs.' Br. at 33), thus concluding that this establishes Congress' authority to force Plaintiffs to purchase healthcare insurance. The glaring error with Defendants' argument is that it is based on a false premise: that not *purchasing* healthcare insurance is the same as *purchasing*

(consuming, or producing) any other commodity or good—which, of course, it isn't.[5]

C. The Fact that the Individual Mandate Is "Essential" to the Act Does Not Cure Its Constitutional Defects; Rather, It Compels the Court to Strike Down the Act in Its Entirety.

1. Because the Individual Mandate Is "Essential" to the Act Does Not Make It Constitutional.

Defendants claim that the Individual Mandate is valid not only because "it regulates the means of payment for health care services"—an utterly feckless claim, as demonstrated above—but because "it 'operates as an essential part of a comprehensive regulatory scheme' to make affordable health care coverage widely available." (Defs.' Br. at 33). According to Defendants, "even if the means of payment for health care services were somehow not regarded as economic, it would nevertheless properly be regulated under the [Act] because Congress concluded that

[5] In their failed attempt to address the fact that the Act regulates "inactivity"—an unprecedented expansion of congressional authority—Defendants, quoting *Wickard*, 317 U.S. at 111, state, "The Supreme Court sustained that exercise of the commerce power even though the wheat at issue was not 'sold or intended to be sold," *id*. at 119, even though the home consumption of wheat by any individual 'may be trivial by itself,' *id*. at 127, and even though the regulation 'forc[ed] some farmers into the market to buy what they could provide for themselves' *id*. 129." (Defs.' Br. at 46-47). But neither *Wickard* nor any other "teachings of the Supreme Court," (*see* Defs.' Br. at 45-52), support the proposition that Congress can force a private citizen to purchase a good or commodity (here, an insurance policy) under penalty of federal law. The "forcing" of farmers into the marker to buy wheat is not analogous. The regulation at issue in *Wickard* prevented the consumption of a good; it did not demand the purchase of anything. Whatever pressure was exerted upon the farmers in *Wickard* to purchase wheat was incidental to the regulation—not required by it. Thus, a farmer under *Wickard* could choose to purchase or not to purchase wheat or choose to farm or not to farm. Plaintiffs in this case have no such option with regard to purchasing a healthcare insurance policy.

the 'failure to regulate that class of *activity* would undercut the regulation of the interstate market[.]'" (Defs.' Br. at 34) (quoting *Raich*, 545 U.S. at 18) (emphasis added). This is a remarkable and inescapable admission that Congress' power to regulate intrastate within a broader regulatory scheme is confined to regulating "activity." Moreover, in *Raich*, the fact that Congress was regulating intrastate "*economic*" activity pursuant to a broader regulatory scheme was *central* to the Court's ruling that the federal law was a permissible exercise of Congress' commerce power. The Court stated:

> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act ("CSA")] are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." *Webster's Third New International Dictionary* 720 (1966). The CSA is a statute that regulates *the production, distribution, and consumption* of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. *Because the CSA is a statute that directly regulates economic, commercial activity*, our opinion in *Morrison* casts no doubt on its constitutionality.

Raich, 545 U.S. at 25-26 (emphasis added).[6]

[6] Defendants claim that "the Supreme Court found it irrelevant that the plaintiffs [in *Raich*] were not engaged in commercial activity and that they did not buy, sell, or distribute any portion of the marijuana that they possessed." (Defs.' Br. at 46). This is misleading in that the Court specifically upheld the regulation of the intrastate activity at issue (i.e., the private production and consumption of marijuana, a

In sum, Congress cannot circumvent the limits of its authority by casting a large net and passing a broad regulatory scheme and then claiming that everything caught within this net by virtue of its impact, however slight, is fair game for regulating. As Plaintiffs argued in their opening brief,

> If the Act is understood to fall within Congress' Commerce Clause authority, the federal government will have the absolute and unfettered power to create complex regulatory schemes to fix every perceived problem imaginable and to do so by ordering private citizens to engage in affirmative acts, under penalty of law, such as eating certain foods, taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy, among others. The term "Nanny State" does not even begin to describe what we will have wrought if in fact the [Act] falls within any imaginable governmental authority. To be sure, George Orwell's *1984* will be just the primer for our new civics.

(Pls.' Br. at 31-32).

Indeed, there is no rational way to limit this new found congressional authority (i.e., the power to compel someone to purchase a commodity) to just healthcare insurance policies. Rather than address this pregnant issue head on, Defendants deflect it and dismissively state that "[t]his rhetoric is not about interstate commerce."[7]

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commodity for which there is an interstate market) because the plaintiffs were engaged in "economic activity," and thus concluded that the regulation at issue "directly regulates economic, commercial activity." *Raich*, 545 U.S. at 25-26.

[7] Defendants' arguments are all over the map. At one point they claim that "[i]mposing conditions on the purchase and sale of health care services is economic regulation of a national market." (Defs.' Br. at 55). But Congress is not imposing any conditions on "purchasing or selling" a commodity, such as an insurance policy (or vitamins, health food, or a health club membership). If Congress wanted to regulate at the time of purchase or sale, it arguably could. It is not doing that, however.

(Defs.' Br. at 54-55). However, based on Defendants' faulty arguments, it certainly is "about interstate commerce." *See generally Raich*, 545 U.S. at 25-26 (defining "economic activity" as the "production, distribution, and consumption of commodities"). If Congress can force a private citizen to purchase healthcare insurance (a commodity) because not doing so shifts costs in the healthcare market it seeks to regulate (Defendants' main argument), then certainly forcing a private citizen to embrace a healthier lifestyle, which is likely the most effective way to reduce healthcare costs in the market, by requiring the purchase of certain vitamins, health foods, or a health club membership falls neatly within the power Defendants want this court to confer upon Congress.

Defendants' next ploy is to dismiss Plaintiffs' "hypothetical requirement[s]" because they do not involve the regulation of "the financing of goods or services that people must have available at unexpected times and in unexpected amounts." (Defs.' Br. at 55). This is simply another way of saying that purchasing an *insurance policy* (a commodity) is not the same as purchasing any other commodity, such as vitamins, health food, or a club membership. But how is that a legitimate basis for establishing a legal principle? Food and health are intimately connected. Why is it that Congress can only force the purchase of insurance policies, but not the purchase of other goods or commodities even if this will promote health and thereby decrease national health costs in ways far more effective than simply purchasing a healthcare insurance policy? In short, if Congress can force the purchase of an insurance policy, its power to force the purchase of other commodities is without a definable limit. Finally, Defendants make the plea that Plaintiffs should not be making such a fuss about the constitutionality of the Individual Mandate because, after all, look at all of the benefits they are receiving from the Act. (*See* Defs.' Br. at 56) ("Plaintiffs' rhetoric is particularly anomalous in light of the Affordable Care Act provisions that confer real and significant benefits on people, like plaintiffs, who are not currently insured."). Like times of crisis, however, benevolence does not justify departure from the Constitution.

2. Remedy.

The fact that Congress considered the Individual Mandate an "essential" component of the Act does not cure the provision's constitutional defects. Rather, this fact demonstrates that upon finding this provision unconstitutional, the court should strike down the entire Act since this provision is not severable. As the Supreme Court noted, "[T]he touchstone for any decision about remedy is legislative intent." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). Thus, "[a]fter finding an application or portion of a statute unconstitutional, [the court] must ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id*. In light of Defendants' arguments regarding the "essential" nature of the Individual Mandate to the overall effectiveness of the Act, there is little doubt that Congress would prefer "no statute at all"—and that conclusion "is supported by a massive legislative record." (*See* Defs.' Br. at 39).

D. The Individual Mandate Cannot Be Upheld under the Necessary and Proper Clause.

Defendants' Necessary and Proper Clause argument can be neatly summed up by this statement in their brief: "Governing precedent leaves no room for plaintiffs' invitation to override Congress's judgment about the appropriate means to achieve its legitimate regulatory objectives." (Defs.' Br. at 40). Thus, according to Defendants, whether the "means" chosen are "necessary" and "proper" is without constitutional limits and based entirely on "Congress's judgment." Defendants are mistaken. *See*

generally Raich, 545 U.S. at 47 (O'Connor, J., dissenting) ("If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.").

Simply put, the Necessary and Proper Clause does not grant Congress license to exceed its constitutional authority. *See, e.g., Printz v. United States*, 521 U.S. 898, 923 (1997) ("[The Necessary and Proper Clause is] the last, best hope of those who defend ultra vires congressional action."). While the issue of whether Congress has authority to enact the Individual Mandate under controlling Supreme Court precedent is often viewed simply (and somewhat inaccurately) as whether Congress has authority to enact this provision pursuant to the Commerce Clause, the reality is that this precedent also subsumes in relevant part the Necessary and Proper Clause. That is, the power to regulate intrastate activity under the "substantial effects" theory (i.e., whether the activity substantially affects interstate commerce, whether its regulation is necessary to a broader regulatory scheme, or both) derives from the conjunction of the Commerce Clause *and* the Necessary and Proper Clause.[8] *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-86 (1985) (O'Connor, J., dissenting) (explaining that it is through the Necessary and Proper Clause that "an intrastate

[8] (*See* Br. of *Amici Curiae* of the Cato Institute & Prof. Randy E. Barnett ("Cato *Amici* Br.") at 8) ("[T]o preserve the constitutional scheme of limited and enumerated powers, the Court drew a judicially administrable line beyond which Congress could not go in enacting 'necessary and proper' means to execute its power to regulate interstate commerce. The 'substantial effects' doctrine, as limited in *Lopez* and *Morrison*, thus established the outer doctrinal bounds of 'necessity' under the Necessary and Proper Clause.").

activity 'affecting' interstate commerce can be reached through the commerce power"); *see also United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (noting that the Necessary and Proper Clause permits Congress to extend its commerce power "to those activities intrastate which so affect interstate commerce"). Thus, the expansion of Congress' commerce power, as illustrated by *Wickard*,[9] for example, and the outer limits of that power, as set forth in *Lopez*, *Morrison*, and even *Raich*, draw their rationale from the Necessary and Proper Clause. Consequently, Defendants cannot expand Congress' commerce power beyond the outer limits established by Supreme Court precedent by claiming that the Necessary and Proper Clause permits such an expansion—it does no such thing. Congress must still exercise its authority under the Necessary and Proper Clause in a manner that is consistent with basic constitutional principles, including the "structural" principle of enumerated powers. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (determining whether congressional action was permissible under the Necessary and Proper Clause as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional"); *see also Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting) ("It is not enough that the 'end be legitimate'; the means to that end

[9] *See Lopez*, 514 U.S. at 560 (describing *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").

chosen by Congress must not contravene the spirit of the Constitution.").

Indeed, if Congress can force a private citizen to engage in commercial or economic activity under penalty of federal law—whether exercising its authority under the Commerce Clause or the Necessary and Proper Clause—then it can regulate virtually anything, and the federal government is no longer one of limited and enumerated powers. Such a result directly contravenes the "letter and spirit of the constitution" by removing any meaningful limits to Congress' Article I powers. *McCulloch*, 17 U.S. at 421. Thus, even assuming *arguendo* that enacting the Individual Mandate was a "necessary" exercise of Congress' commerce power—which it wasn't[10]—it was plainly not a "proper" exercise of that power. (*See* also Cato *Amici* Br. at 18-22) (discussing "proper" prong of analysis). To argue otherwise, as Defendants do here, is to convert the Necessary and Proper Clause into precisely what it was not intended to become: a "pretext . . . for the accomplishment of objects not intrusted to the government." *McCulloch*, 17 U.S. at 423.

[10] (*See* Cato *Amici* Br. at 10) ("In short, regulating intrastate *economic* activity can be a 'necessary' means of regulating interstate commerce as that term is understood under the Necessary and Proper Clause. The obvious corollary is that regulating non-economic activity cannot be 'necessary,' regardless of its effect on interstate commerce. And a power to regulate inactivity is even more remote from Congress's power over interstate commerce.").

II. The Act's Penalty Is in Fact a Penalty and Not a Tax, and If It Is a Tax, It Is an Unconstitutional Capitation Tax.

A. Congress Characterized the "Shared Responsibility Payment" as a "Penalty" and Sought Constitutional Refuge in the Commerce Clause because It Intended to Enact a Regulatory Penalty and Not a Tax.

Defendants ask this court to ignore Congress' expressed and implied intent to impose a "penalty" for failure to comply with the Individual Mandate. They further ask this court to treat the penalty as a tax and to view the Individual Mandate requiring Plaintiffs to engage in an unwanted private commercial transaction as an incidental "regulation." To accomplish all of this, Defendants cite to cases that stand for the unremarkable proposition that a proper tax might also regulate or deter the activities taxed. (*See* Defs.' Br. at 58).[11] What Defendants steadfastly ignore is the required antecedent legal analysis—an analysis which remains for this court: whether Congress intended what it termed a penalty to be a penalty for the failure to act or was it, as Defendants argue, nothing more than a tax (the metaphorical "dog") associated with a regulatory mandate (the "tail").[12] (*See* Defs.' Br. at 58-62).

We begin with the applicable legal standard for the analysis. It is true that once

[11] The same argument is flushed out in the *amici curiae* brief of the "Constitutional Law Professors" (Balkin, Metzger, & Morrison) ("Law Professors *Amici* Br."), beginning at page 8.

[12] There is of course nothing "tail-like" about the Individual Mandate. To be sure, the whole point of the penalty, acting itself more like a regulatory tail, is to force 100% compliance with the mandate. If there is a dog in this show, it is the Individual Mandate and its pedigree is regulatory and its "papers," if in fact it has any, must be found in the Commerce Clause.

a court determines that Congress has properly invoked its Taxing Power to craft revenue-generating legislation for the "general welfare," the court's review of the "welfare" rationale is limited. *See United States v. Kahriger*, 345 U.S. 22, 28, 31 (1953), *rev'd on other grounds by Marchetti v. United States*, 390 U.S. 39 (1968) ("As is well known, the constitutional restraints on taxing are few," and courts are generally "without authority to limit the exercise of the taxing power."). But this judicial deference to the legislative branch on the policy question of what is or is not related to the "general welfare" does not extend to the antecedent question of whether Congress actually intended to invoke its Taxing Power, or, even if it intended to do so, whether the provision at issue in fact operates as a tax. The Court has long held that it is the singular duty of the courts to determine whether a payment required by federal statute is a tax authorized under the General Welfare Clause or a regulatory penalty requiring some other constitutional grant of authority.[13] *See United States v. Butler*, 297 U.S. 1, 58-59 (1936); *United States v. Constantine*, 296 U.S. 287, 295 (1935); *Hill v. Wallace*, 259 U.S. 44, 66-68 (1922); *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*,

[13] It goes without saying that a constitutional tax may have regulatory and even penal effects, but as the Commonwealth of Virginia successfully argued in its challenge to the Act: "'[T]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate.'" *Commonwealth of Va. v. Sebelius*, No. 3:10CV188-HEH, 2010 U.S. Dist. LEXIS 130814, at *46-*47 (E.D. Va. Dec. 13, 2010); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940) (holding that a purported "tax" that is in fact a penalty cannot be sustained under the General Welfare Clause, but must be authorized under a separate grant of constitutional authority such as the Commerce Clause).

259 U.S. 20, 37 (1922).

A uniquely academic argument, however, has been raised by *amici* that these "*Lochner*-era cases" have been superannuated and essentially overturned by *dicta* in a footnote in the 1974 case of *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974). (*See* Law Professors *Amici* Br. at 8-10). Beyond the lack of precedential value in *dicta*, substantively the footnote does not address the distinction between penalties and taxes, but rather observes that modern cases blur the regulatory versus revenue-generating tax analysis used in earlier cases. And, in a very recent decision, the Supreme Court has once again cited approvingly to the "*Lochner*-era cases" for the proposition that it is the duty of the courts in the first instance as a matter of law to determine if a purported tax is really a regulatory penalty in disguise. *See Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (citing specifically to the "Child Labor Tax Case" for the proposition that "we have repeatedly examined taxes for constitutional validity," and stating further that "we have also recognized that 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment'").

Unlike the earlier yet extant "*Lochner*-era cases" where the Court found that statutorily imposed payments labeled and dressed up as taxes were in fact regulatory penalties, this case presents in the first instance a "penalty" specifically imposed to

force compliance with the Individual Mandate. Further, Congress went out of its way to label and describe the penalty as in fact a "penalty" and to distance the Act as enacted from earlier versions which toyed with the idea of imposing a new tax on the uninsured American public. *See Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1135-36 (N.D. Fla. 2010) (discussing point).[14] Thus, to reach the conclusion suggested by Defendants that the penalty imposed for failing to comply with the Individual Mandate is a tax, the court would have to ignore (i) the plain language of the Act, (ii) the expressed and implied Congressional intent to treat the payment as a penalty, and (iii) the actual operation of the penalty, which is only triggered upon the failure to comply with the Individual Mandate.

Indeed, every district court that has addressed the issue as to whether the "shared responsibility payment" is a penalty for non-compliance or a revenue-generating tax with an incidental regulatory effect has concluded unequivocally that Congress intended and indeed crafted a penalty, not a tax.[15] *See Commonwealth of Va.*, 2010 U.S. Dist. LEXIS 130814, at *40-*57 (concluding that the "shared

[14] Almost incredibly, Defendants use the references to a tax in the pre-enactment legislative wrangling as evidence of Congress' intent to enact a tax. (Defs.' Br. at 60-61). The problem, as pointed out by the court in *Commonwealth of Va.*, *see supra*, is that all this shows is that while Congress considered enacting a tax, it purposefully decided (based on its own political calculus) that the Act would not use a tax scheme, but rather a tax-neutral-sounding regulatory penalty to accomplish its regulatory ends.

[15] The court below did not reach this issue, having concluded that there was independent authority for the Individual Mandate and the penalty under the Commerce Clause. (R-28: Order at 19-20).

responsibility payment" was a penalty and not a tax and therefore could not be justified under the General Welfare Clause); *Florida*, 716 F. Supp. 2d at 1131-44 (ruling that the payment required under the Act is a penalty and not a tax, thereby requiring independent Commerce Clause authority); *see also Goudy-Bachman v. United States Dep't of Health & Human Servs.*, No. 1:10-CV-763, 2011 U.S. Dist. LEXIS 6309, at *29-*33 (M.D. Pa. Jan. 24, 2011) (stating that the payment is a penalty and not a tax and therefore not subject to the Anti-Injunction Act); *United States Citizens Ass'n v. Sebelius*, No. 5:10 CV 1065, 2010 U.S. Dist. LEXIS 123481, at *13-*14 (N.D. Ohio Nov. 22, 2010) (adopting the logic and conclusion of Judge Vinson in *Florida* and finding the Anti-Injunction Act inapplicable); *Liberty Univ., Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 U.S. Dist. LEXIS 125922, at *29-*38 (W.D. Va. Nov. 30, 2010) (upholding the Act under the Commerce Clause, but concluding that the Anti-Injunction Act did not apply because the payment operated as a penalty and not a tax).[16]

While not operating as binding precedent for this court, the unanimity of all five district courts that have addressed the penalty-tax question is compelling. More to the point, the thoughtful opinions provided by the courts in *Florida* and in *Commonwealth of Va.* provide a full-throated analysis and response to each of the arguments raised by

[16] It should be noted that Defendants do not challenge the conclusion that the Anti-Injunction Act is not a bar to this litigation (*see* Defs.' Br. at 5, n.1), thus tacitly admitting that the payment is a penalty and not a tax.

Defendants (and, by extension, *amici*) on this threshold legal question of whether the "shared responsibility payment" is a penalty or a tax. For the reasons set forth in those decisions and herein, this court should conclude that Defendants cannot salvage the Individual Mandate through Congress' Taxing Power.[17]

B. If the "Shared Responsibility Payment" Is a Tax, It Is an Un-apportioned Capitation Tax and Unconstitutional.

Defendants' entire argument that the penalty, if a tax, is not a direct capitation tax subject to the constitutional requirement of apportionment is based on the assertion that a capitation tax by definition cannot impose conditions for its application. Defendants then conclude that the penalty is not a capitation because "Section 5000A does not impose a flat tax without regard to the taxpayer's circumstances." (*See* Defs.' Br. at 63). Defendants' assertion is based on a statement by one of only five justices writing *seriatum* in *Hylton v. United States*, 3 U.S. 171, 175 (1796). While Defendants quote Justice Chase to say that a capitation tax is imposed "simply, without regard to property, profession, or any other circumstances," the important

[17] Had it been politically acceptable, Congress could have imposed an excise tax on everyone at the time they engaged in a healthcare transaction. Once the tax was levied, it would have been a facile matter to allow a deduction, for example, for those who purchased a qualified healthcare insurance policy. Congress could allow the greatest (100%) deduction for those who acquire their policy in advance of the healthcare transaction that triggered the tax and no deduction for those who purchased it at the last minute. This is a permissible excise tax structure. But, of course, to have admitted to the American voting public that Congress was about to impose such a tax would have required a political calculus that Congress and the President were not willing to accept.

preface to this statement is omitted: "I am inclined to think, but of this I do not give a judicial opinion, that . . . ." *Id*.

Not only is the statement *dicta* offered by only one justice, it is a weak and tentative "thought" at that. Even more to the point, it is clear in context that the point Justice Chase wished to propose was that direct taxes subject to apportionment are only of two kinds: capitation taxes and taxes on property.

The two string citations offered by Defendants to elevate this irrelevant *dicta* to a controlling principle of tax law are patently misleading and improper. Specifically, Defendants cite *Pacific Ins. Co. v. Soule*, 74 U.S. 433, 444-46 (1868) and *Veazie Bank v. Fenno*, 75 U.S. 533, 543 (1869), adding the parenthetical, "adopting Justice Chase's definition," following the former. (Defs.' Br. at 62-63). But again, in context it is clear that the only issue in *Pacific Ins. Co.* and *Veazie Bank* was whether there are direct taxes other than capitation taxes and taxes on property.[18] It is simply wrong to say that the Court has adopted Justice Chase's *dicta* on an irrelevant offering of what is a capitation tax.[19]

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[18] Even this proposition did not survive *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), which invalidated an income tax as an un-apportioned direct tax, ultimately resulting in the passage of the Sixteenth Amendment, which carved out an exception to apportionment for "derived" income.

[19] The fact that capitation taxes, such as poll taxes, can and do impose all sorts of conditions for their imposition is demonstrated by the 20th century cases outlawing state efforts to impose poll taxes when voters showed up to vote. The taxes were imposed with all sorts of conditions: they applied only to men of a certain age, only to women who chose to register to vote, and not to blind voters. Moreover, the taxes

While Defendants do not suggest to this court the *kind* of permissibly, un-apportioned tax the penalty is, *amici* argue that it is "best understood as an excise tax." (Law Professors *Amici* Br. at 26). The problem with this "best" understanding is that *amici*, while conceding that "excise taxes are only applied to activities, transactions, or the use of property and do not apply directly to individuals for being," are now arguing to this court that *a tax on an individual's inactivity is in fact a tax on activity*. (*See* Law Professors *Amici* Br. at 26) (internal quotation marks omitted).

This is, quite conspicuously, a parallel to the Commerce Clause argument that "inactivity" is, in aggregate, an economic "activity." This sophism doesn't work in the Commerce Clause arena, and it doesn't work here. In fact, there has never been in the history of U.S. tax law an excise tax on an individual's inactivity. *See* Steven J. Willis & Nakku Chung, *Constitutional Decapitation & Healthcare*, 128 Tax Notes 169, 183, n.154 (2010).

While *amici* offer a string cite of statutes which purportedly do that, each example is an excise tax on an entity, not an individual, that has engaged in a specific activity within a regulatory or tax scheme and has failed to act pursuant to the scheme. *See* 26 U.S.C. § 4974 (imposing a tax on the failure of retirement plans engaged in *activities* pursuant to a tax benefit scheme to distribute assets pursuant to that

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were imposed at different times, typically when a voter registered. These classic poll taxes were no more or less conditioned than the penalty at issue here. *See Breedlove v. Suttles*, 302 U.S. 277 (1937).

scheme); *id.* at § 4980B (imposing a tax on the failure of group health plans engaged in *activities* pursuant to a tax benefit scheme to extend coverage to a beneficiary); *id.* at § 4980E (imposing a tax on the failure of employers engaged in *activities* pursuant to a regulatory scheme to make comparable Archer MSA contributions). *Amici*, like every other party and court that has looked closely at this issue, can point to no excise tax on an individual's inactivity. This is because none exists, nor has one ever existed. It is, as in the case of the Individual Mandate under the Commerce Clause, literally unprecedented.

CONCLUSION

Plaintiffs respectfully request that this court reverse the district court, declare the Individual Mandate unconstitutional, and enjoin its enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,992 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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