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, ET AL.,

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

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent company and no stock owned by a publicly owned company.

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF routinely litigates in support of efforts to ensure a strict separation of powers—both among the three branches of the federal government and between federal and state governments—as a means of preventing too much power from being concentrated within a single governmental body.

The remaining *amici* are all members of Congress who believe strongly that Section 1501 of the Patient Protection and Affordable Care Act exceeds the bounds of Congress's constitutional authority by seeking to regulate Americans' economic *inactivity*—an individual's decision *not* to purchase health insurance—which is far afield from the enumerated powers assigned to the federal government under Article I of the Constitution. Congressional *amici* include U.S. Rep. Michelle Bachmann from Minnesota's 6th congressional district; U.S. Rep. Dan Burton from Indiana's 5th congressional district; U.S. Rep. Mike Conaway from Texas's

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* state that no counsel for any party authored this brief in whole or in part; and than no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief.

11th congressional district; U.S. Rep. Lynn Jenkins from Kansas's 2nd congressional district; U.S. Rep. Dan Lungren from California's 3rd congressional district; U.S. Rep. Tom McClintock from California's 4th congressional district; U.S. Rep. Gary Miller from California's 42nd congressional district; U.S. Rep. Ron Paul from Texas's 14th congressional district; U.S. Rep. Ted Poe from Texas's 2nd congressional district; U.S. Rep. Cathy McMorris Rodgers from Washington's 5th congressional district; U.S. Rep. Jean Schmidt from Ohio's 2nd congressional district; and U.S. Rep. Todd Tiahrt from Kansas's 4th congressional district.

SUMMARY OF ARGUMENT

The district court's dismissal of this action below was in error. As even the district court acknowledged (Dkt. 28 at 15), Section 1501 of the Patient Protection and Affordable Care Act, which contains an individual mandate that seeks to compel most Americans to purchase health insurance by 2014, goes well beyond any previous exercise of federal authority. *See* §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). Because the district court's order upholding the individual mandate under the Commerce Clause amounts to a declaration of virtually unlimited congressional power, it must be reversed. As demonstrated below, even the broadest Supreme Court precedents interpreting the limits of federal power do not give Congress the authority to force Americans to

purchase a product they do not want.[2]

The "first principles" of the Constitution are that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST NO. 45). "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.'" *Id.* The federal government, Madison emphasized, is not granted "an indefinite supremacy over all persons and things." THE FEDERALIST NO. 39. These foundational principles are imperiled by the legislation upheld by the district court below.

The Commerce Clause gives Congress the power to regulate "economic activity" and "noneconomic activity" when controlling the latter is "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561; *see also United States v. Morrison*, 529 U.S. 598, 610 (2000) (quoting *Lopez*). But nothing in the Court's Commerce Clause precedents gives Congress the power to force private citizens to engage in economic transactions they would prefer to avoid.

If, as the district court contends (Dkt. 28 at 16), the Commerce power

[2] This brief addresses only the defendants' Commerce Clause and Tax Clause arguments; WLF has analyzed elsewhere the Necessary and Proper Clause issues raised by the individual mandate litigation. *See* Amicus Br. of Washington Legal Foundation and Constitutional Law Scholars, *Virginia ex rel. Cuccinelli v. Sebelius*, 2010 WL 3952344 (E.D. Va. Oct. 4, 2010) at 25-30.

extends to all "economic decisions" as well as all economic activities, Congress would enjoy unlimited authority to mandate any behavior of any kind. After all, any decision to do (or not to do) virtually anything inevitably has some economic impact. Nor is there any special attribute of the health care market that makes refusal to purchase health insurance more of an "economic activity" than any other decision to refrain from purchasing any other product.

In addition, the Court's precedents under the Tax Clause give Congress broad authority to tax income and commercial transactions. But they do not give it the power to use monetary fines to force people to purchase products they do not want. Allowing Congress to use fines relabeled as taxes to regulate conduct that it could not otherwise reach would effectively gut all remaining limits on federal power. The federal government could use this authority to compel citizens to do virtually anything. And even if the monetary penalty imposed by the individual mandate is a tax, it is still unconstitutional because it does not fall under any of the categories of taxes that Congress is authorized to impose.

ARGUMENT

I. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY CONGRESS'S POWERS UNDER THE COMMERCE CLAUSE.

The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court divides Congress's Commerce

Clause powers into three categories: (1) regulation of "the use of the channels of interstate commerce"; (2) "[r]egulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "regulat[ion] [of] . . . those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *Morrison*, 559 U.S. at 609.

The individual mandate clearly does not fall under either the first or second of these categories. The decision not to purchase health insurance does not involve "the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. Similarly, the mandate is not an example of "[r]egulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* The status of being uninsured is neither an instrumentality of interstate commerce, nor is it a person or thing that travels in interstate commerce. The district court does not even suggest that the mandate can be upheld under either of these categories.

The district court's Commerce Clause holding instead hinges on the third category—regulation of "activities that substantially affect interstate commerce." The fatal flaw in the district court's reasoning is that none of the Supreme Court precedents interpreting the Commerce Clause allow Congress to force ordinary individuals to engage in commercial activity.

A. Existing Commerce Clause Precedents Do Not Give Congress The Power To Regulate Mere Inactivity.

The Supreme Court has repeatedly emphasized that the Commerce Clause does not grant Congress unlimited power. "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566; *see also Morrison*, 529 U.S. at 608 ("Even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.").

Even the broadest judicial interpretations of the Commerce Clause do not give Congress the power to regulate inactivity. Instead, they strictly limit Congress's authority to regulation of "economic activity" and noneconomic activity whose restriction is necessary for the implementation of a regulatory scheme aimed at controlling interstate commercial transactions.

1. *Gonzales v. Raich*.

The Supreme Court's most expansive Commerce Clause precedent to date, *Gonzales v. Raich*, 545 U.S. 1 (2005), illustrates this point well. *Raich* was the first and only case where the Court upheld the regulation of intrastate, noncommercial activity under the Commerce Clause. *Raich* ruled that Congress's power to regulate interstate commerce could justify a federal ban on the possession of medical marijuana that had never been sold in any market or left the state where it was grown. *Id.* Respondents Angel Raich and Diane Monson grew marijuana

solely for personal consumption for medical purposes. *Id.* at 7. Despite the lack of any direct involvement in commerce, the Supreme Court ruled that the Commerce Clause gave Congress the power to forbid this activity. Both the defendants and the district court below rely heavily on *Raich*. *See* Dkt. 28 at 12-13. Yet the decision signally fails to justify the individual mandate.

Raich interprets Congress's Commerce power expansively in three ways: by allowing Congress broad authority to regulate "economic activity"; by permitting regulation of noneconomic activity as part of a broader regulatory scheme aimed at interstate commercial activity; and, by applying a "rational basis" test. But none of these three features of *Raich* provide support for the argument that the Commerce Clause authorizes congressional regulation of inactivity—an individual's decision not to engage in commercial activity.

a. The individual mandate does not regulate "economic activity."

The *Raich* Court reaffirmed that Congress has the power to regulate "economic activity." It adopted a broad definition of "economics," which "refers to 'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Expansive as this definition may be, an individual's mere status of being uninsured does not qualify. Choosing not to purchase health insurance involves neither production, nor distribution, nor consumption of commodities. Indeed, an

individual who chooses not to purchase insurance has chosen *not* to consume or distribute the commodity in question. Obviously, he or she is also not "producing" any commodity by refusing to purchase insurance. By contrast, the *Raich* defendants *were* engaged in "economic activity" since they were both producing and consuming marijuana. *Id.* at 7, 25-26.

b. The individual mandate cannot be upheld as a regulation of noneconomic activity necessary to implement a broader regulatory scheme.

Like *Lopez* and *Morrison* before it, *Raich* indicates that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37; *see also Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. But as all three cases demonstrate, this power applies only to the regulation of "noneconomic *activity*." *Id.* It does not cover regulation of inactivity or the refusal to engage in economic transactions. Angel Raich and Diane Monsen had not been inactive or merely refused to engage in some transaction. To the contrary, they were actively involved in the production and consumption of homegrown medical marijuana.

If *Raich* were interpreted so broadly as to permit regulation of mere inactivity, Congress would have the power to compel any citizen to help enforce its regulatory schemes. It could force individuals to purchase General Motors cars in order to assist the struggling auto industry, or purchase financial products from

banks that received federal bailout funds. By the same token, Congress could require individuals to purchase products from any industry with political clout. Similarly, it could require individuals to purchase memberships in exercise clubs in order to increase their physical fitness, which in turn would increase their economic productivity and stimulate interstate commerce. *See* John H. Kerr & Marjolein C. H. Vos, *Employee Fitness Programmes, Absenteeism, and General Well-Being*, 7 WORK & STRESS 179 (1993) (providing evidence that employee physical fitness reduces absenteeism and increases productivity).

In sum, there is no limit to the regulatory authority Congress could claim under the district court's sweeping interpretation of the Commerce Clause. The federal government would have the power to force citizens to engage in any activity that might conceivably affect commerce in some way. This is precisely the kind of unconstrained police power that the Supreme Court has expressly rejected. *See Morrison*, 529 U.S. at 618 (noting that "the police power" is "denied the National Government and reposed in the States").

c. *Raich's* rational basis test does not apply to this case.

Raich applied the deferential "rational basis" test to the government's claims, ruling that "[w]e need not determine whether [defendants'] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22. The defendants

claimed below that the rational basis test should be applied in the present case as well. *See* Dkt. 12 at 19.

But the *Raich* Court nowhere indicated that the rational basis test is applicable in a case where the government seeks to regulate inactivity, as opposed to some sort of positive action. Rather, the Court explicitly noted that the test applied to the government's regulation of Raich and Monsen's "*activities*, taken in the aggregate." *Raich*, 545 U.S. at 22 (emphasis added).

The defendants appear to assume that Congress's mere assertion of Commerce Clause authority is enough to trigger application of the rational basis test. But neither *Raich* nor any previous Supreme Court precedent states any such thing. To the contrary, *Raich* applied the standard only to a regulation of "activity."

Lopez and *Morrison* did not apply the deferential rational basis test, despite the government's invocation of the Commerce Clause. In *Morrison,* the Court struck down the challenged section of the Violence Against Women Act despite the fact that the claim of a substantial impact on interstate commerce was "supported by numerous [congressional] findings" that would almost certainly have been more than enough to pass muster under the rational basis approach. *Morrison*, 529 U.S. at 614. Although *Morrison* did not explicitly reject the rational basis test, the Court's failure to apply the test and its imposition of a considerably

higher standard of scrutiny strongly suggests that, at the very least, rational basis analysis does not apply to regulations of intrastate noneconomic activity such as gun possession in a school zone (the regulated activity in *Lopez*) or sexual violence (*Morrison*).

Indeed, both *Lopez* and *Morrison* emphasized that "'simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Lopez,* 514 U.S., at 557 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 311 (1981)) (Rehnquist, J., concurring in judgment)); *see also Morrison*, 529 U.S. at 614 (quoting identical language from *Lopez*). Had the *Lopez* and *Morrison* Courts applied the rational basis test, these decisions would inevitably have gone the other way. In *Morrison*, Congress had compiled extensive evidence of possible effects of gender-based violence on interstate commerce. *Morrison*, 529 U.S. at 614. In *Lopez*, Justice Breyer's dissent indicated a variety of ways in which a rational basis existed for believing that gun possession in school zones might have such effects. *Lopez*, 514 U.S. at 618-24 (Breyer, J., dissenting). As Justice Breyer pointed out, if we "ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce . . . the answer to this question must be yes." *Id.* at 618. If the rational basis test does not apply to regulation of noneconomic intrastate

activity (as in *Lopez* and *Morrison*), it surely cannot apply to attempts to reach mere inactivity.

2. Other Commerce Clause precedents do not support the district court's position.

Pre-*Raich* Supreme Court Commerce Clause precedent provides even less support than *Raich* for the district court's decision. As the Court pointed out five years before *Raich* in *Morrison*, "in every case" where the Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor" and had a "commercial character." 529 U.S. at 611 & n.4.

Wickard v. Filburn, 317 U.S. 111 (1942), a case relied on by the district court (Dkt. 28 at 13), was one of the Supreme Court's broadest interpretations of Congressional power under the Commerce Clause. Yet its facts differ radically from those of the present case. *Wickard* upheld the application of the 1938 Agricultural Adjustment Act's restrictions on wheat production as applied to Roscoe Filburn, an Ohio farmer who produced wheat for consumption on his own farm. 317 U.S. at 115, 121-27. The Court noted that restriction of home-grown, home-consumed wheat was a necessary component of Congress's scheme to "raise the market price of wheat" because in the absence of regulation, home-grown wheat could serve as a substitute for wheat sold in the market and depress demand for the latter. *Id*. at 127-29.

Unlike the instant case, *Wickard* addressed a regulation of clearly economic activity. Roscoe Filburn sold "a portion of [his wheat] crop" on the market and "fe[d] part to poultry and livestock on the farm, some of which is sold." *Id.* at 114. Filburn's wheat production was unquestionably part of a commercial enterprise that sold goods in interstate commerce. As the Court noted in *Lopez*, *Wickard* "involved economic activity in a way that possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560.

Until *Raich*, all of the Court's other post-New Deal decisions sustaining exercises of congressional power under the Commerce Clause addressed regulations of economic activity involving the sale or production of goods or services.[3] Unlike the individual mandate, these laws clearly regulated preexisting commercial activity.

Nor is the individual mandate analogous to those cases upholding civil rights statutes that ban racial discrimination by motels and restaurants. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding regulation of discrimination against customers of a commercial restaurant); *Heart of Atlanta*

[3] *See, e.g.*, *Hodel*, 452 U.S. at 276-280 (upholding regulation of commercial mining); *Perez v. United States*, 402 U.S. 146 (1971) (upholding regulation of commercial loan sharking); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (upholding regulation of price of milk); *United States v. Darby*, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act regulation of employment conditions); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act regulation of employment relations).

Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding federal ban on discrimination against customers of a hotel serving interstate travelers). Such federal antidiscrimination laws apply only to preexisting businesses engaged in commercial activity in a regulated industry. By contrast, uninsured individuals are, by definition, *not* participating in the insurance business. Thus, the individual mandate is actually analogous to a statute that requires individuals to patronize a restaurant or hotel even if they had no previous intention of doing so. *See* Ilya Somin, *The Individual Health Insurance Mandate and the Constitutional Text*, ENGAGE, Vol. 11, No. 1, Mar. 2010, at 49.

B. The Status of Being Uninsured Is Not An Economic Activity.

The district court attempts to circumvent the constitutional bar on Commerce Clause regulation of inactivity by claiming that the state of being uninsured qualifies as activity under Supreme Court precedent. The argument comes in two forms: a broad version claiming that any "economic decision" can be regulated under the Commerce Clause, and a narrow one focusing on supposedly unique characteristics of the health care market. Both versions fail for similar reasons: they end up giving Congress unconstrained power to mandate virtually anything, something the Supreme Court has repeatedly said is impermissible.

1. "Economic decisions" are not economic activities.

The broad version of the district court's argument claims that any decision with economic effects qualifies as an economic activity. The district court asserts that the Commerce Clause "reaches" not merely "economic *activity*," but "economic *decisions*." Dkt. 28 at 16. A recent decision by the Western District of Virginia similarly concludes that "decisions to pay for health care without insurance are economic activities . . . . Because of the nature of supply and demand, plaintiffs' choices directly affect the price of insurance in the market, which Congress set out in the Act to control." *Liberty Univ., Inc. v. Geithner*, 2010 WL 4860299, at *15 (W.D. Va. Nov. 30, 2010).

The flaw in this argument is obvious. The "nature of supply and demand" means that any decision to do or not do *anything* will directly affect the price of some good or service. If someone chooses not to purchase a car, that will affect the price of cars. If a person chooses to sleep for an hour rather than work, he will earn less money, which in turn means that he will engage in less consumer spending or investment, which will affect the prices of various goods. By this reasoning, Congress could not only force people to purchase any product of any kind, it could force them to engage in just about any other kind of activity that affects the price of some good or service that Congress sets out to control.

The district court's "economic decisions" doctrine also contravenes Supreme Court precedent. Under its approach, *Lopez* would have been decided the other way. Carrying a gun into a school zone—the action forbidden by the Gun Free School Zones Act invalidated in that case—is clearly an "economic decision" under the district court's reasoning. In the aggregate, such actions surely have an effect on prices in various markets, including the market for guns and the market for illegal drugs in schools. Indeed, Alfonso Lopez was paid $40 to carry his gun in a school zone for the purpose of transferring it to a member of a drug gang who probably intended to use it to defend the group's commercial interests in a "gang war." *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

2. No unique feature of the health insurance market transforms being uninsured into economic activity.

In addition to concluding that Congress can regulate any "economic decision," the district court also holds that the individual mandate regulates an activity because of the special nature of the health care market: "[t]he health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market. Indeed, the opposite is nearly always true." Dkt. 28 at 16. For this reason, it concludes, "[t]he plaintiffs have not opted out of the health care services market because, as living, breathing beings, who do not oppose medical services on religious grounds, they cannot opt

out of this market." *Id.* Since everyone participates in the health care market, the district court reasons, choosing not to buy health insurance does not qualify as inactivity. It is "an economic decision to try to pay for health care services later" in some other way. *Id.*

In reality, it is simply not true that everyone purchases health care. Some people rely on charity or home remedies, while others never get sick enough to require medical treatment before they die. Still, it may well be true that the overwhelming majority of people participate in the health care market in some way. But this does not differentiate health care from virtually any other market.

If the relevant "market" is defined broadly enough, one can characterize any decision not to purchase a good or service exactly the same way. The district court does not claim that everyone will inevitably use health *insurance*. Instead, it defines the relevant market as "health *care*." *Id.* (emphasis added). The same sleight of hand works for virtually any other mandate Congress might care to impose. As the district court for the Eastern District of Virginia recently put it, "the same reasoning could apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by [the Supreme Court's]

Commerce Clause jurisprudence." *Virginia ex rel. Cuccinelli v. Sebelius*, 2010 WL 5059718, at *12 (E.D. Va. Dec. 13, 2010).

Consider the case of a mandate requiring everyone to purchase General Motors cars in order to help the auto industry. There are many people who do not participate in the market for cars. But just about everyone participates in the market for "transportation." In the words of the district court, "[n]o one can guarantee . . . [that he] will never participate in the [transportation] market." Dkt. 28 at 16. We all move from place to place in some way.

The same logic can be used to justify virtually any other mandate Congress might care to impose—even a mandate requiring everyone to see the most recent Harry Potter movie. After all, just about everyone participates in the market for *entertainment*. Choosing not to go to the movies is just "an economic decision to try to pay for [other entertainment] services later." *Id.*

Health insurance is undoubtedly an important good. But it has no unique characteristics that transform failure to purchase it into an "economic activity."

II. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE TAX CLAUSE.

The Tax Clause of the Constitution gives Congress "the Power To lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. This Clause does not authorize the individual mandate for two reasons.

First, the mandate is not a tax but a penalty intended to force compliance with a regulation. Second, even it if were a tax, it is not one of the several types of taxes authorized by the Constitution. As with the defendants' effort to advance a comparably unlimited construction of the Commerce Clause (see *supra*, §§ I.A-B), their interpretation of the Tax Clause would give Congress virtually unlimited police power.

A. The Individual Mandate Is A Regulatory Penalty, Not A Tax.

1. The mandate fits the Supreme Court's definition of a "penalty."

Supreme Court precedent distinguishes between a tax defined as a revenue-raising measure and a monetary penalty designed to regulate behavior. Under the Court's approach, "'[a] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.'" *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906), and *United States v. New York*, 315 U.S. 510, 515 (1942)). By contrast, "a penalty . . . is an exaction imposed by statute as punishment for an unlawful act." *United States v. La Franca*, 282 U.S. 568, 572 (1931).

Of course, "if an exaction [is] clearly a penalty it cannot be converted into a tax simply by calling it such." *Id.* Simply put, the government cannot redefine a penalty as a tax through clever labeling. As the Supreme Court explains, "[n]o

mere exercise of the art of lexicography can alter the essential nature of an act or a thing" since "if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *Id.*; *see also Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (holding 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"); *Dep't. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (same).

In *Reorganized CF&I Fabricators of Utah*, the Supreme Court explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." 518 U.S. at 225. Although *Reorganized CF&I* was a case interpreting the federal bankruptcy statute, it relied on Tax Clause precedent in reaching its decision, and made no legal distinction between the two contexts. *See id.* at 224-25 (relying on Tax Clause precedent such as *United States v. La Franca*, 282 U.S. 568 (1931)).

Reorganized CF&I addressed a federal statute "requiring pension plan sponsors to fund potential plan liability according to a complex statutory formula . . . [and] employers who maintain a pension plan to pay the Government 10 percent of any accumulated funding deficiency." *Id.* The court noted that "[i]f the employer fails to correct the deficiency . . . , the employer is obligated to pay an additional 'tax' of 100 percent of the accumulated funding deficiency." *Id.*

Despite the fact that the government described this framework as a "tax," the Court ruled that it was in fact a penalty because it constituted a "punishment for an unlawful omission." *Id.* at 224. The omission in question was the employer's failure to adequately fund its pension plan, and the "penalty" was a fine equal to 100% of the accumulated deficiency. *Id.* (interpreting 26 U.S.C. §§ 4971(a-b), 4982).

The individual mandate is very similar in structure to the statute addressed by the Court in *Reorganized CF&I.* Like the latter, Section 1501 of the PPACA creates a "punishment for an unlawful act or omission." *Id.* at 225. The text of the Act itself defines the fine imposed on those who fail to obey the individual mandate "a penalty with respect to the individual" who fails to obey the requirement that he or she purchase health insurance. *See* PPACA § 1501(b).

Nor does the fact that the penalty is included in the Internal Revenue Code (IRC) and collected by the Internal Revenue Service (IRS), *see* Dkt. 12 at 28, make it a tax. If it did, Congress would have unlimited power to use fines to mandate anything so long as the fine in question was incorporated into the IRC and collected by the IRS. Fines included in the IRC and collected by the IRS have been declared regulatory penalties by the Supreme Court before. *See*, *e.g.*, *Reorganized CF&I*, 518 U.S. at 216-26 (declaring that a fine incorporated into the IRC and collected by the IRS is a regulatory penalty rather than a tax).

For these reasons, all three of the district court decisions to have considered the issue have ruled that the individual mandate is a regulatory penalty rather than a tax. *See Virginia ex rel. Cuccinelli*, 2010 WL 5059718, at *19 (concluding that the mandate "is, in form and substance, a penalty as opposed to a tax"); *Liberty Univ., Inc. v. Geithner*, 2010 WL 4860299, at *10 ("I conclude that the better characterization of the exactions imposed under the Act for violations of the employer and individual coverage provisions is that of regulatory penalties, not taxes."); *Florida ex rel. McCollum v. U.S. Dep't. of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1140 (N.D. Fla. 2010) (holding "that Congress imposed a penalty and not a tax").

2. This court need not inquire into Congress's "hidden motives" in order to conclude that the mandate is a penalty.

It is true that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937). Courts should "not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution." *Id.* at 514. In this case, however, there is no need for any "collateral" research or "inquiry into hidden motives." The penal nature of the statute is evident from its face, since it is described as a "penalty" in the statutory text itself.

Far from hiding their purposes, the supporters of the PPACA repeatedly and publicly emphasized that the statute was not a tax, but only a regulatory measure designed to compel individuals to purchase health insurance. For example, President Barack Obama stated publicly in September 2009 that "for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase." Somin, *Individual Health Insurance Mandate*, *supra* at 50; *see also Virginia ex rel. Cuccinelli*, 2010 WL 5059718, at *18 (citing statements by Congress, and noting "the unequivocal denials by the Executive and Legislative branches that the ACA was a tax"); *Florida ex rel. McCollum*, 716 F. Supp. 2d at 1132-40 (reaching the same conclusion after review of the text and legislative history). Only after PPACA was enacted by Congress and legal challenges to the individual mandate arose, did the government adopt the novel argument that the individual mandate is a tax.

Even if the plaintiffs are precluded from relying on evidence of "hidden motives" to prove that the individual mandate is not a tax, *Sonzinsky*, 300 U.S. at 513-14, "[t]he holding of *Sonzinsky* cuts both ways and applying that holding to the facts here, [courts] have no choice but to find that the [individual mandate] penalty is not a tax." *Florida ex rel. McCollum*, 716 F. Supp. 2d at 1140. The Supreme Court has never allowed the government to cite "hidden motives" after the fact to prove that what the statute unambiguously describes as a penalty is

actually a tax after all. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, NYU J.L. & LIBERTY (forthcoming), at 24, available at http://papers.ssrn.com/abstract=1680392.

3. The mandate is not a tax merely because it might raise some revenue for the federal government.

The defendants contend that the individual mandate should be considered a tax merely because it may end up raising some revenue for the federal government. *See* Dkt. 12 at 28-29. If adopted by the courts, this position would negate all restraints on Congress's taxing power and completely eliminate the longstanding distinction between a tax and a regulatory penalty. Any penalty enforced by a fine is likely to raise at least some revenue, so long as even one violator is forced to pay the fine.

Under this approach, Congress would have the power to use monetary penalties to compel citizens to engage in whatever activities it might desire. For example, it could use the threat of fines to force citizens to purchase General Motors cars in order to assist the auto industry. It could use also use fines to force individuals to exercise every day in order to increase their health and economic productivity. The greater the fine and the resulting degree of compulsion, the greater the potential revenue that might be generated. In this way, the more coercive and punitive Congress's penal fines become, the more likely they are to qualify as "taxes" under the defendants' interpretation of the Tax Clause.

But none of the precedents cited by the defendants compels any such result. For example, *United States v. Kahriger*, 345 U.S. 22 (1953), *rev'd in part on other grounds*, *Marchetti v. United States*, 390 U.S. 39 (1968), nowhere concludes or even suggests that the mere fact that a penalty might generate revenue automatically makes it a tax. To the contrary, it reiterates the principle that "[p]enalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid." *Kahriger,* 345 U.S. at 31. It is true that the Court recognized that "a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed." *Id.* at 28. But the validity of the tax in question turned not only on the fact that it generated revenue but that it was an "excise tax" on a commercial transaction—gambling wagers. *Id.* at 23. Excise taxes are specifically authorized as an independent category of congressional taxing authority in the Constitution. *See* U.S. CONST. art. I, § 8, cl. 1. By contrast, there is no preexisting commercial activity for the government to tax in the present case.

Similarly, *Sonzinsky v. United States* reaffirmed the rule that courts must strike down a "statute [that] contains regulatory provisions related to a purported tax in such a way . . . that the latter is a penalty resorted to as a means of enforcing the regulations." *Sonzinsky,* 300 U.S. at 514. *Sonzinsky* also ruled that the courts

must uphold a statute that "[o]n its face . . . is only a taxing measure" without considering Congress's "hidden motives." *Id.* at 513-14. In the present case, the statute "on its face" is a penalty and the penal motive is anything but hidden.

4. Congress may use non-tax financial penalties to enforce its other enumerated powers, but not to regulate activities that it cannot otherwise reach.

Congress may use financial penalties that do not qualify as taxes in order to enforce its other enumerated powers, such as those provided by the Commerce Clause. "Congress may impose penalties in aid of the exercise of any of its enumerated powers." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940). But it may not use such penalties to regulate behavior that it cannot otherwise reach. If it could, Congress would enjoy essentially unlimited authority. It could then use the threat of monetary penalties to compel individuals to do virtually anything. *See supra* § II.A.3.

As the district court for the Eastern District of Virginia recently recognized in refusing to dismiss another case challenging the individual mandate, "the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause—it must be in aid of an enumerated power." *Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d 598, 613 (E.D. Va. 2010).

B. Even If It Is A Tax, The Individual Mandate Is Not A Tax Authorized By The Constitution.

The Constitution gives Congress the power to enact several types of taxes.

Excise taxes, duties, and imposts are authorized by the Tax Clause. *See* U.S. CONST. art. I, § 8, cl. 1. Income taxes are authorized by the Sixteenth Amendment. *See* U.S. CONST. amend. XVI. All direct taxes must be apportioned among the states in proportion to population. *See* U.S. CONST. art. I, §§, 2, 9.

No one claims that the individual mandate is a duty or an impost. If it is to be constitutional, therefore, the individual mandate must be either an excise tax, an income tax, or a direct tax apportioned among the states. It is none of these.

1. The mandate is not an income tax.

The Supreme Court has stated that it is "essential to distinguish between what is and what is not 'income,' as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form." *Eisner v. Macomber*, 252 U.S. 189, 206 (1920). In *Comm'r of Internal Revenue v. Glenshaw Glass Co.*, the leading case interpreting the definition of "income" under the Sixteenth Amendment, the Court defined income as encompassing "accessions to wealth, clearly realized and over which the taxpayers have complete dominion." 348 U.S. 426, 431 (1955).

The individual mandate does not qualify as an income tax because it does not target any "gain" or "accession to wealth" realized by individuals from their labor, property, or indeed any other source. It "does not appear to tax income [because it] refers to no gains, receipts, accruals, or accessions to wealth, other

than to an arguably unimportant algebraic function of income for some taxpayers." Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 187 (2010).

It is true that the mandate exempts individuals with income below the federal poverty line, and reduces the size of the penalty imposed on other lower-income taxpayers. *See* PPACA § 1501, §§ 5000(A)(d-e). But the mere fact that there are income-based exemptions does not suggest that the tax targets income as such. Otherwise, the government could convert virtually any regulatory penalty into an income tax simply by exempting low-income citizens (or for that matter high-income ones). *See* Willis & Chung, *Constitutional Decapitation*, *supra* at 190-93.

2. The mandate is not an excise tax.

If the mandate is not an income tax, it is even more clearly not an excise tax. Excise taxes "apply to activities, transactions, or the use of property. They do not apply to nothing—that is, they do not apply directly to individuals for being individuals or on land." *Id.* at 182. This is the definition adopted by standard reference works in both law and finance. *Id.* Similarly, the Supreme Court has defined an indirect tax (of which excise taxes are a subset) as a "tax laid upon the *happening of an event*, as distinguished from its tangible fruits." *Tyler v. United*

States, 281 U.S. 497, 502 (1930).[4]

The penalty established by the individual mandate is not triggered by any activity, transaction, or event. It therefore cannot be an excise tax.

3. If the mandate is neither an income nor an excise tax, it is either an unconstitutional direct tax, or no tax at all.

If the individual mandate does not qualify as an income tax, excise tax, duty or impost, it must, by process of elimination, be a direct tax—assuming that it is a tax at all. Direct taxes, however, must be apportioned among the states in proportion to their population. *See* U.S. CONST. art. I, § 9. The individual mandate undeniably fails this requirement. If the mandate qualifies as a tax, it is therefore an unconstitutional direct tax.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the judgment below.

[4] Some jurists suggest that an excise tax may target the possession of property rather than its use. *See, e.g., Hylton v. United States*, 3 U.S. 171 (1796) (upholding a tax on possession of carriages, without resolving whether such a tax is an excise or a duty). But even if a tax on possession qualifies as an excise, the fine imposed by the individual mandate fails to target the possession of any property.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As counsel for *amici curiae*, I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly 6,992 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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Cory L. Andrews

CERTIFICATE OF SERVICE

As counsel for *amici curiae*, I certify that on this 22nd day of December, 2010, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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