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' BRIEF

ROBERT J. MUISE, ESQ.
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MICHIGAN 48106
(734) 827-2001

DAVID YERUSHALMI, ESQ.
LAW OFFICES OF DAVID YERUSHALMI, P.C.
P.O. BOX 6358
CHANDLER, ARIZONA 85246
(646) 262-0500

Attorneys for Plaintiffs-Appellants

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Appellants state the following:

Plaintiff-Appellant Thomas More Law Center is not a publicly owned corporation. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this court hear oral argument. This case presents for review an important question of first impression that has national implications: whether Congress has authority under the Commerce Clause to force private citizens to purchase healthcare coverage under penalty of federal law pursuant to the recently enacted "Patient Protection and Affordable Care Act."

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

U.S. Constitution

STATEMENT OF JURISDICTION

On March 23, 2010, Plaintiffs-Appellants Thomas More Law Center, Jann DeMars, John Ceci, Steven Hyder, and Salina Hyder ("Plaintiffs") filed a complaint against the President of the United States, the Secretary of the U.S. Department of Health and Human Services, the U.S. Attorney General, and the Secretary of the U.S. Department of Treasury ("Defendants"), challenging the constitutionality of the newly enacted federal law known as the "Patient Protection and Affordable Care Act" ("Healthcare Reform Act" or "Act"). (R-1: Compl.). In their first and second claims for relief, Plaintiffs sought a declaration that Congress lacked authority under the Commerce Clause to pass the Healthcare Reform Act, and alternatively a declaration that the penalty provision of the Act is an unconstitutional tax. In their third, fourth, fifth, and sixth claims for relief, Plaintiffs alleged that the Act violates the Tenth Amendment, the Free Exercise Clause, and the Fifth Amendment's equal protection guarantee and Due Process Clause, respectively. Plaintiffs also sought to enjoin the Act as a result. (R-1: Compl.).

On April 6, 2010, Plaintiffs filed a motion for a preliminary injunction, seeking to preliminarily enjoin the Individual Mandate provision of the Act as exceeding Congress' authority under the Commerce Clause (first claim). Alternatively, Plaintiffs argued that the penalty provision of the Act is an unconstitutional tax (second claim). (R-7: Pls.' Mot. for Prelim. Inj.).

On July 15, 2010, the district court issued an order consolidating the hearing on the motion for a preliminary injunction with a trial on the merits of Plaintiffs' first and second claims pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. (R-21: Consolidation Order).

On October 7, 2010, the district court denied Plaintiffs' request for an injunction and dismissed Plaintiffs' first and second claims on the merits. (R-28: Order Denying Mot. & Dismissing First & Second Claims) (hereinafter "Order").

On October 21, 2010, the district court signed a stipulated order dismissing Plaintiffs' remaining claims without prejudice, thereby closing the case. (R-29: Stipulated Order Dismissing Remaining Claims) (hereinafter "Stipulated Order").

On October 22, 2010, Plaintiffs filed a timely notice of appeal, seeking review of the district court's order denying their motion for injunction and dismissing their first and second claims. (R-30: Notice of Appeal). This appeal is from a final order and judgment that disposes of all parties' claims. Consequently, this court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This case challenges the constitutionality of the newly enacted Healthcare Reform Act, which mandates all private citizens, including Plaintiffs, to purchase "minimum essential" healthcare coverage under penalty of federal law (hereinafter

"Individual Mandate"). Plaintiffs contend that Congress exceeded its authority under the Constitution by enacting this mandate.

> As noted by the Congressional Budget Office in August 1994:
>
> A mandate requiring all individuals to purchase health insurance would be *an unprecedented form of federal action.* The government has *never* required people to buy any good or service as a condition of lawful residence in the United States.

(R-7: Ex. 3, CBO Memo) (emphasis added).

In its order upholding the constitutionality of the Individual Mandate, the district court acknowledged this historical reality, stating, "The Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because *in every Commerce Clause case presented thus far, there has been some sort of activity*. In this regard, the Health Care Reform Act arguably presents *an issue of first impression*." (R-28: Order at 15) (emphasis added).

Contrary to the district court's ruling, there is no enumerated power in the Constitution that permits the federal government to mandate that Plaintiffs and other American "residents" purchase healthcare coverage or face a penalty.[1] No matter how convinced Defendants—or even the American public in general—may be that the

[1] In *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2010 U.S. Dist LEXIS 111775, at *113 (N.D. Fla. Oct. 14, 2010), a case in which sixteen state Attorneys General and four state Governors challenged the Healthcare Reform Act, the district court, in its order denying the defendants' motion to dismiss the plaintiffs' challenge to Congress' authority to enact the Individual Mandate, noted that "*this is not even a close call*." (emphasis added).

Healthcare Reform Act is in the public interest, their political objectives can only be accomplished in accord with the Constitution.[2]

Indeed, the Healthcare Reform Act represents an unprecedented encroachment on the liberty of all Americans, including Plaintiffs, by imposing unprecedented governmental mandates that restrict their personal and economic freedoms.

In sum, the ultimate question for this court is a legal one.[3] Its resolution will have an immediate impact upon the lives of Plaintiffs and millions of other American citizens. More important, it will forever impact the fundamental relationship between the power of the federal government and the liberty interests of those it governs. Consequently, this case transcends the public debate on healthcare. At its core, it is about the constitutional limits of the federal government.[4] And when Congress acts

---

[2] *See Commonwealth of Va. v. Sebelius*, No. 3:10CV188-HEH, 2010 U.S. Dist. LEXIS 130814, at *34-35 (E.D. Va. Dec. 13, 2010) (holding the Individual Mandate provision of the Healthcare Reform Act unconstitutional and stating, "Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within constitutional bounds").

[3] "[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." *United States v. Morrison*, 529 U.S. 598, 614 (2000) (citations and quotations omitted).

[4] A ruling that the Individual Mandate is unconstitutional does not mean that Congress is without power to "fix" the national healthcare system. Such a ruling would simply reaffirm the fundamental notion that when the government acts, it must do so consistent with the Constitution.

beyond those limits, as here, the judicial branch must exercise its authority as the guardian of our Constitution and enjoin the illicit acts.

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

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Congress exceeded its authority under the Commerce Clause of the U.S. Constitution by mandating private citizens, including Plaintiffs, purchase healthcare coverage under penalty of federal law pursuant to the Healthcare Reform Act.

II. Whether, alternatively, the penalty provision of the Healthcare Reform Act is an unconstitutional tax.

STATEMENT OF THE CASE

On March 23, 2010, Plaintiffs filed a complaint against Defendants, challenging the constitutionality of the Healthcare Reform Act. (R-1: Compl.). In their first and second claims for relief, Plaintiffs sought a declaration that Congress lacked authority under the Commerce Clause to pass the Act, and alternatively a declaration that the penalty provision of the Act is an unconstitutional tax. In their third, fourth, fifth, and sixth claims for relief, Plaintiffs alleged that the Healthcare Reform Act violates the Tenth Amendment, the Free Exercise Clause, and the Fifth Amendment's equal protection guarantee and Due Process Clause, respectively. (R-1: Compl.).

On April 6, 2010, Plaintiffs filed a motion for a preliminary injunction, seeking to preliminarily enjoin the Individual Mandate provision of the Act as exceeding Congress' authority under the Commerce Clause (first claim). Alternatively, Plaintiffs argued that the penalty provision of the Act is an unconstitutional tax (second claim). (R-7: Pls.' Mot. for Prelim. Inj.).

On July 15, 2010, the district court issued an order consolidating the hearing on the motion for a preliminary injunction with a trial on the merits of Plaintiffs' first and second claims pursuant to Fed. R. Civ. P. 65(a)(2). (R-21: Consolidation Order).

On October 7, 2010, the district court denied Plaintiffs' request for an injunction and dismissed Plaintiffs' first and second claims on the merits. (R-28: Order).

On October 21, 2010, the district court signed a stipulated order dismissing Plaintiffs' remaining claims without prejudice, thereby closing the case. (R-29: Stipulated Order).

On October 22, 2010, Plaintiffs filed a timely notice of appeal, seeking review of the district court's order denying their motion for injunction and dismissing their first and second claims. (R-30: Notice of Appeal). This appeal follows.

STATEMENT OF FACTS

President Obama signed the Healthcare Reform Act into law on March 23,

2010.[5] An "essential" provision of the Act forces private citizens, including Plaintiffs, to purchase and maintain "minimum essential" healthcare coverage under penalty of federal law (*i.e.*, the Individual Mandate). (R-7: Ex. 1, Act at 321-26; R-28: Order at 2-3). What is considered an acceptable or "minimum essential" level of healthcare coverage is determined by the federal government pursuant to the Act.[6] (R-7: Ex. 1, Act at 104-05, 321-26). If a private citizen chooses not to purchase and maintain an acceptable level of healthcare coverage as determined by the federal government, the Act imposes monetary penalties. (*See* R-7: Ex. 1, Act at 321-26).

Plaintiff Thomas More Law Center ("TMLC") is a national public interest law firm based in Ann Arbor, Michigan. TMLC's employees receive healthcare through an employer healthcare plan sponsored and contributed to by TMLC. TMLC's healthcare plan is subject to the provisions and regulations of the Healthcare Reform Act. (R-28: Order at 3).

TMLC objects, through its members, including Plaintiffs DeMars and Steven Hyder, to being forced to purchase healthcare coverage. (R-28; Order at 4, 5).

---

[5] 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) ("Healthcare Reform Act" or "Act").

[6] Indeed, simply having insurance is not enough. To avoid a penalty, the health insurance plan must include, at a minimum, ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance abuse treatment, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventative services, wellness services, chronic disease management, pediatric services, and dental and vision care for children. (*See* R-7: Ex. 1, Act at 105).

The individual plaintiffs are United States citizens, Michigan residents, and federal taxpayers. Plaintiffs do not have the requisite private healthcare insurance, and they object to being compelled by the federal government to purchase healthcare coverage pursuant to the Act. Plaintiffs contend that if they do not purchase the federally-mandated health insurance and are forced to pay a penalty, such money would go into the general fund and could be used to fund abortions pursuant to the Act. Plaintiffs object to being forced by the federal government to contribute in any way to the funding of abortions. (R-28: Order at 3-4).

Plaintiffs have arranged their personal affairs such that it will be a hardship for them to have to either pay for health insurance that is not necessary or desirable or face penalties under the Act. (R-28: Order at 5). Indeed, a basic healthcare policy will cost approximately $8,832.00 per year, and to add one child will increase the cost to approximately $9,914.28 per year. Consequently, the Act negatively impacts Plaintiffs now because they will have to reorganize their affairs and essentially change the way they presently live to meet the government's demands. (R-28: Order at 5).

"The Act was signed into law on March 23, 2010, so the minimum coverage provision is already law, there is no condition precedent necessary, nor is there any subsequent regulation required to make it so." (R-28: Order at 5). As a result, Plaintiffs have been forced to make financial and life decisions and to take the necessary actions to implement those decisions they would not otherwise be required

to do but for the Act, thereby causing a present "economic burden" and "injury" that is "fairly traceable to the Act." (R-28: Order at 7). As the district court below concluded, "the proposition that the Individual Mandate leads uninsured individuals to feel pressure to start saving money today to pay more than $8,000 for insurance, per year, starting in 2014, is entirely reasonable." (R-28: Order at 7-8).

SUMMARY OF THE ARGUMENT

The court below erred in denying Plaintiffs' claim that the Healthcare Reform Act is an unprecedented and unauthorized grant of authority to the federal government under the guise of the Commerce Clause. Specifically, Plaintiffs argue that the district court erred as a matter of law when it upheld the Act's Individual Mandate, which obligates Plaintiffs and other similarly situated citizens to purchase healthcare insurance they do not want—or, suffer the consequences of a monetary penalty. Plaintiffs point out that while the court below recognized that the Individual Mandate is unprecedented in that it penalizes the mere status of being uninsured (in fact, it punishes the mere status of "being"), the lower court took it upon itself to extend the Supreme Court's extant Commerce Clause jurisprudence beyond its current limits of commercial or economic activity. The court erred in accepting Defendants' argument that by not acting—that is, merely "being"—Plaintiffs have effectively made a "choice," and this mental decision-making is akin to "acting," which someday will, but does not now, affect the economy. Plaintiffs argue that the lower court has created

a new kind of Commerce Clause power not previously known to the jurisprudence, which effectively grants the federal government state police power, thereby rendering any notion of the constitutionally mandated federalism dead letter law.

Plaintiffs also argue that Defendants' fall-back position, seeking refuge in the Constitution's grant of power to Congress under its taxing and spending authority, is fundamentally misplaced because the Act's "penalty" is in fact a penalty and not a tax the Constitution recognizes. Without Commerce Clause authority, and given the structure of the Act's Individual Mandate and penalty, Defendants' efforts to game the Constitution's apportionment requirement for direct taxes must fail.

In sum, the Individual Mandate provision of the Act is unconstitutional and should be enjoined. Indeed, it "is not even a close call."

ARGUMENT

I. Standard of Review.

Because the district court consolidated Plaintiffs' motion for a preliminary injunction with a trial on the merits, this court reviews the court's findings of fact for clear error and its conclusions of law *de novo*. *Barden Detroit Casino, L.L.C. v. City of Detroit*, 230 F.3d 848, 853 (6th Cir. 2000).

II. The Act Violates the Commerce Clause because the Individual Mandate Regulates Mere Existence Based on "Inactivity" and Not Commercial or Economic "Activity."

If we are permitted to remove ourselves from the political factors weighing for

or against healthcare reform, one statement is entirely uncontestable and, as a result, not subject to serious challenge: The federal government has never in the history of the United States attempted to stretch the Commerce Clause to include the regulation of *inactivity*, or in effect, mere "existence" or residence within our Nation's boundaries. The Act, however, does just that, notwithstanding the lower court's metaphysical rendering of a mental choice not to purchase health insurance into an economic activity akin to the decision to pay "by credit card rather than by check." (R-28: Order at 17). Even in its analogy, the court ignores that the decision to pay by credit card or by check is ultimately expressed in an actual deed—payment.

For the first time in our history, Congress has cited the Commerce Clause as authority to regulate a man or woman sitting in the privacy of his or her own home doing absolutely nothing but "living" and "breathing." (*See* R-28: Order at 17) (describing Plaintiffs as "living, breathing beings"). No previous interpretation of the Commerce Clause has ever allowed this reach. And, more important, if this is what the Commerce Clause has come to mean, it means that this clause is the enumerated power of the federal government without the need for any other enumerations because it would permit absolute power, save the exceptions carved out by constitutional

amendments, such as the Bill of Rights.[7] In this new scheme of governance, individual liberty is the exception against the backdrop of the federal government's plenary authority to regulate every aspect of our lives—including our choice, whether deliberate or not, to refrain from acting.

This is precisely where the lower court's opinion exposes itself as flawed most fundamentally. The court obviously and necessarily ignores the pregnant question raised in Plaintiffs' arguments below: if the federal government has the authority to require Americans to purchase health insurance, it has the power, *a fortiori*, to require the same citizenry to act in specifically defined ways to safeguard their health in the first instance. Thus, the federal government could mandate that we all join a health club and indeed impose on us a penalty for not actually attending the club, to take multi-vitamins daily, and to dine only in government-approved "health" restaurants. Whatever justification the government might have to require the purchase of health insurance pursuant to the Act, this justification applies with equal force to each of these additional mandates and a never ending list of others.

In the final analysis, this expansion of power effectively converts our Republic,

[7] As the government's Commerce Clause power expanded in the last century, the Tenth Amendment has proven incapable of preserving State's rights. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (invalidating a California statute authorizing personal, medicinal use of marijuana in the wake of the federal government's "comprehensive regulatory statutes [which] may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce").

designed as a federal system with a limited national government, into a single omnipresent national polity with absolute power to regulate all spheres of human existence. Indeed, even the promulgation and enforcement of regulations once considered strictly within the confines of State and local governments under the rubric of police power, such as local sanitation codes, zoning ordinances, and municipal building codes, all would fall within Congress' power should that power include the ability to impose regulations such as the Individual Mandate. Quite simply, if this is what the Commerce Clause means, then the federal government has the authority to regulate any and all behavior imaginable—including inactivity, as in this case. Liberty is no longer an unalienable right possessed by the individual, but a political privilege or license granted by the State—that being the federal government. This state of affairs effectively reverses the American Revolution and terminates the great experiment founded in the constitutional republic begun by our Founding Fathers.

A. The Act Regulates All Legal U.S. Residents Who Have Chosen Not to Engage in the Commercial Activity of Purchasing Health Insurance.

The Healthcare Reform Act creates an Individual Mandate for each "applicable individual" to purchase health insurance or be subject to what the Act calls appropriately a "penalty," and at times euphemistically a "Shared Responsibility Payment." (R-7: Ex. 1, Act at 321-22, 326-28). The definition of an "applicable individual," which triggers this exercise of the federal government's Commerce

Clause power, is mere existence because the definition begins with any individual and then provides three exclusions: (1) religious objectors who oppose health insurance in principle; (2) non-residents or illegal residents; and (3) incarcerated individuals.[8] (R-7: Ex. 1, Act at 326-28).

The Act also exempts certain classes of individuals from the penalty, but includes them within the definition of an "applicable individual." For example, individuals living under the statutorily defined "poverty line" are "applicable individuals" who must obtain health insurance, but are exempted from the penalty. (*See* R-7: Ex. 1, Act at 331).

Plaintiffs are legal residents of the United States who have chosen not to purchase health insurance or obtain the government-mandated level of coverage required by the Act. Plaintiffs do not object to healthcare or health insurance *per se* on religious grounds, and they are not incarcerated. Because Plaintiffs do not intend to engage in the commercial activity of purchasing health insurance, the Act imposes an immediate burden on them by forcing them to contemplate, plan, and effect substantial life changes to avoid the unconstitutional regulation and penalization for

[8] "The term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraphs (2), (3), or (4)." (R-7: Ex. 1, Act at 326). Paragraph (d)(2) excludes "certified" religious objectors pursuant to 26 U.S.C. § 1402(g)(1), which is the religious objection provision contained in the self-employment income tax section of the Internal Revenue Code. Paragraph 3 excludes non-residents of the United States or illegal residents. And paragraph 4 excludes incarcerated individuals. (*See* R-7: Ex. 1, Act at 326-28).

their refusal to engage in the mandated commercial activity.

Consequently, the Act is triggered by mere residence or existence. Persons subject to the Individual Mandate (and its penalty wielded as an enforcement club) include those otherwise law abiding citizens, including Plaintiffs, who have chosen not to purchase health insurance and to those who have not chosen at all but who have simply not acted. In sum, *the Individual Mandate regulates no activity whatsoever*.

To avoid this inconvenient reality, the district court claims that "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*." (R-28: Order at 17) (emphasis added). Therefore, according to the district court, all "living, breathing beings" that Congress does not expressly exempt from the Individual Mandate, which includes Plaintiffs, are participants in the "health care services market" whether they want to be or not. (*See* R-28: Order at 17). Furthermore, according to the court's reasoning, when a person does not go out and purchase health insurance, that individual has made an affirmative economic decision whether intended as such or not. And this imputed mental decision then somehow morphs into "a choice regarding the method of payment for the services they expect to receive," which, according to the court, is analogous to "paying by credit card rather than by check." (R-28: Order at 17). But of course it is precisely not at all analogous because this analogy involves an individual actually going out to purchase

something—*i.e.*, economic activity—with a check or credit card. Nevertheless, the district court apparently believes that Congress possesses the metaphysical power or authority to magically convert non-activity into activity—activity that even the most expansive reading of the U.S. Supreme Court's Commerce Clause cases requires.

The inferences, however, do not end here. Thus, once the imputed mental choice not to purchase health insurance is converted into an affirmative economic decision and this imputed decision somehow morphs into an actual act akin to purchasing something, only then does Congress (and the district court) impose the additional inferences that this individual belongs to a class of individuals who will (1) use the healthcare system and (2) nonetheless unfairly exploit the healthcare system by either not paying for healthcare or health insurance or by paying below market rates. This then by an additional inference presumably affects interstate commerce by shifting the costs (assuming a sufficient number of freeloaders) to those who do pay market rates for healthcare through insurance. (*See, e.g.*, R-28: Order at 17 ("How participants in the health care services market pay for such services has a documented impact on interstate commerce. Obviously, this market reality forms the rational basis for Congressional action designed to reduce the number of uninsured.")). But how is this inferential chain not what the Supreme Court has expressly rejected in its Commerce Clause cases? In fact, the inferences here piled one on top of another do not consist of only a chain of inferred causal relationships, but per force begin with the

metaphysical conversion of a non-act—an imputed decision—into a specific activity called "a choice regarding the method of payment." How is this possible?

The answer to these perplexing questions is perhaps found in the district court's remarkable conclusion that essentially wipes out decades of Supreme Court precedent: "While plaintiffs describe the Commerce Clause power as reaching economic *activity*, the government's characterization of the Commerce Clause reaching economic *decisions* is more accurate." (R-28: Order at 17). Thus, according to the district court (and Defendants), Congress' Commerce Clause authority is so expansive (indeed, without limits), that it can now regulate "decisions"—whether acted upon or not—whether deliberate or not.

The district court supports its faulty reasoning by incorrectly concluding, "The Supreme Court has consistently rejected claims that individuals who choose not to engage in commerce thereby place themselves beyond the reach of the Commerce Clause." (R-28: Order at 17) (citing *Raich*, 545 U.S. at 30; *Wickard v. Filburn*, 317 U.S. 111, 127, 128 (1942); and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)).

It is worth noting that the district court in the federal lawsuit challenging the Healthcare Reform Act in Florida firmly rejected the district court's conclusion here (and thus Defendants' arguments) and fully concurred with Plaintiffs' position (which is discussed further in this brief), stating, in relevant part:

The defendants "firmly disagree" with the characterization of the individual mandate as "unprecedented" and maintain that it is "just false" to suggest that it breaks any new ground. . . . During oral argument, as they did in their memorandum, . . . they attempted to analogize this case to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241. . . (1964), which held that Congress had the power under the Commerce Clause and the Civil Rights Act to require a local motel to rent rooms to black guests; and *Wickard v. Filburn*, 317 U.S. 111 . . . (1942), which held that Congress could limit the amount of wheat grown for personal consumption on a private farm in an effort to control supply and avoid surpluses or shortages that could result in abnormally low or high wheat prices. The defendants have therefore suggested that because the motel owner in Heart of Atlanta was required to rent rooms to a class of people he did not want to serve, Congress was regulating inactivity. And, because the farmer in *Wickard* was limited in the amount of wheat he could grow for his own personal consumption, Congress was forcing him to buy a product (at least to the extent that he wanted or needed more wheat than he was allowed). 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*. The plaintiff in the former was not required to be in the motel business, and the plaintiff in the latter did not have to grow wheat (and if he did decide to grow the wheat, he could have opted to stay within his allotment and use other grains to feed his livestock—which would have been most logical, since wheat is usually more expensive and not an economical animal feed—and perhaps buy flour for him and his family). Their respective obligations under the laws being challenged were tethered to a voluntary undertaking. *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.

But, *in 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*.

Florida, 2010 U.S. Dist LEXIS 111775, at *115-18 (emphasis added).

As discussed further below, the district court's unprecedented decision upholding Congress's authority to enact the Individual Mandate is contrary to controlling law and must be reversed.[9]

B. The Commerce Clause Authorizes the Federal Government to Regulate Economic *Activity* that Affects Interstate Commerce.

The Supreme Court has referred to the principles that establish the fundamental structure of our government embodied in the Constitution, which limits the powers of the federal government to those expressly enumerated, as "first principles":

> 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) (internal citations and quotations omitted).

---

[9] *See Commonwealth of Va.*, 2010 U.S. Dist. LEXIS 130814, at *39 ("Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.").

In this case, the district court essentially handed a constitutional pen and eraser to Congress to rewrite these first principles. This decision must be reversed.

1. Article I, Section 8 of the Constitution authorizes the federal government to regulate commerce "among the several States."

The first of the discreet enumerated powers of the federal government are set out in Article I, section 8 of the Constitution. The third of this first grouping of powers is the Commerce Clause, which grants Congress the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, §8, cl. 3.

From the early days of our Republic until the present, the Supreme Court has confronted and grappled with the meaning and scope of the phrase "commerce . . . among the several States." In the first of these cases, *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Court held that "commerce" included more than just the "traffic" of goods from one state to another; it also included the regulation of commercial "intercourse," such as navigation on the country's waterways. *Id.* at 189-90. Over the course of the Commerce Clause's long and storied jurisprudence, the Court has mapped out a three-prong analysis to determine if a federal law (or a regulations promulgated pursuant to it) properly falls within this enumerated grant of authority. *See Lopez*, 514 U.S. at 552-57, 568-74, 584 (Kennedy, J., concurring); *id*. at 593-99 (Thomas, J., concurring) (reviewing the history of Commerce Clause jurisprudence).

2. The Court's three-prong analysis.

Beginning with *Perez v. United States*, 402 U.S. 146 (1971), every important Commerce Clause opinion has expressly adopted a three-prong analysis to test whether legislation falls within the bounds of permissibly *regulated activities*.[10] *Id.* at 150. This inquiry presumes that Congress may regulate: (1) "the use of the channels of interstate commerce," such as regulations covering the interstate shipment of stolen goods; (2) to protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce," such as legislation criminalizing the destruction of aircraft and theft from interstate commerce; and (3) "those activities that substantially affect interstate commerce." *Lopez*, 514 at 558-59; *see also Perez*, 402 U.S. at 150.

While the first two categories are rather straightforward because they touch upon interstate commerce directly, it is the last category that has so vexed the Court. Notwithstanding the vexation quotient of this prong, its rationale is manifestly plausible. That is, while there are some local commercial activities that in themselves do not participate whatsoever in interstate commerce, they are nonetheless quite obviously commercial activities that "substantially affect" interstate commerce.

Two civil rights era cases of this sort are *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and its companion case, *Katzenbach v. McClung*, 379

[10] *See also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-77 (1981).

U.S. 294 (1964). These cases involved a challenge to the then-recently enacted civil rights legislation, which prevented motel-hotel owners and restaurateurs, respectively, from discriminating against their "Negro" consumers. The Court in those cases made clear that a purely local activity that substantially affects interstate commerce, such as providing lodging accommodations or food to customers traveling interstate and dealing in and consuming goods that were very much a part of interstate commerce, is properly within the reach of the Commerce Clause because the local activity substantially and directly affects interstate commerce. Thus, in both cases, the plaintiffs had made an affirmative choice to engage in commercial activity—activity that Congress could regulate.[11]

This third prong begins to vex, however, when the Court expands its reach to include a purely local, non-commercial activity, which may or may not ever affect interstate commerce, simply because it is an integral part of a broader statutory scheme that permissibly regulates interstate commerce. The two model cases of this sort—bookends separated by more than 60 years—are *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005).

In *Wickard*, the Court held that a broad regulatory scheme permissibly

[11] Similarly, the plaintiffs in *Heart of Atlanta Motel* and *Katzenbach*, unlike the Plaintiffs here, could opt out of the motel and restaurant markets and thus place themselves beyond the reach of Congress. The district court in this case, however, held that Plaintiffs could not opt out of the health services market so long as they were "living, breathing beings." (R-28: Order at 17).

regulating commercial, interstate agricultural activity could properly capture the non-commercial, economic activity of individual wheat farmers growing wheat for their own personal consumption precisely because this activity could have an adverse affect on the regulatory scheme's price control mechanisms. Similarly, in *Raich*, the Court concluded, relying in large part on *Wickard*, that non-commercial, home-grown, medicinal marijuana was permissibly captured by the legislative regulatory scheme because Congress could rationally conclude that some of this marijuana would leak into the illegal interstate commercial market, which was the central target of the statutory scheme.

Vexation is inescapable, however, because nestled in between *Wickard* and *Raich* are two modern cases which are widely understood to cabin the Commerce Clause's reach by prohibiting the federal regulation of purely local, non-commercial activity. Both *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), invalidated federal statutes which sought impermissibly to regulate purely local, non-commercial activity—activity Congress had concluded quite rationally could affect interstate commerce. Specifically, in *Lopez*, the Court confronted the Gun-Free School Zone Act of 1990, which criminalized possession of a gun within a statutorily defined school zone. It is worth a moment's pause here to follow the *Lopez* Court's reasoning in rejecting the Commerce Clause's reach into this domain of non-commercial activity:

> The Government's essential contention, *in fine*, is that we may determine here that § 922(q) [the provision of the legislation at issue] is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, *through the mechanism of insurance*, those costs are spread throughout the population. [*United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991)]. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. [*Cf. Heart of Atlanta Motel, Inc.*, 379 U.S. at 253]. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could *rationally* have concluded that § 922(q) substantially affects interstate commerce.
>
> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. *Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate*.

Lopez, 514 U.S. at 563-64 (1995) (internal citations and references omitted) (emphasis added). What is striking about *Lopez* is that it can hardly be argued that it was irrational for Congress to have concluded that possessing guns near schools would

affect interstate commerce. It is no less of an "effect" than the possible leakage of private, homegrown, medicinal marijuana fully regulated by California. But what is apparent from the lengthy quote above is that the *Lopez* Court understood that if the multi-tiered inference required to move from gun possession to an "effect" on interstate commerce was an appropriate nexus for upholding the constitutionality of a regulation, that inference would obliterate the Constitution's enumeration of powers.

Morrison's result was similar and no less vexatious for the older *Wickard* and the yet to be rendered *Raich*. This is especially true because in *Morrison*, unlike in *Lopez*, Congress had made a host of explicit findings supporting its legislation allowing a federal private right of action for a woman violently assaulted in a "gender-based" crime. There the Court held:

> In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 [the provision of the federal legislation at issue] *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, "whether 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."
>
> In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from

> traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison, 529 U.S. at 614-15 (internal quotations and citations omitted).

Ultimately, the majority opinion in *Raich* (and Justice Scalia's concurrence) struggled mightily with the third prong of the Commerce Clause. This struggle was necessitated by the incongruity and inconsistency of the Court's own jurisprudence. One version of the Commerce Clause forbade federal regulation to reach non-economic, local activity even if that activity in the aggregate might very well materially impact interstate commerce (per *Lopez* and *Morrison*). The other version of the Commerce Clause was understood to reach wholly private, non-commercial activity, like growing your own wheat or cultivating your own personal marijuana for medicinal purposes, neither of which might ever actually affect interstate commerce

(per *Wickard* and *Raich*). But, thankfully, *Raich* does not leave the vexing problem unattended.

The Court in *Raich* explained how to reconcile the differences between these two pairs of Commerce Clause decisions. This reconciliation rests in the distinction between *economic activities* and *non-economic activities*. The legislation at issue in *Lopez* and *Morrison* impermissibly dealt with local criminal behavior that was rooted in violence, but which had no necessary economic nexus as an activity. That is, the carrying of a gun or violence against a woman is not economic activity in any generic way. *Wickard* and *Raich*, however, permissibly regulated local, non-commercial activity because the cultivation of an agricultural product and a regulated drug were intrinsically *economic* activities. In the Court's own words:

> Despite congressional findings that such crimes [violence against women in *Morrison*] had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." [*Morrison*, 529 U.S. at 610].
>
> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act ("CSA"), which criminalized even private, medicinal marijuana,] 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).

The point of this Commerce Clause analysis, whether in the expansive rulings of *Wickard* and *Raich* or the more careful federalism-sensitive rulings of *Lopez* and *Morrison*, is that these cases and every single other Commerce Clause decision since this Nation's founding unanimously and explicitly hold that *congressional power under this clause is strictly and absolutely limited to some kind of affirmative behavior or activity*. Whether it's the "economic activity" of the non-commercial growing of wheat (*Wickard*) or marijuana (*Raich*) within the broad permissible legislative scheme or the commercial activity of providing lodging and food services to interstate travelers in *Heart of Atlanta Motel* or *Katzenbach*, before Congress can reach you through the Commerce Clause, *you must be engaged in some affirmative activity*.

Moreover, as confirmed by *Lopez*, *Morrison*, and *Raich*, activity alone (like possessing a gun or assaulting a woman)—even if it will affect interstate commerce in the aggregate over time—is not enough to cross the Commerce Clause Rubicon. The activity must be *economic*. But this means, at the very least, that there must be *some activity* to apply the Commerce Clause analysis. And, as *Lopez*, *Morrison*, and *Raich* make clear, that activity must in and of itself be economic even if it need not be

commercial.

C. The Act Does Not Regulate Economic "Activity," but rather the *Decision* to Not Engage in Commercial or Economic Activity by Penalizing "Inactivity."

The Act does not even pretend to fit within any of the Court's previous Commerce Clause rulings. The Individual Mandate attaches to a legal resident of the United States who chooses to sit at home and do nothing. This resident, quite literally, merely exists (*i.e.*, he is "living" and "breathing"). (*See* R-28: Order at 17). He or she is neither engaged in economic activity nor in any other activity that would bring him or her within the reach of even a legitimate regulatory scheme. *Lopez*, 514 U.S. at 561 (holding that the non-commercial *activity* must be an "*essential* part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated") (emphasis added). In this case, we have neither economics nor activities.

The Act purports to provide legislative findings to support Congress's authority to enact the Individual Mandate under the Commerce Clause. According to the Act: "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)." (R-7: Ex. 1, Act at 317-18). Paragraph (2) sets forth various "effects on the national economy and interstate commerce" to support mandating the "individual responsibility requirement." These

findings make statements about the general economic and commercial impact healthcare and healthcare insurance has on the national economy and how much of that impact is harmful to healthcare generally and to the individual specifically. The legislative findings conclude by suggesting that the proposed legislation ameliorates these deleterious effects of the current system. (R-7: Ex. 1, Act at 318-21).

Plaintiffs assume for purposes of this litigation that the national healthcare system is in need of repair. Plaintiffs acknowledge that the healthcare delivery system in general and the healthcare insurance markets in particular fall within the Commerce Clause analysis described above. But none of these legislative findings are at all relevant to the issue this lawsuit—and this appeal—raises as a matter of law: whether the federal government has authority under the Commerce Clause *to force* Plaintiffs and other similarly situated persons *to purchase* insurance from specific vendors[12] or suffer the consequences of a federally-imposed penalty.

Indisputably, Plaintiffs—as volitionally uninsured legal residents of the United States—are not now engaged in any commercial or economic activity that affects in any way interstate commerce. This is because, unlike *Wickard* and *Raich*, or *Heart of Atlanta Motel* and *Katzenbach*, Plaintiffs are not engaged in any economic activity whatsoever relative to the legislative findings of the Act or the regulatory scheme of the Act—essential or otherwise.

[12] Only "qualified" health plans satisfy the Individual Mandate. (R-7: Ex. 1, Act at 102-18, 333-34).

As the Court forcefully pointed out in both *Lopez* and *Morrison*, the national government is restrained and constrained by federalism not to go beyond its discreet and enumerated powers. This fundamental requirement of our federal government, which is and remains the law of the land, was described by the Supreme Court as a "first principle." Under the Commerce Clause, Congress is limited to regulating *at the far reaches of its authority* only local *economic* activity that it rationally determines is an "essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." *See Lopez*, 514 U.S. at 561 (emphasis added).

But these *far reaches* of congressional authority fall *far short* of this case because the regulatory scheme of the Act seeks to reach not just economic activity, but mere existence and inactivity. Thus, the Act seeks to mandate that Plaintiffs cease their inactivity, and it further designs a penalty scheme to deprive Plaintiffs of their liberty to choose *not* to engage in a private commercial transaction. 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.[13] The term "Nanny State" does not even begin to describe what we will have wrought if in fact the Healthcare Reform Act falls within any imaginable governmental authority. To be sure, George Orwell's *1984* will be just the primer for our new civics.

D. The Necessary and Proper Clause under *Comstock* Does Not Provide Constitutional Authority for the Individual Mandate.

Defendants argued below that the Court's recent decision in *United States v. Comstock*, 130 S. Ct. 1949 (2010), provides authority for their position that the Necessary and Proper Clause (Art. I, § 8, cl. 18) extends the reach of the Commerce Clause to the Individual Mandate. Interestingly, the object lesson Defendants wanted the lower court to take from *Comstock* was that the courts may not second guess

[13] Central to its conclusion that Congress had the authority to enact the Individual Mandate pursuant to the Commerce Clause was the district court's following finding: "The 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 true." (R-28: Order at 16). However, simply because a particular market might be "unlike other markets" can't be a basis for extending Congress's Commerce Clause authority to include regulating "decisions" affecting that market. Indeed, the same could be said about the "food" market since every "living, breathing" person must participate in that market at some level or else they would perish. (*See* R-28: Order at 17 (claiming that Plaintiffs "have not opted out of the health care services market because, as living, breathing beings . . . they cannot opt out of this market")). Does the Constitution permit Congress to force private citizens to purchase "health" foods which they wouldn't otherwise purchase under penalty of federal law? Moreover, precisely because the healthcare market is "unlike" any other market in that a person's health is arguably affected by almost every *decision* made on a daily basis, including whether to take vitamins, to exercise, to maintain a certain body weight, etc., permitting Congress to regulate "decisions" affecting a person's health gives Congress unbridled power and thus obliterates the very structure of our constitutional Republic.

Congress's Necessary and Proper Clause powers as long as they are "reasonably determined." (R. 14: Defs.' Notice of Supp. Auth. at 2). This argument is misguided and misleading for at least two distinct reasons.

First, the *Comstock* facts stand in the way of Defendants' claim of constitutionality like the proverbial elephant in the room. Specifically, the federal law at issue in *Comstock* allows a district court to order any person previously convicted of a federal criminal statute (and who is still subject to the custodial control of the federal government) to remain in custody at the conclusion of the criminal sentence if the person is found to be a sexual predator and a danger to others. *See Comstock*, 130 S. Ct. at 1954-55. Thus, the convict must first engage in criminal activity which resulted in incarceration pursuant to a federal law grounded in the Commerce Clause or some other enumerated power. Explicitly, then, *Comstock* deals with what is "necessary and proper" in dealing with an individual who has engaged in *criminal activity* which violated a federal statute authorized under some specific enumerated grant of constitutional authority.

This exact point is emphasized by the Court in its opinion and was highlighted by the government at oral argument. As Justice Breyer pointed out in the majority opinion, the federal government may not incarcerate an individual for the *status* of being a sexual predator and a danger to others if that person was not already convicted and incarcerated under a federal statute. Indeed, Justice Breyer makes this point by

referring approvingly to the Solicitor General's position that the federal government's constitutional authority over individuals based on their status (*i.e.*, sexual predator determined to be a danger to others) is solely dependent on the fact that the individual had already engaged in an activity which ran afoul of a federal criminal statute. *Id.* at 1964-65. *Comstock* quite obviously is not an exception to the Court's long-standing requirement that the federal government's authority under the Commerce Clause itself, or as extended by the Necessary and Proper Clause, is limited to regulating "activity," whether that be *Raich*'s economic activity or the explicit federal criminal activity in *Comstock*.

Second, Defendants' reliance on *Comstock* to preclude the courts from engaging in any meaningful analysis under the Necessary and Proper Clause is belied by *Comstock* itself. There, the Court begins and ends its opinion by telling us that courts must take into account "five considerations, taken together." *Id*. at 1956, 1965. After a careful examination of the five considerations *seriatim*, only then does the Court conclude that the "Constitution consequently authorizes Congress to enact the statute." *Id.* at 1965. Defendants, however, provided the lower court with no analysis; they merely asserted immunity from judicial scrutiny because they now claim Necessary and Proper Clause authority. But, when we apply the five-factor test the Court itself followed, we are left with an unbridgeable chasm between *Comstock* and the facts and circumstances of the Act's Individual Mandate.

Specifically, under the second consideration, unlike the legislative history involved in federal incarceration and dealing with dangerously ill mental patients, Congress has never before attempted to regulate in any field, including healthcare—based upon the Commerce Clause—the inactivity of a large segment of the population. Indeed, never before has Congress sought to regulate inactivity and force individuals to engage in a specific commercial activity. The Act's Individual Mandate also falls short of satisfying the third consideration because while Congress might have an interest in regulating healthcare, it has no existing interest in regulating uninsured, inactive individuals who have not entered the health insurance market. Similarly, under the fourth consideration, the Act effectively usurps the States' police power by mandating behavior in place of inactivity—a legislative effort historically left to the States. Finally and most egregiously, the Act's Individual Mandate is anything but narrow in scope. The whole point of the legislative findings is that uninsured individuals occupy a large portion of the pool of the potentially insured population. But rather than regulate these individuals at the point of contact with the health industry, a regulation which would have been focused and narrow, the Act reaches into the uninsureds' homes while they are wholly inactive and unengaged in the very economic activity the Act seeks to regulate.

In sum, on the facts alone, *Comstock* remains fully committed to the Commerce Clause requirement restricting the federal government's reach to regulating "activity."

Any effort to render the courts a rubber stamp for the extension of the Commerce Clause under the Necessary and Proper Clause is expressly rebutted by the *Comstock* Court's careful five-part analysis. Even a cursory review under the *Comstock* analysis renders the Act an unprecedented and unheard of extension of federal power.[14]

III. The Act's Penalty Imposed for Failure to Abide by the Individual Mandate Is Not a Constitutional Tax.

In its Order, the district court dismissed Plaintiffs' second claim for relief, which argued that if the penalty imposed for failure to abide by the Individual Mandate was construed to be a tax and thus enacted pursuant to Congress' taxing and spending power, the provision still fails because it is an unconstitutional tax. In sum, Plaintiffs argued that Defendants cannot rely on Congress's taxing and spending power as the "fall back" source of constitutional authority for enacting the Individual Mandate. However, as the district court noted, "Having concluded that Congress has the power under the Commerce Clause to enact the Health Care Reform Act, it is unnecessary for the court to address the issue of Congress's alternate source of authority to tax and spend under the General Welfare Clause." (R-28: Order at 19).

Because Defendants advanced the argument below that irrespective of

[14] *See Commonwealth of Va.*, 2010 U.S. Dist. LEXIS 130814, at *39-40 ("Because an individual's personal decision to purchase—or decline to purchase—health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary. . . . This authority may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power.") (citing *Comstock*, 130 S.Ct. at 1956-57).

Congress's authority to enact the Individual Mandate pursuant to the Commerce Clause, Congress had the independent authority to enact this provision pursuant to its "Taxing Power" and the fact that the district court dismissed Plaintiffs' second claim for relief that addressed this argument, the issue of whether the penalty provision of the Individual Mandate is a constitutional tax is squarely before this court.

Defendants' argument that Congress can compel private citizens to purchase "minimum essential" healthcare coverage under its Taxing Power is not only substantively deficient; it is a transparent tactical retreat from the expressed legislative justification for the Act. Specifically, Congress went to great lengths within the Act itself to found the constitutional authority for the Individual Mandate in the Commerce Clause.[15] As misguided as this congressional effort was, it is clear from the plain language of the Act that Congress did not view the Individual Mandate as some integral part of a tax regime, but rather a "penalty" for not abiding by a statutory mandate purportedly authorized by the Commerce Clause. Moreover, the "tax" is referred to in the Act throughout as a "penalty" for failing to comply with the Individual Mandate.[16] *See also Commonwealth of Va.*, 2010 U.S. Dist. LEXIS 130814, at *56-59 (concluding that the "penalty" provision is "a penalty as opposed to a tax" and without constitutional authority). And, fundamentally, if the Individual

[15] *See* Pub. L. No. 111-148, § 1501, 129 Stat. 119 (2010).
[16] *See, e.g.*, Pub. L. No. 111-148, § 1501, 129 Stat. 119 (2010) (codified at 26 U.S.C. 5000A).

Mandate does not survive the constitutional limitations of the Commerce Clause, it simply does not matter what the penalty is called because the Act's expressed terms only trigger the imposition of the "penalty" on taxpayers and their households who have not complied with the Individual Mandate. In other words, without a constitutionally valid Individual Mandate, the penalty (or "tax") provisions of the Act become meaningless because they lack a predicate (*i.e.*, failure to comply with a legally valid Individual Mandate) by which to be triggered. Thus, the Act's plain language provides a controlling context in evaluating Defendants' newly discovered Taxing Power rationale.

Specifically, Defendants propose the alternative Taxing Power claim by arguing that the Act's penalty is a tax, pursuant to Article I, section 8, clause 1, "for the general welfare of the United States." (R-12: Defs.' Resp. to Pls.' Mot. at 27-28). Defendants focus this argument entirely on two legs: (1) a penalty can still be a constitutional tax even if it has a regulatory purpose that would otherwise be unconstitutional under the Commerce Clause; and (2) any tax that is "for the general welfare," a determination entirely within Congress's purview and effectively outside of judicial review, is necessarily constitutional. The problem with Defendants' two-legged Taxing Power argument is that it misses the point almost entirely and does so in large part by ignoring the express terms of the Act.

A. Irrespective of whether the "Penalty" Is Construed as a Penalty, Regulatory Fee, or Tax, It Is only Triggered if the Individual Mandate Survives Constitutional Challenge under the Commerce Clause.

As to the first leg of Defendants' Taxing Power argument, Plaintiffs acknowledge that a levy, fee, or penalty can be a constitutional tax even though it seeks to effect regulatory purposes in addition to revenue-generation. *See, e.g.*, *United States v. Sanchez*, 340 U.S. 42, 44 (1950). Plaintiffs also acknowledge that a regulatory fee or penalty that might otherwise be invalid as unconstitutional under the Commerce Clause, might still be a constitutional tax under the Taxing Power. *Id.* But these legal truisms miss the point of the Act's unconstitutionality under the Commerce Clause by ignoring the plain language of the Act and its mechanism for even triggering the penalty-"tax" provisions.

Specifically, Plaintiffs direct the court's attention to the language of the Act itself and the mechanism employed by Congress to trigger the penalty. Specifically, the Act, as codified, states:

> § 5000A. Requirement to maintain minimum essential coverage.
>
> (a) Requirement to maintain minimum essential coverage. An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.
>
> (b) Shared responsibility payment.
> (1) In general. If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under

> paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).
> (2) Inclusion with return. Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

26 U.S.C. § 5000A (2010).

Thus, subsection (a), which is the Individual Mandate, is the basis for the penalty-"tax" trigger that is set out in subsection (b)(1). Quite simply, if the Individual Mandate referenced in subsection (a) is not constitutional under the Commerce Clause and therefore illegal and invalid, subsection (b)(1)'s trigger of "fails to meet the requirement of subsection (a)" is never met. A trigger that cannot constitutionally be pulled is not a trigger. And this simple and explicit statutory analysis goes to the more fundamental point that Congress really intended the penalty to be just that: a penalty for failure to comply with the Individual Mandate and not a tax.

Indeed, had Congress simply passed a tax hike on all incomes and provided for a deduction for those individuals and households with qualified health insurance, such legislation would have been a true income tax and subject to a tax analysis.[17] *See*,

[17] This would have been an honest and more direct approach. Plaintiffs suggest this approach was not taken for political reasons—because of the voting public's disdain for any tax increase during these difficult times (and the President's campaign promise not to raise taxes). But political expediency cannot trump constitutional limitations.

e.g., *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371 (1934) (holding that while the income tax must be based upon "derived" income, the deduction regime need not be). But that is not at all what Congress did. Congress mandated that individuals engage in commercial activity they would not otherwise have engaged in and then imposed a penalty on those who "fail[] to meet the requirement." And Congress understood quite well that the Individual Mandate stands or falls upon the authority granted in the Commerce Clause and thus made an effort in the legislative findings to justify its actions. But, as argued above, those justifications fall constitutionally short and as such the Individual Mandate is unconstitutional and must be stricken by this court. Once the Individual Mandate is gone, the penalty-"tax" languishes as meaningless because it can never be triggered by the failure to abide by a mandate that no longer exists. Put simply, Defendants reliance on Congress's Taxing Power fails because it ignores the language and the mechanisms chosen by Congress in the Act itself.

B. The Constitution Authorizes only Apportioned Direct Taxes, Unapportioned "Derived" Income Taxes, and Uniform Indirect Taxes such as Excise Taxes and Duties.[18]

As to the second leg, Plaintiffs also concede that the Supreme Court has granted Congress broad authority to determine the "general welfare of the United States" as a

[18] While "imposts" are also indirect taxes and explicitly subject to the uniformity requirement of Article I, section 8, there can be no claim in this case that the Act's "penalty" at issue here is an impost (*i.e.*, tax on imports). *See generally Dooley v. United States*, 183 U.S. 151 (1901) (discussing imposts as levies on imported goods).

rationale for a tax. But what Defendants don't seem to understand (and certainly did not address anywhere substantively below) is that the penalty or tax must be a form of "tax" the Constitution recognizes as falling within Congress's Taxing Power in the first instance. If the Act's penalty is not a constitutionally valid tax, it does not matter what rationale Congress had in mind.

In other words, as a matter of straightforward legal analysis, a court must definitively determine that it is dealing with a "tax" recognized by the Constitution before it pauses, even if ever so briefly, to assess whether the rationale of the tax is proper under Article I, section 8, clause 1. In this sense, the "general welfare" rationale operates as a kind of condition subsequent for constitutionality. But the antecedent question is whether the purported tax is a constitutionally recognized tax to bring it within Congress's Taxing Power in the first instance. A careful analysis of the Constitution's Taxing Power provisions and the relevant case law demonstrates this point.

Congress's Taxing Power is set forth in Article I, section 8 of the Constitution:

> The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Art. I, § 8, cl. 1. This provision quite obviously imposes a condition on "Duties, Imposts and Excises" that they be applied uniformly throughout the United States. The Supreme Court has held that "uniformity" relates to geographic uniformity.

Fernandez v. Wiener, 326 U.S. 340, 359 (1945) (citing *Knowlton v. Moore*, 178 U.S. 41, 83-109 (1900) (discussing uniformity requirement of indirect taxes)).

Two separate constitutional provisions distinguish between "direct" taxes and what has come to be termed "indirect" taxes. Article I, section 2, clause 3 states, "Representatives and direct Taxes shall be apportioned among the several States."[19] Art. I, § 2, cl. 3. Article I, section 9, clause 4, provides, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Art. I, § 9, cl. 4. Thus, the Constitution expressly requires "direct taxes" to be apportioned according to the population as determined by the census. Direct taxes have long been defined as taxes on property, taxes on the individual—often referred to as a "capitation tax," such as a "head tax" or "poll tax"—and income taxes. In fact, in direct response to the Supreme Court's decision in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), wherein the Court held that income taxes were direct taxes and therefore subject to the constitutional requirement of apportionment, the Sixteenth Amendment was passed by the Sixty-first Congress and ratified by the requisite three-fourths of the states on February 25, 1913. This Amendment excluded income taxes from the apportionment requirement but left the apportionment requirement for all other direct taxes intact. It reads:

The Congress shall have power to lay and collect taxes on incomes, from

[19] The Fourteenth Amendment amended the apportionment clause by eliminating the "Three-fifths Compromise." U.S. Const. amend. XIV.

> whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

U.S. Const. amend. XVI.

In sum, Congress may levy either direct or indirect taxes. Direct taxes must be apportioned among the states by population. Indirect taxes must be uniform. The Constitution specifically authorizes indirect levies (*i.e.*, duties, imposts, and excise taxes). The 16th Amendment authorizes a tax on "derived" income *without* apportionment. Direct taxes, including capitation taxes, fall on a person or property and are not passed on to another. In contrast, indirect taxes may fall on one person, but can often be passed onto another because they are imposed as part of an activity, transfer, or use of property. The Supreme Court has dealt with and upheld this distinction between direct and indirect taxes and has acknowledged the direct tax apportionment requirement on several occasions.[20]

In *Hylton v. United States*, 3 U.S. 171 (1796), the Court upheld a tax on the *use of* carriages as an indirect tax requiring only uniformity not apportionment. The Court

[20] The Supreme Court has consistently recognized the apportionment requirement for direct taxes, and this includes the seminal post-16th Amendment case of *Eisner v. Macomber*, 252 U.S. 189 (1920). A capitation tax is merely one species of direct tax expressly mentioned in the Constitution requiring apportionment. The Court has consistently referred to the "No Capitation . . . . unless in Proportion" provision when upholding an indirect tax without ever hinting that this provision has fallen into desuetude. *See, e.g., United States v. Manufacturers Nat'l Bank*, 363 U.S. 194 (1960). Lower courts have also treated the entire direct tax-apportionment rule as alive and well. *See Union Elec. Co. v. United States*, 363 F.3d 1292, 1301 (Fed. Cir. 2004) (citing *Pollock*, *Hylton*, and Alexander Hamilton approvingly for the definition of direct taxes subject to apportionment, expressly including "Capitation or poll taxes").

explicitly recognized the apportionment requirement for direct taxes such as a capitation tax.

The second important case in recognizing the distinction between direct and indirect taxes was, as noted above, *Pollock.* In *Pollock*, the Court invalidated an income tax as a direct tax requiring apportionment. Subsequently, the Sixteenth Amendment carved out the singular exception to the direct tax apportionment requirement for income taxes. Following *Pollock*, the Court in *Knowlton v. Moore*, 178 U.S. 41 (1900), upheld an inheritance tax and ruled explicitly that the tax avoids the apportionment requirement of a direct tax because it is an indirect tax in the form of an excise or duty *on the transfer of property*—a specific *activity* tied to an object, not a tax on the person himself.

Finally, in *Eisner v. Macomber*, 252 U.S. 189 (1920), a post-Sixteenth Amendment case that is universally considered one of the most important tax cases in American history and as correctly decided, the Court was asked to determine if a tax on stock dividends was an income tax subject to the Sixteenth Amendment's exception to the apportionment requirement for direct taxes. The Court struck down the stock dividend tax as a direct tax requiring apportionment and in so doing provided a critical gloss on the Sixteenth Amendment's income tax exception to the apportionment rule. According to the Court, the only income taxes that will be considered a direct tax exempted from the apportionment clause are those income

taxes on "derived" income as expressly stated in the Sixteenth Amendment ("from whatever source derived"). Since the tax targeted no gain actually "derived" from something, even though delineated as a tax on income, it fell outside the Sixteenth Amendment's exception to the apportionment rule and was unconstitutional. *Id*. at 207-08.

C. The Individual Mandate's "Penalty," if a Tax, Is a Direct Tax Requiring Apportionment.

1. The Individual Mandate's "penalty" cannot be an indirect excise tax or duty because no activity or use triggers its application.

We begin by taking note that apparently Congress understood at some level the constitutional nuances of the direct-indirect tax dichotomy because it undertook to at least couch the "penalty" as an excise tax by virtue of its placement in one of the Internal Revenue Code's excise tax sections. Thus, the Act's "penalty" mechanism is codified at § 5000A, Chapter 48, Subtitle D, of the Internal Revenue Code. 26 U.S.C. § 5000A ("Miscellaneous Excise Taxes"). But Congress's effort to label something an indirect excise tax (or indeed Defendants' effort to simultaneously label the penalty a direct income tax falling within the Sixteenth Amendment's non-apportionment safe harbor) is wholly ineffective in determining whether the tax is in fact and in law an indirect excise tax subject only to geographic uniformity, a "derived" income tax exempt from the direct tax apportionment requirement, or a direct capitation tax requiring apportionment. This is an analysis this court must make based upon the

structure and effect of the operational statutory language. *Pollock*, 157 U.S. at 554 ("[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.").

This judicial responsibility was underscored quite presciently in *Pollock* when the Court refused to allow Congress to disguise a direct pre-Sixteenth Amendment income tax requiring apportionment as an indirect tax subject only to geographic uniformity, warning that such games would render the Constitution and its limits meaningless:

> If it be true that by varying the form the substance may be changed, *it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation*, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. *It is the substance and not the form which controls*, as has indeed been established by repeated decisions of this court . . . . Chief Justice Marshall said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing."

Id. at 581 (emphasis added); *see also Stadnyk v. Commissioner*, No. 09-1485, 2010 U.S. App. LEXIS 4209, *22-23 (6th Cir. Feb. 26, 2010) (noting that the name given a tax by Congress is not a factor for the court's analysis, but rather the actual form and substance of the tax are what matter) (R-18: Ex. 3, Op.).

The straightforward question, then, is whether the penalty is in fact an indirect

tax such as an excise tax or duty. In other words, is the penalty triggered by an activity or privilege (excise) or on the use or transfer of one's property (excise or duty)? *See generally Thomas v. United States*, 192 U.S. 363 (1904) (citing to the range of indirect taxes approved by the Court); *see also Murphy v. IRS*, 493 F.3d 170, 184 (D.C. Cir. 2007) (citing to *Thomas* and defining an indirect tax as "a tax upon a use of property, a privilege, an activity, or a transaction"); *Stadnyk*, 2010 U.S. App. LEXIS 4209, *22-23 (citing *Murphy* approvingly for the proposition that an indirect tax is a tax on an activity or use or transfer of property and a direct tax is on the person or the person's ownership of property).[21]

The penalty-"tax" imposed by the Act is quite obviously a penalty on non-action (*i.e.*, by expressed statutory language, the penalty is imposed on one who "*fails to meet* the requirement [of the Individual Mandate]"). Even assuming that the taxpayer has made some mental decision not to act (and this is certainly not a given since many taxpayers—like young, single people—will simply not even reach the point of actually making a decision one way or the other, but will simply not consider the question at all), there is no "activity" or "use of property" or "transfer" that takes

[21] It should not go unnoticed that in the history of the United States, there has never been an indirect tax of any kind triggered by inaction on the part of an individual. That is, there has never been a "failure-to-act" tax on an individual. *See, e.g.*, *Commonwealth of Va.*, 2010 U.S. Dist. LEXIS 130814, at *57 n.13 ("If allowed to stand as a tax, the [Individual Mandate] would be the only tax in U.S. history to be levied directly on individuals for their failure to affirmatively engage in activity mandated by the government not specifically delineated in the Constitution.").

place. There is only the sheer existence of the taxpayer (and his or her household) and the *status* of either being insured or uninsured. Only metaphysical fictions and a long chain of causal inferences could possibly convert the status of being an inactive person into a tax on activity. The attempt to engage in alchemy to convert status or inactivity into an indirect tax on activity (and then to argue that this purported indirect tax is actually a direct tax on income) all in an effort to avoid the constitutional requirement of apportionment must fail.

2. The Individual Mandate's "penalty" is manifestly not an income tax exempted from apportionment under the Sixteenth Amendment.

Nowhere in the Act is the penalty "derived" from income.[22] Income simply operates as part of the calculus or, if there is insufficient income, a way to gain an exemption from the penalty. 26 U.S.C. § 5000A(e)(1). But the penalty is derived from the fact of being uninsured and is not "derived" from any income or wealth accumulation. In all of the important Supreme Court cases dealing with the Sixteenth Amendment's exception to the requirement of apportionment for direct income taxes,

[22] Per the Act, the penalty is calculated as the lesser of (i) a calculated amount (see below) or (ii) a determined "national average premium" for a "bronze level of coverage" policy. The calculated amount in (i) above is in turn based upon the greater of (a) a flat amount or (b) a percentage of income; however, even if calculated as a percentage of income, the penalty cannot exceed a certain amount unrelated to income. 26 U.S.C. § 5000A(c). As noted in more detail in the accompanying text, the "penalty" is not "derived" from income but only in a fraction of the cases in which uninsured "freeloaders" are subject to the penalty will income even be used to calculate the amount of the penalty. But the penalty itself is "derived" only from the fact of being or not-being insured—a capitation or head tax based on status.

the Court has been steadfast in requiring that the tax be on "derived income." While the Court has refined the definition of "derived" over the years, it remains the essential characteristic for a direct tax to qualify as an income tax exempted from apportionment under the Sixteenth Amendment. *See generally Macomber*, 252 U.S. at 189 (holding that stock dividends were not derived income because it was not severed from the property); *Helvering v. Bruun*, 309 U.S. 461 (1940) (holding that "severability" did not require physical severance of lessee improvements left over at termination, but there must be an event of increase of wealth and dominion); *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359 (1931) (holding that derived income may be measured through annual rather than transactional accounting methods); *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371 (1934) (holding that Congress may allow or disallow deductions to income tax without regard to whether the qualification for the deduction is based upon derived income, while the income tax must be derived, the deduction regime need not be); *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931) (holding that the discharge of indebtedness income is sufficiently derived to qualify under the Sixteenth Amendment); *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955) (announcing the Court's most famous statement of "derived income," recognizing *Macomber* as its judicial source).

In *Glenshaw Glass*, Chief Justice Warren announced what has become the essential definition of derived income under the Sixteenth Amendment: "[U]ndeniable

accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Glenshaw*, 348 U.S. at 431. Congress did not even attempt to meet this three-fold burden of (i) undeniable accession to wealth, (ii) clearly realized, and (iii) complete dominion by the taxpayer. How does one's status as an uninsured meet any of these requirements? How is this penalty understood to be derived from income in any meaningful way? Indeed, it is not.

And, as such, the *Macomber* Court's careful approach to safeguarding the meaning of constitutional language in the context of the Sixteenth Amendment rings true to this day:

> The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. . . . As repeatedly held, [the Amendment] did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income. . . . *A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.*
>
> In order . . . that the clauses cited from Article I . . . may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not "income," as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, *since it cannot by legislation alter the Constitution*, from which alone it derives its power to legislate, and within whose

limitations alone that power can be lawfully exercised.

Macomber, 252 U.S. at 205-06 (emphasis added).

It should be clear that if the Individual Mandate's penalty is in fact a tax, and if this court finds it even necessary to address the tax question, the penalty-"tax" is a tax on the person based merely on his or her status of being uninsured—that is, the state of being inactive ("fails to meet the requirement"). As such, it is a classic direct tax on the person otherwise referred to as a capitation or head tax. As a capitation tax, the Individual Mandate's penalty is patently unconstitutional in that it is not apportioned and calculated with regard to the population census. Finally, even should this penalty somehow be construed as a kind of income tax, it is not a tax based upon any "derived income" as that term has been defined by the Supreme Court in *Macomber* and its progeny and would thus not qualify for the Sixteenth Amendment's exemption to the apportionment requirement. For these reasons, Plaintiffs respectfully request that this court reject any attempt to bootstrap this Act into constitutional compliance by claiming authority under the Taxing Power.

CONCLUSION

Plaintiffs respectfully request that this court reverse the district court, declare the Individual Mandate provision of the Healthcare Reform Act unconstitutional, and enjoin its enforcement.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.

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 13,976 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2010, 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.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise (P62849)

ADDENDUM: DESIGNATION OF RELEVANT

DISTRICT COURT DOCUMENTS

Record Entry No.	Description
R-1	Complaint
R-7	Plaintiffs' Motion for Preliminary Injunction
	Exhibit 1: Healthcare Reform Act (excerpts)
	Exhibit 2: Amendments to Healthcare Reform Act (excerpts)
	Exhibit 3: CBO Memorandum
	Exhibit 4: Declaration of Plaintiff DeMars
	Exhibit 5: Declaration of Plaintiff Steven Hyder
R-12	Defendants' Response to Motion for Preliminary Injunction
R-14	Defendants' Notice of Supplemental Authority
R-18	Plaintiffs' Reply to Defendants' Response to Motion for Preliminary Injunction
	Exhibit 1: Supplemental Declaration of Plaintiff DeMars
	Exhibit 2: CBO Letter of May 11, 2010
	Exhibit 3: *Stadnyk v. Commissioner*, No. 09-1485, 2010 U.S. App. LEXIS 4209, (6th Cir. Feb. 26, 2010)
R-21	Order Consolidating Hearing on Preliminary Injunction with Trial on Merits pursuant to Fed. R. Civ. P. 65(a)(2)
R-28	Order Denying Plaintiffs' Motion for Injunction and

	Dismissing Plaintiffs' First and Second Claims for Relief
R-29	Stipulated Order Dismissing Remaining Claims without Prejudice
R-30	Notice of Appeal