

**In the United States Court of Appeals  
for the Eighth Circuit**

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PETER KINDER, ET AL.,

*Plaintiffs-Appellants,*

v.

TIMOTHY GEITHNER, ET AL.,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
Eastern District of Missouri – Cape Girardeau

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**BRIEF OF TEXAS, FLORIDA, ALABAMA, ALASKA, ARIZONA,  
COLORADO, GEORGIA, IDAHO, LOUISIANA, MAINE,  
MICHIGAN, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO,  
PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA,  
UTAH, WASHINGTON, AND WISCONSIN, AS AMICI CURIAE  
SUPPORTING APPELLANTS AND REVERSAL**

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## INTEREST OF AMICI CURIAE

The amici curiae States have an interest in enforcing the constitutional limits on federal authority, defending their constitutionally protected prerogatives under the Tenth Amendment, and vindicating the rights of their citizens to make their own health-care decisions. Pursuant to Fed. R. App. P. 29, amici certify that no party or party's counsel authored this brief in whole or in part, and no person other than amici contributed money intended to fund the brief's preparation or submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (ACA) is an extraordinary law that rests on unprecedented assertions of federal authority, pushing even the most expansive conception of the federal government's constitutional powers past the breaking point. *See* Pub. L. No. 111-148, 124 Stat. 119 (2010). The Act imposes a direct mandate upon individuals to obtain health insurance, marking by all accounts the first time in our Nation's history that Congress has required individuals to enter into commerce as a condition of living in the United States. The federal government identifies no limiting principle that would prevent Congress from employing that same power to force

individuals to engage in any manner of commerce so that the federal government may better regulate it. Instead, the federal government embraces a sweeping view of the Commerce Clause — broad enough to reach any subject and encompassing enough to include the power to compel — that would imperil individual liberty, render Congress’s other enumerated powers superfluous, and allow Congress to usurp the general police power reserved to the States.

If this Court were to uphold this assertion of federal power, there would remain little if any power “reserved to the States ... or to the people.” U.S. CONST. amend. X. Because that is plainly not the federal government that the Constitution envisions, if this Court reaches the merits of the claims in this case, it should hold that the individual mandate is unconstitutional.

## ARGUMENT

### **I. The Individual Mandate Exceeds Congress’s Authority To Regulate Interstate Commerce.**

Simply for being alive, an individual, by federal directive, must purchase qualifying health insurance, or have it purchased for him by an employer. *See* 26 U.S.C. § 5000A(a), (d), (f). By attempting to *compel* people to participate in commerce, the individual mandate far

exceeds the federal government’s Commerce Clause authority to “*regulate* commerce.” U.S. CONST. art. I, § 8, cl. 3 (emphasis added). Permitting Congress to force citizens to engage in commerce all the better to regulate them is simply not compatible with a system of enumerated and limited powers or a system of dual sovereignty. Sanctioning such a power would eliminate all meaningful limits on Congress’s authority and sound the death knell for our constitutional structure and individual liberties.

**A. The Power To Regulate Commerce Does Not Include the Power To Compel Individuals To Engage in Commerce.**

- 1. The constitutional text and precedent are clear that the power to regulate commerce does not include the power to compel commerce.**

The Constitution grants Congress authority to “regulate” interstate commerce. Dating all the way back to Chief Justice Marshall, the Supreme Court has repeatedly confirmed that, consistent with its plain meaning, “the power to regulate” is the power “to prescribe the rule by which commerce is to be governed.” *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824). Thus, commerce “is regulated by prescribing rules for carrying on [commercial] intercourse,” *id.* at 190 — *not* by forcing anyone to carry on such intercourse in the first place.

Justice Field similarly explained that “[t]he power to regulate [interstate] commerce ... is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted.” *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885); *see also City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 469–70 (1893).

Even as the challenges of economic modernization have caused the Supreme Court to expand the traditional meaning of “interstate commerce,” *see United States v. Lopez*, 514 U.S. 549, 554–56 (1995), the Court has never questioned that the power to “regulate” commerce is the power to prescribe rules to govern pre-existing, voluntary conduct. Indeed the very breadth of modern Commerce Clause doctrine is what makes so alarming the federal government’s claim that if it may *regulate* conduct, it may also *compel* it. There are now “three general categories of regulation in which Congress is authorized to engage under its commerce power.” *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). Congress may regulate (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) “*activities* that substantially

affect interstate commerce.” *Id.* at 16–17 (emphasis added); *see also United States v. Morrison*, 529 U.S. 598, 609 (2000); *Lopez*, 514 U.S. at 558–59. In the third category, Congress may regulate purely “intrastate *activity*” that is “economic in nature” and that, viewed in the aggregate, has a substantial effect on interstate commerce. *Morrison*, 529 U.S. at 613 (emphasis added); *see Lopez*, 514 U.S. at 559–61; *Raich*, 545 U.S. at 17. Each of these categories presupposes a pre-existing voluntary activity to be regulated. In particular, the third category — the one at issue in this case — requires that the congressional regulation be directed at commercial or economic “activity.” *Morrison*, 529 U.S. at 613.

Regulation of intrastate activity that substantially affects interstate commerce is already at the edge of the Commerce Clause authority because it does not directly regulate interstate commerce itself. Because broad regulation of such intrastate activities creates tension with our federalist system, the courts must resist “additional expansion” of that third category. *See Lopez*, 514 U.S. at 567–68; *accord id.* at 580 (Kennedy, J., concurring). That makes the “activity” limitation crucial, because without it that third category would lose any



claim to be grounded in the Constitution. Congress would no longer be regulating interstate commerce or even activities that substantially affect interstate commerce — instead, it would be reaching out to compel private conduct where there had been no activity, and thus no effect on interstate commerce.<sup>1</sup>

Moreover, Congress’s “plenary” regulatory authority over matters within the scope of its commerce power, *see Gibbons*, 22 U.S. at 197, is strong evidence that Congress may not drag unwilling individuals within the scope of that power. Congress has “direct and plenary powers of legislation over the whole subject” of interstate commerce and

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<sup>1</sup> That the individual mandate also compels conduct by individuals who have engaged in the voluntarily activity of purchasing health insurance, or are otherwise within the scope of Congress’s commerce power, does not alter the constitutional analysis. *But see Thomas More Law Center v. Obama*, \_\_\_ F.3d \_\_\_, 2011 WL 2556039, at \*33 (6th Cir. June 29, 2011) (opinion of Sutton, J.). The mandate does not regulate existing participation in commerce; it compels all individuals to purchase health insurance. Because Congress lacks power to do so under the Commerce Clause, the mandate is unconstitutional in all of its applications. That much is clear from *Lopez*, which facially invalidated the Gun-Free School Zones Act notwithstanding the fact that the Act reached some individuals and activities that were within Congress’s commerce power. *Lopez*, 514 U.S. at 561–62. Although Congress might constitutionally have enacted a statute that applied only to paid gun couriers or guns in interstate commerce, Congress in fact enacted a statute that prohibited all gun possession near a school. Because Congress lacked Commerce Clause authority to do so, the Act was invalid in all of its applications. *Id.*

therefore “has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals [in] respect thereof.” *Civil Rights Cases*, 109 U.S. 3, 18 (1883). Indeed, Congress has “full control” of “the subjects committed to its regulation.” *North Am. Co. v. SEC*, 327 U.S. 686, 705 (1946) (quoting *Minn. Rate Cases (Simpson v. Shepard)*, 230 U.S. 352, 399 (1913)). If the Constitution gave Congress authority to draft individuals not just for military service, but for any activity directly affecting interstate commerce, and then to exercise full control over them, the Framers surely would have proposed far more protections in the Bill of Rights or rejected this dangerous new power altogether. But they did neither, precisely because the commerce power was not some vortex of authority that rendered the entire process of enumeration beside the point. *Cf.* THE FEDERALIST No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961) (the commerce power “seems to be an addition which few oppose, and from which no apprehensions are entertained”).

**2. Congress has never before attempted to use the Commerce Clause to compel private commercial activity.**

The absence of historical precedent for the exercise of such an extraordinary authority is revealing; if Congress actually possessed this power, it is doubtful that it would have taken two centuries to exercise it. When “earlier Congresses avoided use of” a “highly attractive power,” that avoidance is “reason to believe that the power was thought not to exist.” *Printz v. United States*, 521 U.S. 898, 905 (1997); *see also Alden v. Maine*, 527 U.S. 706, 743–44 (1999).

Congress’s own legal advisers have repeatedly confirmed that there is no historical precedent for this asserted power. In 1994, the nonpartisan Congressional Budget Office observed that a “mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.” CBO, *The Budgetary Treatment of an Individual Mandate To Buy Health Insurance* 1 (1994) [hereinafter “CBO Report”]. The CBO explained that the federal government “has never required people to buy any good or service as a condition of lawful residence in the United States.” *Id.* Rather,

Congress has generally limited itself to imposing “[f]ederal mandates” that “apply to people as parties to economic transactions.” *Id.* at 2.

Similarly, during the debate over the current version of the individual mandate, the nonpartisan Congressional Research Service advised that “[d]espite the breadth of powers that have been exercised under the Commerce Clause,” it is “a novel issue whether Congress may use this clause to require an individual to purchase a good or service.” CRS, *Requiring Individuals To Obtain Health Insurance: A Constitutional Analysis* 3 (2009). And while differing on the constitutional bottom line, courts have uniformly agreed that the individual mandate is unprecedented. *See Mead v. Holder*, 766 F. Supp. 2d 16, 36–37 (D.D.C. 2011); *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 at \*20 (N.D. Fla. Jan. 31, 2011); *Virginia ex rel. Cucinelli v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010).

The absence of prior Commerce Clause legislation mandating private activity is not for lack of a motive; Congress previously declined to exercise that power even in situations where it obviously would have

been expedient. For example, when it became evident that “relatively few individuals” were voluntarily purchasing flood insurance under the National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572, Congress made the purchase of flood insurance a prerequisite for participation in certain voluntary economic transactions. *See* 42 U.S.C. § 4012a(a) (no federal financial assistance for acquisition or construction of a building without flood insurance); *id.* § 4012a(b)(1) (federally regulated lenders may not make loans secured by property without flood insurance). How much simpler to directly compel the purchase of such insurance; yet Congress never mandated the purchase of flood insurance by everyone in the flood plain.

The very same arguments the government is now making in defense of the individual mandate to purchase health insurance would have applied with equal force to a flood insurance mandate: Most individuals living in flood hazard areas will suffer flood-related losses at some point, and those losses are likely to be distributed throughout society by mechanisms such as governmental disaster relief. That Congress did not mandate the purchase of flood insurance by persons

living in flood plains, despite the obvious practical benefits of doing so, strongly suggests that Congress thought it lacked that power.

Similarly, a power to compel commerce would be particularly attractive during a recession, when congressional efforts to stimulate the economy are often frustrated by individuals' decisions to save rather than spend. *See* Edmund L. Andrews, *Economists See a Limited Boost from the Stimulus*, N.Y. TIMES, Aug. 7, 2009, at A1. How much better for the long-run deficit and the short-term economy to mandate spending by individuals; yet Congress instead tinkered with different mechanisms for encouraging individuals voluntarily to spend more. *See* Michael Cooper, *From Obama, the Tax Cut Nobody Heard Of*, N.Y. TIMES, Oct. 19, 2010, at A1 (reporting that in light of "evidence that people were more likely to save than spend the tax rebate checks they received," Congress "arranged for less money to be withheld from people's paychecks"). Indeed, even during the Great Depression and two world wars, the government did not claim such a power.

"Federal mandates that apply to individuals as members of society are extremely rare," CBO Report at 2, and non-existent under the Commerce Clause. The "numerousness" of federal statutes regulating

voluntary commercial and economic activity, “contrasted with the utter lack of statutes” mandating such activity, is compelling evidence of the “assumed *absence* of such power.” *Printz*, 521 U.S. at 907–08.

**B. The Power To Regulate Commerce Does Not Authorize the Lifelong Regulation of Every Citizen on the Ground that Most Will, at Some Point, Engage in Commerce in the Future.**

Under correct legal principles, Congress’s findings underlying the Act are plainly insufficient. Congress found that the *mandate itself* “is commercial and economic in nature, and substantially affects interstate commerce.” ACA § 1501(a)(1). That focus on regulatory impact, rather than pre-existing commercial activity, only underscores the absence of constitutional authority under correct legal standards — instead of regulating *activity* with substantial effects on interstate commerce, Congress apparently considered it sufficient that the *regulation* itself would have such effects. Requiring everyone to buy an airplane would certainly have a substantial effect on interstate commerce, but that hardly brings such a mandate within Congress’s Commerce Clause authority. Congress also found that the “decision” not to purchase a product, such as health insurance, is itself “economic activity.” ACA § 1501(a)(2)(A). But treating a mental process as the relevant “activity”

only underscores the absence of actual activity and the troubling lack of a limiting principle.

1. **It is not inevitable that everyone will purchase health insurance or consume health care services.**

In the numerous cases challenging the constitutionality of the ACA, the government's defense of the individual mandate has proceeded in three steps. First, it identifies a broad national market for health care services. Second, the government claims that virtually all citizens participate in this broadly defined market. Third, the government contends that Congress may impose on all citizens a requirement to purchase health insurance as a means of regulating the way those citizens pay for services in the interstate health care market.

The government's theory thus boils down to the claim that if it can identify an "interstate market" in a broadly defined commodity, such as "health care services," that *most* individuals will need to consume *at some point* in their lives, it can then regulate *everyone* at *every* moment of their lives, from cradle to grave, as if they were at that very moment active participants in the interstate market in question. That is troubling and far too broad. Just as "depending on the level of generality, any activity can be looked upon as commercial," *Lopez*, 514



U.S. at 565, the government's theory shows that, depending on the level of generality, anyone, no matter how dormant, could be looked at (under the government's approach) as participating in a market.

In the first place, the relevant market here is insurance, not health care. The individual mandate does not force participation in the health care market or even mandate the use of insurance once purchased. Instead, it forces people to pay now for health care that they may or may not receive at some point in the future. But many people voluntarily decide to forego the purchase of health insurance, and many do so for reasons having nothing to do with the incentives created by other federal programs.

The government has attempted to distinguish health insurance on the ground that everyone will participate in the health care market at some point. But that is not strictly true, and does not render the market unique. The government cannot contend that *all* these individuals will necessarily participate in the health care market (much less that they will all fail to pay for any services). Some will not participate due to religious scruples or individual circumstances. Indeed even the government concedes that participation in the health

care market is not truly universal, as it feels the need to qualify its still-expansive claim that “[v]irtually all Americans participate” in the health care market. And participation in the health care market is not as truly universal as participation in the market for basic necessities, like food and clothing.

Moreover, even if it were permissible (it is not) for Congress to adopt a false presumption that every individual will participate in the health care market at some point in time, Congress still would not have the power to force individuals into the market at *other* times. An individual becomes subject to regulation only at the point at which the individual engages in a “commercial transaction” or other “economic activity” in or substantially affecting interstate commerce. *Lopez*, 514 U.S. at 560–61. The Court has never held commercial regulation justified based on a mere likelihood of economic activity at some unknown, perhaps distant, point in the future.

- 2. Exercising regulatory authority over everyone on the theory that most people will eventually engage in an activity would impermissibly give Congress an unbounded police power.**

This novel theory — that Congress may exercise its plenary commerce power over *all* individuals at *all* times based on the likelihood

that *most* citizens will participate in a broadly defined national market at *some* time — fails for the additional reason that it would vastly expand congressional power at the expense of States and our system of dual federalism. The “Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States.” *Morrison*, 529 U.S. at 618 n.8 (quoting *New York v. United States*, 505 U.S. 144, 155 (1992)) (internal quotation marks omitted). Thus, the “scope of the interstate commerce power ‘must be considered in light of our dual system of government, and may not be extended so as to ... obliterate the distinction between what is national and what is local and create a completely centralized government.’” *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). In particular, the Commerce Clause may not be read to grant the federal government “a general police power.” *Lopez* at 567; *see id.* at 564.

But that is precisely what the government’s theory would do. Every individual would be at all times subject to federal regulation of his or her private decisions related to health care or anything else that substantially affects interstate commerce (which it to say, almost

everything). There is no logical reason why such regulation would have to be limited to the decision whether to purchase health insurance. Congress could regulate other decisions bearing on an individual's supposed "active participation in the health care market," such as whether to have an annual physical or to undertake certain courses of treatment. The federal government's interest in controlling the cost of health care would likewise give Congress authority to order individuals to eat more vegetables and fewer desserts, to exercise at least 45 minutes per day, to sleep at least eight hours per day, and to drink one glass of wine a day but never any beer. Congress could rationally conclude that such mandates would control health-care costs, more directly and perhaps more effectively, than ordering people to pay for services in a particular way.

Even apart from health care, most citizens participate in a number of interstate markets at some point in their lives, including markets for housing, food, clothing, education, and transportation. Indeed, the need for food and clothing is at least as pressing and ubiquitous as health care. By the government's logic, Congress could legislate as if all citizens were participants in those interstate markets

at all times, and tell them what type of housing, food, and clothing to consume, and how to pay for them.

This is precisely the sort of limitless reading of the Commerce Clause that the Supreme Court has foreclosed. So long as the commerce power is “subject to outer limits,” *Lopez*, 514 U.S. at 557, it cannot be invoked to justify the imposition of a cradle-to-grave regulatory regime on all or nearly all individuals in the United States.

**3. “Cost-shifting” is neither unique to the health care context nor a basis for departing from fundamental constitutional precepts.**

The government has suggested that “cost-shifting” is a unique feature that distinguishes the health care services market from other markets and justifies the especially intrusive regulation represented by the individual mandate. But uniqueness is not a talisman that justifies the government’s use of unconstitutional means; if anything, the government’s repeated emphasis on purported uniqueness only underscores its lack of a viable legal theory. And as noted above, the only thing that is really unique here is Congress’s unprecedented attempt to use its authority to regulate commerce as a basis for conscripting people into participating in commerce.

Cost-shifting is certainly not unique to this context. It is an inherent aspect of many markets due to the frequent availability of bankruptcy protection and other government-funded financial assistance and services. On the same rationale, therefore, the government could require everyone to adopt arguably prudent practices to protect their financial status, as well as that of their dependents, by, for example: maintaining minimum levels of life insurance; avoiding risky investments; and not incurring more than a certain amount of debt. Similarly, because the eventual need for burial or cremation services is at least as likely as the need for health care, the government would evidently assert authority to require everyone to pre-pay for a coffin or urn, to avoid shifting costs onto the public.

The Supreme Court rejected a similar cost-shifting and insurance rationale in *Lopez* and *Morrison*. In *Lopez*, the government argued that Congress could regulate violent crime under the commerce power because “the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population.” 514 U.S. at 563–64. The Court reasoned that under this cost-shifting and insurance rationale, “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.” *Id.* at 564. *Morrison* similarly rejected the government’s argument that gender-motivated violence affects interstate commerce by, among other things, “increasing medical and other costs.” 529 U.S. at 615.

The cost-shifting and insurance rationale is even weaker here insofar as the government would apply it to almost *all* Americans solely for being alive, not only to people who engage in specific targeted activities. And unlike violent crime, the cost-shifting problem is also of Congress’s making — Congress made the decision to guarantee free healthcare to uninsured individuals through the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. It is absurd to argue that Congress’s decision to make healthcare available for *free* gives it authority to force everyone to *pre-pay* for that service (regardless of whether they ever use or want it).

**C. The Individual Mandate Is Not a Necessary and Proper Means of Executing the Commerce Power.**

The government nonetheless has argued that the individual mandate is justified under the Necessary and Proper Clause. But even

that “last, best hope of those who defend ultra vires congressional action,” *Printz*, 521 U.S. at 923, cannot be stretched so far.

As the Supreme Court has long held, a law that is inconsistent with the “letter and spirit” of the Constitution is not a “proper” means of executing an enumerated power. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). The Court has also made clear that when a law violates fundamental constitutional principles, “it is not a ‘La[w] ... *proper* for carrying into Execution the Commerce Clause,’ and is thus, in the words of the Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’” *Printz*, 521 U.S. at 923–24 (alterations in original) (citation omitted); *see also Alden*, 527 U.S. at 733–34 (same). One such principle, which is “deeply ingrained in our constitutional history,” is that the “Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States.” *Morrison*, 529 U.S. at 618 n.8 (quoting *New York*, 505 U.S. at 155) (internal quotation marks omitted). These “precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government” under the Necessary



and Proper Clause. *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring).

As explained above, the individual mandate would violate the fundamental constitutional principle that the federal government is one “of limited powers.” *Morrison*, 529 U.S. at 618 n.8. It is far from “Proper” to eviscerate that basic constitutional precept.

Moreover, the mandate is not “incidental” (*McCulloch*, 17 U.S. at 411) to some other legitimate regulation under the Commerce Clause. Congress sought to “increase the number and share of Americans who are insured,” ACA § 1501(a)(2)(C), and it did so by the most direct route available: requiring them to be insured. Thus this is not a means to some legitimate end, but an end in itself. The Supreme Court has long held that Congress may not invoke the Necessary and Proper Clause to exercise any “great substantive and independent power,” only powers that are “incidental to those powers which are expressly given” and which “subserve the legitimate objects of” the federal government. *McCulloch*, 17 U.S. at 411. But the power exercised here is distinct from any Commerce Clause power ever exercised and could not have been granted without prompting contemporaneous objection. The

fundamental problem is that Congress has invoked a power that it was not granted under the Commerce Clause, the Necessary and Proper Clause or anywhere else.

The multi-factor inquiry used by the Supreme Court in its most recent exposition of the Necessary and Proper Clause confirms that the individual mandate is not necessary and proper. *See Comstock*, 130 S. Ct. at 1949. *Comstock* upheld a civil-commitment statute for prisoners with certain mental health issues after considering four contextual factors, *none* of which supports invocation of that Clause here.

While there was a “long history of federal involvement” in prison-related mental health statutes, *id.*, there is no history of the federal government mandating the purchase of health insurance (or any other commodity). Similarly, the individual mandate is not “reasonably adapted” to Congress’s “responsibilities.” *Id.* at 1961–62. Unlike *Comstock*, where the common law imposed obligations on the government as custodian, the federal government has no legal duty to undertake the unprecedented step of providing or mandating health care to everyone legally in the country.

Nor does the individual mandate have only a “narrow” scope. *Id.* at 1949, 1364–65; *cf. Lopez*, 514 U.S. at 566 (“the question of congressional power under the Commerce Clause is ‘necessarily one of degree’”) (citation omitted). It applies to almost everyone legally living in the United States, solely because they live in the United States. 26 U.S.C. § 5000A(a), (d).

The individual mandate certainly does not “accommodat[e] state interests” by leaving them any choice in the matter, *Comstock*, 130 S. Ct. at 1962; instead, it overrides state interests in favor of a one-size-fits-all federal mandate, even in those States like Idaho, Utah, and Virginia that have enacted laws expressly guaranteeing their citizens the freedom to choose not to purchase health insurance. *See* IDAHO CODE ANN. § 39-9003; UTAH CODE ANN. § 63M-1-2505.5; VA. CODE. ANN. § 38.2-3430.1:1.

The manner in which the individual mandate runs roughshod over state interests is particularly egregious given that protection of the public health lies at the core of the States’ traditional police power. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982); *Head v. N.M. Bd. of Exam’rs in Optometry*, 374 U.S. 424, 428 (1963).

The lack of any limiting principle on this power and the reality that it amounts to a federal police power vitiates any reliance on the Necessary and Proper Clause. *See Comstock*, 130 S. Ct. at 1964 (“Nor need we fear that our holding today confers on Congress a general ‘police power, which the Founders denied the National Government and reposed in the States.’” (quoting *Morrison*, 529 U.S. at 618)). When, as here, the fundamental problem with the federal government’s Commerce Clause theory is the lack of a limiting principle, its resort to the Necessary and Proper Clause to *augment* that power, and make it more like a federal police power is a non-sequitur. Unlike *Comstock*, this *is* a case in which “the National Government relieves the States of their own primary responsibility to enact laws and policies for the safety and well being of their citizens” and “the exercise of national power intrudes upon functions and duties traditionally committed to the State.” *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring in the judgment).

**D. The Individual Mandate Is Not a Valid Exercise of Congress’s Taxing Power.**

The government has also suggested that even if the individual mandate is not a valid exercise of Congress’s commerce power, it is nonetheless a valid exercise of Congress’s power to “lay and collect

Taxes.” U.S. CONST. art. I, § 8, cl. 1. Like every other court to consider the issue, the district court correctly rejected the government’s argument. *See Thomas More Law Center v. Obama*, \_\_\_ F.3d \_\_\_, 2011 WL 2556039, at \*17–\*21 (6th Cir. June 29, 2011) (opinion of Sutton, J.); *Mead*, 766 F. Supp. 2d at 40–41; *Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.*, 764 F. Supp. 2d 684, 695–97 (M.D. Pa. 2011); *Virginia*, 728 F. Supp. 2d at 786–88; *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 628–30 (W.D. Va. 2010); *U.S. Citizens Ass’n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010); *Thomas More*, 720 F. Supp. 2d at 890–91.

Whether the statutory penalty for not complying with the individual mandate is a tax is ultimately irrelevant in a challenge to the mandate itself, which is clearly not a tax. The ACA mandates that nearly every individual in the United States “*shall* ... ensure that the individual ... is covered under minimum essential coverage” as defined by federal law. 26 U.S.C. § 5000A(a) (emphasis added). Congress then imposed a “penalty” on any individual who “fails to meet the requirement” of that individual mandate. § 5000A(b)(1). Plaintiffs’ main constitutional challenge is to the mandate itself, which makes it

unlawful not to secure qualifying health insurance coverage; the “penalty” for failure to comply is invalid simply as a consequence of the mandate’s invalidity.

Cases the government has relied on in arguing to the contrary are beside the point because they do not involve the constitutionality of a regulatory prohibition or requirement, as opposed to a tax. For example, *United States v. Sanchez*, 340 U.S. 42, 45 (1950), involved a tax on transferring a drug where the “transfer is *not* made an unlawful act under the statute” (emphasis added); instead of mandating or prohibiting any activity, Congress simply taxed it. Similarly, in *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937), the Court emphasized that “[t]he case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations.” It would be unprecedented to uphold as a valid exercise of the taxing power an act of Congress that on its face purports to impose a direct regulatory mandate on individual conduct.

The distinction is not a mere formality; there are important differences between a regulation directly mandating certain conduct and a tax encouraging that conduct. Most obviously, when Congress provides incentives through the tax code, the choice whether to take advantage of those incentives remains with each individual; but when Congress expressly mandates an action, law-abiding individuals must comply. Tax and regulatory legislation are also treated differently under the Constitution. *See* U.S. CONST. art. I, § 7, cl. 1 (“All bills for raising revenue shall originate in the House of Representatives ....”). Finally, whether a measure is structured as a tax or a regulation has tangible consequences in terms of public perception and political accountability.

Finally, the legislation would still be unconstitutional even if Congress had not imposed a direct regulatory mandate and even if it had not chosen to treat the penalty as a penalty rather than a tax. The taxing power is broad, but not so broad as to eliminate constitutional limits on Congress’s regulatory authority. Thus, the Supreme Court has long recognized that “the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with

respect to which the Congress has no authority to interfere.” *United States v. Butler*, 297 U.S. 1, 70 (1936).

While the Supreme Court has cut back on some of the limits it used to impose on the taxing power, it has never abandoned, and instead has reaffirmed, the principle that “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.” *Dep’t of Rev. of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (quoting *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46 (1934)).<sup>2</sup> The Supreme Court certainly would not have upheld the federal intrusions into traditional State domains at issue in *Lopez* and *Morrison* if Congress had simply imposed a “tax penalty” for gender-motivated violence or possession of a gun in a school zone. This Court need not reach that question, however, because Congress expressly imposed a direct regulatory mandate, instead of imposing only a tax on lawful conduct.

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<sup>2</sup> The Supreme Court’s statement in a footnote in *Bob Jones University v. Simon*, 416 U.S. 725, 741 n.12 (1974) that it had “abandoned” “distinctions between regulatory and revenue-raising taxes” such as those drawn in *Hill v. Wallace* was dictum that has been superseded by *Kurth Ranch*’s recognition of the continued viability of such distinctions.



## CONCLUSION

For the foregoing reasons, if the Court reaches the merits of this case, it should hold the individual mandate unconstitutional.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 5,832 words as determined by the word-counting feature of Microsoft Word 2007. The font used is Century Schoolbook at 14-point type.

I also certify that the Brief has been scanned for viruses and is virus-free.

/s/ Paul D. Clement

July 18, 2011

## CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on this 18th day of July, 2011, I caused the foregoing brief to be filed with the Clerk of the Court through the Court's EM/ECF system, which will serve electronic copies on all registered counsel.

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