No. 11-398

In the
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

v.

STATE OF FLORIDA, ET AL.,

On Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE COMMONEALTH OF VIRGINIA EX REL. ATTORNEY GENERAL KENNETH T. CUCCINELLI, II, IN SUPPORT OF APPELLEES ON THE ISSUE OF THE UNCONSTITUTIONALITY OF THE MANDATE AND PENALTY IN WHICH VIRGINIA GOVERNOR ROBERT F. MCDONNELL AND THE REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE JOIN

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INTEREST OF THE AMICI AND BASIS OF AUTHORITY TO FILE

The parties to this brief *amicus curiae* are the Commonwealth of Virginia, by and through its Attorney General, the Governor of Virginia, and the Republican Governors Public Policy Committee. This brief is authorized to be filed pursuant to Rule 37.4, Rules of the United States Supreme Court and the blanket consents filed in No. 11-398. In addition to the interest asserted by Virginia in support of standing in No. 11-420, governors have an interest in not having to elect between administering an unconstitutional regime or submitting to federal administration of the health care law in their states. As chief executive officers of their states, governors must submit and live within balanced budgets while carrying out the daily execution of laws imposed upon them by their state and the federal government. The administrative and financial mandates imposed on the states through the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (PPACA), will unreasonably burden governors in carrying out the duties of their office as imposed by their respective state constitutions.

Furthermore, PPACA burdens states directly by eliminating traditional powers and increasing costs of administration. For example, Section 1321 abolishes the states' traditional authority to regulate health insurance. A responsibility that states have taken seriously and are best situated to handle given they know best the particular needs of, and are more directly accountable to, their citizens. Additionally, Section 2001(a) requires states to increase Medicaid eligibility. This will result in as many as 425,000 new enrollees in Virginia alone at the cost of 2.2

billion between now and 2022. The State of Utah estimates that up to 250,000 cases will be added to their roles as a result of PPACA at an initial cost of up to $26,215,150.00, simply for systems and case maintenance. During fiscal year 2011, Utah accounted for over 5,700 hours of personnel time related to PPACA, equating to approximately $182,000 in personnel costs.

On February 1, 2012, the actuarial consulting firm Milliman, Inc., released a report commissioned by Medicaid Health Plans of America. The report concluded that the PPACA health insurer fee will act as a tax on both the United States and the states. This will further exacerbate the very difficult fiscal problems of the states by providing less flexibility with Medicaid funding and ultimately resulting in fewer choices and services for the poor.

The Republican Governors Public Policy Committee ("RGPPC") is a Section 501(c)(4) social welfare organization incorporated in the District of Columbia. Its members are the Republican governors of the U.S. states and territories. The RGPPC's mission includes promoting social welfare and efficient and responsible government practices; advocating public policies that reduce the tax burdens on U.S. citizens, strengthen families, promote economic growth and prosperity, and improve education; and encouraging citizen participation in shaping laws and regulations relating to such policies.

SUMMARY OF ARGUMENT

Competing presumptions respecting constitutionality are implicated in this suit. The affirmative presumption of constitutionality should be at its weakest because PPACA was adopted outside of regular order and because Congress took no hard look at its own authority. As a consequence, PPACA has a common fame of irregularity. On the other hand, the sheer novelty of Congress's claim to a power, unlimited in principle, to require a citizen to purchase a good or service from another gives rise to a negative presumption that no such power exists.

Recourse to the usual tools of constitutional interpretation - text, historical context, tradition, and precedent - clearly establish that the mandate and penalty of PPACA are beyond the affirmative and negative limits of the Commerce Clause even as aided by the Necessary and Proper Clause.

ARGUMENT

I. THE PRESUMPTION OF CONSTITUTIONALITY ATTACHING TO PPACA IS WEAK OWING TO THE IRREGULAR PARLIAMENTARY PROCESS EMPLOYED IN ITS ENACTMENT

Even before actually exercising the power of judicial review to strike down an act of Congress in *Marbury v.* Madison, 5 U.S. (1 Cranch) 137 (1803), this Court assumed the existence of the power by reviewing and upholding an act of Congress in *Hylton v. United States*, 3 U.S. (Dallas) 171 (1796). Justice Chase, however, remarked in his opinion: "As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case." *Id.* at 175. He repeated this formula with respect to treaties in *Ware v. Hylton*, 3 U.S. (Dallas) 199, 237 (1796), and again in *Calder v. Bull*, 3 U.S. (Dallas) 386, 395 (1798), with respect to a challenge to a state law under the *ex post facto* clause. These statements have been viewed as the foundation for a presumption of constitutionality, David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888,* at 33 (University of Chicago Press 1985), although the same author notes uncertainty about "its consistency with *Marbury's* conclusion that the judges are oath-bound to disregard a law that offends the Constitution." *Id*).

There is doctrinal and philosophical support for such a presumption resting upon notions of separation of powers, particularly when it appears that Congress

has taken a 'hard look' at its own powers. *See* Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, at 64-65 (Vintage Books 2006). But the force of any presumption should be at its weakest when legislation has a common fame of irregularity such as that which attached to the Kansas Nebraska Act of 1854, repealing the Missouri Compromise. 10 Stat. 277. As reported by *The Weekly Standard* on January 31, 2011, pollsters Patrick Caddell and Douglas Schoen have written: "it could even be that no such piece of major legislation has created the continued, vehement public opposition that health care has provoked since the Kansas-Nebraska Act of 1854 . . . " http://www.weeklystandard.com/blogs/political-consequences-obamacare_537735.html, page 1 of 3.

Aside from substance, a serious problem with the Kansas-Nebraska Act was that it passed the House with the aid of those who purported to oppose it on the merits. On May 15, 1854, there "was a roll call . . . in the House, not the Committee of the Whole, that required a two-thirds vote to postpone consideration of a Pacific railroad bill from May 16 to May 24 in order to allow continued action on the Nebraska bill in committee." Michael F. Holt, *The Rise and Fall of the American Whig Party*, at 820 (Oxford University Press (paperback edition 2003) (© 1999 by Michael F. Holt). "Had that procedural roll call been defeated, it is likely that the Nebraska bill would have been permanently buried, but it passed by a margin of 123-53, 16 more than the necessary two-thirds majority." *Id.* There were also resorts to unusual parliamentary maneuvers. The House manager Alexander H.

Stephens would also discover or remember an obscure procedural rule by which the Nebraska bill was finally removed from the Committee of the Whole without the possibility of further amendment on the House Floor and forced a vote on final passage." *Id.* The vote was 113-110 on accepting the Senate bill as a substitute. *Id*. at 821. The Senate bill itself had passed the Senate a few minutes before five in the morning of March 4, following a session of seventeen hours. John William Burgess, *The Middle Period, 1817-58* at 398 (New York Charles Scribner's Sons 1897) (Google Books). The Albany, New York *Evening Journal*, in its May 23, 1854 edition, opined: "It was fitting that the Law should be passed as it was. It was in accordance with its spirit that it should be concerned in treachery, sprung upon the House by a fraud and forced through it by a parliamentary lie." Bleeding Kansas: A Narrative Guide to the Sources, http://www.assumption.edu/ahc/Kansas/default.html, pages 2-3 of 14. That this reflected mass opinion is suggested by the fact that the Northern Democrats who passed the law "suffered a massive rebuke at the hands of the electorate." Holt at 838.

Similarly, PPACA was not passed through any process resembling regular order. The United States Senate passed PPACA late on Christmas Eve 2009 as a floor substitute on a straight party line vote. The legislative vehicle was a House tax bill chosen to satisfy the Originating Clause for the taxes in PPACA. See Const. Art. I, § 7; PPACA § § 9001; 9004; 9015; 9017; 10907 (taxes). PPACA was passed, without committee hearing or report, employing such florid deal-making as to

generate scornful popular terms like "the Louisiana Purchase" and "the Cornhusker Kick-back."

PPACA passed the Senate on cloture with considerable minority protest. *See, e.g.*, Cong. Rec. Nov. 2, 2009 S10965 (no bill); *id.*, S10973 (bill being drafted behind closed doors); *id.*, Nov. 17, 2009 S11397 ("The majority leader has had in his office a secret bill that he is working on that we have not seen yet."); *id.*, S11401 (No Child Left Behind got 7 weeks on the floor – "We don't even have a bill yet"); *id.*, Nov. 19, 2009 S11819 (bill is a shell, not a real one); *id.*, Nov. 30, 2009 S11982 (official debate begins); *id.*, Dec. 3, 2009 S12263 (bill has been on floor for 3 days and never has been in committee); *id.*, Dec. 5, 2009 S12487 (majority will not slow down); *id.*, Dec. 11, 2009 S12981 ("We are going to have three Democratic amendments and one Republican amendment voted on, and the Democrats wrote the bill"); *id.*, S12977 (votes on amendments blocked; "In the meantime, this backroom deal that is being cut, which we haven't seen – supposedly it has been sent to the CBO to see what it would cost"); *id.*, Dec. 14, 2009 S13144 ("There is somewhere in this building a hidden bill, known as the manager's amendment, which is being drafted by one or two or three people . . ."); *id.*, Dec. 17, 2009 S13344 (bill is not being given the legislative time it deserves because the polls show a majority of Americans are against it and thus it has become a political nightmare for the majority who now simply want to ram it through before Christmas even though "no one outside the majority leader's conference room has seen it yet"); *id.*, Dec. 22, 2009 S13756

(Nebraska deal); *Id.*, Mar. 10, 2010 H1307 (reconciliation being used because bill could not re-pass the Senate).

PPACA has roiled America. In the 2010 midterm election, the party that unanimously opposed PPACA in the House of Representatives saw its largest electoral gains in over seventy years. With the intervention of six additional states in the Florida suit on January 19, 2011, it became possible for the first time in American history to count a clear majority of states in litigation with the federal government, each claiming that the federal government has exceeded its enumerated powers. That same day the House of Representatives voted to repeal PPACA on a vote of 245 to 189. On January 21, 2011, Oklahoma filed suit in the Eastern District of Oklahoma to vindicate a recently enacted constitutional amendment which conflicts with PPACA.

To the extent that a presumption of constitutionality arises from regular order and a hard look by Congress at the limits of its own power, those conditions are simply not present with PPACA. On October 22, 2009, the then Speaker of the House captured a certain prevailing mood when she famously replied "Are you serious? Are you serious?" when asked where the Constitution conferred the power on Congress to require a citizen to purchase a good or a service from another citizen. Flashback: Pelosi on Obamacare's Constitutionality: 'Are You Serious?,' Matt Cover and Michael W. Chapman, http://cnsnews.com/news/article/flashback-pelosi-obamacares-constitutionality-are-you-serious

II. THE FACT THAT CONGRESS HERETOFORE HAS NEVER CLAIMED THE POWER TO REQUIRE A CITIZEN TO PURCHASE A GOOD OR SERVICE FROM ANOTHER CITIZEN TENDS TO NEGATE THE EXISTENCE OF THAT POWER.

The Attorney General of Virginia has previously noted that:

> This is an odd moment in American history for Congress to claim the power to require one citizen to purchase a good or service from another. It has been asserted only recently without judicial foreshadowing or doctrinal preparation. Because of its sheer novelty, it arrives in the courts with a presumption of invalidity.

Cuccinelli, et al, *Why the Debate Over the Constitutionality of the Federal Health Care Law is About Much More Than Healthcare*, 15 Texas Review of Law & Politics, 334-35 (2011) (citing *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010); *Prinz v. United States*, 521 U.S. 898, 918 (1997)).

This Court in *Free Enterprise Fund*, 130 S. Ct. at 3159, quoted Judge Kavanaugh's dissent in the Court of Appeals:

> "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency."

In *Printz*, 521 U.S. at 918, the Court said the fact that Congress had not asserted a particular power for 200 years "tends to negate the existence of that power." *See also*, *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity").

In the case of PPACA, the lack of historical precedent was well known to Congress before it acted. At the heart of PPACA is § 1501, which generally requires American citizens to purchase a good or service from other citizens, namely, a health insurance policy. Although Congress purported to be exercising Commerce Clause powers in enacting PPACA, this claim was known to be problematical. When the Senate Finance Committee asked the Congressional Research Service whether a mandate supported by a penalty would be constitutional, the response was equivocal: "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service." Jennifer Stahan and Cynthia Brougher, Cong. Research Serv., *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (2009). *See also,* Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.") Because an intervening election in Massachusetts removed the availability of cloture in the Senate, PPACA was necessarily passed by the House of Representatives unaltered. Pub. L. No. 111-152, 124 Stat. 1029).

III. THE MANDATE AND PENALTY ARE CONTRARY TO THE TEXT OF THE COMMERCE CLAUSE AND FOUNDATIONAL UNDERSTANDINGS.

A. The Mandate and Penalty are Not Supported by the Text of the Commerce Clause.

Article I, § 8 of the Constitution provides that "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Our classically educated Founders would have known that the word "commerce" is derived from the Latin *commercium*. *See* N. Baily, *Dictionarium Britannicum or a more complete Universal Etymological English Dictionary than any Extant* (London 1730); *A Pocket Dictionary* (3d ed. London 1765) (both available at The Library of Virginia Special Collections). Thus, they would have understood commerce as comprehending "traffick, dealing, merchandise, buying and selling, bartering of wares; also an intercourse or correspondence of dealing . . . ". Adam Littleton, *Dr. Adam Littleton's Latin dictionary, in four Parts: I. An English-Latin, II. A Latin-classical, III. A Latin-Proper, IV. A Latin-barbarous*, Part II (no pagination) (6th ed. London 1735) (Library of Va.). Had they consulted John Mair, *The Tyro's Dictionary, Latin and English* at 96 (2d ed. Edinburgh 1763) (Library of Virginia with autograph of P. Henry and of Patrick Henry Fontaine), they would have seen *commercium* rendered as "trade, traffic, commerce, intercourse." Those who stopped with an English dictionary might have seen commerce defined as "trade or traffick in buying or selling." N. Baily, *supra*. This collection of terms is the way that the word has been historically understood both in language and law. Noah Webster in 1828 defined commerce as "an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale; trade; traffick." Noah Webster, *An American Dictionary of the*

English Language at 42 (S. Converse New York 1828) (facsimile). These terms echo in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) ("Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."). *See also Black's Law Dictionary* at 304 (West 9th ed. 2008) ("The exchange of goods and services, especially on a large scale involving transportation between cities, states and nations.").

As Justice Thomas has noted, the founding generation distinguished between commerce on the one hand, and manufacturing or agriculture on the other, as distinct things. *United States v. Lopez*, 514 U.S. 549, 586 (Thomas, J., concurring). However, there is nothing illogical about the Supreme Court's inclusion of manufacturing and agriculture within the modern understanding of commerce because they are similar and related things in a continuum of commercial activities. Although expansive when measured by what had gone before, it was not economically illogical to hold that commerce consists of the whole of voluntary commercial activity in a certain commodity. *Wickard v. Filburn*, 317 U.S. 111, 114, 118-19 (1942). Even when an agricultural product is raised for home consumption, it is still part of the total stock which in the aggregate regulates and controls price through the law of supply and demand. *Id.*; *Gonzales v. Raich*, 545 U.S. 1 (2005).

In this respect, even *Wickard* and *Raich* fall short of doing violence to the understanding of the founding generation that commerce, industry, labor,

agriculture, trade and navigation were all constituents of "a certain propensity in human nature . . . to truck, barter, and exchange one thing for another"; the end result of which was that mankind brought "the different produces of their respective talent . . . , as it were, into a common stock, where every man may purchase whatever part of the produce of other men's talents he has occasion for." Adam Smith, *Wealth of Nations,* at 9-10, 19, 22-23, 26, 81 (Prometheus Brooks Amherst N.Y. 1991) (facsimile). This is commerce. Its hallmarks are spontaneity and voluntary activity; not a command to buy something. The claim that commerce means not commercial activity but mere passivity is violently discordant with any normal use of the word commerce at the Founding or at any subsequent time. Only in the world of post-modernism are words infinitely plastic. Any claim that the word commerce is sufficiently elastic to support the PPACA mandate and penalty treats the text of the Constitution with post-modernist disrespect.

B. The Historical Context in which the Commerce Clause was Drafted Makes it Highly Unlikely that it Included a Power to Command a Citizen to Purchase Goods or Services From Another Citizen.

The American Revolution and national independence resulted from parliament's claimed right to legislate for America. First, parliament passed the Stamp Act, only to see it repealed in the face of furious opposition. Then came the Townshend Acts, placing a duty on paper, glass, lead, paint and tea. As the struggle continued, all of the taxes except those on tea were repealed. That remaining tax, however, led to the Boston Tea Party, the Intolerable Acts, and the First Continental Congress. Throughout this period, from the Stamp Act forward,

Americans responded with boycotts under the name of non-importation and non-consumption agreements.

The Declaration and Resolves of the First Continental Congress of October 14, 1774 "cheerfully consent[ed] to the operation of such acts of the British Parliament, as are bona fide, restrained for the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother-country, and the commercial benefits of its respective members." However, the Continental Congress at the same time and in the same document promised "[t]o enter into a non-importation, non-consumption, and non-exportation agreement or association." Charles C. Tansill, *Documents Illustrative of the Formation of the Union of the American States Library of Congress Legislative Reference Service,* No. 398 (Government Printing Office 1927), *available at* http://avalon.law-yale.edu/18th_century/resolves.asp. Such boycott agreements were generally considered lawful even by the royal colonial governments. For example "[a]t New York the merchants held a meeting to join with the inhabitants of Boston; and against the opinion of the governor, the royal council decided that the meetings were legal; that the people did but establish among themselves certain rules of economy, and had a right to dispose of their own fortune as they pleased." George Bancroft, *History of the United States*, Vol. III at 287 (New York D. Appleton & Company 1896). Later, in New York, in the same colony "where the agreement of non-importation originated, every one, without so much as dissentient, approved it

as wise and legal; men in high station declared against the revenue acts; and the governor wished their repeal." *Id.* at 359. In Massachusetts, Governor Hutchinson

> looked to his council; and they would take no part in breaking up the system of non-importation. He called in all the justices who lived within fifteen miles; and they thought it not incumbent to interrupt the proceedings. He sent the sheriff into the adjourned meeting of the merchants with a letter to the moderator, requiring them in his majesty's name to disperse; and the meeting of which justices of peace, selectmen, representatives, constables, and other officers made a part, sent him an answer that their assembly was warranted by law.

Id. at 369. Even where legislatures were dissolved to prevent the adoption of resolutions, the non-importation movement flourished. In Virginia, upon dissolution of the General Assembly, the burgesses met by themselves and "adopted the resolves which Washington had brought with him from Mount Vernon, and which formed a well digested, stringent, and practical scheme of non-importation." *Id.* at 348. "The assembly of Delaware adopted the Virginia resolutions word for word: and every colony south of Virginia followed the example." *Id.* In light of this experience, the founding generation would have regarded as preposterous any suggestion that Great Britain could have solved its colonial problems by commanding Americans to purchase tea under the generally conceded power of parliament to regulate commerce.

Additional historical arguments against the power of Congress to enact the mandate and penalty can be almost endlessly adduced. For example, Alexander Hamilton at the New York convention "not[ed] that there would be just cause for rejecting the Constitution if it would enable the Federal Government to 'penetrate the recesses of domestic life, and control, in all respects, the private conduct of

individuals.'" *Lopez*, 514 U.S. at 592. What cannot be adduced is a countervailing historical example under the Commerce Clause in favor of the mandate and penalty.

C. There is No Tradition of Using the Commerce Clause to Require a Citizen to Purchase Goods or Services from Another Citizen.

"For nearly a century" after *Gibbons v. Ogden,* the Court's first Commerce Clause case, its "decisions . . . under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce." *Wickard,* 317 U.S. at 121. Whatever else might be said about these dormant or negative Commerce Clause cases, they seem to have advanced the core intent of the Commerce Clause.

Writing in January 1788 in No. 42 of *The Federalist*, Madison addressed the regulation of foreign and Indian commerce without clearly differentiating them from interstate commerce. *The Founder's Constitution,* Vol. 2, Art. 1, § 8, Clause 3 (Commerce), Doc. 9, *available at* http://press-pubs.uchicago.edu/Founders/a1_8_3_commerces9.html. (Univ. of Chicago Press 2010). Years later he explained why in a letter dated February 13, 1829 to Joseph C. Cabel.

> For a like reason, I made no reference to the "power to regulate commerce among the several States." I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it,

> which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Id.

There is a sense in which *Gibbons v. Ogden* can be viewed as a negative Commerce Clause case voiding a state transportation barrier. Currie at 173 ("This was the beginning of incessant litigation over the extent to which state legislation is precluded by the commerce clause"). As a consequence, it would be just to conclude that the Commerce Clause functioned just as Madison had expected for the first hundred years of national existence. However, beginning with the Interstate Commerce Act in 1887, the Sherman Antitrust Act in 1890, and many other enactments after the beginning of the twentieth century, Congress began asserting its positive power under the Commerce Clause. In doing so, it was met at first with significant checks from the Supreme Court. *Wickard,* 317 U.S. at 121-22, 122, n.20 (collecting cases striking down congressional enactments). In general, the Court protected state authority over intrastate commerce by excluding from it "activities such as 'production,' 'manufacturing,' and 'mining,'" and by removing from its definition activities that merely affected interstate commerce, unless the effect was "direct" rather than indirect. *Id.* at 119-20. With respect to citizens, the reach of the Commerce Clause was limited by the Fifth Amendment which, prior to the late 1930's, was held to protect economic liberty through substantive due process. *R.R.*

Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935); *see also Lopez*, 514 U.S. at 606 (Souter, J. dissenting). Because this regime viewed the regulation even of economic activity as illegitimate unless that activity harmed or threatened harm to someone else, *Lochner v. New York,* 198 U.S. 45 (1905), it is inconceivable that the Commerce Clause prior to 1938 would have been deemed to validly reach inactivity. The question thus becomes, has the Supreme Court decided any case in the post-*Lochner* era that has extended the Commerce Clause far enough to cover the mandate and penalty?

D. The Mandate and Penalty are Outside the Existing Outer Limits of the Commerce Clause and Associated Necessary and Proper Clause as Measured by Supreme Court Precedent.

Although *Wickard* has been described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez,* 514 U.S. at 560, it still involved the voluntary activity of raising a commodity which, in the aggregate, was capable of affecting the common stock of wheat. Some of Mr. Filburn's commodities, as a matter of past practice, had been placed into commerce, and homegrown wheat in the aggregate would affect the total common stock, with a resulting effect on price. The Agricultural Adjustment Act of 1938 contained "a definition of 'market' and its derivatives, so that as related to wheat, in addition to its conventional meaning, it also mean[t] to dispose of 'by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of.'" *Wickard,* 317 U.S. at 118-19. It was Filburn's practice to sell milk, poultry and eggs from animals fed with his home grown wheat.

Id. at 114. The parties stipulated that the use of home grown wheat was the largest variable (greater than 20 per cent) in the domestic consumption of wheat. *Id.* at 125, 127. This, in turn, permitted the Supreme Court to hold that "even if [an] **activity** be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125 (emphasis added). This marks the affirmative outer limits of the Commerce Clause.

What *Wickard* stands for, as *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), make clear, is **not** the proposition that the case "expand[s] the commerce power to cover virtually everything," as used to be said. *See* Currie, at 170, n. 89. Instead, *Wickard* establishes the principle that, when activity has a substantial aggregate impact on interstate commerce, there is no as-applied, *de minimis* constitutional defense to regulation under the Commerce Clause. *See Raich*, 545 U.S. at 47-48 (O'Connor dissenting) ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis.")).

Wickard represented itself as a return to the pure and sweeping doctrine established by *Gibbons* thereby correcting the Supreme Court's excursion into Lochnerism. *Wickard*, 317 U.S. at 119-25. However, the *dictum* of the *Wickard* Court that Chief Justice Marshall had made statements in *Gibbons* with respect to

the Commerce Clause "warning that effective restraints on its exercise must proceed from political rather than from judicial processes" is a tautology that conceals more than it reveals. *Wickard*, 317 U.S. at 120. It is a tautology because it is true of any enumerated power that, when Congress is validly acting under the power, the only effective restraints are political unless some other positive prohibition applies. *See Morrison,* 529 U.S. at 616, n. 7 (The "assertion that from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds* . . . *Gibbons* did not remove from this Court the authority to define that boundary.") (emphasis in original). What the *Wickard* tautology also conceals is Marshall's actual holding in *Gibbons* that the terms "to regulate" and "Commerce . . . among the several States" are bounded, with judicially ascertainable meaning, and his further holding that the Commerce Clause does not reach transactions that affect only intrastate commerce. *Gibbons,* 22 U.S. (9 Wheat.) at 189-90, 196.

Since *Wickard,* the Supreme Court has proceeded no further than to hold that Congress can regulate three things under the Commerce Clause: (1) "use of the channels of interstate commerce" (2) "the instrumentalities of interstate commerce," and (3) "**activities** that substantially affect interstate commerce." *Lopez,* 514 U.S. at 558-59 (emphasis added). The majority in *Raich* went no further than to display a willingness to accept congressional findings that home-grown marijuana in the

aggregate has a substantial effect on interstate commerce. *Raich,* 545 U.S. at 18-19. The challenge in *Raich* was not facial, but involved an atomized, as-applied challenge of the sort foreclosed by *Wickard*. *Id.* at 15, 23.

In addition to the affirmative, tripartite definition of the commerce power, the Supreme Court has developed a workable negative rule for determining when the outer limits of the Commerce Clause have been exceeded: a facial challenge will succeed when Congress seeks to regulate non-economic activities, particularly where the claimed power has no principled limits, requiring the Court "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local." *Lopez,* 514 U.S. at 567-68. (Chief Justice Rehnquist for the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas) (citations omitted). As Justice Kennedy stated in his concurrence in *Lopez:* "Although it is the obligation of all officers of the Government to respect the constitutional design, the Federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* at 578 (citations omitted).

That principle was found applicable in *Morrison* because the federal government was attempting to exercise police powers denied to it by the Constitution. *Morrison*, 529 U.S. at 618-19 ("'We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to

exercise a police power.'") (emphasis in original) (citations omitted). Not only are the mandate and its penalty provision a part of the police power conceptually, but historically, commands to act, such as vaccination and school attendance laws, have been justified under the state police power. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("protection of the lives, limbs, health, comfort and quiet of all persons" falls within state police power).

None of this is changed by an appeal to the Necessary and Proper Clause. Each enumerated power of Congress is modified by this statement: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." However, that provision "is not itself a grant of power." *Kinsella v. Singleton*, 361 U.S. 234, 247-48 (1960). Furthermore, the affirmative outer limit of the Commerce Clause relevant to this case – activities substantially affecting interstate commerce – itself depends upon the Necessary and Proper Clause. *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). It would be wrong to assume that such power is part of the Commerce Clause itself, which can then be infinitely extended by the Necessary and Proper Clause. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). Taken together, these cases recognize

that Congress can regulate intrastate activity where such regulation is connected with and appropriate to Congress's power to regulate the interstate market.

In this way, Congress's power remains tethered to the text of the Commerce Clause. It may reach interstate commerce directly. It may reach economic intrastate activities substantially affecting interstate commerce even before they ripen into "commerce" through trade, barter or sale, if they affect the common stock of a commodity. *Raich*; *Wickard*. Regulation may reach many things under the Necessary and Proper Clause. However, the mode of regulation must fit the enumerated power by executing it – not by altering its character. And the question of fit is irrelevant unless the thing being regulated is proper. Textually and according to precedent, there is a proper prong to the Necessary and Proper Clause:

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of State sovereignty reflected in the various constitutional provisions . . . , it is not a "Law . . . proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

Printz v. United States, 521 U.S. 898, 923-24 (1997) (emphasis in original). The "various constitutional provisions" referred to by the Court are those that underlie structural federalism, including the limitation of federal power to enumerated, delegated powers. Hence, any application of the Necessary and Proper Clause that renders the concept of enumerated powers superfluous, and is tantamount to the creation of a national police power, fails under the proper prong.

Nor does *United States v. Comstock*, 130 S. Ct. 1949 (2010), alter this analysis. Instead it recognizes that *Morrison's* negative outer limit denying the

national government a police power applies to the Necessary and Proper Clause. *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.'") (citing *Morrison*). Justice Kennedy in his concurrence in the judgment in *Comstock* expressly stated: "It is of fundamental importance to consider whether essential attributes of State sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power." *Id.* at 1967.

Furthermore, this Court elsewhere has emphatically held that the Necessary and Proper Clause is limited by general principles of federalism independent of any direct prohibition. *Alden v. Maine*, 527 U.S. 706 (1999) ("When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'Law . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'") (citing *Printz*, 521 U.S. at 923-24). Not only are there clear federalism limits on the Necessary and Proper Clause, but those limits compel the conclusion that any attempt to exercise an unenumerated power, such as regulating the status of being uninsured, for the purpose of making the regulation of an enumerated power more efficient, is improper because the unenumerated power is, by definition, reserved to the States. Once it is determined that an enactment is improper in this

sense, there is nothing further to consider under the Necessary and Proper Clause. That is why the majority opinions in *Morrison* and *Lopez* find it unnecessary to engage the Clause. It simply does not matter how "necessary" the mandate and penalty might be to the congressional scheme if the end being pursued is improper under the Necessary and Proper Clause. That is the end of it.

CONCLUSION

This Court should affirm the holding of the United States Court of Appeals for the Eleventh Circuit that the mandate and penalty of PPACA exceed the enumerated powers of Congress and that the mandate and penalty cannot be sustained under the Commerce Clause even as aided by the Necessary and Proper Clause.

Respectfully submitted,

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