Nos. 11-11021 and 11-11067

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, et al.,

Plaintiffs-Appellees-Appellants,

v.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, et al.,

Defendants-Appellants-Appellees.

On Appeal from the United States District Court
for the Northern District of Florida, Pensacola Division
Honorable Roger Vinson, District Judge

BRIEF AMICUS CURIAE OF MATTHEW SISSEL, PACIFIC LEGAL FOUNDATION, AMERICANS FOR FREE CHOICE IN MEDICINE, AND NATIONAL TAX LIMITATION COMMITTEE IN SUPPORT OF PLAINTIFFS-APPELLEES-APPELLANTS AND FOR AFFIRMANCE

TIMOTHY SANDEFUR
LUKE WAKE*
DANIEL A. HIMEBAUGH*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice pending

Counsel for Amici Curiae Matthew Sissel, Pacific Legal Foundation, Americans for Free Choice in Medicine, and National Tax Limitation Committee

Nos. 11-11021 and 11-11067

State of Florida, et al. v. U.S. Dep't of Health & Human Servs., et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1-1, Amici Curiae certify that the following persons and entities have an interest in the outcome of these appeals:

1. AARP, Amicus Curiae;
2. Ahlburg, Kaj, Plaintiff-Appellee;
3. Alabama, State of, Plaintiff-Appellant;

   (by and through Luther Strange, Attorney General)
4. Alaska, State of, Plaintiff-Appellant;

   (by and through Daniel S. Sullivan,

   Attorney General of the State of Alaska)
5. American Academy of Pediatrics, Amicus Curiae;
6. American Association of People with Disabilities, Amicus Curiae;
7. American Center for Law and Justice, Amicus Curiae;
8. American Hospital Association, Amicus Curiae;
9. American Nurses Association, Amicus Curiae;
10. Americans for Free Choice in Medicine, Amicus Curiae;
11. Annino, Paolo Giuseppe, counsel for Amicus Curiae Young Invincibles;

12. Arizona, State of, Plaintiff-Appellant;

    (by and through Janice K. Brewer, Governor of the State of Arizona and Thomas C. Horne, Attorney General)

13. Beckenhauer, Eric B., counsel for Defendant-Appellant-Appellee;

14. Berger, Adam J., counsel for Amicus Curiae Governor of the State of Washington;

15. Blalack, K. Lee, III, counsel for Amicus Curiae Chamber of Commerce;

16. Bland, Frank Paul, Jr., counsel for Amicus Curiae Professors of Federal Jurisdiction;

17. Bobroff, Rochelle, counsel for Amicus Curiae American Association of People with Disabilities;

18. Boehner, John, Amicus Curiae;

19. Bondy, Thomas Mark, counsel for Defendant-Appellant;

20. Branstad, Terry E., Plaintiff-Appellant;

    (Governor of the State of Iowa on behalf of the People of Iowa)

21. Brief of Law Professors, Amicus Curiae;

22. Brown, Mary, Plaintiff-Appellee;

23. Carvin, Michael Anthony, counsel for Plaintiff-Appellee;

24. Casey, Lee Alfred, counsel for Plaintiff-Appellee-Appellant;

25 Cato Institute, Amicus Curiae;

26. Chaifetz, Samantha L., counsel for Defendant-Appellant;

27 Chamber of Commerce, Amicus Curiae;

28. Clement, Paul D., counsel for Plaintiff-Appellee-Appellant;

29. Cobb, William James, III, counsel for Plaintiff-Appellee;

30. Cohen, Stuart R., counsel for Amicus Curiae AARP;

31. Colorado, State of, Plaintiff-Appellant;

    (by and through John W. Suthers, Attorney General)

32. Dellinger, Walter Estes, III, counsel for Amicus Curiae Harry Reid;

33. Dubanevich, Keith S., counsel for Amicus Curiae State of Oregon;

34. Economic Scholars, Amicus Curiae;

35. Florida, State of, Plaintiff-Appellee-Appellant;

    (by and through Pam Bondi, Attorney General)

36. Geithner, Timothy F., Defendant-Appellant-Appellee;

    (in his official capacity as the Secretary of the

    United States Department of the Treasury)

37. Georgia, State of, Plaintiff-Appellant;

    (by and through Samuel S. Olens, Attorney General)

38. Governor of the State of Washington, Amicus Curiae;

39. Grossman, Andrew, counsel for Plaintiff-Appellee-Appellant;

40. Hart, Melissa, counsel for Amicus Curiae

    The National Women's Law Center;

41. Himebaugh, Daniel A., counsel for Amici Curiae Matthew Sissel, Pacific Legal Foundation, Americans for Free Choice in Medicine, and National Tax Limitation Committee;

42. Hirth, J. Andrew, counsel for Amicus Curiae Missouri Attorney General;

43. Horton, Philip, counsel for Amicus Curiae Economic Scholars;

44. HR Policy Association, Amicus Curiae;

45. Idaho, State of, Plaintiff-Appellant;

    (by and through Lawrence G. Wasden, Attorney General)

46. Indiana, State of, Plaintiff-Appellant;

    (by and through Gregory F. Zoeller, Attorney General)

47. Jacquot, Joseph W., counsel for Plaintiff-Appellee-Appellant;

48. Kaersvang, Dana, counsel for Defendant-Appellant;

49. Kansas, State of, Plaintiff-Appellant;

    (by and through Derek Schmidt, Attorney General)

50. Katsas, Gregory, counsel for Plaintiff-Appellee;

51. Katyal, Neal Kumar, counsel for Defendant-Appellant;

52. Kennedy, Brian G., counsel for Defendant-Appellant-Appellee;

53. Kimberly, Michael B., counsel for Amicus Curiae Constitutional Law Professors;

54. Klein, Alisa B., counsel for Defendant-Appellant;

55. Lamken, Jeffrey A., counsel for Amicus Curiae Brief of Law Professors;

56. Louisiana, State of, Plaintiff-Appellant;

    (by and through James D. Buddy Caldwell, Attorney General)

57. Maine, State of, Plaintiff-Appellant;

    (by and through William J. Schneider, Attorney General)

58. Makar, Scott Douglas, counsel for Plaintiff-Appellee-Appellant;

59. Marshall, C. Kevin, counsel for Plaintiff-Appellee;

60. Massachusetts, Commonwealth of, Amicus Curiae;

61. Michigan, State of, Plaintiff-Appellant;

    (Bill Schuette, Attorney General, on behalf of the People of Michigan)

62. Millhiser, Ian, counsel for Amicus Curiae American Nurses Association;

63. Mills, John Stewart, counsel for Amicus Curiae Kevin C. Walsh;

64. Mississippi, State of, Plaintiff-Appellant;

    (by and through Haley Barbour, Governor of the State of Mississippi)

65. Missouri Attorney General, Amicus Curiae;

66. Mooppan, Hashim M., counsel for Plaintiff-Appellee;

67. National Federation of Independent Business, Plaintiff-Appellee;

    (a California nonprofit mutual benefit corporation)

68. National Indian Health Board, Amicus Curiae;

69. National Tax Limitation Committee, Amicus Curiae;

70. Nebraska, State of, Plaintiff-Appellee-Appellant;

    (by and through Jon Bruning, Attorney General)

71. Nevada, State of, Plaintiff-Appellant;

    (by and through Jim Gibbons, Governor of the State of Nevada)

72. North Dakota, State of, Plaintiff-Appellant;

    (by and through Wayne Stenejham,

    Attorney General of the State of North Dakota)

73. Ohio, State of, Plaintiff-Appellant;

    (by and through Michael Dewine, Attorney General)

74. Oregon, State of, Amicus Curiae;

75. Osterhaus, Timothy David, counsel for Plaintiff-Appellee-Appellant;

76. Pacific Legal Foundation, Amicus Curiae;

77. Pennsylvania, Commonwealth of, Plaintiff-Appellant;

    (by and through Thomas W. Corbett Jr., Governor of the Commonwealth of Pennsylvania and William H. Ryan, Jr., Acting Attorney General)

78. Perkins, Jane, counsel for Amicus Curiae American Academy of Pediatrics;

79. Peterson, Michael D., counsel for Amicus Curiae HR Policy Association;

80. Philo, Gregory J., counsel for Amicus Curiae Kevin C. Walsh;

81. Professors of Federal Jurisdiction, Amicus Curiae;

82. Reid, Harry, Amicus Curiae;

83. Rittgers, David, counsel for Amicus Curiae Cato Institute;

84. Rivkin, David B., counsel for Plaintiff-Appellee-Appellant;

85. Sandefur, Timothy, counsel for Amici Curiae Matthew Sissel, Pacific Legal Foundation, Americans for Free Choice in Medicine, and National Tax Limitation Committee;

86. Sebelius, Kathleen, Defendant-Appellant-Appellee;
(in her official capacity as the Secretary of the
United States Department of Health and Human Services)

87. SEIU, Amicus Curiae;

88. Severino, Carrie Lynn, counsel for Amicus Curiae John Boehner;

89. Sissel, Matthew, Amicus Curiae;

90. Solis, Hilda L., Defendant-Appellant;
(in her official capacity as the Secretary of the
United States Department of Labor)

91. South Carolina, State of, Plaintiff-Appellee-Appellant;
(by and through Alan Wilson, Attorney General)

92. South Dakota, State of, Plaintiff-Appellant;
(by and through Marty J. Jackley, Attorney General)

93. Spohn, Katherine Jean,
counsel for Plaintiff-Appellee and Defendant-Appellee;

94. State Legislators, Amicus Curiae;

95. Stephan, John Michael, counsel for Amicus Curiae The Commonwealth of Massachusetts;

96. Stern, Mark B., counsel for Defendant-Appellant;

97. Stetson, Catherine E., counsel for Amicus Curiae American Hospital Association;

98. Strommer, Geoffrey D., counsel for Amicus Curiae The National Indian Health Board;

99. Suda, Molly, counsel for Amicus Curiae American Cancer Society;

100. Texas, State of, Plaintiff-Appellee-Appellant; (by and through Greg Abbott, Attorney General)

101. Timothy, Elizabeth M., United States District Judge;

102. United States Department of Health and Human Services, Defendant-Appellant-Appellee;

103. United States Department of Labor, Defendant-Appellant-Appellee;

104. United States Department of the Treasury, Defendant-Appellant-Appellee;

105. Utah, State of, Plaintiff-Appellee-Appellant;

 (by and through Mark L. Shurtleff, Attorney General)

106. Vinson, Roger, United States District Court Judge;

107. Wake, Luke, counsel for Amici Curiae Matthew Sissel, Pacific Legal Foundation, Americans for Free Choice in Medicine, and National Tax Limitation Committee;

108. Walsh, Kevin C., Amicus Curiae;

109. Washington, State of, Plaintiff-Appellant;

 (by and through Robert M. McKenna, Attorney General)

110. Weissglass, Jonathan, counsel for Amicus Curiae SEIU;

111. White, Edward Lawrence, III, counsel for Amicus Curiae American Center for Law and Justice;

112. Winship, Blaine H., counsel for Plaintiff-Appellee-Appellant;

113. Wisconsin, State of, Plaintiff-Appellant;

 (by and through J.B. Van Hollen, Attorney General)

114. Wydra, Elizabeth B., counsel for Amicus Curiae State Legislators;

115. Wyoming, State of, Plaintiff-Appellant;

 (by and through Matthew H. Mead, Governor of the State of Wyoming)

116. Young Invincibles, Amicus Curiae;

s/ Timothy Sandefur
TIMOTHY SANDEFUR

Counsel for Amici Curiae Matthew Sissel,
Pacific Legal Foundation,
Americans for Free Choice in Medicine,
and National Tax Limitation Committee

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IDENTITY AND INTEREST OF AMICI

Matthew Sissel is an Iowa citizen, and the plaintiff in *Sissel v. United States Department of Health and Human Services*, No. 1:10-cv-01263-RJL (D.D.C. filed July 26, 2010), a lawsuit pending in the United States District Court for the District of Columbia, which challenges the constitutionality of the Patient Protection and Affordable Care Act (PPACA).

Pacific Legal Foundation (PLF) was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation defending private property rights, economic liberty, and limited government. PLF attorneys represent Sissel in his challenge to the PPACA.

Americans for Free Choice in Medicine (AFCM) is a national nonprofit, nonpartisan, educational organization based in Newport Beach, California. AFCM was founded in 1993 to promote the philosophy of individual rights, personal responsibility, and free-market economics in the health care industry. AFCM members include patients, Medicare recipients, physicians, nurses, health care professionals, insurance industry professionals, pharmacists, and others.

The National Tax Limitation Committee (NTLC) is headquartered in Roseville, California, and is one of the oldest pro-taxpayer organizations in the country working to limit taxation and government spending for the purpose of enhancing individual freedom.

Sissel, PLF, and AFCM appeared as amici in the United States Court of Appeals for the Fourth Circuit in *Virginia v. Sebelius* (Nos. 11-1057 and 11-1058), a challenge to the PPACA presenting issues similar to those presented here. Amici believe their legal and public policy experience will assist this Court.

This brief is filed with the consent of the parties. No party's counsel authored this brief in whole or in part, neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund preparing or submitting this brief.

ISSUES ADDRESSED BY AMICI

Amici address the following issues:

(1) Do the Appellees have standing?

(2) Does the Commerce Clause authorize the Individual Mandate?

(3) Does the Necessary and Proper Clause authorize the Individual Mandate?

(4) Does Congress' taxing power authorize the Individual Mandate?

STATEMENT OF THE ISSUES

Amici Curiae Matthew Sissel, Pacific Legal Foundation, Americans for Free Choice in Medicine, and the National Tax Limitation Committee address the following issues raised in this appeal: (1) whether the standing requirements of Article III have been satisfied to allow this Court to consider the constitutionality of

the Individual Mandate; and, (2) whether the Individual Mandate represents an unconstitutional ultra vires act?

SUMMARY OF ARGUMENT

The Appellees challenge the PPACA, which Congress passed in 2010 in an effort to reorganize the nation's health care industry. The PPACA includes a provision barring insurance companies from denying coverage to persons with preexisting medical conditions. 42 U.S.C. § 300gg-1. Because the cost of insuring persons who already suffer from illness is high, Congress sought to subsidize the insurance companies under a separate provision—the "Individual Mandate"—which compels almost all persons to buy health insurance or pay a fine. 26 U.S.C. § 5000A.

The Appellees have standing because uninsured individuals Kaj Ahlburg and Mary Brown are injured by the Individual Mandate. Appellee National Federation of Independent Business (NFIB) has standing because some of its members are in the same position as Ahlburg and Brown. Because federal courts may hear claims advanced by multiple parties; as long as any one of the parties has standing, the states are also deemed to have standing. Even if the Court considers the states' standing separately, any state that has enacted a statute to shield its citizens from the Individual Mandate has standing, because states have a constitutionally recognized sovereign interest in articulating and defending those individual rights that are not conferred exclusively to federal protection, and because the enactment of such a statute renders

the dispute concrete instead of an abstract political question. Thus the case satisfies both the constitutional and prudential standing requirements.

The PPACA represents the first time Congress has invoked its Commerce Clause power to compel Americans to buy a product or service *not* as a condition of some other activity, but simply because they are resident citizens. The assertion of such a power expands the power to "regulate commerce" far beyond either its original meaning or existing judicial precedent. A person's not deciding to buy health insurance is not "commerce among . . . the several states." Indeed, it is not activity of any sort. To hold that the Commerce Clause gives Congress power to *compel* economic activity as well as to *regulate* it would effectively eliminate all limits on Congress' authority, contrary to the "first principle" that "[t]he Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552; 115 S. Ct. 1624, 1626 (1995). It would also conflict with the Constitution's plain language, which gives Congress power to compel *other* activities—such as the power to "raise" armies by compelling individuals to join the military who would otherwise not do so—but which in the Commerce Clause gives Congress power only to *regulate* commerce.

Because the Individual Mandate is beyond Congress' Commerce Clause authority, the Necessary and Proper Clause also does not warrant such an act. The Necessary and Proper Clause is not a separate source of constitutional authority; it

merely states that Congress may select "necessary and proper" means by which to carry out its enumerated powers. The Individual Mandate is not proper because it violates the constitutional principles of federalism, of limited, enumerated powers, and of representative government. The Necessary and Proper Clause allows Congress only to pursue ends that are "within the scope of the constitution" and only by means which are "not prohibited, but consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Because interpreting the Commerce Clause as broadly as the federal government demands here "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634, and would radically alter the federal/state balance, it cannot be considered "proper" within the meaning of the Necessary and Proper Clause.

Finally, the Individual Mandate cannot be supported under Congress' taxing power. It is a penalty imposed to enforce a requirement, not a tax to raise revenue, and is therefore not governed by the tax provisions of the Constitution.

Because the Appellees have standing and the Constitution does not authorize the Individual Mandate, the Court should affirm the district court's decision to invalidate it.

ARGUMENT

I

THE APPELLEES HAVE STANDING

The district court correctly determined that individual plaintiffs Kaj Ahlburg and Mary Brown have standing because they are injured by the Individual Mandate. *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at *30-*32 (N.D. Fla. Jan. 31, 2011). Ahlburg and Brown have no health insurance and do not wish to purchase it, but if they refuse they will be fined under 26 U.S.C. § 5000A. They are therefore currently injured to the extent that they are forced to rearrange their finances to comply with this obligation. *See Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 889 (E.D. Mich. 2010). Moreover, they face an impending future financial injury if they fail to buy health insurance. *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143; 95 S. Ct. 335, 358 (1974) ("Where the inevitability of the operation of a statute against [plaintiffs] is patent, it is irrelevant . . . that there will be a time delay before the disputed provisions will come into effect."). Each of these injuries alone satisfies the Article III case or controversy requirement.[1] Additionally, the district court correctly

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[1] Although previous decisions challenging the Individual Mandate have found standing due to the present effect on the plaintiffs' finances, even a plaintiff who faces only a *future* obligation to purchase insurance on pain of penalty, but who has (continued...)

held that NFIB has standing because some of its members stand in the same position as Ahlburg and Brown. *Florida*, 2011 U.S. Dist. LEXIS at *33.

Amicus Kevin Walsh argues that the states lack standing on their own accord to challenge the constitutionality of the Individual Mandate, but when a claim is advanced by multiple parties, a federal court has jurisdiction to hear the claim so long as any one of the parties has standing. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2; 126 S. Ct. 1297, 1303 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Bowsher v. Synar*, 478 U.S. 714, 721; 106 S. Ct. 3181, 3185 (1986) ("members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. This is sufficient to confer standing . . . . We therefore need not consider the standing issue as to the [other appellees].)" (citations omitted).

In *Massachusetts v. EPA*, 549 U.S. 497; 127 S. Ct. 1438 (2007), various states, local governments, and private organizations advanced a claim under the Clean Air Act. *Id.* at 514; 1451. The EPA contested their standing, arguing that none of the

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[1] (...continued)
undertaken no present financial actions due to that impending injury would still have standing. A plaintiff need not "await the consummation of threatened injury to obtain preventive relief." *Farmer v. Brennan*, 511 U.S. 825, 845; 114 S. Ct. 1970, 1983 (1994) (citation omitted).

parties had suffered a specific injury. *Id.* at 517; 1453. The Court rejected the EPA's argument, holding that the states had standing, but the opinion strongly suggests that the private organizations would not have had standing acting on their own. *Id.* at 518; 1453. Nevertheless, the Court did not dismiss the private organizations, but held that those plaintiffs were properly before the Court because they had joined with other plaintiffs who did have standing. *Id.* ("Only one of the petitioners needs to have standing to permit us to consider the petition for review.").

Amicus Walsh argues that the individual plaintiffs' standing cannot suffice as far as the state plaintiffs are concerned because the individual mandate does not compel the states as it does the individuals, and plaintiffs may not "leverage their standing to challenge a part of the Act that does apply to them into standing to challenge a part that does not." Amicus Br. of Kevin Walsh at 24. Even if this is true, however, the state plaintiffs need not rely on the individual plaintiffs' standing, because at least some of the states here also have standing due to PPACA's effect on their constitutionally protected sovereign interests. For example, Arizona and Utah—like Virginia—have enacted statutes (Health Care Freedom Acts) that protect the right of their citizens to choose whether to buy health insurance.[2] These states,

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[2] Plaintiffs Arizona, Georgia, Idaho, Louisiana, North Dakota, and Utah have enacted Health Care Freedom Acts that protect residents from being compelled to buy health insurance. Missouri, Oklahoma, Tennessee, and Virginia have enacted similar Acts.
(continued...)

at least, have standing to defend their sovereign authority to enact laws protecting those individual rights that the Tenth Amendment leaves to state protection. *See Virginia v. Sebelius*, 702 F. Supp. 2d 598, 607-08 (E.D. Va. 2010). And because these states, at least, have standing, this Court may consider the arguments raised by other states injured in a similar way, but whose claims would otherwise be too abstract for judicial resolution.

The Constitution gives Congress power only over a list of specified, enumerated powers, and leaves anything not specified to the states. *See The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 77 (1873) ("Beyond the very few express limitations which the Federal Constitution imposed upon the States . . . the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government."); *New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837) (each state enjoys "the same undeniable and unlimited jurisdiction . . . as any foreign nation"); *The Federalist* No. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961) ("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

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[2] (...continued)
See American Legislative Exchange Council, *Freedom of Choice in Health Care Act*, *available at* http://www.alec.org/foca/ (last visited May 5, 2011).

indefinite."). The Tenth Amendment incorporates into the Constitution the residual sovereignty of the states. Indeed, the federalist structure depends on states enjoying and defending that autonomy against incursion by unconstitutional federal action. *See The Federalist* No. 51, at 323 (James Madison) (the "power surrendered by the people" is divided "between two distinct governments," federal and state, so that "[t]he different governments will control each other"); *The Federalist* No. 46, at 297 (James Madison) (if the federal government were to "extend its power beyond the due limits," states would have plentiful means of opposition, including "the embarrassments created by legislative devices"). States therefore enjoy constitutionally recognized power to articulate and enforce individual rights that are not wholly given over to federal protection, just as they have power to enact statutes that set drinking ages, *South Dakota v. Dole*, 483 U.S. 203, 209; 107 S. Ct. 2793, 2797 (1987), establish voting procedures, *South Carolina v. Katzenbach*, 383 U.S. 301, 325; 86 S. Ct. 803, 817 (1966), or regulate the hunting of wild animals, *Missouri v. Holland*, 252 U.S. 416, 430; 40 S. Ct. 382, 382 (1920). And just as states had standing to defend that sovereign authority in federal courts in *Dole*, *Katzenbach*, and *Holland*, so, too, states that have enacted laws that articulate and protect individual rights, that the Tenth Amendment leaves to state protection, have standing to defend that sovereign authority in federal court. The archetypical case of this sort is *McCulloch*, 17 U.S. (4 Wheat.) at 421, in which the state of Maryland enacted a tax

on the national bank, and had standing to sue in order to enforce that statute—and to argue that the federal government had acted beyond its constitutional authority and intruded on state sovereignty.

Amicus Walsh argues, *supra*, at 7-10, that the states lack standing under *Massachusetts v. Mellon*, 262 U.S. 447; 43 S. Ct. 597 (1923), but this case is distinguishable. In *Mellon*, Massachusetts had sought judicial determination only of an abstract political question. *Id.* at 484-85; 600 ("We are called upon to adjudicate, not rights . . . but abstract questions of political power, of sovereignty"). In contrast, states like Arizona and Utah, that have actually exercised their sovereign powers to articulate and defend their citizens' rights by enacting their Health Care Freedom Acts, have exercised sovereign authority and concretized what might previously have been a mere abstract dispute over political power. Thus these states have standing, as do the individual plaintiffs. This Court is faced with a true case and controversy arising under the Constitution, and has jurisdiction to decide this case.

II

THE INDIVIDUAL MANDATE EXCEEDS THE SCOPE OF POWER GRANTED BY THE COMMERCE CLAUSE

The Commerce Clause allows only for regulation of channels and instrumentalities of interstate commerce, and of "activities affecting commerce." *Perez v. United States*, 402 U.S. 146, 150; 91 S. Ct. 1357, 1359 (1971). This case

raises a question of first impression: May Congress force individuals to engage in commerce? *Virginia*, 728 F. Supp. 2d at 775 ("[T]he Minimum Essential Coverage Provision appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark."); *see also* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 3.[3] In every previous case testing the constitutionality of a federal law under the Commerce Clause, the law has regulated some activity—*i.e.*, some action, transaction, or deed affirmatively undertaken by the regulated party. *See Gonzales v. Raich*, 545 U.S. 1, 13; 125 S. Ct. 2195, 2203 (2005) (regulating the act of growing marijuana); *Wickard v. Filburn*, 317 U.S. 111; 63 S. Ct. 82 (1942) (regulating the act of growing wheat). The government can offer no precedent in support of Congress' attempt to force inactive individuals to become market participants because no such power has ever before been asserted under the Commerce Clause. Indeed, the examples the government does offer, Appellants' Opening Brief at 44, all involve some form of activity. The Endangered Species Act, for instance, does not *compel* any activity, but *prohibits* activity; it regulates voluntarily undertaken acts that affect protected species, but does not compel any activity *ex nihilo*. *See*, *e.g.*, 16 U.S.C. § 1538 (describing prohibited acts). Likewise,

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[3] *Available at* http://assets.opencrs.com/rpts/R40725_20090724.pdf (last visited May 5, 2011).

the Federal Access to Clinic Entrances Act does not compel behavior, but forbids violent interference with voluntarily undertaken commercial activity. *See*, *e.g.*, 18 U.S.C. §§ 875, 876, 844, 223, 1951 (prohibiting threats or extortion). Federal child pornography laws apply only to persons who "us[e] any means or facility of interstate . . . commerce," 18 U.S.C. § 2252(a)(2), and do not purport to compel activity, but create an affirmative defense to a charge of possession. 18 U.S.C. § 2252(c).

It is true that the Second Militia Act of 1792, 1 Stat. 271 (1792), *did* require all free men to obtain firearms, but *that statute was not enacted under the Commerce Clause*; it was an exercise of Congress' power, specified in Article I, section 8, clause 16, to "provide for organizing, arming, and disciplining, the Militia"—language that, unlike the Commerce Clause, *does* contemplate requiring an inactive person to act. *Parker v. Dist. of Columbia*, 478 F.3d 370, 387 n.12 (D.C. Cir. 2007), *aff'd sub nom. Dist. of Columbia v. Heller*, 554 U.S. 570; 128 S. Ct. 2783 (2008).

In the absence of precedential authority, this Court must discern the meaning of the Commerce Clause in its original context to determine whether the Clause grants Congress the power to force individuals to engage in commerce. *Heller*, 554 U.S. at 635; 128 S. Ct. at 2821 ("Constitutional rights [and conversely federal powers] are enshrined with the scope they were understood to have when the people adopted them."). The Clause's intended meaning is evinced by its plain language, as

commonly understood at the time of the Constitution's ratification, because the chosen words are the strongest indicia of what the Founders intended when drafting the text, and what the public believed it was assenting to in ratification. *See United States v. Auguste*, 392 F.3d 1266, 1268 (11th Cir. 2004) (holding that where there is no relevant case law on point, the "plain language" of the governing law controls); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803) (looking to the text of Article II to determine the scope of the president's powers). But, originally understood, the power to "regulate commerce" did not imply a power to compel action. *McCulloch*, 17 U.S. (4 Wheat.) at 414 ("It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies.").

Both the terms "regulate" and "commerce" imply not the compulsion of behavior by persons who have not chosen to act, but the governing or regularizing of behavior that has been voluntarily undertaken. At the time the Constitution was written, the term "commerce," was commonly understood as including only activities involving transactions and exchanges of goods or services. *See* 2 *Encyclopedia Britannica* 229 (1771) ("Commerce is an *operation*, by which . . . wealth, or work . . . may be *exchanged*") (emphasis added); *see also* John Entick, *A New English-Latin*

Dictionary (no pagination) (2d ed. 1783)[4] (indicating that the word "commerce" derives from the Latin word *commercium*); John Mair, *The Tyro's Dictionary, Latin and English* 96 (2d ed. 1763) (defining *commercium* as "trade, traffic, commerce, intercourse"); N. Bailey, *Dictionarium Britannicum or a more complete Universal Etymological English Dictionary than any Extant* (no pagination) (1730) (defining commerce as "trade or traffick in buying and selling"). Accordingly, the Supreme Court defined "commerce" as an activity in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) ("Commerce, undoubtedly, is traffic [i.e., movement], but it is something more: it is intercourse [i.e., an active exchange, dealing or communication between parties]."); *see also* Adam Smith, *The Wealth of Nations* 398 (Random House, Inc., 1937) (1776) (referring to money as the "instrument of commerce" [*i.e.*, a tool for effectuating a transaction]).

Thus, as originally understood, the power to regulate *commerce* among the states was intended only to allow Congress to regulate cross-border *transactions* between states, consisting of selling, buying, bartering, and transporting for those purposes. *Lopez*, 514 U.S. at 585; 115 S. Ct. at 1642-43 (Thomas, J., concurring); *The Federalist* No. 42, at 268 (James Madison) (The Clause was drafted to give

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[4] *Available at* http://books.google.com/books?id=2oQUAAAAQAAJ&dq=latin%20to%20english%20commercium%20dictionary%20John%20Entick&pg=PA48#v=onepage&q&f=false (last visited May 9, 2011)

Congress "a superintending authority over reciprocal trade of . . . States," taking away the states' often conflicting regulatory powers as exercised under the Articles of Confederation); *see also* Letter from James Madison to Joseph Cabell (Feb. 13, 1829), *reprinted in* 2 *The Founders' Constitution* 521 (Philip B. Kurland & Ralph Lerner eds., 1987) (Commerce power "was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.").

Moreover, the term "regulate" was originally understood to mean "to make regular." *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001) ("The power to regulate is, in essence, the power to say, 'if you want to do something, here is how you must do it.'"); Samuel Johnson, 2 *A Dictionary of the English Language* (no pagination) (J.F. Rivington, et al., eds., 6th ed 1785) (defining "to regulate" as: "1. To adjust by rule or method . . . 2. To direct").

The term "commerce" means commercial *activities*, and the term "regulate" connotes the power to govern *activities*. These terms contrast notably with the language of clauses that allow Congress to actually compel activity *ex nihilo*; when the framers wanted to empower Congress to compel activity, they chose language to that effect. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 414 (when the Constitution's authors meant "absolutely necessary" they used that language); *Heller*, 554 U.S.

at 596; 128 S. Ct. at 2799-2800 (noting that syntactical differences between constitutional provisions evince different meanings). The Constitution does allow Congress in certain cases to compel activity. For instance, as noted above, the Militia Act of 1792, which required individuals to buy firearms and ammunition, was enacted pursuant to the Clause allowing Congress to "provide for . . . *arming* . . . the Militia." Likewise, the federal power to draft an army is textually rooted in Clauses 12, 13, and 15 of Article I, Section 8, which allows Congress "to *raise* armies" and "provide for *calling forth* the Militia." *See Selective Draft Law Cases*, 245 U.S. 366, 382; 38 S. Ct. 159, 163 (1918) (emphasis added). The terms "raise," "provide," and "call forth" necessarily imply compelling action in a way that the term "regulate" does not.

Had the word "regulate" been understood so broadly as to encompass the power to compel any behavior having an economic effect, the militia and army provisions and many other clauses would have been surplusage. The operations of the military, of the Post Office, the patent and copyright system, and the coining of money all have some ultimate economic effect. Yet these matters are all addressed in separate constitutional clauses. If the Commerce Clause were originally understood as allowing Congress power to compel whatever behavior would affect interstate commerce in some way, the framers would have had no need to write these separate clauses. "An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct." *Lopez*, 514 U.S. at 589; 115 S. Ct. at 1644 (Thomas, J.

concurring). Instead, the phrase "regulate commerce" must be read in its more natural sense, as allowing Congress power to prescribe the rules by which people may voluntarily engage in interstate trade.

The national debate over the Constitution's ratification, and the historical context from which it was born, offer compelling evidence of the limited scope of the commerce power. *Cf. Heller*, 554 U.S. at 594-99; 128 S. Ct. at 2799-2802 (considering the revolutionary generation's experience under British rule, and citing the ratification debates as evidence of the intended scope of the right to bear arms). The Founders were inherently skeptical of centralized power, and hesitated to give much power to the federal government. *Id.* As a result, they drafted the Constitution's language in precise terms to give the federal government only "few and defined" powers, leaving all authority not specifically listed to the states. *The Federalist* No. 45, at 292 (James Madison). It is highly unlikely that the Founding generation would have assented to ratification of the Constitution, had it been understood as giving Congress such a limitless power as the authority to force people to act in ways Congress considers economically preferable. Considering that many of the American Revolutionaries had boycotted English goods to protest oppressive taxes, *see* Arthur Meier Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776*, at 105 (1918) (discussing colonial efforts to "boycott to starve Great Britain into a surrender of her trade restrictions"), it is unthinkable that

they would have supported a Constitution that gave the federal government power to force them to buy goods against their will.[5]

In short, the federal government's interpretation of its commerce power contains no limiting principle, and would transform the federal government from one of enumerated powers to one which can compel or prohibit any and all individual behavior that has some ultimate effect on the economy—which is any and all behavior. This is no exaggeration. In a decision upholding the constitutionality of the Individual Mandate, the Virginia District Court held that Congress can compel the purchase of health insurance because, due to "the nature of supply and demand," not deciding to buy health insurance will "directly affect the price of insurance in the market, which Congress set out in the Act to control." *Liberty Univ., Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 U.S. Dist. LEXIS 125922, at *50-*51 (W.D. Va. Nov. 30, 2010). Similarly, in *Mead v. Holder*, No. 10-950, 2011 U.S. Dist. LEXIS 18592, at *56 (D.D.C. Feb. 22, 2011), the district court held that Congress can regulate any "mental activity, *i.e.*, decision-making," which has an ultimate economic

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[5] Indeed, one of the leading reasons for the Revolution was the British Parliament's assertion of power to "bind the colonies and people of *America* . . . in all cases whatsoever." *Compare* Declaratory Act of 1766, 6 Geo. III c. 12, *in* 27 *Statutes at Large* 19-20 (Danby Pickering ed., 1767) *with* Declaration of Independence, 1 Stat. 1, 2 (1776). It cannot be imagined that the founding generation intended to give Congress the very same authority to compel whatever behavior had any ultimate economic consequence—that is, the same power against which they rebelled.

effect. These decisions indicate the total lack of principled limits on the constitutional theory advanced by the federal government in this case. All activity or inactivity of any sort has *some* ultimate effect on supply and demand, and any failure to do what Congress would prefer can be characterized as a "mental activity" with some ultimate economic consequence. Thus the doctrine accepted by the *Liberty Univ.* and *Mead* decisions would give Congress power to compel whatever activity it chooses to compel, making it essentially the judge of its own extent of power.[6]

Though the government suggests that the Individual Mandate regulates how medical services are to be paid for, the Mandate is actually silent about how individuals must pay for their medical care if and when they seek it. Appellants' Opening Brief at 81 (admitting that the Individual Mandate does not condition receipt of health care on any sort of payment). There is no escaping the fact that the mandate seeks to compel individuals to buy insurance, and does so on the theory that Congress may compel any activity—or even mental in-activity—that ultimately affects the economy. This interpretation of the Commerce Clause lacks foundation in the text, leads to unreasonably extreme results, would violate the principles of federalism and limited government, and would unconstitutionally transform the commerce power

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[6] The Government may contend that it is necessary to regulate inactivity to make the PPACA work because eventually everyone will need health care, but this is not a limiting principle. The same rationale could be employed to require Americans to purchase food, shelter, clothing, transportation, etc.

into a general police power. *Lopez*, 514 U.S. at 567; 115 S. Ct. at 1634. That theory must be rejected.

III

THE NECESSARY AND PROPER CLAUSE DOES NOT AUTHORIZE THE INDIVIDUAL MANDATE

The Necessary and Proper Clause does not authorize the Individual Mandate because Congress' commerce power does not authorize the Individual Mandate. The Necessary and Proper Clause is not a freestanding source of congressional authority; it merely supplements Congress' enumerated powers, expressing nothing more than the principle that Congress may choose legitimate means by which to accomplish legitimate ends. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247; 80 S. Ct. 297, 304 (1960). But if a particular law is not within the scope of Congress' enumerated powers, the Necessary and Proper Clause cannot authorize it. Such laws are merely a "pretext" of constitutional authority. *McCulloch*, 17 U.S. (4 Wheat.) at 423 (courts must not uphold "laws [enacted] for the accomplishment of objects not intrusted to the government"); *see The Federalist* No. 33, at 204 (Alexander Hamilton) (a congressional act beyond enumerated powers is "merely [an] act of usurpation" which "deserves to be treated as such"); *see also Printz v. United States*, 521 U.S. 898, 923; 117 S. Ct. 2365, 2378 (1997) (describing Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action").

A. The Individual Mandate Is Not an Appropriate Means for Regulating Commerce

Yet even if this Court finds that the Individual Mandate comes under Congress' commerce power, the law must still be held unconstitutional because it is not a necessary and proper means for carrying out that power. Chief Justice Marshall set out the test for determining whether a law passes muster under the Necessary and Proper Clause in *McCulloch*:

> Let the end be legitimate, let it be *within the scope of the constitution*, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution*, are constitutional.

17 U.S. (4 Wheat.) at 421 (emphasis added). *McCulloch* sets forth a two-step inquiry. First, the law must be plainly adapted to executing an enumerated power. Second, the means chosen must be constitutionally appropriate. Under the *McCulloch* test, *only* means that are "plainly adapted" to Congress' objective, "not prohibited" by other constitutional provisions, and which do not violate fundamental constitutional principles (the "spirit"), are constitutional. *See also Printz*, 521 U.S. at 924; 117 S. Ct. at 2379 (holding that when a law carrying out the commerce power violates state sovereignty, that law is not "proper"); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 271-72 (1993) ("The [Necessary and Proper] Clause . . .

serves as a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights.”).

The Supreme Court has described the inquiry under the Necessary and Proper Clause as the “mirror image[]” of analyzing the fundamental principles of enumerated powers and federalism. *New York v. United States*, 505 U.S. 144, 156; 112 S. Ct. 2408, 2417 (1992). To expand the commerce power so that Congress may compel whatever personal behavior has some ultimate effect on the nation’s economy would transform that power into an unlimited police power. *See Gregory v. Ashcroft*, 501 U.S. 452, 458; 111 S. Ct. 2395, 2399-2400 (1991) (describing federalism as a “check on abuses of government power”). Because the Constitution unequivocally denies the federal government such power, and because such power is inconsistent with the basic structure of the Constitution, a constitutional theory that substantively creates such power cannot be necessary or proper. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547; 105 S. Ct. 1005, 1016 (1985) (“[T]he text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for ‘[b]ehind the words of the constitutional provisions are postulates which limit and control.’ ”) (citation omitted).

Furthermore, the Individual Mandate is not an appropriate means for regulating commerce because it undermines representative government. Unlike a public health care system, which would be funded through taxation and ostensibly overseen by the

people at the ballot box, the Individual Mandate allows Congress to evade the political accountability contemplated by the Constitution by creating a system in which individuals are mandated to purchase government-approved insurance policies from *private* companies. Professor Barnett explains:

> [E]conomic mandates undermine political accountability . . . . The public is acutely aware of tax increases. Rather than incur the political cost of imposing a general tax on the public using its tax powers, economic mandates allow Congress and the President to escape accountability for tax increases by compelling citizens to make payments directly to private companies.

Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 NYU J.L. & Liberty 581, 632 (2010). As in *Printz*, the Court should view the Individual Mandate with great skepticism because it forces individuals, companies, and states to absorb the burden of implementing a federal regulatory program, and improperly insulates Congress from accountability for the program's defects. 521 U.S. at 929-30; 117 S. Ct. at 2381-82.

B. The Individual Mandate Does Not Survive the *Comstock* Test

The Individual Mandate also fails the Necessary and Proper Clause test set forth in *United States v. Comstock*, 130 S. Ct. 1949 (2010). The *Comstock* Court upheld the statute challenged in that case under the Necessary and Proper Clause based on five "considerations": (1) the breadth of the Clause; (2) a long history of federal involvement in the area being regulated; (3) the government's sound reasons

for enacting the law in light of its interest in safeguarding the public; (4) the law's accommodation of state interests; and (5) the law's scope. 130 S. Ct. at 1965. As Justice Thomas noted in dissent, *Comstock* does not specify how many of the considerations need to be satisfied for a law to be upheld. *Id.* at 1975. Still, the Individual Mandate fails each one.

While the Necessary and Proper Clause is "broad" in that it provides Congress with substantial leeway to choose the means for executing legitimate ends, the Clause is not toothless. Its boundaries were articulated in *McCulloch*, which prohibits Congress from enacting laws that contradict fundamental constitutional principles like federalism and representative government.

The Individual Mandate also has no pedigree in federal law. *See Printz*, 521 U.S. at 918; 117 S. Ct. at 2376 ("almost two centuries of apparent congressional avoidance" of a practice calls into question that practice's constitutionality). The Individual Mandate is a legislative novelty that raised constitutional suspicions from the time it was first proposed. *See* Congressional Research Service, *supra*, at 6 ("This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of required participation can be considered economic activity."). Indeed, the House of Representatives voted to repeal the Individual Mandate less than a year after it was enacted. *See* David M. Herszenhorn & Robert Pear, *House Votes for Repeal of Health Law in Symbolic Act*,

N.Y. Times, Jan. 19, 2011, at A1. The Individual Mandate is hardly a longstanding tradition in American federal law.

There is also no question that the Individual Mandate does not accommodate state interests. With over half the states suing to have the Individual Mandate declared unconstitutional, and with a number of states enacting legislation to protect their citizens from the law's effects, it is clear that the states do not believe their interests are being accommodated. In *Comstock*, several states filed amicus briefs in support of the civil commitment provision because it allowed them to forgo supervising sexually dangerous felons. 130 S. Ct. at 1982 (Thomas, J., dissenting). In contrast, the Individual Mandate, and the PPACA generally, require states to overhaul their health care systems at great financial and administrative expense. *See* Edmund Haislmaier & Brian Blase, The Heritage Foundation, *Obamacare: Impact on States* (July 1, 2010).[7]

Lastly, the Individual Mandate is not narrow in scope. It applies to virtually every American, and prescribes a blanket rule: buy health insurance, or pay a fine. It is, in principle, unavoidable. *See* 26 U.S.C. § 5000A.

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[7] *Available at* http://www.heritage.org/Research/Reports/2010/07/Obamacare-Impact-on-States (last visited May 6, 2011).

The Individual Mandate does not satisfy the *McCulloch* test or any of the *Comstock* factors, and therefore must be declared unconstitutional under the Necessary and Proper Clause.

IV

CONGRESS CANNOT COMPEL INDIVIDUALS TO BUY HEALTH INSURANCE UNDER THE TAXING POWER

The government alternatively argues that the Individual Mandate can be upheld under Congress' taxing power. Appellants' Opening Brief at 50-54. But the taxing power does not authorize the Individual Mandate because the mandate is *not a tax*. A "tax" is "a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224; 116 S. Ct. 2106, 2113 (1996) (citation omitted). But a federal law primarily designed to regulate behavior—and not to raise public revenue—is not a tax at all, and is not governed by Congress' taxing power, no matter how extensive that power might be. *See Rodgers v. United States*, 138 F.2d 992, 995 (6th Cir. 1943) (holding Agricultural Act of 1938 was exercise of commerce power, not taxing power).

In *United States v. La Franca*, 282 U.S. 568, 572; 51 S. Ct. 278, 280 (1931), the Supreme Court highlighted the distinction between "taxes" and "penalties." A tax "is an enforced contribution to provide for the support of government; a penalty . . .

is an exaction imposed by statute as punishment for an unlawful act." *Id.* This distinction between taxes and penalties is still viable. In fact, in the 1996 case, *Reorganized CF&I Fabricators of Utah*, the Supreme Court expressly relied on that distinction to hold that a federal fine levied against a bankrupt corporation qualified as a penalty—and not a tax—because it was penal in nature. 518 U.S. at 226; 116 S. Ct. at 2114 ("Given the patently punitive function of [the exaction], we conclude that [it] must be treated as imposing a penalty, not authorizing a tax."); *accord*, *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1352-53 (Fed. Cir. 2009); *Hardee v. Internal Revenue Serv.*, 137 F.3d 337, 341 (5th Cir. 1998); *In re Juvenile Shoe Corp. of Am.*, 99 F.3d 898, 900 (8th Cir. 1996).

The Individual Mandate is not a tax because it is not designed to raise revenue to support the government. Instead, the penalty imposed as part of the Individual Mandate is designed to punish individuals who do not buy health insurance. The unmistakable purpose of the Individual Mandate—*according to Congress*—is to regulate the behavior of individuals by adding "millions of new consumers to the health insurance market," deterring people from "forego[ing] health insurance coverage and attempt[ing] to self-insure," and preventing them from "wait[ing] to purchase health insurance until they need[] care." 42 U.S.C. § 18091. If the mandate works as intended, the government will collect zero revenue because no individual will be penalized for failing to buy health insurance. The Individual Mandate is thus

only a regulation of individual behavior relating to the purchase of health insurance in violation of the Commerce Clause and Necessary and Proper Clause, and is not governed by the tax provisions of the Constitution.

CONCLUSION

The Individual Mandate is not authorized by the Commerce Clause, the Necessary and Proper Clause, or Congress' taxing power. Amici respectfully request that this Court find that the Appellees have standing, and uphold the decision below invalidating the PPACA.

DATED: May 10, 2011.

Respectfully submitted,

TIMOTHY SANDEFUR
LUKE WAKE*
DANIEL A. HIMEBAUGH*
Pacific Legal Foundation

By s/ Timothy Sandefur
TIMOTHY SANDEFUR

Counsel for Amici Curiae Matthew Sissel,
Pacific Legal Foundation,
Americans for Free Choice in Medicine,
and National Tax Limitation Committee

*Pro Hac Vice pending

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,730 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-point Times New Roman.

s/ Timothy Sandefur
TIMOTHY SANDEFUR

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF MATTHEW SISSEL, PACIFIC LEGAL FOUNDATION, AMERICANS FOR FREE CHOICE IN MEDICINE, AND NATIONAL TAX LIMITATION COMMITTEE IN SUPPORT OF PLAINTIFFS-APPELLEES-APPELLANTS AND FOR AFFIRMANCE was filed with the Clerk this 10th day of May, 2011, via Federal Express. I further certify that copies of the foregoing BRIEF AMICUS CURIAE OF MATTHEW SISSEL, PACIFIC LEGAL FOUNDATION, AMERICANS FOR FREE CHOICE IN MEDICINE, AND NATIONAL TAX LIMITATION COMMITTEE IN SUPPORT OF PLAINTIFFS-APPELLEES-APPELLANTS AND FOR AFFIRMANCE were served this day via first-class mail, postage prepaid, upon each of the following:

JOSEPH W. JACQUOT
SCOTT DOUGLAS MAKAR
TIMOTHY DAVID OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General
The Capitol - PL-01
400 South Monroe Street
Tallahassee, FL 32399-1050

LEE ALFRED CASEY
ANDREW GROSSMAN
DAVID B. RIVKIN
Baker & Hostetler, LLP
1050 Connecticut Avenue NW
Suite 1100
Washington, DC 20036

PAUL D. CLEMENT
Bancroft PLLC
1919 M Street NW
Suite 470
Washington, DC 20036

KATHERINE JEAN SPOHN
Nebraska Attorney General's Office
2115 State Capitol
Lincoln, NE 68509

WILLIAM JAMES COBB III
State of Texas Office of Attorney General
209 West 14th Street
Austin, TX 78711

MICHAEL ANTHONY CARVIN
GREGORY KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
Jones Day
51 Louisiana Avenue NW
Washington, DC 20001-2105

ERIC B. BECKENHAUER
BRIAN G. KENNEDY
U.S. Department of Justice
20 Massachusetts Avenue NW
Washington, DC 20530

THOMAS MARK BONDY
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
NEAL KUMAR KATYAL
ALISA B. KLEIN
MARK B. STERN
U.S. Department of Justice
Civil Division - Appellate Staff
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

s/ Timothy Sandefur
TIMOTHY SANDEFUR