1-1-2011

Goudy-Bachman v. HHS - Plaintiffs' Motion for Summary Judgement

Barbara Goudy-Bachman

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BARBARA GOUDY-BACHMAN; and GREGORY BACHMAN	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 1:CV-10-763**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY, and TIMOTHY F. GEITHNER, in his capacity as Secretary of the United States Department of the Treasury,	:	(Judge Conner)
Defendants	:	*Electronically Filed*

PLAINITFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Paul A. Rossi
Counsel for Plaintiffs
(PA 84947)
873 East Baltimore Pike, #705
Kennett Square, PA 19348
Office: 717.285.2858
Cell: 717.615.2030
Email:panthonyrossi@comcast.net

DATED: July 6, 2011

TABLE OF CONTENTS

Exhibit #3

Article, *Green Construction Costs And Benefits: Is National Regulation Warranted?*

Exhibit #4

Article, *Changing The Customer-Utility Paradigm.*

Exhibit #5

Article, *Green At Any Price?*

Exhibit #6

Article, *New Jersey Legislature Approves Solar Power Mandate For All New Public Schools.*

Exhibit #7

Article, Kaiser Health News: *Is The Individual Mandate Really A Lynchpin In The New Health Law?*

Exhibit #8

Article, Heritage Foundation: *Obamacare And The Individual Mandate: Violating Personal Liberty and Federalism*

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes and Rules:

Other Authority:

INTRODUCTION

Plaintiffs hereby submit this memorandum of law in support of their Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment. As set forth below, and as supported in the accompanying Statement of Material Facts and Appendix, there remains no issue of material facts in this action. Plaintiffs are entitled to judgment as a matter of law on Count One of the Complaint. Accordingly, summary judgment should be entered in favor of plaintiffs and the "Individual Mandate" of the Patient Protection and Affordable Care Act[1] (hereinafter the "ACA" or "the Act") should be declared unconstitutional and enforcement permanently enjoined.

SUMMARY OF THE ARGUMENT

Lacking the votes in either house of Congress or political support from the electorate, and seeking to evade immediate electoral accountability inherent in the exercise of its more expansive authority to tax and spend (electoral accountability demanded by the Constitution) to provide (if it so wanted) a health care scheme for the uninsured and those with pre-existing medical conditions, Congress stealthily tethered its power to enact the ACA's "Financial Responsibility" provision to require virtually all United States residents to purchase qualifying health care insurance starting on January 1, 2014 (the "Individual Mandate"), and its associated penalty for non-compliance, to congressional power under the Commerce Clause. In so doing, Congress ignored, as defendants now ask this Court to do, the express limitation the Supreme Court has placed on the outer bounds on the commerce power to regulate economic (as opposed

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("HCERA").

to non-economic) activity affecting interstate commerce as explained by the Court in *Lopez* and *Morrison*.

The Supreme Court has consistently articulated that the Constitution imposes real limits on federal power. *See, Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (opinion for the Court by Marshall, C.J.)("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). It follows from the enumeration of specific powers that there are boundaries to what the Federal Government may do. *See Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) ("The enumeration presupposes something not enumerated…"). The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995).

Recently, the Supreme Court has undertaken to more sharply refine Commerce Clause analysis in order to better enforce limits on Congress's enumerated "[p]ower…[t]o regulate Commerce…among the several States." U.S. Const. Art. I, §8, cl. 3. In *Lopez*, the Court expressly limited congressional power under the Commerce Clause to three categories of ***activity***: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) "***activities*** having a substantial relation to interstate commerce… *i.e.*, those ***activities*** that substantially affect interstate commerce." 514 U.S. at 558-59. The Court emphasized that it was not willing to "convert congressional authority under the Commerce Clause to a general police power," id., at 567.

Five years after *Lopez*, the Supreme Court reaffirmed the "substantial effects" test in *United States v. Morrison*, 529 U.S. 598 (2000). In *Morrison*, the Court rejected a congressional

effort to "regulate noneconomic…conduct based solely on that conduct's aggregate effect on interstate commerce," and held unconstitutional the civil remedy portion of the Violence Against Women Act of 1994. *Id.* At 617, 619.

To be more precise, and an analysis not yet advanced by any other party litigating the constitutional fate of the Individual Mandate, precedent admits that the congressional grant of authority to regulate under the Commerce Clause is not just limited to any economic activity, ***but to economic activity on the supply side of the economic supply and demand equation***. Heretofore, congressional power to regulate under the Commerce Clause has been limited to those proactively engaged in the economic activity of providing a supply of goods and/or services to interstate commerce. Legal consumers, whether they are active or inactive, have never themselves been subject to direct regulation under the Commerce Clause. Mr. Filburn proactively grew a supply of wheat increasing the interstate supply of wheat. *Wickard v. Filburn*, 317 U.S. 111 (1942). However, it has never been posited by any court that those who might purchase Mr. Filburn's wheat (or the surplus wheat made available to the interstate supply of wheat owing to Mr. Filburn growing his own wheat) could be mandated to continue their wheat purchases as part of a broader congressional regulation of the national agricultural market under the Commerce Clause. Mr. Lopez was nothing more than a consumer of a legal product (a legal firearm) – his status as a mere consumer was insufficient to trigger Commerce Clause power over his conduct.

Defendants now ask this Court to adopt the notion that not only shall inactivity be denominated as economic activity subject to Congressional regulation under the Commerce Clause, but also (again for the first time) that the activity and/or inactivity of ***consumers*** will now place the legal consumer, ***as an individual***, to congressional regulation under the Commerce

Clause. Consumers, as individuals (active or inactive) are not engaged in an "economic enterprise" however broadly that term may be defined, and which is a necessary predicate to for an individual to be subject to congressional regulation trigger Commerce Clause regulation. This analysis is implicit in every Commerce Clause case decided by the Court. *Lopez* at 560-61 (the criminal statute in question in *Lopez* "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.").

The ACA was not enacted pursuant to the Taxing and Spending Clause of the Constitution. A mandate to purchase a private commercial product is, simply, not a tax. Further, a purported regulation denominated as a "penalty" is not interchangeable as a "tax." The Supreme Court explained in *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) that: '"[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*. at 224, *quoting United States v. La Franca*, 282 U.S. 568, 572 (1931). The *La Franca* Court expressly instructed that the word "tax" and the word "penalty" "are not interchangeable, one for the other." 282 U.S. at 572. Further, Congress cannot regulate conduct through its power to tax and spend that which it is prohibited to regulate under an enumerated power other than the taxing power justifying the regulation. *See e.g., Child Labor Tax Case*, 259 U.S. 20 (1922); *See also R.R. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982) (alternative power will not be used to support enactment if it evades the limits of another grant).

At bottom, the fatal flaw with defendants' Commerce Clause and Taxing and Spending Clause arguments are the same: They represent nothing less than a complete evisceration of the Founding Father's legacy of a federal government possessed of limited, enumerated power. Nothing in our history nor supported by any precedent of any court supports the government's

Orwellian argument that inactivity – and more precisely mere consumer inactivity (whether conscience or not) – is activity sufficient for congressional regulation of the private fisc of over 300 million residents of the United States.

In George Orwell's *Animal Farm*, the founding principal that "All Animals Are Equal" was later amended by a self-serving elite group of Pigs to add "But Some Animals Are More Equal Than Others" in order to entrench their power to control the lives and fate of the other animals on the farm in servitude to make their lives fat and happy. In similar fashion, the government seeks to amend a constitution bespoke of a federal government limited to enumerated power into one where the citizens are subject to the ever present threat of a new government edict tantamount to economic slavery upon the whim of government elites and those who successfully lobby to compel economic conduct in favor of their own economic niche to make their own lives fat and happy. "Inactivity" is now "Activity." A "Mandate" to purchase a private product is now a "Tax." The government's legal argument in support of the Individual Mandate ought to be confined by this Court to the fictional confines of Orwell's nightmarish barnyard.

Accordingly, defendants' motion for summary judgment must be rejected and plaintiffs' are entitled, as a matter of law, to summary judgment in their favor.

ARGUMENT

Consistent with this Court's request, plaintiffs hereby expressly incorporate plaintiffs' brief in opposition to defendants' motion to dismiss into plaintiffs' argument in support of plaintiffs' instant motion for summary judgment and in opposition to defendants' motion for summary judgment.

I. LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact," such that "the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (citing Fed. R. Civ. P. 56(c)). Summary judgment is the appropriate resolution of any action where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Hankins v. Temple Univ.*, 829 F.2d 437, 440 (3rd Cir. 1987). In examining a Rule 56 motion, this Court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

Plaintiffs' pleading, briefing, statement of facts in support of the instant motion for summary judgment and attached sworn declaration by plaintiff Barbara Goudy-Bachman admit that there are no material issues of fact for a jury to determine. The case at bar is purely a legal dispute as to the constitutionality of the Individual Mandate of the ACA. Plaintiffs' claims are in accord with established Supreme Court precedent and are ripe for adjudication on summary judgment.

II. PLAINTIFFS CONTINUE TO HAVE STANDING TO MAINTAIN THE INSTANT ACTION WHICH IS RIPE FOR ADJUDICATION.

By its Order and Memorandum Opinion of January 24, 2011 (Doc. #37), the Court denied defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) (Doc. #11) ("Mem. Op.").

Plaintiffs' Statement of Material Facts and plaintiff Goudy-Bachman's attached sworn declaration in support of the instant motion for summary judgment fully support the allegations of plaintiffs' Complaint, including those facts bearing on plaintiffs' standing to maintain and the ripeness of the instant litigation. Plaintiffs' remain subject to the Individual Mandate and have, and continue to suffer, concrete and particularized injury that "affect[s] the plaintiff[s] in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 n.1 (1992).

Plaintiffs have suffered both economic and non-economic harm as a result of the passage of the Individual Mandate. The Individual Mandate immediately imposed a negative impact on plaintiffs' long-term purchasing power causing them a present injury-in-fact sufficient to confer standing to challenge the constitutionality of the Individual Mandate. Specifically, plaintiffs were unable to finance a five-year contract on a new vehicle, and must presently and continue to act and make plans to rearrange and evaluate their finances before the mandate becomes effective on January 1, 2014. Mem. Op. at 10-11.

Other courts have recognized standing to challenge the Individual Mandate where the plaintiffs alleged an immediate financial pressure to rearrange their affairs and forego current spending in anticipation of the statutory requirement that they must purchase qualifying health care insurance starting in 2014. *See Liberty University, Inc. v. Geithner*, --- F.Supp. 2d ---, 2010 WL 4860299, at *5 (W.D. Va. 2010); *Thomas More Law Center v. Obama*, --- F.Supp. 2d ---, 2010 WL 3957805 (E.D. Mich. 2010); *Florida v. U.S. Department of Health and Human Services*, 716 F.Supp. 2d 1120 (N.D. Fla. 2010). Plaintiff Goudy-Bachman's sworn declaration in support of the instant motion for summary judgment is in full accord with this Court's prior analysis of plaintiffs' standing and the ripeness of plaintiffs' claims in its Memorandum Opinion dismissing defendants' motion to dismiss on standing and ripeness. Plaintiff Goudy-Bachman

affirms that plaintiffs: (1) do not carry health care insurance; (2) have incurred and paid for all of their medical expenses since dropping out of the health insurance market; (3) are subject to the Individual Mandate; (4) their income is sufficient so as to not exempt them from the Individual Mandate and the associated penalty provisions of the ACA; (5) are not members of any group exempted by the ACA from the Individual Mandate; (6) they intend to comply with the Individual Mandate; (7) calculated and determined that solely because of the costs associated with the Individual Mandate they could not, in March of 2010, afford the costs of long-term financing for a new car whose payments stretched beyond the start date for the Individual Mandate, nor purchase the same suitable car of their choice on a shorter term financing plan that ending prior to the start of the Individual Mandate in January 2014; and (8) did not, in fact, purchase a new car as a direct and proximate result of the Individual Mandate.

Accordingly, upon the same analysis that this Court used to deny defendants' motion to dismiss this action for lack of standing and ripeness, plaintiffs have clearly demonstrated standing to maintain the instant motion for summary judgment. Further, the facts of the instant litigation present a record ripe for adjudication.

III. THE INDIVIDUAL MANDATE AND PENALTY EXCEED THE OUTER BOUNDS OF CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE.

1. The Commerce Clause Does Not Support the Individual Mandate

In the ACA, Congress adverts only to the Commerce Clause for its claimed power to enact the Individual Mandate and its associated financial penalty provisions. *See* ACA § 1501(a). The Commerce Clause of the Constitution provides that: "The Congress shall have the Power…To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, §8, cl. 3. This broad grant of authority specifically does

not authorize Congress to command commerce. The Supreme Court has never extended the Commerce Clause beyond the regulation of: (1) "use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 541 U.S. at 558-59 (1995); *United States v. Morrison*, 529 U.S. at 608-09. Only the third prong of the Supreme Court's Commerce Clause test is implicated in support of congressional authority to impose the Individual Mandate and its associated penalty provisions on plaintiffs.

The clear objective of congressional regulation under the Commerce Clause must be some form of commercial or "economic activity." Binding Supreme Court precedent is saturated with recognition of this most fundamental requirement which has been consistently applied both in cases where the Court has upheld statutes under the Commerce Clause and decisions where the Court has stricken the offending enactment as exceeding congressional power to regulate interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("…the power to regulate *activities* that substantially affect interstate commerce") (emphasis added); *Morrison*, 529 U.S. at 608-09 (Congress has "the power to regulate those *activities* having a substantial relation to interstate commerce') (emphasis added); *Lopez*, 514 U.S. at 558-59 (commerce power allows Congress to "regulate those *activities* having a substantial relation to interstate commerce,") (emphasis added).

No decision assessing any enactment (other than recent court decisions on the ACA) under the Commerce Clause has ever exceeded the bounds of the three-category analysis of permissible Commerce Clause regulation identified in *Lopez* and *Morrison*, and none have ever found inactivity to be a proper subject of congressional regulation under the Commerce Clause. In particular, neither *Gonzales v. Raich*, nor *Wickard v. Filburn* – the Supreme Court's most

sweeping articulation of Commerce Clause power, and upon which defendants argument rely – suggests that Congress through its commerce power can regulate anything other than economic activity.

Although *Wickard* has been described as "perhaps the most far reaching example of Commerce Clause authority over interstate 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. What *Wickard* makes clear, as *Lopez* and *Morrison* make clear, is not the proposition that the commerce power is without limit. Instead, *Wickard* establishes the principle that, when activity has a substantial aggregate impact on interstate commerce, there is no as-applied, *de minimus* 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 the analysis]."). In fact, plaintiffs do not advance a *de minimus* argument in opposition to the Individual Mandate; rather, their argument is simply that they have not engaged in any conduct that would trigger congressional regulation of them as individuals – such as the kind of commercial conduct that Mr. Filburn engaged.

What *Wickard* also instructs is that component parts of a broader or comprehensive effort by Congress to regulate a national market must individually comply with Commerce Clause jurisprudence. Each individual component regulation made part of a comprehensive attempt to regulate a national market must individually fit within the outer bounds of recognized congressional power to regulate under the Commerce Clause. Regulation of Mr. Filburn's

activity of growing a wheat crop had to pass constitutional muster as having, in the aggregate, an impact on interstate commerce. Even though the regulation at issue in *Wickard* was part of an integrated regulation of the national agricultural market, the Agricultural Adjustment Act of 1938, the question as to whether or not Mr. Filburn's conduct was subject to congressional regulation was decided by the Court via an analysis as to whether Mr. Filburn's conduct had, in the aggregate, an impact on interstate commerce. Mr. Filburn was subject to the commerce power because he was adjudged to have: (1) engaged in an economic activity; that (2) had, in the aggregate, an impact on interstate commerce. No part of the Supreme Court's decision to affirm the constitutionality of the regulation of Mr. Filburn's wheat crop in *Wickard* suggests that Congress may regulate non-economic conduct even if such a regulation would aid in the broader regulation of a national interstate market. The regulation at issue in *Wickard* was valid on its face, and not because it was merely part of a broader regulation of an interstate market. The Court's Commerce Clause jurisprudence does not admit that Congress cannot bootstrap additional powers in furtherance, and as part, of an alleged comprehensive regulation of an interstate market.

At bottom, defendants are asking this Court to ignore the fact that plaintiffs are not actually engaged in any economic activity. Defendants' are using word games (i.e., defendants' arguments that plaintiffs' passive decision not to purchase health insurance is, in reality, economic activity subject to Commerce Clause regulation) to mask their true argument in favor of an radical expansion of Commerce Clause power: That Congress has the power under the Commerce Clause to command any conduct, and to regulate any person or thing, if that command or regulation will assist Congress in advancing policy goals that Congress advocates as part of an alleged comprehensive regulation of a national interstate market. Defendants'

argument is that the Commerce Clause allows Congress to manipulate individual behavior if such a manipulation will permit Congress to more easily remedy a targeted dysfunction or problem it identifies in the interstate markets. Defendants' argument is simple, the federal government is empowered under the Commerce Clause to command commerce (by anyone) in aid of its lesser enumerated power to regulate interstate commerce. The fact that the power to command commerce is a greater power (the power of tyranny) than the enumerated power to regulate commerce initiated by spontaneous economic activity exposes the fatal flaw in defendants' vision of the Commerce Clause – and how dangerous the argument is for the safeguarding of liberty (both economic and individual). *See* Brief of *Amici Curiae,* filed with the United States Court of Appeals for the Eleventh Circuit by Gary Lawson, Robert G. Natelson, & Guy Seidman, the authors of *The Origins of the Necessary and Proper Clause* at pp. 1 - 13. Attached as Exhibit #1.

The passive status of not purchasing a commercial product does not fall within any of the three categories of interstate commerce articulated by the Supreme Court in *Lopez,* whether or not that status can be traced back to an "economic decision." Simply stated, not only has the Supreme Court never extended the Commerce Clause to countenance Congressional authority to regulate individuals who have not first chosen to proactively engage in commercial economic activity, but the Supreme Court has never extended the Commerce Clause to submit any consumer – whether or not that consumer has made a choice to purchase or not purchase a particular commercial product, to Congress' Commerce Clause powers.

As applied to the facts of this litigation – and to be blunt – even if plaintiffs decided to purchase health care insurance tomorrow, such a proactive "economic choice" to make a legal consumer purchase is insufficient under any prior articulation of the outer bounds of the

commerce power to subject plaintiffs to any direct, personal regulation by Congress. Even under such a scenario, the affirmative act of purchasing legal health care insurance does not and would not trigger a congressional mandate, supported by the Commerce Clause, to require plaintiffs to maintain and to continue to purchase health care insurance. Consumers, whatever their choice, do not submit themselves to congressional regulation upon making a legal purchase of any consumer item.

Therefore, even if this Court were to accept defendants' novel argument that plaintiffs' inactivity in failing to purchase health care insurance is really an "economic decision" and, therefore "economic activity" having a substantial impact in interstate commerce and subject to congressional regulation, the government's argument fails to explain how and on what authority any legal "economic decision" (whether real or imagined for purposes of litigation) by a mere consumer triggers a valid exercise of congressional regulation over the person of the consumer under the Commerce Clause. While the Commerce Clause does permit Congress to prohibit the sale and possession of a service, good or article in interstate commerce – the legal purchase, possession and consumption of a legal goods and/or service has never been contemplated to place the individual consumer under the jurisdiction of congressional power under the Commerce Clause. *See e.g.*, *Raich*, 545 U.S. at 26 (Congress's power to ban the intrastate manufacture, possession and the use of marijuana for medical purposes upheld under the Commerce Clause limits congressional power over the article in interstate commerce). And it certainly cannot be fathomed that those who are not engage in any consumer activity, but are in a state of repose, would also be scooped up and placed – as an individual – under the jurisdiction of congressional commerce power.

2. The Individual Mandate Impairs the Constitutional Design

As the Supreme Court noted in *Lopez*, Alexander Hamilton at the New York convention to ratify the Constitution "not[ed] that there would be a 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. Hamilton's articulation of the fundamental framework of the Constitution is an essential bulwark in the aid of defending individual and economic liberty.

Defendants' argument makes no mention of the textual protections afforded by the Constitution for the protection of individual liberty, nor any effort to explain how individual liberty will be protected from congressional power should the Individual Mandate be upheld. In fact, defendants seem to view individual liberty protected by the Founder's constitutional framework as a hurdle to be overcome rather than a core interest to be cherished and protected at all costs (an interest more important, frankly, than the pedestrian policy goal of providing health insurance to the uninsured [including to those who do not want it] or health care coverage to those with pre-existing medical conditions).

The Supreme Court, however, is intimately concerned with maintaining a federal government possessed of limited enumerated power in defense of individual liberty. In addition to the affirmative, tripartite definition of the commerce power announced in *Lopez*, the Supreme Court has developed a workable negative rule for determining when the outer limit of the Commerce Clause has been exceeded: a facial challenge will succeed when Congress seeks to regulate non-economic activity, particularly where the claimed power has no principled limit. 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." *Lopez*, 514 U.S. at 578 (citations omitted).

The commerce power must be construed '"in the light of our dual system of government and may not be extended so as to…effectively obliterate the distinction between what is national and what is local….'" *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). 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 is the Individual 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); *Jacobson v. Massachusetts*, 197 U.S. 11, 12, 24-25 (1905) (compulsory vaccination); *Robinson v. California*, 370 U.S. 660, 665 (1962) (drug rehabilitation); *Ex Parte Poresky*, 290 U.S. 30, 32 (1933) (automobile insurance and collecting cases).

Accordingly, any valid interpretation of the Commerce Clause must preserve meaningful limits on congressional authority which cannot transform the commerce power into a source of "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Defendants

fail to articulate any judicially enforceable limiting doctrine consistent with their view of the Commerce Clause's grant of power to Congress that would preserve the Constitution's division of authority between a limited federal government and the States. If defendants' arguments in support of an expansive Commerce Clause had been the Founder's intent, and if this is the Constitution's meaning, then all of the remaining constitutional provisions demarcating Congress's specific authority would be "mere surplusage." *Marbury v. Madison*, 5 U.S. 137, 174 (1803). The commerce power by itself would have been sufficient for any and all federal action – the Founders need not have spent so much time cooped up in Philadelphia birthing a federal government bounded by the express text of the Constitution.

This is not valid constitutional interpretation, *see id.* ("It cannot be presumed that any clause in the Constitution is intended to be without effect."), and nothing in the Supreme Court's Commerce Clause jurisprudence – let alone the text, structure and history of the Constitution – supports such an unbounded expansion of federal power. Defendants cannot identify a single case suggesting that Congress may compel persons to engage in commerce because their failure to do so might affect the national economy in a way that Congress finds undesirable. In effect defendants would rely on politics to keep Congress in check, an argument as unavailing as the notion that political forces are sufficient to maintain the protections afforded under the Bill of Rights.

Defendants utterly fail in the most crucial of tasks of articulating how any ruling in support of the Individual Mandate would not extend to authorize similar future acts of congressional power under the Commerce Clause. Defendants are reduced to mere incantation that the health care market is "special" and that the rule of law established in this case would have no application to future controversies. Defendants merely state the rule is limited but does

not articulate why – and the "why" is what they must and cannot provide to this, or any other court.

In fact, contrary to defendants' argument (or more likely evasion because they cannot explain how their theory of the Commerce Clause will be limited in the future) health care is not special. Not everyone will use it. Of those who do use the health care market (admittedly most) the vast majority of those who are not otherwise covered by a federal program, pay for the services they receive – including those who have ordered their lives in such a manner as to pay for medical services as they come due. There are, in fact, many different national markets to which any analysis used to uphold the Individual Mandate would necessarily extend.

For instance, everyone uses energy, the energy market is national in scope and has a longer pedigree of federal regulation than the health care market – and it is under political attack from well-funded radical special interest groups that have long sought the power to impose dictates to force other citizens to curtail their consumption (of everything) in aid of their own narrow concerns (some valid, but most hyped-up on sound bites and self-righteous do-goodism [I know, "do-goodism" is not a word, but it hits the mark closer than any word in the English lexicon]). Many who found themselves politically abandoned upon the fall of the Communist ideal have migrated into the environmental movement where they have found a comfortable home in a well-funded movement connected to the world's elites who have no qualms in imposing their understanding of utopia on the rest of society – at the point of a gun if necessary. Is it truly inconceivable that (at a minimum), if the Individual Mandate is upheld, radical environmental constituencies would not move to compel all homeowners (or landowners) to install solar panels to make their homes more "green" in aid of their mythical and dystopian fight against man made climate change?

In fact, such an initiative has already been launched by the Prime Minister of Japan for his country, and the many States have, themselves – in exercise of their own police power – begun to impose "green" energy quotas on the energy industry and solar panel mandates for some new construction. If Congress can compel individuals to buy or sell particular goods and services merely because their "decision" not to do so has broader economic consequences, then congressional power is virtually without limit. *See* Exhibits #2, #3, #4, #5 & #6. It is simply not credible to suggest that if the Individual Mandate is upheld as a valid exercise of congressional power under the Commerce Clause that such a ruling will not be immediately used by extremists (of all stripes) to seek to impose new and onerous mandates on entire populations through federal, as opposed to state, regulation.

If the Individual Mandate is upheld as a valid exercise of the Commerce Clause, the way is made clear to real and radical threats to our freedoms. The stakes are much higher than the funny little hypothetical threat that Congress might now be granted the power to force people to eat broccoli. ***No policy goal is worth exposing our nation to real and pending threats to our freedoms***. And this is precisely why the burden rests on defendants to articulate a judicially manageable limiting standard on congressional power under the Commerce Clause. It is not enough to parrot that the health care market is special, it is not constitutionally or in practice "special," and any such answer is an insufficient constitutional twig upon which the entire framework of the constitution and our freedoms as a people must rest. So long as defendants fail to articulate a workable limiting constitutional standard to be applied to future cases, no further analysis of defendants' argument in support of the Individual Mandate is warranted and should not be considered.

Further, "cost shifting" the "free rider problem" and "market timing" are not unique or "special" problems that visit only upon the health care and insurance markets. Any time an individual makes a choice about what and when to buy they are engaged in "market timing" – presumably choosing the optimal moment to enter a particular market based on their own circumstances. This is true whether that market is for necessities such as food, energy, transportation, clothing, shelter, and health care, or for luxuries such as entertainment, jewelry or vacation travel. Whenever individuals avoid a particular market for any (or no reason), economic or otherwise, they also can be said to "impose" costs in that market: their lack of demand may deflate prices (if supply remains constant) or increase prices (if relative supply falls), and may even affect whether particular goods and services are offered at all. ***This is to be expected in a free society***.

It should also be noted that where Congress has imposed affirmative obligations on individuals based only on their being citizens or residents of the United States, it has never done so either under the Commerce Clause or pursuant to any claim of a general police power. Instead, such congressional impositions have been based upon explicit constitutional authorizations entirely inapplicable to this litigation. *See, e.g., Selective Service Cases*, 245 U.S. 366, 383, 390 (1918) (finding conscription of men into the armed services to be justified by Congress's power "to raise and support Armies" under U.S. Const. art. I, § 8, cl. 12); *Morales v. Daley*, 116 F.Supp. 2d 801 (S.D. Tex. 2000), *aff'd* 275 F.3d 45 (5th Cir. 2001) *cert. denied*, 534 U.S. 1135 (2002) (Congress may compel answers to census questions pursuant to U.S. Const. art. I, § 2, cl. 3).

This Court should decline defendants' invitation to expand the Commerce Clause far beyond the scope of the Constitution's text and established Supreme Court jurisprudence.

IV. THE NECESSARY AND PROPER CLAUSE CANNOT SAVE THE INDIVIDUAL MANDATE

The Necessary and Proper Clause cannot sustain the Individual Mandate. 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." U.S. Const. art. I, § 8. This provision gives Congress the "means" to carry out a proper exercise of its enumerated powers. Chief Justice Marshall explained "in language that has come to define the scope of the Necessary and Proper Clause...'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.'" *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

On May 17, 2010, the United States Supreme Court spoke to the meaning of the Necessary and Proper Clause in opinions that foreclose the use of the provision to sustain the Individual Mandate and its penalty provision. *Comstock*, 130 S. Ct. at 1956-1957 (2010). Beginning with the dissent, Justice Thomas and Justice Scalia categorically stated: "Under the Court's precedents, Congress may not regulate non-economic activity (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce." *Id*. at 1973 (citing *Morrison* and *Lopez*) (emphasis added). Under Justice Thomas and Justice Scalia's view, by definition, Congress cannot regulate based upon aggregation of non-economic inactivity of the failure of individuals to secure health care insurance.

With respect to the concurrences, Justice Kennedy concurred because the civil commitment of federal prisoners at issue was a narrow, traditional function of the federal government that is not in competition with the general state police power. *Id*. at 1968. Justice Alito concurred because the power to hold federal prisoners was supported by deep history, going back to the First Congress, and the power of civil commitment is merely incidental to that hoary power. *Id*. at 1969-70.

The majority opinion upheld the law under a five part test: first, whether there is means-ends rationality between the enumerated power and the means chosen; second, whether the activity is one of long standing; third, if the reach of the longstanding practice is being extended, whether it is a reasonable extension; fourth, whether the statute properly accounts for state interests; and fifth, whether the links between the means chosen and an enumerated power are too attenuated. *Id*. at 1956-63. When the majority applied these factors to the facts of *Comstock*, they upheld the civil commitment statute because of "(1) the breadth of the Necessary and Proper Clause, (2) the long history of Federal involvement in this area, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in Federal custody, (4) the statute's accommodation of state interests [the States have a right of first refusal for custody upon release but historically have wanted nothing to do with paying for these federal prisoners], and (5) the statute's narrow scope." *Id*. at 1965.

Here, in contrast, (1) the rationality of the ends-means fit is weak because there is a traditional Anglo-American dislike of compulsion in financial transactions involving government, not only at the time of the Founding, but extending back to forced loans under the Stuarts; (2) the history of federal involvement in regulating the health care insurance market is

nonexistent; (3) the Individual Mandate and its penalty provision are not a reasonable extension of pre-existing practice; (4) the asserted power represents a claim of police power in competition with the historical role of states in the regulation of the health care and insurance markets; and (5) the claimed power has no principled limits. The Necessary and Proper Clause simply does not save the Congressional overreach inherent in a command to one citizen to purchase a good or service from other citizen under threat of a civil penalty.

Moreover, the Individual Mandate simply is not the "means for implementing a constitutional grant of legislative authority." *Id*. at 1962. Rather, the Individual Mandate is the central cog of Congress's scheme to provide health care coverage for those with pre-existing coverage. Congress is trying to force the more healthy 20 - 35 year old population (those most likely to temporarily opt out of joining medical insurance pools until later in life, and – as a result – least likely to use the health care market) as a pay-off to the insurance industry not to squawk (or challenge in court) about the ACA's mandate prohibiting health insurance companies from denying insurance coverage to those with pre-existing medical conditions. At bottom, the Individual Mandate is an end run around the Taxing and Spending Clause and the immediate political accountability inherent in an alternative congressional scheme to impose higher taxes to allow Congress to provide health care coverage for those with pre-existing medical conditions through Congress's spending power. The Individual Mandate is not a means to a legitimate end sought under the Commerce Clause – it embodies that end.

Further, it is no answer to suggest that the Individual Mandate can be upheld as part of a larger plan to regulate health care insurance. In *Lopez*, the Court rejected the contention that the statute at issue might stand as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could by undercut unless the intrastate *activity* were regulated.

Lopez, 514 U.S. at 561. (emphasis added). Regardless of which is the means and which is the end, commercial activity is required: Congress simply cannot command unwanted participation in commerce.

The Supreme Court has warned time and again that the federal government may not use the Necessary and Proper Clause as a pretext to exercise a type of authority denied it by Constitution. *See McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) ("Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."); *Jinks v. Richland Co.*, 538 U.S. 456, 464 (2003) (measures adopted "as a 'pretext' for 'the accomplishment of objects not entrusted to the [federal] government,'" would not be a proper exercise of authority under the Necessary and Proper Clause (citing *McCulloch*, 17 U.S. at 423)); *Comstock*, 130 S.Ct. at 1964 (the Necessary and Proper Clause does not give Congress a general police power, which is reserved to the States).

Further, the Individual Mandate cannot, on its face, support defendants' proposition that it is designed to eliminate the "free rider" problem that defendants' allege is associated with those who fail to purchase health care insurance, and as an essential part of a regulatory scheme to regulate the national health care market. *See* Exhibit #7. To the extent that Congress acts within its enumerated and necessary powers, it is not for a court of law to delve into the wisdom of a particular enactment. Congress is free, within the grant of authority vested in it by the Constitution, to enact unwise laws. However, if the government rests the constitutionality of an enactment on the argument that a novel regulatory scheme is vital to remedy a perceived economic ill, then this Court has, at minimum, the threshold responsibility to determine if, on its

face, whether or not the contested regulatory scheme is a rational means toward a legitimate ends. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). A scheme doomed, on its face, to fail in achieving a legitimate ends is invalid on its face. The Individual Mandate and associated penalty is doomed to fail to the point that it is laughable that anyone could conceive that such a scheme could ever deliver a beneficial adjustment to the health care or health insurance markets.

The Individual Mandate increases the expense of coverage for many of the uninsured that the Individual Mandate is purportedly designed to help. For example, the ACA requires not only the purchase of coverage, but expensive coverage, precluding lower-cost plans. The ACA also requires insurers to compress the ratio of insurance ratings between younger and older enrollees. This, in turn, will lead to high premiums, particularly for the younger and healthier enrollees – the very population the Individual Mandate seeks to compel to enter the insurance pool. When confronted by higher health care insurance premiums rejected by the uninsured prior to the effective date of the Individual Mandate, it is very likely that the uninsured will continue to opt out of the insurance pool and, instead, just pay the financial penalty for failure to comply with the Individual Mandate (to be phased in from 1% to 2.5% of income by 2016 or $95 in 2014, $325 in 2015, and $695 in 2016 – whichever is greater) rather than to pay the even higher costs associated with entry into the insurance pools under the ACA..

At the same time, the ACA's pre-existing medical coverage mandate allows those who decide to pay the financial penalty to secure health care insurance when they discover they are sick, and then drop insurance coverage when they get well and simply revert back to paying the financial penalty after recovery (even those who could otherwise pay for their medical costs without the aid of health care insurance would be foolish not to secure insurance when they get ill rather than pay for their medical services out of their own pockets, or in advance). *See*

Robert E. Moffit, *Obamacare and the Individual Mandate: Violating Personal Liberty and Federalism*, HERITAGE FOUNDATION WEBMEMO No. 3103 (January 18, 2011), Attached as Exhibit #8.

In tandem, the Individual Mandate coupled with the relatively low financial penalty associated with non-compliance and the pre-existing medical condition mandate cannot seriously be advocated or adjudged to constitute a necessary component for the rational or comprehensive regulation of the national health care market to lower costs and to decrease the number of uninsured citizens. It certainly cannot be cited as a necessary solution to the "free rider" problem that the Individual Mandate is alleged to remediate. Anyone who complies with the Individual Mandate will not be acting in their own economic self-interest when they can just pay a small fine and wait to secure health care insurance after they become ill – and then drop such coverage when they are healed. The Individual Mandate will act to increase the number of "free riders" that defendants posit is the very evil the Individual Mandate seeks to reduce.

V. THE INDIVIDUAL MANDATE AND PENALTY CANNOT BE SUSTAINED UNDER THE CONSTITUTION'S TAXING AND SPENDING CLAUSES.

A threshold problem for defendants' resort to the taxing power is that no government has ever denominated a mandate as a tax. Not a single state has codified its car insurance mandate or financial responsibility requirements under that state's respective tax code. Nor is there a single published instance where either a governmental entity or the insurance industry has ever characterized the car insurance mandate as a tax. Further, counsel's survey of the published and available tax codes of the English speaking nations failed to reveal any mandate to purchase a private commercial product incorporated into that nation's tax code.

The Individual Mandate requires individuals to engage in a commercial purchase of a product. Funds used by individuals to purchase the required health care insurance are directed to private commercial interest (i.e., to an insurance company), not to the government. The penalty for failure to comply with the Individual Mandate is just that, a penalty, not a tax, paid to the government as punishment for ignoring a federal congressional mandate.

Congress itself called the payment for failure to comply with the Individual Mandate a "penalty," ACA § 1501 at § 5000A(b)(1). The President similarly declared that it was not a tax. Elsewhere in the ACA, Congress levies taxes denominated as such, demonstrating that it knew how to draw the distinction. *See, e.g.*, ACA §§ 9001; 9004; 9015; 9017; 10907. In other contexts, the Supreme Court has refused to permit litigants to denominate as a tax that which Congress has declared an exercise of the Commerce Clause. *Board of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 58 (1933) ("But if the Congress may thus exercise the power, and asserts here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power.").

The penalty, in light of traditional norms, is simply not a tax. '"A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.'" *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995) *quoting United States v. Butler*, 297 U.S. 1, 61 (1936). In contrast, the purpose of a penalty is to alter conduct in hopes that the penalty will not be collected at all.

The Supreme Court has recognized that "taxes" and "penalties" are separate and distinct, stating that '"[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." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), *quoting La Franca*, 282 U.S. at 572. To prevail defendants' taxing power argument requires that this Court first ignore Congress's express decision to label the Individual Mandate penalty as a "penalty" and then to "alter the essential nature" of the penalty by ignoring its function so that it can be called a tax. Because such steps would have this Court rewriting the ACA, as opposed to interpreting it, defendants' argument that the Individual Mandate and associated penalty was enacted pursuant to Congress's taxing power must fail.

CONCLUSION

For all the foregoing reasons, plaintiffs' motion for summary judgment on Count I of plaintiffs' complaint should be granted and the Individual Mandate and associated penalty should be declared unconstitutional and permanently enjoined

Defendants' motion for summary judgment should, in all respects, be denied.

Respectfully submitted,

Dated: July 6, 2011

/s/ Paul A. Rossi, Esq.

Paul A. Rossi, Esq.
Pennsylvania Attorney I.D. # 84947
873 East Baltimore Pike, #705
Kennett Square, PA 19348
(O) 717.285.2858
(C) 717.615.2030
paularossi@comcast.net

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of July, 2011, a copy of the foregoing "Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment" was served on counsel of record for all Defendants through the Court's Notice of Electronic Filing System

/s/ Paul A. Rossi, Esq.

Paul A. Rossi, Esq.
Pennsylvania Attorney I.D. #84947
873 East Baltimore Pike, #705
Kennett Square, PA 19348
(O) 717.285.2858
(C) 717.615.2030
paularossi@comcast.net

APPENDIX