

Nos. 11-1057 & 11-1058

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF VIRGINIA,

Plaintiff-Appellee,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH &
HUMAN SERVICES, IN HER OFFICIAL CAPACITY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia

**BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND
CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE, URGING AFFIRMANCE**

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INTERESTS OF *AMICI CURIAE*¹

The Washington Legal Foundation (WLF) is a public interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF routinely litigates in support of efforts to ensure a strict separation of powers—both among the three branches of the federal government and between federal and state governments—as a means of preventing too much power from being concentrated within a single governmental body.

The remaining *amici* are all legal scholars specializing in constitutional law and related fields. Based on their substantial legal expertise, they believe that Section 1501 of the Patient Protection and Affordable Care Act exceeds the bounds of Congress’s constitutional authority. *Amici* include Jonathan Adler, Professor of Law and Director, Center of Business Law and Regulation, Case Western Reserve University School of Law; George Dent, Schott-van den Eynden Professor of Law, Case Western University School of Law; Michael Distelhorst, Professor of Law, Capital University Law School; James W. Ely, Jr., Milton R. Underwood Professor

¹ Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief.

of Law Emeritus, Vanderbilt University Law School; Elizabeth Price Foley, Professor of Law, Florida International University College of Law; David Kopel, Research Director of the Independence Institute and Adjunct Professor of Law, University of Denver Sturm College of Law; Kurt Lash, Alumni Distinguished Professor of Law and Co-Director of the Program on Constitutional Theory, History and Law, University of Illinois College of Law; David N. Mayer, Professor of Law and History, Capital University Law School; Andrew Morris, University of Alabama School of Law; Leonard J. Nelson III, Professor of Law, Samford University's Cumberland School of Law; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Ronald J. Rychlak, Associate Dean for Academic Affairs and Professor of Law, University of Mississippi School of Law; Steven J. Willis, Professor of Law, University of Florida Levin College of Law; and, Todd J. Zywicki, Foundation Professor of Law, George Mason University School of Law.

SUMMARY OF ARGUMENT

The district court's grant of summary judgment below should be affirmed. Section 1501 of the Patient Protection and Affordable Care Act, which seeks to compel most Americans to purchase health insurance by 2014, goes well beyond any previous exercise of federal authority. *See* §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). Even the broadest Supreme Court

precedents interpreting the limits of federal power do not give Congress the authority to force Americans to purchase a product they do not want.²

The “first principles” of the Constitution are that it “creates a Federal Government of enumerated powers.” *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST NO. 45). As James Madison observed, “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” *Id.* The federal government, Madison emphasized, is not granted “an indefinite supremacy over all persons and things.” THE FEDERALIST NO. 39. These foundational principles are both vindicated and preserved by the district court’s ruling below.

The Commerce Clause gives Congress the power to regulate “economic activity” and “noneconomic activity” when controlling the latter is “an essential part of a larger regulation of economic activity.” *Lopez*, 514 U.S. at 561; *see also United States v. Morrison*, 529 U.S. 598, 610 (2000) (quoting *Lopez*). But nothing in the Court’s Commerce Clause precedents gives Congress the power to force private citizens to engage in economic transactions they would prefer to avoid.

² This brief addresses only the Secretary’s Commerce Clause and Necessary and Proper Clause arguments. WLF has previously addressed, in the district court below, the Secretary’s Taxing Clause arguments. *See* Amicus Br. of Wash. Legal Found. & Const. Law Scholars, *Virginia ex rel. Cuccinelli v. Sebelius*, 2010 WL 3952344, at *17-20 (E.D. Va. Oct. 4, 2010).

Apparently conceding that some “activity” is required to trigger the Commerce Clause power, the Secretary argues that the individual mandate actually regulates “the practice of consuming health care services without insurance.” Appellant’s Br. at 34. Yet the individual mandate regulates neither consumption nor any other activity, but applies instead to virtually all uninsured Americans *whether or not* they consume health care services. If the individual mandate operated as the Secretary claims, one could simply avoid the mandate by not consuming health care services; but such “opting out” is not allowed under Section 1501.

If, as the Secretary suggests, the Commerce power extends to all economic *decisions* as well as all economic activities, Congress would enjoy unlimited authority to mandate any behavior of any kind. After all, any decision to do (or not do) virtually anything has some economic impact. Nor is there any special attribute of the health care market that makes refusal to purchase health insurance more of an “economic activity” than any other decision to refrain from purchasing any other product.

Finally, the Supreme Court’s Necessary and Proper Clause precedents give Congress wide latitude to determine what kinds of regulations are “necessary” to the implementation of Congress’s other enumerated powers. *See, e.g., M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-15 (1819) (ruling that such measures

need not be “absolutely necessary,” but merely “useful” or “convenient” to the execution of other powers). But they do not give Congress the kind of sweeping power asserted by the Secretary in this case. Indeed, the individual mandate runs afoul of at least three of the five criteria for evaluating Necessary and Proper Clause cases recently utilized by the Supreme Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010). *Comstock* cited five factors in justifying its decision to uphold a claim of congressional power under the Necessary and Proper Clause: “(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (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, and (5) the statute’s narrow scope.” *Id.* at 1965. A majority of these criteria weigh against the individual mandate.

Section 1501 also violates the Necessary and Proper Clause’s requirement that legislation authorized by it must be “proper.” Historical evidence suggests that “proper” legislation at the very least must not upset the constitutional balance of power between the federal and state governments by giving Congress virtually unlimited authority. The logic of the Secretary’s argument for the individual mandate does just that.

ARGUMENT

I. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY CONGRESS'S POWERS UNDER THE COMMERCE CLAUSE.

The Commerce Clause gives Congress 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. The Supreme Court divides Congress’s Commerce Clause powers into three categories: (1) regulation of “the use of the channels of interstate commerce”; (2) “[r]egulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “regulat[ion] [of] . . . those activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558-59; *Morrison*, 559 U.S. at 609.

The individual mandate clearly does not fall under either the first or second of these categories. The decision not to purchase health insurance does not involve “the use of the channels of interstate commerce.” *Lopez*, 514 U.S. at 558. Similarly, the mandate is not an example of “[r]egulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce.” *Id.* The status of being uninsured is neither an instrumentality of interstate commerce, nor is it a person or thing that travels in interstate commerce.

The Secretary’s Commerce Clause argument instead hinges on the third category—regulation of “activities that substantially affect interstate commerce.”

The fatal flaw in the Secretary's position is that none of the Supreme Court precedents interpreting the Commerce Clause allow Congress to force ordinary individuals to engage in commercial activity.

A. Existing Commerce Clause Precedents Do Not Give Congress The Power To Regulate Mere Inactivity.

The Supreme Court has repeatedly emphasized that the Commerce Clause does not grant Congress unlimited power. “The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.” *Lopez*, 514 U.S. at 566; *see also Morrison*, 529 U.S. at 608 (“Even under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.”).

Even the broadest judicial interpretations of the Commerce Clause do not give Congress the power to regulate inactivity. Instead, they strictly limit Congress’s authority to the regulation of “economic activity” and noneconomic activity whose restriction is necessary for the implementation of a regulatory scheme aimed at controlling interstate commercial transactions.

1. *Gonzales v. Raich*.

The Supreme Court’s most expansive Commerce Clause precedent to date, *Gonzales v. Raich*, 545 U.S. 1 (2005), illustrates this point well. *Raich* was the first and only case where the Court upheld the regulation of intrastate, noncommercial activity under the Commerce Clause. *Raich* ruled that Congress’s

power to regulate interstate commerce could justify a federal ban on the possession of medical marijuana that had never been sold in any market or left the state where it was grown. *Id.* Respondents Angel Raich and Diane Monson grew marijuana solely for personal consumption for medical purposes. *Id.* at 7. Despite the lack of any direct involvement in commerce, the Supreme Court ruled that the Commerce Clause gave Congress the power to forbid this activity. Although the Secretary relies heavily on *Raich*, see Appellant's Br. at 30-39, the decision fails to justify the individual mandate.

Raich interprets Congress's Commerce power expansively in three ways: by allowing Congress broad authority to regulate "economic activity"; by permitting regulation of noneconomic activity as part of a broader regulatory scheme aimed at interstate commercial activity; and, by applying a "rational basis" test. But none of these three features of *Raich* supports the argument that the Commerce Clause authorizes congressional regulation of an individual's decision not to engage in commercial activity.

a. The individual mandate does not regulate "economic activity."

Raich reaffirmed that Congress has the power to regulate "economic activity." It adopted a broad definition of "economics," which "refers to 'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

Expansive as this definition may be, an individual's mere status of being uninsured does not qualify. Choosing not to purchase health insurance involves neither production, nor distribution, nor consumption of commodities. Indeed, an individual who chooses not to purchase insurance has chosen *not* to consume or distribute the commodity in question. Obviously, he or she is also not "producing" any commodity by refusing to purchase insurance. By contrast, the *Raich* defendants *were* engaged in "economic activity" since they were both producing and consuming marijuana. *Id.* at 7, 25-26.

b. The individual mandate cannot be upheld as a regulation of noneconomic activity necessary to implement a broader regulatory scheme.

Like *Lopez* and *Morrison* before it, *Raich* indicates that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37; *see also Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. But as all three cases demonstrate, this power applies only to the regulation of "noneconomic *activity*." *Id.* It does not cover regulation of inactivity or the refusal to engage in economic transactions. Angel Raich and Diane Mosen had not been inactive or merely refused to engage in some transaction. To the contrary, they were actively involved in the production and consumption of medical marijuana.

If *Raich* were interpreted to permit regulation of mere inactivity, Congress

would have the power to compel any citizen to help enforce its regulatory schemes. It could force individuals to purchase General Motors cars in order to assist the struggling auto industry, or purchase financial products from banks that received federal bailout funds. By the same token, Congress could require individuals to purchase products from any industry with political clout. Similarly, it could require individuals to purchase memberships in exercise clubs in order to increase their physical fitness, which in turn would increase their economic productivity and stimulate interstate commerce. *See* John H. Kerr & Marjolein C. H. Vos, *Employee Fitness Programmes, Absenteeism, and General Well-Being*, 7 WORK & STRESS 179 (1993) (providing evidence that employee physical fitness reduces absenteeism and increases productivity).

In sum, there is no limit to the regulatory authority Congress could claim under the Secretary's sweeping interpretation of the Commerce Clause. The federal government would have the power to force citizens to engage in any activity that might conceivably affect commerce in some way. This is precisely the kind of unconstrained police power that the Supreme Court has expressly rejected. *See Morrison*, 529 U.S. at 618 (noting that "the police power" is "denied the National Government and reposed in the States").

c. *Raich's* rational basis test does not apply to this case.

Raich applied the deferential "rational basis" test to the government's

claims, ruling that “[w]e need not determine whether [defendants’] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.” *Raich*, 545 U.S. at 22. The Secretary claimed below that the rational basis test should be applied in the present case as well, *see* J.A. at 67-71, and she repeats this argument in her opening brief on appeal. *See* Appellant’s Br. at 20 (“Congress had far more than a rational basis for its finding that such consumption of health care services without insurance substantially affects interstate commerce.”).

But the *Raich* Court nowhere indicated that the rational basis test is applicable in a case where the government seeks to regulate inactivity, as opposed to some sort of positive action. Rather, the Court explicitly noted that the test applied to the government’s regulation of Raich and Mosen’s “*activities*, taken in the aggregate.” *Raich*, 545 U.S. at 22 (emphasis added).

The Secretary appears to assume that Congress’s mere assertion of Commerce Clause authority is enough to trigger application of the rational basis test. But neither *Raich* nor any previous Supreme Court precedent states any such thing. To the contrary, *Raich* applied the standard only to a regulation of “activity.”

Neither *Lopez* nor *Morrison* applied the deferential rational basis test, despite the government’s invocation of the Commerce Clause. In *Morrison*, the

Court struck down the challenged section of the Violence Against Women Act despite the fact that the claim of a substantial impact on interstate commerce was “supported by numerous [congressional] findings” that would have been more than enough to pass muster under the rational basis approach. *Morrison*, 529 U.S. at 614. Although *Morrison* did not explicitly reject the rational basis test, the Court’s failure to apply the test and its imposition of a considerably higher standard of scrutiny strongly suggest that, at the very least, rational basis analysis does not apply to regulations of intrastate noneconomic activity such as gun possession in a school zone (the regulated activity in *Lopez*) or sexual violence (*Morrison*).

Indeed, both *Lopez* and *Morrison* emphasized that “‘simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.’” *Lopez*, 514 U.S., at 557 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)); *see also Morrison*, 529 U.S. at 614 (quoting identical language from *Lopez*). Had *Lopez* and *Morrison* applied the rational basis test, these decisions would inevitably have gone the other way. In *Morrison*, Congress had compiled extensive evidence of possible effects of gender-based violence on interstate commerce. *Morrison*, 529 U.S. at 614. In *Lopez*, Justice Breyer’s dissent indicated a variety of ways in which a rational basis existed for believing that gun possession in school zones might have such effects.

Lopez, 514 U.S. at 618-24 (Breyer, J., dissenting). As Justice Breyer pointed out, if we “ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce . . . the answer to this question must be yes.” *Id.* at 618. If the rational basis test does not apply to regulation of noneconomic intrastate activity (as in *Lopez* and *Morrison*), it surely cannot apply to attempts to reach mere inactivity.

2. Other Commerce Clause precedents do not support the Secretary’s position.

The Supreme Court’s pre-*Raich* Commerce Clause precedents provide even less support than *Raich* for the Secretary’s position. As the Court pointed out five years before *Raich* in *Morrison*, “in every case” where it has “sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor” and had a “commercial character.” 529 U.S. at 611 & n.4.

Wickard v. Filburn, 317 U.S. 111 (1942), a case relied on by the Secretary, *see* Appellant’s Br. at 45-46, was one of the Supreme Court’s broadest interpretations of Congressional power under the Commerce Clause. Yet its facts differ radically from those of the present case. *Wickard* upheld the application of the 1938 Agricultural Adjustment Act’s restrictions on wheat production as applied to Roscoe Filburn, an Ohio farmer who produced wheat for consumption on his

own farm. 317 U.S. at 115, 121-27. The Court noted that restriction of home-grown, home-consumed wheat was a necessary component of Congress's scheme to "raise the market price of wheat" because in the absence of regulation, home-grown wheat could serve as a substitute for wheat sold in the market and depress demand for the latter. *Id.* at 127-29.

Unlike the instant case, *Wickard* addressed a regulation of clearly economic activity. Roscoe Filburn sold "a portion of [his wheat] crop" on the market and "fe[d] part to poultry and livestock on the farm, some of which is sold." *Id.* at 114. Filburn's wheat production was unquestionably part of a commercial enterprise that sold goods in interstate commerce. As the Court noted in *Lopez*, *Wickard* "involved economic activity in a way that possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560.

Until *Raich*, all of the Court's other post-New Deal decisions sustaining exercises of congressional power under the Commerce Clause addressed regulations of economic activity involving the sale or production of goods or services.³ Unlike the individual mandate, these laws clearly regulated preexisting

³ See, e.g., *Hodel*, 452 U.S. at 276-280 (upholding regulation of commercial mining); *Perez v. United States*, 402 U.S. 146 (1971) (upholding regulation of commercial loan sharking); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (upholding regulation of price of milk); *United States v. Darby*, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act regulation of employment conditions); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act regulation of employment relations).

commercial activity.

Nor is the individual mandate analogous to those cases upholding civil rights statutes that ban racial discrimination by motels and restaurants. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding regulation of discrimination against customers of a commercial restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding federal ban on discrimination against customers of a hotel serving interstate travelers). Such federal antidiscrimination laws apply only to preexisting businesses engaged in commercial activity in a regulated industry. By contrast, uninsured individuals are, by definition, *not* participating in the insurance business. Thus, the individual mandate is actually analogous to a statute that requires individuals to patronize a restaurant or hotel even if they had no previous intention of doing so. *See Ilya Somin, The Individual Health Insurance Mandate and the Constitutional Text*, ENGAGE, Vol. 11, No. 1, Mar. 2010, at 49.

B. The Status of Being Uninsured Is Not An Economic Activity.

Apparently conceding that some “activity” is required to trigger the Commerce Clause power, the Secretary argues that the individual mandate actually regulates “the practice of consuming health care services without insurance.” Appellant’s Br. at 34. Yet the individual mandate purports to regulate neither consumption nor any other activity, but applies instead to virtually all uninsured

Americans *whether or not* they ever consume health care services. If the individual mandate operated as the Secretary claims, one could simply avoid the mandate by not consuming health care services; but such “opting out” is not allowed under Section 1501.

The Secretary attempts to circumvent the constitutional bar on Commerce Clause regulation of inactivity by claiming that the state of being uninsured eventually qualifies as activity under Supreme Court precedent. This argument comes in two forms: a broad version claiming that any “economic decision” can be regulated under the Commerce Clause, and a narrow one focusing on supposedly unique characteristics of the health care market. Both versions fail for similar reasons: they end up giving Congress unconstrained power to mandate virtually anything, something the Supreme Court has repeatedly said is impermissible.

1. Economic decisions are not economic activities.

The broad version of the Secretary’s argument claims that any decision with economic effects qualifies as an economic activity. *See* Appellant’s Br. at 47 (“But that type of economic preference is plainly subject to regulation under the Commerce Clause.”). The Secretary cites with approval a district court decision upholding the mandate on the grounds that the Commerce Clause reaches not merely economic activity but economic *choices*. *See id.* (citing *Liberty Univ. Inc. v. Geithner*, 2010 WL 4860299, at *15 (W.D. Va. Nov. 30, 2010)). This recent

decision by the Western District of Virginia concludes that “decisions to pay for health care without insurance are economic activities Because of the nature of supply and demand, plaintiffs’ choices directly affect the price of insurance in the market, which Congress set out in the Act to control.” *Liberty Univ.*, 2010 WL 4860299, at *15.

The flaw in this argument is obvious. The “nature of supply and demand” means that any decision to do or not do *anything* will directly affect the price of some good or service. If someone chooses not to purchase a car, that will affect the price of cars. If a person chooses to sleep for an hour rather than work, he will earn less money, which in turn means that he will engage in less consumer spending or investment, which will affect the prices of various goods. By this reasoning, Congress could not only force people to purchase any product of any kind, it could force them to engage in just about any other kind of activity that affects the price of some good or service that Congress sets out to control.

The Secretary’s “economic decisions” doctrine also contravenes Supreme Court precedent. Under this approach, *Lopez* would have been decided the other way. Carrying a gun into a school zone—the action forbidden by the Gun Free School Zones Act invalidated in that case—is clearly an “economic decision” under the Secretary’s reasoning. In the aggregate, such actions surely have an effect on prices in various markets, including the market for guns and the market

for illegal drugs in schools. Indeed, Alfonso Lopez was paid \$40 to carry his gun in a school zone for the purpose of transferring it to a member of a drug gang who probably intended to use it to defend the group's commercial interests in a "gang war." *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

2. No unique feature of the health insurance market transforms being uninsured into economic activity.

In addition to insisting that Congress can regulate any "economic decision," the Secretary also argues that the individual mandate regulates an "activity" because of the special nature of the health care market: "The means that Congress adopted to achieve [healthcare reform] are adapted to the unique conditions of the national market for health care services. Participation in the market is nearly universal." Appellant's Br. at 19-20.

Since everyone eventually participates in the health care market, the Secretary reasons, choosing not to buy health insurance does not constitute inactivity. Rather, it is an economic decision to try to consume health care services later without paying for them. *See id.* at 20 ("When that need arises, individuals depend on the extensive medical infrastructure financed and sustained by other participants in the health care services market.").

In reality, it is simply not true that everyone consumes health care. Some people rely on charity or home remedies, while others never get sick enough to

require medical treatment before they die. Still, it may well be true that the overwhelming majority of people participate in the health care market in some way. But this does not differentiate health care from virtually any other market.

If the relevant “market” is defined broadly enough, one can characterize any decision not to purchase a good or service exactly the same way. The Secretary does not claim that everyone will inevitably use health *insurance*. Instead, she defines the market as “health *care* services.” *Id.* (emphasis added). The same sleight of hand works for virtually any other mandate Congress might care to impose. As the district court below properly noted, “the same reasoning could apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by [the Supreme Court’s] Commerce Clause jurisprudence.” J.A. at 1097.

Consider the case of a mandate requiring everyone to purchase General Motors cars in order to help the auto industry. There are many people who do not participate in the market for cars. But just about everyone participates in the market for “transportation.” In the words of the Secretary, “[w]hen [transportation] need[s] arise[], individuals depend on the extensive [transportation] infrastructure financed and sustained by other participants in the

[transportation] services market.” Appellant’s Br. at 20. After all, everyone moves from place to place in some way.

The same logic can be used to justify virtually any other mandate Congress might care to impose—even a mandate requiring everyone to see the most recent Harry Potter movie. After all, just about everyone participates in the market for *entertainment*. Choosing not to go to the movies is just an “economic decision” to try to pay for other entertainment services later.

The same flaw undermines the claim that health care is distinctive because service providers are sometimes required to provide free care. *See, e.g., Mead v. Holder*, Civ. No. 10-950 (GK), 2011 WL 611139, at *18 (D.D.C. Feb. 22, 2011). The only reason why that difference may be constitutionally relevant is that failing to purchase health insurance has adverse economic effects on producers. But, in that respect, failing to purchase insurance turns out to be no different from failing to purchase any other product. Whenever someone fails to purchase a product, producers are made economically worse off than they would be if the potential buyer had made a different decision.

Health insurance is undoubtedly an important good. But it has no unique characteristics that transform failure to purchase it into an “economic activity.”

II. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE.

The Necessary and Proper Clause gives Congress the authority 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, cl. 18. The Supreme Court has described the Clause as “the last, best hope of those who defend *ultra vires* congressional action.” *Printz v. United States*, 521 U.S. 898, 923 (1997). If the individual mandate cannot be upheld under the Commerce Clause, the Necessary and Proper Clause cannot salvage it.

The Secretary contends that the individual mandate is permissible under the Necessary and Proper Clause because it is needed to effectuate the PPACA’s regulations forcing insurance companies to accept customers with preexisting health conditions, which in turn is an exercise of Congress’s authority under the Commerce Clause. In its *amicus* brief opposing the Secretary’s motion for dismissal below, WLF provided a detailed argument against the claim that the Necessary and Proper Clause authorizes the individual mandate. *See Amicus Br. of Wash. Legal Found., Virginia ex rel. Cuccinelli v. Sebelius*, 2010 WL 2661289 (E.D. Va. June 18, 2010). *Amici* incorporate those legal arguments by reference here.

Here, we emphasize two critical points: that the individual mandate runs afoul of the standards for Necessary and Proper Clause claims established by the Supreme Court in its recent decision in *United States v. Comstock*, 130 S.Ct. 1949

(2010), and that it fails the requirement that any exercise of federal power under the Clause be “proper” as well as “necessary.”

A. The Scope Of The Necessary And Proper Clause.

The Necessary and Proper Clause is not a free-standing grant of power. Instead, it gives Congress only the authority to enact legislation that “carr[ies] into Execution” other powers granted to the federal government by the Constitution. U.S. CONST. art. I, § 8, cl. 18. The Supreme Court recently reiterated this principle, emphasizing that “every . . . statute” authorized by the Necessary and Proper Clause “must itself be legitimately predicated on an enumerated power.” *Comstock*, 130 S. Ct. at 1964; *see also Kinsella v. Singleton*, 361 U.S. 234, 247-48 (1960) (noting that the Necessary and Proper Clause “by itself, creates no constitutional power”).

But even if a statute in fact helps to execute an enumerated power, it still may not be authorized by the Necessary and Proper Clause. In its famous ruling in *M’Culloch v. Maryland*, the Supreme Court outlined several constraints on Congress’s power under 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.

M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

This passage outlines four constraints on the range of statutes authorized by the Necessary and Proper Clause: (1) the “end” pursued must be “legitimate” and “within the scope of the constitution”; (2) the means must be “appropriate” and “plainly adapted to that end”; (3) the means must “not [be] prohibited” elsewhere in the Constitution; and, finally (4) the means must be “consist[ent] with the letter and spirit of the Constitution.” A statute that is “improper” in nature can be rejected as inconsistent “with the letter and spirit of the Constitution” or because it is “inappropriate.”

B. The Individual Mandate Fails The Five-Part Test Adopted By The Supreme Court In *United States v. Comstock*.

In *United States v. Comstock*, the Supreme Court held that Section 4248 of the Adam Walsh Act was valid under the Necessary and Proper Clause. *See Comstock*, 130 S.Ct. at 1956-67. That provision gave federal prison officials the power to detain “sexually dangerous” federal prisoners after the completion of their sentences. *See* 42 U.S.C. § 4248. The Court cited five factors justifying its decision to uphold Section 4248: “(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (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, and (5) the statute’s narrow scope.” *Id.* at 1965.

A majority of these criteria weigh against the individual mandate: the lack of a deep history of federal involvement, the failure of the PPACA to accommodate state interests, and the statute's extraordinarily broad scope. A fourth factor (the possible lack of "sound reasons" for the statute's enactment) is potentially ambiguous. The fifth—"the breadth of the Necessary and Proper Clause"—is a constant that does not vary from case to case. *See* Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 CATO SUP. CT. REV. 239, 260-67 (assessing implications of *Comstock* for the present case).

1. No deep history exists of the federal government's compelling individuals to purchase insurance products against their will.

As the district court emphasized below, the "congressional enactment under review . . . literally forges new ground." J.A. at 315. There is no history of comparable federal regulation. Although the federal government has adopted numerous previous statutes regulating health care, it has never compelled ordinary citizens to purchase health insurance or other health care products. It has never forced citizens to purchase products of any kind merely as a consequence of their status as residents of the United States. *See* J.A. at 322 ("Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far."). Nor have the courts ever previously sustained such a statute.

Comstock relied on a 155-year history of federal involvement in the relevant

field. *See Comstock*, 130 S. Ct. at 1958-59 (tracing the relevant history of federal involvement back to 1855). There is no similarly extensive history of previous federal regulation remotely comparable to the individual mandate. Indeed, the Supreme Court denied Congress the power to regulate insurance policies (for health care or otherwise) until 1944, when it overruled longstanding precedents forbidding such regulation. *See United States v. S.E. Underwriters*, 322 U.S. 533 (1944). Until only the last few decades, there was very little federal regulation of health care of any kind.

In sharp contrast to the lengthy history of federal involvement at issue in *Comstock*, “[f]ederal involvement in health is *a fairly new occurrence in U.S. history.*” Jennie Jacobs Kronenfeld, *THE CHANGING FEDERAL ROLE IN U.S. HEALTH CARE POLICY* 67 (Praeger Publishers, 1997) (emphasis added). “While a few laws and special concerns were passed prior to the twentieth century, the bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years.” *Id.* Indeed, modern health care in the United States “occupies a completely different place in the economy, in the mind of the public, and in its impact on the government at all levels than it did 100 years ago, at the beginning of the twentieth century, or at the beginning of the country in the late 1700s, when the U.S. Constitution was adopted.” *Id.* at 1.

2. The individual mandate does not accommodate state interests.

Section 4248 of the Adam Walsh Act accommodated state interests by giving states the option of confining the “sexually dangerous” former prisoners themselves. *Comstock*, 130 S. Ct. at 1962-63. Indeed, it even let states assume custody of the former prisoners and then release them. *Id.* at 1963. The federal government could only confine a “sexually dangerous” former federal inmate if the state government consented to it. And the state can, if it wishes, assume custody of the inmate in question and immediately set him free. *Id.*

In stark contrast, the PPACA’s individual mandate applies throughout the country, even in the many areas where elected state governments oppose it and would prefer a different system of health insurance regulation. Moreover, states are not given any right to avoid the mandate or exempt any of their citizens from it. Significantly, twenty-seven states⁴ have now successfully challenged the constitutionality of the individual mandate, a strong indication that many state governments believe the PPACA runs counter to their interests. Far from “requir[ing] accommodation of state interests,” the individual mandate runs roughshod over them. *Comstock*, 130 S.Ct. at 1962 (emphasis in the original).

⁴ These include the Commonwealth of Virginia, the plaintiff in the present case, and twenty-six states who recently prevailed as plaintiffs in a parallel case filed in the U.S. District Court for the Northern District of Florida. *See Florida v. Dep’t. of Health & Human Serv.*, No. 3:10-cv-0091-RV-EMT (N.D. Fla. 2010).

3. The individual mandate is extremely broad in scope.

Comstock upheld Section 4248 in large part because of its “narrow scope.” *Id.* at 1965. It emphasized the fact that the statute “has been applied to only a small fraction of federal prisoners.” *Id.* at 1964. In marked contrast, the individual mandate is extraordinarily broad. It forces millions of people to purchase insurance products against their will. As the text of PPACA itself indicates, “[t]he requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market.” PPACA § 1501(a)(2)(C).

The individual mandate clearly fails at least three prongs of the five-part test laid out in *Comstock*. The other two do little to strengthen it. Whether Congress enjoyed “sound reasons” for enacting the mandate is at the very least debatable. Many economists believe that it is possible to provide coverage for preexisting conditions without resorting to compulsion on the massive scale undertaken by the PPACA. *See, e.g.,* John H. Cochrane, *What to Do About Preexisting Conditions*, WALL ST. J., Aug. 14, 2009. At the very least, the “sound reasons” underlying the mandate are not nearly as clear as those supporting Section 4248 in *Comstock*.

The final consideration outlined in *Comstock* is the “breadth of the Necessary and Proper Clause.” *Comstock*, 130 S.Ct. at 1965. This factor, however, is identical in every case. It cannot by itself justify upholding a statute. If it could,

the other four considerations would be superfluous.

In sum, a majority of the factors outlined in the five-part *Comstock* test weigh heavily against the mandate. A fourth is ambiguous at best. And the final factor never varies from case to case, and therefore cannot be the basis for upholding legislation on its own.

C. The Individual Mandate Is Not “Proper.”

In order to be a valid exercise of congressional power under the Necessary and Proper Clause, a statute must be “proper” as well as “necessary.” *See Printz*, 521 U.S. at 923-24 (holding that a law that is not “proper” can exceed the scope of Congress’s power under the Necessary & Proper Clause). The Supreme Court has provided very little guidance on the definition of “proper.” But evidence from the Founding era suggests that a proper statute must, at the very least, not depend on a constitutional rationale that gives Congress virtually unlimited power to legislate in areas traditionally reserved to the states.⁵ As James Madison explained in

⁵ *See* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 215-20 (2003) (discussing the relevant evidence); Gary Lawson & Patricia Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) (arguing that the evidence shows that “proper” means that laws “must be consistent with principles of separation of powers, principles of federalism, and individual rights”); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 921 (2008) (citing evidence that the original meaning of the Constitution precludes any reading of the Necessary and Proper Clause that has “the effect of completely obliterating the people’s retained right to local self-government”).

Federalist No. 39, the Constitution does not give the federal government “an indefinite supremacy over all persons and things.” THE FEDERALIST NO. 39.

The Secretary’s interpretation of the Clause threatens to do just that. Remarkably, she contends that “[g]overning precedent leaves no room to override Congress’s judgment about the appropriate means to achieve its legitimate objectives” where a provision is “rationally related to the exercise of a constitutionally enumerated power.” Appellant’s Br. at 39, 41. But virtually any imaginable regulatory measure is “rationally related” to some enumerated power in some way. For example, a federal statute requiring citizens to exercise every day is rationally related to Congress’s power to raise and support armies. *See* U.S. CONST. Art. I, § 8, cl. 12. Citizens who exercise regularly might make more effective draftees. Similarly, a statute requiring individuals to wake up early might increase their economic productivity by ensuring that they get to work earlier, and would thereby be “rationally related” to Congress’s power to regulate interstate commerce.

The Secretary claims that such a sweeping interpretation of the Necessary and Proper Clause was adopted by the Court in *Comstock*. *See* Appellant’s Br. at 39-41 (quoting *Comstock*, 130 S.Ct. at 1956-57). *Comstock* did indeed indicate that “in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the

statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” *Comstock*, 130 S.Ct. at 1956-57. But the fact that courts must “look to” the presence or absence of a “rational relationship” does not mean that this is the end of the constitutional inquiry. The Court also indicated that assertions of federal power under the Necessary and Proper Clause are subject to the five-factor test described above. If a rational relationship were sufficient in and of itself, Congress would have “a plenary police power that would authorize enactment of every type of legislation.” *Lopez*, 514 U.S. at 566.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly **6993** words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Cory L. Andrews
Cory L. Andrews

CERTIFICATE OF SERVICE

I certify that on April 4, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record. In addition, per Local Rule 31(d), eight bound copies of the foregoing brief were mailed to the Clerk of the Court.

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