

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA,)	Civil Action No. 3:10cv188
EX REL. KENNETH T. CUCCINELLI, II,)	
in his official capacity as Attorney General of Virginia,)	
)	
Plaintiff,)	
)	
v.)	
)	
KATHLEEN SEBELIUS, Secretary of the Department of)	
Health and Human Services, in her official capacity,)	
)	
Defendant.)	

**BRIEF AMICUS CURIAE OF AMERICANS FOR FREE CHOICE IN MEDICINE
AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF COMMONWEALTH
OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II**

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INTRODUCTION

Congress passed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (PPACA), in March of 2010 in an effort to reorganize the medical insurance industry. This legislative overhaul includes a provision barring insurance companies from denying insurance coverage to persons with preexisting medical conditions. *See* Pub. L. No. 111-148 § 1201 (2010). Because the cost of insuring persons who already suffer from illness is so high, Congress sought to subsidize the insurance companies under a separate provision, the “Individual Mandate,” which compels all persons (with some exceptions) to purchase health insurance on pain of a substantial financial penalty. 26 U.S.C. § 5000A (2010).

This is the first time that Congress has ever invoked its Commerce Clause authority to justify forcing Americans to buy a product or service, not as a condition of some other activity, but merely because they exist. Such an assertion of power expands the Commerce Clause authority far beyond both its original meaning and existing precedent. A person’s decision not to buy health insurance is not an “economic activity,” and no precedent exists allowing Congress to compel people to engage in commerce who otherwise would not choose to do so. The Supreme Court’s statement in *United States v. Lopez*, 514 U.S. 549, 560 (1995), about Congress’s power to regulate the possession of firearms is equally applicable to a person’s decision not to purchase health insurance: “Even *Wickard [v. Filburn]*, 317 U.S. 111 (1942), which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the [choice not to purchase health insurance] does not.” To hold that the Commerce Clause gives Congress power to force persons to engage in economic activity would effectively eliminate any

limits on Congress’s authority, contrary to the “first principle” that “[t]he Constitution creates a Federal Government of enumerated powers.” *Id.* at 552.

The mandate cannot be justified under Congress’s taxing power, either. The Individual Mandate is a penalty imposed to enforce the requirement, not a tax to raise revenue. *United States v. La Franca*, 282 U.S. 568, 572 (1931) (“A tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed . . . as punishment for an unlawful act.”). If it *were* a tax, it still would be an unconstitutional capitation tax because it would tax each individual’s existence. With the exception of income taxes, which the Individual Mandate is not, all such direct or capitation taxes must be apportioned among the states, which the Mandate’s penalty provisions are not. U.S. Const. art. I, § 9, cl. 4. The Individual Mandate therefore exceeds Congress’s powers and is unconstitutional.

ARGUMENT

I

THE INDIVIDUAL MANDATE TO PURCHASE HEALTH INSURANCE EXCEEDS THE SCOPE OF POWER GRANTED IN THE COMMERCE CLAUSE

A. Constitutional Questions of First Impression Should Be Resolved in Consideration of the Founding Fathers’ Original Intent That Federal Powers Should Be Few and Constrained

This case raises a question of first impression: May Congress force individuals to engage in commerce? In matters of first impression, courts look to the purposes of the Constitution’s authors to discern the meaning of the text. *See, e.g., District of Columbia v. Heller*, 128 S. Ct. 2783, 2793-95, 554 U.S. 570 (2008) (looking to the original intentions of the Founders in resolving the

scope of the right to bear arms). The national debate over the Constitution's ratification offers compelling evidence that the Commerce Clause was not originally understood as allowing Congress to compel economic activity. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 6 N.Y.U. J.L. & Liberty ____ (forthcoming, 2010).¹

The founding generation was inherently skeptical of centralized power, and was hesitant to give power to the federal government. They drafted the Constitution's language in precise terms to confer on the federal government only "few and defined" powers, leaving all authority not listed in the Constitution to the states instead. *Federalist* No. 45 at 292 (C. Rossiter ed. 1961). The Constitution limits federal authority primarily through the enumeration of powers, which allows Congress only to exercise those specific "legislative powers . . . herein granted," Art. I, § 1, and those powers that are both necessary and proper for carrying into effect the enumerated powers. Art. I, § 8, cl. 18. This latter provision allows Congress only to engage in those actions that are "appropriate, . . . plainly adapted to [the enumerated power]," and "not prohibited, but which consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). The Individual Mandate is none of these things.

As originally understood, the power to regulate commerce among the states was meant only to allow Congress to regulate cross-border transactions between states, consisting of selling, buying, bartering, and transporting for those purposes. *Lopez*, 514 U.S. at 585 (Thomas, J., concurring);

¹ Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680392 (last visited Oct. 30, 2010).

Barnett, *Commandeering the People*, *supra*, at 2 (Defining interstate commerce as “the communication of something—whether goods, people, or messages—from one state to another.”). However broadly the Supreme Court has construed this power in recent years, it has always recognized that the Commerce Clause grants only limited authority. *Lopez*, 514 U.S. at 552, 556-57 (“The Constitution creates a Federal Government of enumerated powers [E]ven . . . modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.”).

Previous Commerce Clause decisions have focused on whether intrastate activities are subject to federal regulation under the commerce power. As to that question, case law establishes that purely intrastate activities can be regulated under the Commerce Clause if they are economic in nature, and if those activities have, in the aggregate, an effect on the national economy. *Lopez*, 514 U.S. at 585; *GDF Realty Investments, LTD v. Norton*, 326 F.3d 622, 630 (5th Cir. 2003) (“[T]he key question for purposes of aggregation is whether the nature of the regulated activity is economic.”). But while this “aggregation” principle gives Congress authority even over otherwise inconsequential economic activities, Congress cannot regulate *noneconomic* activity, even if that activity has economic consequences in the aggregate. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000). This principle is important because *all* actions have *some* effect on the nation’s economy. To allow Congress to “aggregate” noneconomic activity, and assert authority over that activity, would eliminate any limits on congressional power. *Id.*

In fact, although the Government argues here that the decision to forgo health insurance is an activity substantially affecting interstate commerce, a person who does not decide to buy or sell

a product is not even engaged in an activity in the first place, let alone an economic activity; not purchasing insurance is *inactivity*. Even in its most expansive interpretations of the Commerce Clause, the Supreme Court has never suggested that the absence of a choice to buy or sell a product is itself an economic act subject to federal regulation. Although *Gonzalez v. Raich*, 545 U.S. 1, 26 (2005), held that Congress may regulate noncommercial activities if they are essential to the vindication of a larger economic regulatory scheme, that decision did not authorize Congress to compel persons who are otherwise not acting at all, to participate in a comprehensive economic regulatory scheme. Rather, that decision, like all Commerce Clause decisions heretofore, involved some voluntarily undertaken activity which is arguably a part of the intrastate market Congress has authority to regulate. If that power is expanded to allow Congress to regulate not only the commercial activities people freely choose to undertake, but also to force people to engage in interstate commerce, then the limiting principle inherent in the enumeration of Congress' powers, and recognized in *Lopez*, *Morrison*, and all other Commerce Clause precedents, would be rendered meaningless.

There is no evidence that the Framers intended the Commerce Clause to authorize Congress to compel participation in nationwide economic programs. It was drafted to give Congress “a superintending authority over the reciprocal trade of the . . . states,” *Federalist* No. 42 at 268 (C. Rossiter ed. 1961), taking away from states their often conflicting regulatory powers as exercised under the Articles of Confederation. See Letter from James Madison to Joseph Cabell, Feb. 13, 1829, reprinted in *2 The Founders' Constitution* 521 (P. Kurland & R. Lerner eds., 1987) (commerce power “was intended as a negative and preventative provision against injustice among the States

themselves, rather than as a power to be used for the positive purposes of the General Government.”). There is no evidence that the Clause was understood as allowing Congress to compel buying, selling, shipping, or other economic activities.

The Commerce Clause’s language contrasts notably with the language of clauses that *do* allow Congress to compel activity. In the *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918), the Court found that Congress may draft an army, compelling persons who would otherwise not join the military to do so, but that power is exercised pursuant to clauses 12, 13, and 15 of Article I, section 8, which allow Congress “to *raise* . . . armies,” to “*provide* . . . a Navy,” and “to provide for *calling forth* the Militia.” (emphasis added). The terms “raise,” “provide,” and “call forth” necessarily imply compelling action from persons otherwise not acting—which “regulate” does not. Indeed, “regulate” was originally understood as “to make regular” activity that is already independently occurring. See Randy E. Barnett, *The Original Meaning of The Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001) (“Samuel Johnson defines ‘to regulate’ as ‘1. To adjust by rule or method . . . 2. To direct The power to regulate is, in essence, the power to say, ‘if you want to do something, here is how you must do it.’”). When Congress enacted the Militia Act of 1792, 1 Stat. 271 (1792), which required persons to buy firearms and ammunition, it acted, not under the Commerce Clause, but under its authority to “provide for . . . arming . . . the Militia.” *Parker v. District of Columbia*, 478 F.3d 370, 387 n.12 (D.C. Cir. 2007) (citing Art. I, § 8, cl. 16). When the Constitution’s authors intended to grant Congress power to compel action, they chose words other than “regulate” for that purpose. Indeed, had the word “regulate” been understood so broadly as to encompass the power to compel any behavior having an economic effect, the militia and army clauses would have been

redundant surplusage. *See Lopez*, 514 U.S. at 589 (Thomas, J., concurring) (“[M]uch if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over [all] matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.”).

**B. The Necessary and Proper Clause
Does Not Authorize the Individual Mandate**

The Necessary and Proper Clause is not an independent source of congressional authority. *United States v. Comstock*, 130 S. Ct. 1949, 1972 (2010). Instead, it is “a caveat that the Congress possesses all the means necessary to carry out the . . . Powers vested by [the] Constitution.” *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). Accordingly, Congress cannot justify the Individual Mandate’s regulation of inaction under the Necessary and Proper Clause, if compelling participation in commerce is not impliedly authorized under the commerce power. *Id.* The Necessary and Proper Clause does not allow Congress to enact legislation that is beyond the “the letter and spirit of the constitution,” *McCulloch*, 17 U.S. (4 Wheat.) at 421—*i.e.*, the enumerated powers principle.

In determining whether the Individual Mandate was necessary and proper for the regulation of interstate commerce, this Court must consider the “means-ends rationality” between the mandate and the Commerce Clause. *Sabri v. United States*, 541 U.S. 600, 605 (2004). *See also Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (A congressional act may only be viewed as necessary and proper “[i]f it can be seen that the means adopted are really calculated to attain the end . . .”). Yet in this case the mandate furthers no legitimate end under the commerce power, because it is not an inherent component of any enumerated power, and because it subverts the principle of enumerated

and limited powers. *See McCulloch*, 17 U.S. (4 Wheat.) at 423 (Congress has no power to “pass laws for the accomplishment of objects not entrusted to the government.”).

To satisfy the Necessary and Proper Clause, a regulation must be both necessary—*i.e.*, required by—the accomplishment of an enumerated power, and a “proper” means of serving that power—*i.e.*, consistent with broader constitutional principles and other provisions of the Constitution. In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010), the Supreme Court held that a statute exceeded the Necessary and Proper Clause because it violated the principle of separation of powers, regardless of the absence of explicit constitutional language barring the statute in question, and despite the lack of significant historical precedent. Instead, the case lay “at the intersection of two sets of conflicting, broadly framed constitutional principles.” *Id.* at 3167 (Breyer, J., dissenting). Looking to the “function” and “context” of the principle of separation of powers, *id.*, the Court found that a statute barring the President from removing public officials from their posts was unconstitutional. Thus the Necessary and Proper Clause does not allow Congress to choose whatever means it seeks to accomplish its ends, but only those means which are consistent with the overall constitutional structure. A key feature, if not *the* key feature, of the Constitution’s structure, is the fact that Congress enjoys only limited and enumerated powers. To allow Congress authority not only over persons engaged in commerce, but also over those engaged in no activity at all, would so dramatically undermine that principle that it is neither necessary nor proper.

**C. Legitimate Regulation of the Insurance Industry
Cannot Justify Regulation of Nonmarket Participants
Who Have Not Chosen To Undertake Any Activity**

The Secretary contends that the Individual Mandate operates as a legitimate regulation of the insurance industry, Def.'s Mot. Summ. J., 25, but the mandate imposes a duty, not on insurance companies, but on all American citizens. The Secretary argues that all Americans are active participants in the health insurance market, but this is not true. Many Americans were uninsured when the PPACA was enacted, and have no wish to purchase insurance before the Act's penalties begin in 2014. Pacific Legal Foundation attorneys, for example, are currently representing a citizen, Matt Sissel, in a lawsuit filed in the District of Columbia Federal District Court, alleging that the Individual Mandate is unconstitutional. *Sissel v. United States Dep't of Health and Human Services*, 1:10-cv-01263 (District of Columbia) (filed Jul. 26, 2010). Other similar cases are currently pending in other district courts in which individual citizens who have not chosen to purchase health insurance are similarly alleging violations of their individual rights. *See, e.g., Coons v. Geithner*, 2:2010cv1714 (D. Ariz.) (filed Aug. 12, 2010); *Kinder v. Geithner*, 1:10-cv-00101-RSW (Eastern District of Missouri) (filed Jul. 7, 2010). Mr. Sissel has chosen not to purchase insurance because he found no economic advantage to him in doing so. *Sissel*, Complaint ¶¶ 25-29. The Commerce Clause may allow Congress to require Sissel and other individuals to obtain health insurance as a condition of engaging in some economic activity, *see, e.g.,* 42 U.S.C. § 4012 (a) and (b) (requiring individuals to purchase flood insurance in order to obtain a mortgage), but in the absence of any such activity, those individuals stand outside the field of commerce. Until they voluntarily choose to take an action that affects commerce, Congress has no authority to compel them to do so.

Indeed, the law has always distinguished between acts and omissions, holding that an individual may only be held liable for omissions where he has a preexisting duty to act. *See Station # 2, LLC v. Lynch*, 280 Va. 166, 171 (2010) (“[A]n omission or non-performance of a duty may sound both in contract and in tort, but only where the omission or non-performance of the contractual duty also violates a common law duty.”); *Rodriguez-Quinones v. Jimenez & Ruiz, S.E.*, 402 F.3d 251, 254 (1st Cir. 2005) (“In the case of an omission, the defendant must have been under a duty to act . . .”); *see also* William L. Prosser, *Handbook of the Law of Torts* 190 (1st ed. 1941) (“[I]f the defendant enters upon an affirmative course of conduct affecting the interests of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions.”). But no American has a preexisting duty to purchase a product for which he has no use, and when he is not engaged in any activity that affects others. To impose such a duty by legislative fiat would again undermine the constitutional system of limited, enumerated powers.

II

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

The Secretary alternatively argues that the Individual Mandate can be upheld under Congress’s taxing power because the taxing power is “extensive.” Def. Mot. Summ. J. 39. But Congress’s taxing power does not authorize the Individual Mandate because the Individual Mandate is *not a tax*. A “tax” is generally defined as “a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.” *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (citations omitted). However, a federal law primarily designed to regulate behavior—and not to raise public revenue—is not a tax at all, and is not

governed by Congress's taxing power, no matter how "extensive" that power might be. *Rodgers v. United States*, 138 F.2d 992, 995 (6th Cir. 1943) (holding that the Agricultural Act of 1938 was an exercise of the commerce power, not the taxing power).

To allow Congress to compel whatever activity it wishes, by imposing financial penalties on those who do not act as Congress wishes, and by labeling those penalties a "tax," would allow Congress to "break down all constitutional limitation of [its] powers," by employing a "magic" word. *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). A so-called "tax" that is really designed to penalize or regulate matters that Congress cannot rightfully reach under its enumerated powers is unconstitutional. *See also Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 541 (1869) ("It would undoubtedly be an abuse of the [taxing] power if . . . exercised for ends inconsistent with the limited grants of power in the Constitution."); *see also United States v. Butler*, 297 U.S. 1, 68 (1936) (Taxation cannot be the "means to an unconstitutional end.").

A. The Individual Mandate Is a Penalty, Not a Tax

Taxes are to be distinguished from "penalties," which are not governed by the tax provisions of the Constitution. The Sixth Circuit highlighted this rule in the *Rodgers* case, in which a cotton farmer challenged the legality of over \$3,000 in fines that were assessed against him for exceeding his crop quota under the Federal Agricultural Adjustment Act. 138 F.2d at 994. *Rodgers* argued that the penalty was an unconstitutional direct tax, but the court disagreed, holding instead that the penalty was not a tax at all. *Id.* at 994-95. Acknowledging that the Act was a constitutional exercise of Congress's commerce power, the court characterized the penalty not as a tax, but as "a method adopted by the Congress for the express purpose of regulating the production of cotton affecting

interstate commerce.” *Id.* at 994. The court then set forth a test for determining when the tax provisions of the Constitution will and will not govern a particular federal statute:

The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. *Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.*

Id. (emphasis added). A measure that is not enacted primarily for revenue-raising purposes is, therefore, not a tax. In *Rodgers*’s case, the court found that the government did not fine *Rodgers* for the purpose of raising revenue, but to punish him for growing too much cotton. This meant that the \$3,000 fine was not a true “tax,” and that the apportionment rule governing direct taxes did not apply.

In *La Franca*, 282 U.S. at 572, the Supreme Court defined the legal distinction between “taxes” and “penalties.” A tax “is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.” Contrary to the Secretary’s argument, this distinction between taxes and penalties is still viable. *See* Def. Mot. Summ. J. 45. In fact, in the 1996 case *Reorganized CF&I Fabricators of Utah*, the Supreme Court expressly relied on that distinction to hold that a federal fine levied against a bankrupt corporation qualified as a penalty—and not a tax—because it was penal in nature. 518 U.S. at 224, 226 (“Given the patently punitive function of [the exaction], we conclude that [it] must be treated as imposing a penalty, not authorizing a tax.”); *see also SKF USA, Inc. v. United States Customs & Border Prot.*, 556 F.3d 1337, 1352-53 (Fed. Cir. 2009) (following *Reorganized CF&I*

Fabricators of Utah); *Hardee v. Internal Revenue Serv.*, 137 F.3d 337, 341 (5th Cir. 1998) (same); *In re: Juvenile Shoe Corp. of America*, 99 F.3d 898, 900 (8th Cir. 1996) (same).

In short, case law indicates that the Individual Mandate is not a tax because it is not designed to raise revenue to support the government. Instead, the financial penalty imposed as part of the Individual Mandate is designed to punish individuals who do not buy health insurance. The unmistakable purpose of the Individual Mandate—*according to Congress*—is to regulate the behavior of individuals by adding “millions of new consumers to the health insurance market,” deterring people from “forego[ing] health insurance coverage and attempt[ing] to self-insure,” and preventing them from “wait[ing] to purchase health insurance until they need[] care.” Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119, §§ 10106, 1501(a)(2)(G).

Indeed, the Secretary argues throughout her motion for summary judgment that the Individual Mandate is specifically designed to force people to buy health insurance. Def. Mot. Summ. J. at 2, 12-15, 21, 24-27, 29, 31-39, 44. If the mandate works as intended, the government will collect zero revenue because no individual will be penalized for failing to purchase health insurance. For these reasons, the Individual Mandate is solely a regulation of individual behavior relating to the purchase of health insurance in violation of the Commerce Clause, and is not governed by the tax provisions of the Constitution.

B. The Taxing Power Does Not Allow Congress To Violate Enumerated Powers

Moreover, Congress cannot use taxation as a tool for regulating matters that lie beyond the scope of Congress’s regulatory authority. In the *Child Labor Tax Case*, 259 U.S. at 34-35, the Internal Revenue Service assessed Drexel Furniture over \$6,000 in penalties because Drexel had

employed an underage boy in its factory, in violation of the Federal Child Labor Tax Law. *Id.* Drexel argued that the fine was not a tax, but an unconstitutional federal regulation of child labor, a matter which fell exclusively within state jurisdiction. *Id.* at 36. The Court agreed. Though styled as a tax on profits, the Court found that the penalty constituted a backdoor regulation of child labor, an activity then considered beyond Congress’s regulatory authority. *Id.* at 37-38. Congress had overstepped its enumerated powers by cloaking an unconstitutional penalty in the trappings of taxation.

The Court adopted similar reasoning in *United States v. Constantine*, 296 U.S. 287, 294 (1935), where it invalidated a post-Prohibition federal law that imposed a “special excise tax” on liquor dealers operating in violation of state laws prohibiting liquor sales. *Id.* at 288-90. The federal government defended the law as a tax, but the Court determined that it was clearly intended to penalize activity outside the scope of Congress’s authority. *Id.* at 295. Namely, the so-called tax penalized the commission of a state crime—the sale of alcohol—over which the federal government had no jurisdiction following the repeal of the Eighteenth Amendment. *Id.* at 294. Since the law served a penal purpose and punished activity that Congress had no constitutional basis to proscribe, the Court held that the law exceeded Congress’s enumerated powers and intruded on state jurisdiction “under the guise of a taxing act.” *Id.* at 296.

The Individual Mandate imposes a penalty for the purpose of regulating in an area that falls outside the ambit of Congress’s enumerated powers. Congress cannot compel the purchase of health insurance through the Commerce Clause. If the rule of enumerated powers means anything, Congress cannot force individuals to buy health insurance by renaming the Individual Mandate a

“tax.” Barnett, *Commandeering the People* at 27 (“[I]f [the Secretary’s] theory is accepted, Congress would be able to penalize or mandate any activity by anyone in the country, provided it limited the sanction to a fine enforced by the Internal Revenue Service.”).

C. As a Capitation Tax, the Individual Mandate Would Be Unconstitutional Because It Has Not Been Apportioned Among the States

Finally, even if the Individual Mandate were a tax, it is an unconstitutional capitation tax. A capitation tax is a tax imposed “on a person because of the person’s existence.” Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. Pa. J. Const. L. 839, 841 (2009). The Individual Mandate does apply to every nonexempt individual simply by virtue of his or her residency in the United States. *See* 26 U.S.C. § 5000A(d)-(e). The Constitution provides that capitation taxes are a type of direct taxation. U.S. Const. art. I, § 9, cl. 4; *see Murphy v. Internal Revenue Serv.*, 493 F.3d 170, 181 (D.C. Cir. 2007) (“Only three taxes are definitely known to be *direct*: (1) a capitation (citation omitted), (2) a tax upon real property, and (3) a tax upon personal property.”).

Because Congress has never imposed a capitation tax, Supreme Court cases dealing with direct taxation do not squarely address capitation taxes, but focus only on distinguishing between direct taxes and “indirect” taxes. Dodge, *supra*, at 841 (“In fact, the federal government has never imposed a . . . capitation tax.”); *see Steward Machine Co. v. Davis, Collector of Internal Revenue*, 301 U.S. 548, 581-82 (1937) (holding Social Security tax was not direct tax); *Springer v. United States*, 102 U.S. 586 (1881) (holding Civil War income tax was not direct tax); *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1875) (holding tax on inheritances of real estate was not direct tax); *Veazie Bank*, 75 U.S. (8 Wall.) at 533 (holding tax on notes of state-chartered banks was not direct tax);

Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 443, 446 (1869) (holding tax on insurance company receipts was not direct tax); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (holding carriage tax was not direct tax).

Nevertheless, assuming the Individual Mandate is a capitation tax, the Constitution requires that it be apportioned among the states by population, meaning that Congress must first set a sum to be raised, and then determine each state's share of that sum based on the latest census data to derive a per capita tax rate in each state. U.S. Const. art. I, § 9, cl. 4; see *Veazie Bank*, 75 U.S. (8 Wall.) at 542-43 (explaining apportionment process in detail). The Individual Mandate has not been apportioned according to this constitutional rule. Thus, even if it were enacted under Congress's taxing power, the Individual Mandate is an unconstitutional capitation tax because it has not been apportioned as the Constitution requires.

CONCLUSION

Given the “first principle[]” that Congress only enjoys limited, enumerated powers, *Lopez*, 514 U.S. at 552, the Individual Mandate unconstitutionally exceeds both Congress’s commerce and taxing powers. The Commonwealth’s Motion for Summary Judgment should be granted.

DATED: October 4, 2010.

Respectfully submitted,

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By /s/ Robert Luther III

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