Record 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/Cross-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the
Department of Health and Human Services,
in her official capacity,

Defendant-Appellant/Cross-Appellee.

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

APPELLEE'S OPENING AND RESPONSE BRIEF

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STATEMENT OF THE ISSUES

The Secretary raises three issues:

1. Whether Virginia has standing to defend its legal code.

2. Whether the district court erred in holding that the mandate and penalty exceed Congress's power under the Commerce Clause.

3. Whether the mandate and penalty can be upheld under the taxing power.

Virginia raises two additional issues:

1. Whether the mandate and penalty can be severed from the rest of the enactment.

2. If so, what is the proper scope of severance.

STATEMENT OF THE CASE

The United States Senate passed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"), on Christmas Eve 2009 on a straight party line vote. PPACA was passed, without committee hearing or report, employing such florid deal-making as to generate scornful popular terms like "the Louisiana Purchase" and "the Cornhusker Kick-back." (See J.A. 354-55).

At the heart of PPACA is § 1501, which generally requires American citizens to purchase a good or service from other citizens, namely, a health insurance policy. Although Congress purported to be exercising Commerce Clause powers in enacting PPACA, this claim was known to be problematical. When the Senate Finance Committee asked the Congressional Research Service whether a mandate supported by a penalty would be constitutional, the response was equivocal: "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service." (J.A. 354). Because an intervening election in Massachusetts removed the availability of cloture in the Senate, PPACA was passed by the House of Representatives unaltered, and then subjected to minor amendment in a reconciliation process dealing as much with college loans as with health care. Pub. L. No. 111-152, 124 Stat. 1029.

At the 2010 Session of the Virginia General Assembly, the Virginia Health Care Freedom Act, Virginia Code § 38.2-3430.1:1, had been enacted with the assent of the Governor. That act provides in

pertinent part:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the Federal Government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a Court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding.

This legislation was enacted in several identical versions with margins as high as 90 to 3 in the House of Delegates and 25 to 15 in the Senate. At the time of enactment, the Republicans controlled the Virginia House of Delegates while the Democrats controlled the Virginia Senate. (J.A. 341-42).

The Attorney General of Virginia has the duty to defend the legislative enactments of the Commonwealth. Virginia Code §§ 2.2-507; 2.2-513. When the President signed PPACA on March 23, 2010, the validity of both the federal and state enactments was drawn into question. If PPACA were supported by an enumerated power, then it would prevail under the Supremacy Clause. If not, the Virginia statute would be a valid exercise of the police powers reserved to the States. In order to resolve this conflict, Virginia filed a Complaint in federal Court

for Declaratory and Injunctive Relief. (J.A. 28-37).

The gravamen of the Complaint was that the claimed power to require a citizen to purchase a good or a service from another citizen lacks any principled limit and is tantamount to a national police power. Since *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court has gone no further than to hold that Congress can regulate (1) "use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons and things in interstate commerce," and (3) "**activities** that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Section 1501 of PPACA seeks to regulate **inactivity** affecting interstate commerce, a claimed power well in excess of the affirmative outer limits of the Commerce Clause heretofore recognized, even as executed by the Necessary and Proper Clause. *See Gonzales v. Raich*, 545 U.S. 1 (2005). This claimed power also violates the negative outer limits of the Commerce Clause identified in *Lopez* and in *United States v. Morrison*, 529 U.S. 598 (2000). As was stated by the Supreme Court in *Morrison*: "We **always** have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police

power." *Morrison*, 529 U.S. at 618-19.

The Secretary filed a motion to dismiss premised upon lack of standing, the Anti-Injunction Act, ripeness, and failure to state a claim. The motion was briefed and argued. Regarding standing, Virginia argued that States suffer a sovereign injury and have standing to claim that the federal government is acting in excess of its enumerated powers whenever their code of laws is attacked or whenever they are otherwise commanded to give way. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144, 155 (1992); *Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("a State clearly has a legitimate interest in the continued enforceability of its own statutes"); *Diamond v. Charles*, 476 U.S. 54, 62, 65 (1986) ("a State has standing to defend the constitutionality of its statute"); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) ("[T]he power to create and enforce a legal code, both civil and criminal" is a core state function); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (State has standing to defend the efficacy of its expungement statute from threatened federal pre-emption); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir.

1999) (States have a sovereign interest in the power to create a legal code); *Alaska v. U.S. Dep't of Transportation*, 868 F.2d 441, 443-45 (D.C. Cir. 1989) (preemptive effect [of federal regulations] is sufficient to confer standing); *Ohio v. U.S. Dep't of Transportation*, 766 F.2d 228, 232-33 (6th Cir. 1985) (same).

The Secretary argued in the alternative that the mandate and penalty are supported by the taxing power. But there is a justiciable difference between a tax and a penalty. *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 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*). Furthermore, even if the penalty had been denominated a tax, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty . . . ." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994). *See also United States v. Butler*, 297 U.S. 1, 68 (1936); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). Because the penalty requires a supporting enumerated power

independent of the taxing power the tax argument collapses back into the Commerce Clause argument.

The district court denied the motion to dismiss. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010).

The Secretary filed her Answer, and the parties filed cross-motions for summary judgment, joining issue on the Commerce Clause and the taxing power.

The district court granted Virginia's Motion for Summary Judgment and declared the mandate unconstitutional. (J.A. 1111-12, 1115). The Secretary filed her Notice of Appeal, (J.A. 1118), and, because the district court had ruled that the mandate and penalty were severable, Virginia also filed a Notice of Appeal. (J.A. 1121). The cases were consolidated by this Court.

STATEMENT OF FACTS

The Secretary relies upon various publications to argue that the health care market is large; the individual need for health care is temporally unpredictable; procedures are expensive; and government intervention in the market mandates treatment without regard to ability to pay in many cases. She notes that, in 2009, 32% of health

care costs were paid by private insurance and 35% by Medicare and Medicaid; the uninsured consume $100 billion in health care services annually, but $43 billion of this amount is not paid to the provider; "Congress further found that health care providers pass on a significant portion of these costs 'to private insurers, which pass on the cost to families'"; private coverage has declined since 2000; and non-employment based insurance is difficult to obtain because of cost and underwriting for pre-existing conditions. (Doc. 21 at 19-25).

PPACA "bars insurers from refusing coverage because of pre-existing medical conditions, cancelling insurance absent fraud or intentional misrepresentation of material fact, charging higher premiums based on a person's medical history, and placing lifetime caps on benefits the policyholder can receive." (Doc. 21 at 27). Because this creates a perverse incentive for young healthy people to purchase insurance only after they fall ill, Congress imposed the unprecedented mandate enforced by a penalty.

These matters do not implicate evidentiary facts. Some of these arguments – those based upon Congressional findings – do implicate legislative facts. The Secretary's evident purpose in reciting them is to

bolster her position that the mandate and penalty are necessary to PPACA in the senses of being expedient and integral to congressional purpose. This highlights a fundamental difference between the position of the Secretary and that of Virginia. Virginia submits that regardless of the perceived exigencies of the day, no claim of federal power can be necessary **and** proper if it is without principled limits. *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.")

That the mandate and penalty were central to the scheme, however, does have significant consequences on the severance issue. It is as obvious as any such matter can ever be that PPACA would not have been enacted without the unconstitutional mandate and penalty. Under the legislative bargain analysis of *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-86 (1987), PPACA should have been declared unconstitutional in its entirety. Failing that, the district court should have stricken both the private insurance and Medicare/Medicaid changes under *Alaska Airlines*, because those provisions cannot function as intended without the mandate and penalty. In the

alternative, the district court should have accepted the Secretary's concession that "insurance industry reforms" were not severable from the mandate and penalty. (J.A. 901-02).

SUMMARY OF ARGUMENT

Standing

Whenever a State has its code of laws brought into question by federal action, such that it will have to give way under the Supremacy Clause if the federal enactment is valid, the State has suffered a sovereign injury and has standing to challenge the constitutionality of the federal enactment. This is settled law in the Supreme Court and is the law of the Circuit in the Fifth, Sixth, Tenth and District of Columbia Circuits. The federal government claims such standing for itself and has prevailed in establishing the proposition in the Supreme Court and in the Federal Circuit. There is no principled reason why such standing would not apply equally to Virginia.

Commerce Clause

Wickard and *Raich* currently mark the affirmative outer limits of congressional power under the Commerce Clause, even as aided by the Necessary and Proper Clause: **activities** that in the aggregate

substantially affect interstate commerce. *Lopez* and *Morrison* mark the negative outer limits of the Commerce Clause: the Supreme Court always rejects readings of the Commerce Clause and of federal power in general that are tantamount to a federal police power. Because the claimed power to order a citizen to purchase a good or service from another citizen has no principled limit, it violates the negative outer limits of the Commerce Clause. This should come as no surprise to Congress, which was warned by the Congressional Research Service that the claimed power was wholly unprecedented.

Necessary and Proper Clause

The power to regulate **activities** that substantially affect interstate commerce is itself an application of the Necessary and Proper Clause. As John Marshall noted, any legitimate use of the clause must be consistent with the letter and spirit of the Constitution. As the Supreme Court ruled in *Printz*, violations of structural federalism violate the "proper" prong of the clause. Extending congressional power to the point of requiring a citizen to purchase a good or service from another citizen violates structural federalism because it is tantamount to a national police power.

Taxing Power

To date, the Secretary's argument that the mandate and penalty represent an exercise of the taxing power has not been accepted by any federal court which has considered it. The argument must be rejected because the penalty is an exaction imposed for a failure to comply with a governmental command. Thus, in both name[1] and operation, the penalty is a true penalty and not a tax.

Because the penalty is a true penalty and not a tax, it requires an enumerated power for its support. Because the only imaginable enumerated power that could support the penalty would be the Commerce Clause, the tax argument collapses back into the Commerce Clause argument.

Severance

Because it is clear that Congress would not have passed PPACA without the mandate and penalty, those provisions cannot be severed under *Alaska Airlines*. Even if they could be, the district court was

[1] Even if the penalty had been called a tax, it would still be a penalty for constitutional purposes. As the Supreme Court has recognized on multiple occasions, there comes a point where an exaction, even if it is labeled a tax, is a regulatory penalty that must be supported by an enumerated power other than the taxing power.

required to sever at the joint. Doing so would invalidate all insurance, Medicare, and Medicaid changes. At a minimum, the district court should have accepted the Secretary's concession that all private insurance regulation falls with the mandate and penalty.

ARGUMENT

I. VIRGINIA HAS STANDING TO CHALLENGE THE MANDATE AND PENALTY.

On appeal, the Secretary belabors the same *parens patriae* strawman she belabored below. Virginia renounced any reliance on *parens patriae* standing in the district court (J.A. 112), and does so again here. Furthermore, *parens patriae* and proprietary state standing are types of quasi-sovereign standing. *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007). Neither has anything to do with sovereign standing. *See, e.g., Taylor*, 477 U.S. at 137 ("a State clearly has a legitimate interest in the continued enforceability of its own statutes"); *Diamond*, 476 U.S. at 62 ("a State has standing to defend the constitutionality of its statute").

According to the Supreme Court, this principle is not complicated. Speaking in *Snapp*, the Court said that two core sovereign interests remaining with the states are easily identified:

> First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction - - **this involves the power to create and enforce a legal code, both civil and criminal**; second, the demand for recognition from other sovereigns - - most frequently this involves the maintenance and recognition of borders. **The former is regularly at issue in constitutional litigation**. The latter is also a frequent subject of litigation, particularly [under the original jurisdiction of the Supreme Court.]

Snapp, 458 U.S. at 601 (emphasis added). *See also, Diamond*, 476 U.S. at 65.

In advancing her *parens patriae* strawman, the Secretary, in an error adopted by several amici, makes statements about the Virginia law that are simply incorrect. She asserts: "The statute applies to no entities other than the federal government." (Doc. 21 at 37). But as Virginia pointed out below, the Virginia statute prevents any private employer from requiring insurance. (J.A. 241, 247). Because Virginia is a Dillon Rule State, the law also prevents any locality from requiring insurance. (J.A. 241). Nor is it true that "Virginia has not suggested that it serves any other function other than purportedly to create standing here." (Doc. 21 at 38). Virginia's law is one of broad application. (J.A. 241, 247). Nor does it matter that there is no express machinery of enforcement. Many federal statutes lack such machinery

but are enforceable at the instance of the Attorney General. *See, e.g.,* Title 1 § 7; Title 8 § 1623; Title 28 § 1738C. Similarly, nothing would prevent the Attorney General of Virginia from bringing an injunction suit against a Virginia locality that purported to require health insurance. *Cf. United States v. Republic Steel, Corp.*, 362 U.S. 482, 492 (1960) (citing *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888) ("[T]he Attorney General [of the United States] could bring suit, even though Congress had not given specific authority. The test was whether the United States had an interest to protect or defend.")). And while Virginia is for most purposes an at-will employment state, a private employee discharged in violation of the Virginia law would have a claim for wrongful termination under the public policy exception to the at-will rule. *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709 (Va. 2002).

The Secretary reads *Massachusetts v. Mellon*, 262 U.S. 447 (1923), as though *Diamond* had never been decided, leading her to declare: "Virginia's declaratory statute is immaterial; the Supreme Court would not have reached a different conclusion in *Mellon* if the state had first incorporated its complaint into a statute declaring that no

Massachusetts citizen could be required to pay federal taxes to support the challenged federal program." (Doc. 21 at 39). The first thing to be noticed is that this assertion is supported by no citation. The second thing which should be noticed is that the text of *Mellon* refutes the Secretary's argument. The reason why Massachusetts' claim was found to be too abstract to confer standing was that the challenged federal statute did not "require the States to do or to yield anything." *Mellon*, 262 U.S. at 482. *See also New Jersey v. Sargent*, 269 U.S. 328 (1926) (State claims abstract because no right of State was being or about to be affected); *Texas v. ICC*, 258 U.S. 158 (1922) (same).

The Secretary's disdain of the States as joint sovereigns is reflected in her argument that it would be surprising and unsound if "a State could generate standing to challenge a federal law merely by passing a State law to contradict it" (Doc. 21 at 41); as though the enactment of a law is a matter of no consequence or is some kind of low trick. A State acting within the scope of its sovereign interests is uniquely different from any other litigant precisely because of its power to establish a code of laws. The Secretary's hypotheticals, positing that a State could legislate against Social Security taxes or the federal war

powers, fail to appreciate that litigants frequently have standing to lose on the merits.

The Secretary has adopted the position of conceding individual standing to challenge PPACA on enumerated powers grounds in the appeals of *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), and *Liberty University, Inc. v. Geithner*, No. 6:10cv15, 2010 WL 4860299, (W.D. Va. Nov. 30, 2010), while arguing that Virginia, as a joint sovereign, is categorically disabled from mounting an enumerated powers challenge in defense of its own code of laws. This inverts one of the foundational purposes of the federal court system: to address competing claims of state and federal powers. As Justice O'Connor noted in *New York v. United States*, 505 U.S. at 155 (internal citations omitted):

> In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "the Constitution created a Federal Government of

> limited powers," and while the *Tenth Amendment* makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, the Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

The Virginia law transforms Tenth Amendment issues of the sort found to be merely abstract in *Mellon* into an immediate and concrete dispute within the ambit of the sovereign standing cases. Not only is the concept of sovereign standing firmly established in the Supreme Court, but in the Circuit Courts of Appeals as well. *Alaska v. U.S. Dep't of Transp.*, 868 F.2d at 443-45 (recognizing state sovereign standing); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 449 (same); *Ohio v. U.S. Dep't of Transportation*, 766 F.2d at 232-33 (same); *Wyoming ex rel. Crank v. United States*, 539 F.3d at 1242 (same).

The Secretary's use of case authority is highly selective. She continues to cite *Massachusetts v. EPA*, 549 U.S. at 522-23 (Doc. 21 at 41), although it was pointed out below that that is a quasi-sovereign

standing case with no direct application to this case. (J.A. 112). She refuses to acknowledge the very existence of *Diamond*, 476 U.S. at 65, although it was cited by the court below in its standing analysis. (J.A. 302-03).

Where the Secretary does discuss a case of central relevance to the district court's standing analysis, she does so in a way that is entirely unfair to that court. (Doc. 21 at 40). *Snapp*, 458 U.S. at 600, contains a straight-forward discussion of the taxonomy of state standing. In seeking to determine whether Puerto Rico had quasi-sovereign standing to bring a *parens patriae* action in that case, the Court began by contrasting such standing with the full, sovereign standing of the type enjoyed by Virginia in this case.

> Its nature [quasi-sovereign standing] is perhaps best understood by comparing it to other kinds of interests that a State may pursue and then by examining those interests that have historically been found to fall within this category.
>
> Two sovereign interests are easily identified: First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction - - this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns - - most frequently this involves the maintenance and recognition of borders. The former is regularly at issue in

> constitutional litigation. The latter is also a frequent subject of litigation, particularly in this Court . . . .

Snapp, 458 U.S. at 600. In dealing with that case, the Secretary proceeds first by totally ignoring the quoted language and then purports to distinguish the case on the irrelevant grounds that *Snapp* is a *parens patriae* case. (Doc. 21 at 40).

This is not only unfair, but is odd given the Secretary's apparent acceptance of *Wyoming ex rel. Crank* as good law. (Doc. 21 at 42). In that case, the Tenth Circuit stated: "The States have a legally protected sovereign interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction [, which] involves the power to create and enforce a legal code,'" 539 F.3d at 1242 (quoting *Snapp*, 458 U.S. at 601). The Tenth Circuit concluded: "Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong" of standing. *Id.* Given that *Wyoming ex rel. Crank* is the principal authority upon which the district court relied in its standing ruling (J.A. 310-11), the failure of the Secretary to question the status of that case as good law leaves her without a coherent explanation of why she thinks that the district court erred.

At the close of her standing argument (Doc. 21 at 42), the Secretary makes three concessions which should prove fatal to her position. First, she acknowledges that "[a] State likewise may challenge a measure that commands the State to take action." Second, she acknowledges that a State may challenge a measure "that prohibits specified State action." Finally, the Secretary asserts: "Nor is this a case in which federal action 'interferes with [a State's] ability to enforce its own legal code.'" The Secretary continues: "The Commonwealth's suit has none of those features." (Doc. 21 at 42). But clearly this suit implicates the last two features. It is only possible for the Secretary to argue the contrary because of her erroneous view of the scope of the Virginia law. Were she ever to concede its true scope and reach, Virginia would be seen to have standing even under the Secretary's view.

Standing is merely an aid for determining the existence of an Article III case or controversy. The purposes of standing, to ensure that the parties "have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for

illumination,'" are easily made out here. *Massachusetts v. EPA*, 549 U.S. at 517 (internal citation omitted). When the claimed powers of the States and the federal government collide, the Supreme Court usually addresses the merits without even addressing standing. *See, e.g., New York v. United States*, 505 U.S. at 144; *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Finally, it should be noted that the Secretary's views on sovereign standing contrast sharply with the position of the United States in other cases. In *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1324-25 (Fed. Cir. 2010), the United States successfully argued that disobedience of its laws "is a sufficient injury in fact" to confer sovereign standing. Furthermore, the Supreme Court in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771 (2000), stated: "It is beyond doubt that the complaintant asserts an injury to the United States - - both the injury to its sovereignty arising from the violation of its laws . . . and the proprietary injury resulting from the alleged fraud." If sovereign standing runs in favor of the United States, there is no principled reason why it does not also run in favor of Virginia, a joint sovereign.

II. THE MANDATE AND PENALTY ARE BEYOND THE OUTER LIMITS OF THE COMMERCE CLAUSE.

In PPACA, Congress asserted its Commerce Clause powers in enacting the mandate and penalty. But 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, or persons and things in interstate commerce," and (3) "**activities** that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (emphasis added).

The passive status of being uninsured falls within none of these categories. In her Answer, the Secretary pled that the status of being uninsured is "an economic decision" that "has a substantial effect on interstate commerce." (J.A. 333-34). This strange and awkward formulation underscores the correctness of the district court's ruling that the Secretary's position is well outside of the currently established limits of the Commerce Clause. On appeal, the Secretary argues that the mandate "regulates the means of payment for services in the interstate healthcare market" (Doc. 21 at 44-45) – even though it is obvious that it expressly regulates inactivity antecedent to any activity for which payment would be required. Although the Commonwealth's

position is in accord with existing precedent, acceptance of the Secretary's position would require a change in the law.

It is true that the Secretary also pled in her answer that "Congress had a rational basis to conclude that the minimum coverage provision is essential to ensure the success of the [Act's] larger regulation of the interstate health insurance market." (J.A. 333). This argument is repeated on appeal. (Doc. 21 at 47-52). But this is simply a reference to the Necessary and Proper Clause, which cannot be employed contrary to the letter and spirit of the Constitution. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Because the power claimed here would alter the federal structure of the Constitution by creating an unlimited federal power indistinguishable from a national police power, it cannot be a proper use of the Necessary and Proper Clause. *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.").

According to Justice Breyer, the potential sources of constitutional construction include "language, history, tradition, precedent, purpose, and consequence," Stephen Breyer, *Active Liberty* 8 (Vintage Books)

(2006), although the last two are subject to debate. *Id.* at 78-80, 115-16. The Secretary refused to engage with language, history or tradition in the district court, and she avoids them here as well –because they demonstrate that the claimed power to regulate present inactivity in anticipation of future activity represents a qualitative change in the law.

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

Article I, § 8 of the Constitution provides that "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." If the Founders accepted contemporary suggestions that the word "commerce" is derived from the Latin *commercium*, *see* N. Baily, *Dictionarium Britannicum or a more complete Universal Etymological English Dictionary than any Extant* (London 1730), and *A Pocket Dictionary* (3d ed. London 1765) (Library of Virginia), then they would have understood commerce as comprehending "traffick, dealing, merchandise, buying and selling, bartering of wares; also an intercourse or correspondence of dealing; acquaintance, converse; business, affair; intelligence." Adam Littleton, *Dr. Adam Littleton's Latin dictionary, in four Parts: I. An English-*

Latin, II. A Latin-classical, III. A Latin-Proper, IV. A Latin-barbarous, Part II (no pagination) (6th ed. London 1735) (Library of Virginia). Or had they consulted John Mair, *The Tyro's Dictionary, Latin and English* at 96 (2d ed. Edinburgh 1763) (Library of Virginia with autograph of P. Henry, and of Patrick Henry Fontaine), they would have seen the word defined as "trade, traffic, commerce, intercourse." Those who stopped with an English dictionary might have seen commerce defined as "trade or traffick in buying or selling." N. Baily, *supra.* This collection of terms is the way that the word was historically understood both in language and law. Noah Webster in 1828 defined commerce as "an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale; trade; traffick." *An American Dictionary of the English Language* at 42 (S. Converse New York 1828) (facsimile). These terms echo in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) ("Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.").

Those in the founding generation distinguished between commerce on the one hand, and manufacturing or agriculture on the other. *Lopez*, 514 U.S. at 586 (Thomas J., concurring). Although they were considered distinct, they are not unrelated. Almost all manufacture is done for trade. And while pure subsistence farming is possible, what farmer will forgo profit from his surplus? Mr. Filburn in the famous wheat case was subject to a marketing order because it was his practice to feed his wheat to his cattle and poultry, some of which he then sold, together with eggs and milk. *Wickard v. Filburn*, 317 U.S. at 114, 118-19. (Agricultural Adjustment Act of 1938 defined marketing wheat "in addition to its conventional meaning" as including "feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged."). Even where an agricultural product is raised for home consumption, it is still part of the total stock which in the aggregate regulates and controls price through the law of supply and demand. *Raich*, 545 U.S. 1. Thus, the regulations at issue in *Wickard* and *Raich* are not untethered from commerce in the way that the claimed power is in this case.

For the founding generation, commerce, industry, labor, agriculture, trade, and navigation were all constituents of "a certain propensity in human nature . . . to truck, barter, and exchange one thing for another"; with the end result that mankind brought "the different produces of their respective talent . . . , as it were, into a common stock, where every man may purchase whatever part of the produce of other men's talents he has occasion for." Adam Smith, *Wealth of Nations,* at 9-10, 19, 22-23, 26, 81 (Prometheus Brooks 1991) (facsimile). This is commerce. Its hallmarks are spontaneity and voluntary activity; not a command to buy something.

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

The American Revolution was the direct result of parliament's claimed right to legislate for America, joined with actual attempts to do so. The Stamp Act, repealed in the face of furious opposition, was the first attempt. Then came the Townshend Acts, placing a duty on paper, glass, lead, paint and tea.

As the struggle continued, all of the taxes except those on tea were repealed, leading to the Boston Tea Party, the Intolerable Acts, and the

First Continental Congress. Throughout the period from the Stamp Act forward, Americans responded with non-importation and non-consumption agreements.

The Declaration and Resolves of the First Continental Congress of October 14, 1774 "cheerfully consent[ed] to the operation of such acts of the British Parliament, as are bonfide, restrained for the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother-country, and the commercial benefits of its respective members." However, Congress, in the very same document, promised "To enter into a non-importation, non-consumption, and non-exportation agreement or association." Charles C. Tansill, *Documents Illustrative of the Formation of the Union of the American States Library of Congress Legislative Reference Service,* Government Printing Office No. 398 (1927) http://avalon.law-yale.edu/18th_century/resolves.asp. Such boycott agreements were generally considered lawful even by the royal colonial governments. For example, "[a]t New York the merchants held a meeting to join with the inhabitants of Boston; and against the opinion of the governor, the royal council decided that the meetings were legal; that the people did

but establish among themselves certain rules of economy, and had a right to dispose of their own fortune as they pleased." George Bancroft, *History of the United States*, Vol. III at 287 (D. Appleton & Company 1896). Later in New York, "where the agreement of non-importation originated, every one, without so much as dissentient, approved it as wise and legal; men in high station declared against the revenue acts; and the governor wished their repeal." *Id.* at 359. In Massachusetts, Governor Hutchinson

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

Id. at 369. Even where legislatures were dissolved, the non-importation movement continued. Upon dissolution of the Virginia General Assembly, the burgesses met by themselves and "adopted the resolves which Washington had brought with him from Mount Vernon, and which formed a well digested, stringent, and practical scheme of

non-importation." *Id.* at 348. "The assembly of Delaware adopted the Virginia resolutions word for word: and every colony South of Virginia followed the example." *Id.* The founding generation would have regarded as preposterous any suggestion that Great Britain could have solved its colonial problems by commanding Americans to purchase tea under the generally conceded power of parliament to regulate commerce.

Additional historical arguments against the power of Congress to enact the mandate and penalty can be almost endlessly adduced. For example, Alexander Hamilton, at the New York convention, "not[ed] that there would be just cause for rejecting the Constitution if it would enable the Federal Government to 'penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals.'" *Lopez*, 514 U.S. at 592. What cannot be adduced is a countervailing historical example under the Commerce Clause in favor of the mandate and penalty.

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

"For nearly a century" after *Gibbons v. Ogden,* the Court's "decisions . . . under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce." *Wickard,* 317 U.S. at 121.

Beginning with the Interstate Commerce Act in 1887, the Sherman Antitrust Act in 1890, and other enactments after 1903, Congress began asserting its positive power under the Commerce Clause. In doing so, it was met at first with significant checks from the Supreme Court. *Wickard,* 317 U.S. at 121-22 and 122, n. 20 (collecting cases striking down congressional enactments). "In general," the Court protected state authority over intrastate commerce by excluding from the concept of interstate commerce "activities such as 'production,' 'manufacturing,' and 'mining,'" and by removing from its definition activities that merely affected interstate commerce, unless the effect was "direct" rather than indirect. *Id.* at 119-20. With respect to

citizens, the reach of the Commerce Clause was limited by the Fifth Amendment which, prior to 1938, was held to protect economic liberty through substantive due process. *Railroad Retirement Bd. v. Alton Railroad Co.,* 295 U.S. 330 (1935). Because this regime viewed the regulation of economic activity to be illegitimate unless that activity harmed or threatened harm to someone else, *Lochner v. New York,* 198 U.S. 45 (1905), it is inconceivable that the Commerce Clause prior to 1938 would have been deemed to reach and control a citizen's decision not to engage in a commercial activity. The question thus becomes, has the Supreme Court decided any case in the post-*Lochner* era that would warrant extending the Commerce Clause to authorize the mandate and penalty? The answer is no.

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

The Secretary's reliance on precedent is based on over-reading *Wickard* and *Raich* in isolation from *Lopez* and *Morrison*. (Doc. 21 at 43-47).

Although *Wickard* has been described as "perhaps the most far reaching example of Commerce Clause authority over intrastate

activity," *Lopez,* 514 U.S. at 560, it involved the voluntary activity of raising a commodity which, in the aggregate, was capable of affecting the common stock of wheat. It had been Filburn's practice to sell milk, poultry and eggs from animals fed with his home-grown wheat. *Wickard* at 114. The parties stipulated that the use of home-grown wheat was the largest variable in the domestic consumption of wheat. *Id.* at 125, 127. This permitted the Supreme Court to hold that "even if [an] **activity** be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125 (emphasis added). This marks the affirmative outer limits of the Commerce Clause.

What *Wickard* stands for, as *Lopez* and *Morrison* make clear, is **not** the proposition that the case "expand[s] the commerce power to cover virtually everything," as used to be said. *See* David P. Currie, *The Constitution in the Supreme Court the First Hundred Years 1789-1888*, at 170 and note 89 (University of Chicago Press 1985). Instead, *Wickard* establishes the principle that, when activity has a substantial

aggregate impact on interstate commerce, there is no as-applied, *de minimis* constitutional defense to regulation under the Commerce Clause. *See Raich*, 545 U.S. at 47-48 (O'Connor, J., dissenting) ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis).").

Wickard describes itself as a return to the pure and sweeping doctrine established by *Gibbons* following the Court's excursion into Lochnerism. *Wickard*, 317 U.S. at 119-25. However, the dictum of the *Wickard* Court that Chief Justice Marshall had made statements in *Gibbons* with respect to the Commerce Clause "warning that effective restraints on its exercise must proceed from political rather than from judicial processes" was a tautology that conceals more than it reveals. *Wickard*, 317 U.S. at 120. It is a tautology because it is true of any enumerated power that, when Congress is validly acting under the power, the only effective restraints are political. *See Morrison,* 529 U.S. at 616, n. 7 (The "assertion that from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce

power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds* . . . . *Gibbons* did not remove from this Court the authority to define that boundary."). What it conceals is Marshall's actual holding in *Gibbons* that the terms "to regulate" and "Commerce . . . among the several States" are bounded, with judicially ascertainable meaning, and his further holding that the Commerce Clause does not reach transactions between persons which affect only intrastate commerce. *Gibbons,* 22 U.S. (9 Wheat.) at 189-90, 196.

Since *Wickard,* the Supreme Court has progressed no further than to hold that Congress can regulate (1) channels of interstate commerce (2) instrumentalities of and persons and things in interstate commerce and (3) "**activities** that substantially affect interstate commerce." *Lopez,* 514 U.S. at 558-59 (emphasis added). The majority in *Raich* went no further than to accept congressional findings that home-grown marijuana in the aggregate has a substantial effect on interstate commerce. *Raich,* 545 U.S. at 18-19. The challenge in *Raich* was not

facial, but involved an atomized, as-applied challenge of the sort foreclosed by *Wickard*. *Id.* at 15, 23.

The Supreme Court has also developed a workable negative rule for determining when the outer limits of the Commerce Clause have been exceeded: a facial challenge will succeed when Congress seeks to regulate non-economic activities where the claimed power has no principled limits distinguishing it from a national police power. *Lopez,* 514 U.S. at 566-68. As Justice Kennedy stated in his concurrence in *Lopez*: "Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* at 578 (citations omitted).

That principle was found applicable in *Morrison* because the federal government was attempting to exercise police powers denied to it by the Constitution. *Morrison* at 618-19. Not only are the mandate and penalty a part of the police power conceptually, but, historically, commands to act 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).

E. The Mandate And Penalty Are Not A Valid Exercise Of Congress's Power Under The Necessary And Proper Clause.

Most of the Secretary's brief rests upon implicit or explicit appeals to the Necessary and Proper Clause. (Doc. 21 at 47-63). However, that provision "is not itself a grant of power." *Kinsella v. Singleton*, 361 U.S. 234, 247-48 (1960). Furthermore, the affirmative outer limit of the Commerce Clause relevant to this case – activities substantially affecting interstate commerce – itself depends upon the Necessary and Proper Clause. *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). It would be a mistake to assume that such power is part of the Commerce Clause itself, which can then be infinitely extended by the Necessary and Proper Clause. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate

commerce) derives from the Necessary and Proper Clause."). Taken together, these cases recognize that Congress can regulate intrastate activity where such regulation is connected with and appropriate to Congress's power to regulate the interstate market.

In this way, Congress's power remains tethered to the text of the Commerce Clause. It may reach interstate commerce directly. It may reach economic intrastate activities substantially affecting interstate commerce even before they ripen into "commerce" through trade, barter or sale, if they affect the common stock of a commodity. *Raich*; *Wickard*. The Secretary's view of the scope of the Necessary and Proper Clause is both extravagant and untethered: "Governing precedent leaves no room to override Congress's judgment about the appropriate means to achieve its legitimate objectives." (Doc. 21 at 52). The only way that this statement could be true would be for *Morrison* to be wrong in its explicit rejection of the view that the only limits on the Commerce Clause are political. 529 U.S. at 616.

Regulation may reach many things under the Necessary and Proper Clause. However, the mode of regulation must fit the enumerated power by executing it – not by altering its character. And

the question of fit is irrelevant unless the thing being regulated is proper. The essential difference between Virginia and the Secretary turns on this point: the Secretary believes that if a statute is necessary in the sense that "'the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power'" that is the end of the inquiry. (Doc. 21 at 55). Virginia submits that there is also a proper prong to the Necessary and Proper Clause:

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

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

Although the Secretary cites *United States v. Comstock*, 130 S. Ct. 1949 (2010), that opinion, contrary to her use of it, recognizes that *Morrison's* negative outer limit denying the national government a police power applies to the Necessary and Proper Clause. *Comstock*, 130 S. Ct. at 1964 ("Nor need we fear that our holding today confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States.'") (citing *Morrison*). Justice Kennedy in his concurrence in the judgment in *Comstock* expressly stated: "It is of fundamental importance to consider whether essential attributes of State sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power." *Id.* at 1967.

Furthermore, the United States Supreme Court elsewhere has emphatically held that the Necessary and Proper Clause is limited by general principles of federalism independent of any direct prohibition. *Alden v. Maine*, 527 U.S. 706 (1999) ("When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is

not a 'Law . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'") (citing *Printz*, 521 U.S. at 923-24). Not only are there clear federalism limits on the Necessary and Proper Clause, but those limits compel the conclusion that any attempt to exercise an unenumerated power, such as regulating the status of being uninsured, for the purpose of making the regulation of an enumerated power more efficient, is improper because the unenumerated power is, by definition, reserved to the States. Once it is determined that an enactment is improper in this sense, there is nothing further to consider under the Necessary and Proper Clause. That is why the majority opinions in *Morrison* and *Lopez* find it unnecessary to engage the Clause. It simply does not matter how "necessary" the mandate and penalty might be to the congressional scheme if the end being pursued is improper under the Necessary and Proper Clause. That is the end of it.

F. The Decision To Forgo Insurance Is Not An Activity Substantially Affecting Commerce Within The Meaning Of The Necessary And Proper Clause.

The claim that the health care market is unique (Doc. 21 at 54) is false. Any market can be affected through limiting supply or increasing demand. Hence the Agricultural Adjustment Act of 1938 at issue in *Wickard* could have, in economic theory, just as easily addressed the agricultural crisis by ordering citizens to purchase a certain measure of wheat. The reason Congress could not adopt this approach is that it would not have been supported by an enumerated power. In particular, it would not be a regulation of interstate commerce or of economic activities substantially affecting commerce.

While it is true that Congress has directly regulated aspects of the health care system, principally by mandating emergency room treatment by hospitals receiving federal funds, Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, (Doc. 21 at 55-56), the question in this case is whether Congress can command a citizen to purchase insurance solely for the convenience of the government in regulating market distortions caused, at least in part, by previous

congressional regulation. That question must be answered in the negative for at least four reasons.

First, Congress cannot pass a law that distorts the market and then claim it must have all powers necessary to correct that distortion. Federal power is limited by the Constitution and cannot be extended by statute.

Second, the notion that the federal government can issue naked commands that citizens live their lives for the convenience of the government is repugnant to historical constitutional thinking. The Constitution was adopted not merely for the utilitarian benefits of government, but also to "secure the Blessings of Liberty to" the Founders and their "Posterity." U.S. Const., Preamble. As Alexander Hamilton told the New York convention, a constitution that "enable[d] the Federal Government to penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals" would have been unworthy of ratification. *Lopez*, 514 U.S. at 592 (Thomas, J. concurring).

Third, the claim that citizens can be commanded to purchase goods or services from another citizen in order to increase the efficiency

of the federal government's regulation of commercial actors goes beyond the negative outer limits of the Commerce Clause, even as aided by the Necessary and Proper Clause, because the claimed power would be unlimited and indistinguishable from a national police power. *Lopez*; *Morrison*.

Fourth, the claim that Congress can use unenumerated powers to increase the efficiency of its use of an enumerated power is constitutionally incoherent in a government of enumerated powers. By definition, *all* unenumerated powers "are reserved to the states respectively, or to the people." U.S. Const. amend. X.

Although the mandate can be earnestly defended as addressing a matter of moral urgency (Doc. 21 at 54-56), the Supreme Court addressed the dangers of subordinating the Constitution to the perceived exigencies of the day last term in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010). There the Court said:

> Calls to abandon [constitutional] protections in light of "the era's perceived necessity," *New York*, 505 U.S. at 187, are not unusual . . . . The failures of accounting regulation may be a "pressing national problem," but "a judiciary that licensed extraconstitutional government

> with each issue of comparable gravity would, in the long run, be far worse." *Id.* at 187-188.

The Secretary, citing the three district court cases that have upheld PPACA on the merits (Doc. 21 at 57), argues that "'the individuals subject to [the minimum coverage provision] are either present or future participants in the national healthcare market.'" But they are not being regulated when acting in this capacity. They are being regulated on account of the passive status of being uninsured. The two district courts that have found PPACA to be unconstitutional note that the claimed power is an unprecedented extention of existing doctrine. (J.A. 328); *Florida v. HHS*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at *71 (N.D. Fla. Jan. 31, 2011). The district courts that have ruled in favor of the Secretary have noted that the regulation of inactivity in this fashion is, at the very least, novel. *Mead v. Holder*, No. 10-950 (GK), 2011 U.S. Dist. LEXIS 18592, at *66-67 (D.D.C. Feb. 22, 2011); *Liberty University*, 2010 U.S. Dist. LEIXS 125922, at *48-49; *Thomas More Law Center*, 720 F. Supp. 2d at 893. So, the Secretary's argument that *Raich* and *Wickard* directly supply the rule of decision in this case (Doc. 21 at 58-59) has not met with judicial favor. Even the Secretary, in her docketing statement, characterized this case as one of

first impression. *Raich* and *Wickard* not only fail to support the Secretary's position, they mark the existing affirmative outer limits of the Commerce Clause at a point well short of the power claimed by Congress in PPACA. When *Raich* and *Wickard* are read together with *Lopez* and *Morrison*, it becomes clear that the mandate and penalty are unconstitutional.

The Secretary cites *Liberty University* (Doc. 21 at 60) for the proposition that choices are the constitutional equivalent of activities. But the choice not to buy is the default position for the human condition. So, if the choice not to buy insurance is subject to regulation under the Commerce Clause, there is no valid limiting principle. The Secretary complains that the district court found that her "rationales for upholding the mandate and penalty 'could apply to transportation, housing, or nutritional decisions.'" (Doc. 21 at 60). But, as the Northern District of Florida noted in its order granting a conditional stay, "Former Solicitor General and Harvard Law Professor Charles Fried testified (during the course of *defending* the Constitutionality of the individual mandate) that under this view of the commerce power

Congress could, indeed, mandate that everyone buy broccoli." Order of Mar. 3, 2011 at 4, n. 2, *Florida* (No. 3:10-cv-91-RV-EMT), Doc. 167.

Appealing once again to the exigencies bearing on the issue, the Secretary argues that the mandate and penalty "prevent[ ] the substantial cost-shifting in the interstate healthcare services market that results from the practice of consuming healthcare without insurance." (Doc. 21 at 61). While the scope of congressional power is not defined by the wisdom of its enactments, this is not even the choice Congress made. Unlimited cost-shifting is permitted to continue subject to the penalty. Indeed, cost shifting is further aided by the Bankruptcy Code.

The Secretary's examples of supposed precedential regulation of inactivity are inapt. (Doc. 21 at 62-63). Superfund liability only attaches to an actor in interstate commerce. *United States v. Olin Corp.*, 107 F.3d 1506, 1510-11 (11th Cir. 1997). The Secretary's use of *Nurad, Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837, 845 (4th Cir. 1992) (Doc. 21 at 62-63), confuses the substantive, no-fault provisions of CERCLA with the *Olin* jurisdictional requirement.

The Secretary's argument that "federal laws regulating child pornography are triggered even when an individual comes into possession of child pornography innocently, without having taken any active measures," citing 18 U.S.C. § 2252(c), (Doc. 21 at 63), overlooks the fact that § 2252(c) creates an affirmative defense. The offense itself requires proof of a jurisdictional hook: either (1) possession on federal lands or waters or in Indian Country or (2) use of the mails or movement in interstate commerce. 18 U.S.C. § 2252 (a)(4). The Second Militia Act of 1792, ch. 38, § 1, 1 Stat. 264, 265 (requiring all free men to obtain firearms, ammunition, and other equipment) was supported by the express enumerated power of Congress "To provide for organizing, arming, and discipling, the Militia . . ." U.S. Const. art. I, § 8. The requirement to provide arms, equipment and ammunition was deeply historical; that is how militias worked. *See* 13 *Hening's Statutes At Large* at 354-55 (Philadelphia 1823) (Militia to muster armed as required by law, all arms, ammunition and equipment exempt from levy for debt). The power to call all gold into the Treasury discussed in *Nortz v. United States*, 294 U.S. 317, 328 (1935), was conceded by the parties and was based on the enumerated power "To coin Money,

regulate the value therefore. . ." Because the power was conceded, the Court dismissed for want of damages, there being no legal market in gold. When the Secretary discusses *Lopez* and *Morrison* (Doc. 21 at 63-65), she seeks to atomize their principles and confine them to their facts. Under the Secretary's view, when what has been recognized as commerce is being regulated, those cases simply have nothing to say. But what they clearly do say is this: (1) the Commerce Clause has outer limits (2) those limits are justiciable and (3) those limits are violated by a claimed power with no principled limits.

The Secretary's statement that "[t]he district court did not suggest that the Affordable Care Act intrudes into an area of regulation that is reserved to the states" (Doc. 21 at 65) is mistaken in an important way. Under our system of enumerated powers, any attempt to exercise an unenumerated power like the claimed power to require a citizen to purchase a good or service from another citizen is automatically an invasion of police powers reserved to the States.

When the Secretary argues that Congress has both the practical motive and the power to regulate aspects of the healthcare system on a national basis, what she says is uncontroversial. (Doc. 21 at 65-70).

What is controversial – as the Congressional Research Service warned – is whether it may do so by employing as a means a command that citizens purchase a good or service from another citizen under threat of a penalty.

The Secretary ends her discussion of the Commerce Clause and the Necessary and Proper Clause with three propositions. First, reacting to the discomfort caused by the fact that the claimed power would permit Congress to mandate the purchase of anything, she counsels: "The analysis cannot be driven by hypothetical statutes that no legislature would ever adopt." (Doc. 21 at 69). However, the corrolary is also true: "[T]he [Constitution] protects against the Government; it does not leave us at the mercy of *noblesse obligue*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

The Secretary quotes *Gibbons v. Ogden*, 22 U.S. at 197, for the principle that, in many instances, the only limits on congressional power are political. (Doc. 21 at 70). As we have already seen, the *Morrison* Court expressly noted that this was true only when Congress

is acting within its enumerated powers, and that it was for the Court to determine when it was not. *Morrison*, 529 U.S. at 616, 616 n. 7.

Finally, the Secretary appeals to Story's *Commentaries*: "Justice Story likewise recognized that it is manifestly incorrect to suggest that, 'because Congress had not hither to used a particular means to execute any . . . given power, therefore it could not now do it.'" (Doc. 21 at 70). However apt that thought was at the beginning of a young republic, the experience of over 200 years cannot simply be ignored in constitutional adjudication.

For example, at the end of last term, the Supreme Court in *Free Enterprise Fund*, 130 S. Ct. at 3159, quoted Judge Kavanaugh's dissent in the Court of Appeals:

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

In *Printz*, 521 U.S. at 918, the Court said the fact that Congress had not asserted a particular power for 200 years "tends to negate the existence

of that power." Finally, the five factors employed in deciding *Comstock* are deeply historical, causing PPACA to fail most of them.

III. THE MANDATE AND PENALTY ARE NOT AUTHORIZED BY THE POWER TO TAX.

Although the district courts are divided on the constitutionality of PPACA, they are unanimous in declining to accept the taxing power argument. As the United States District Court for the District of Columbia noted in *Mead*, 2011 U.S. Dist. LEXIS 18592 at *69-70:

> In reaching its decision [to reject the taxing power argument], the Court notes that, to date, every court which has considered whether § 1501 operates as a tax has concluded that it does not. *See Goudy-Bachman*, 2011 U.S. Dist. LEXIS 6309, 2011 WL 223010, at *10-12; *Liberty Univ.*, 2010 U.S. Dist. LEXIS 125922, 2010 WL 4860299, at *9-11; *State of Florida*, 716 F.Supp.2d at 1130-41; *United States Citizens Ass'n*, 2010 U.S. Dist. LEXIS 123481, 2010 WL 4947043, at *5; *Virginia ex rel. Cuccinelli v. Sebelius,* 728 F.Supp.2d 768, 786-88 (E.D. Va. 2010).

A threshold problem with the Secretary's resort to the taxing power is that no one can seriously call the **mandate** a tax. Thus it requires some other enumerated power to support it. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940); *United States v. Butler*, 297 U.S. 1, 61 (1936). Furthermore, the penalty is a penalty, not a tax. Of course, because the penalty is in aid of the mandate and

not in aid of a tax, the Secretary's attempt to rename the "penalty" a "tax penalty" necessarily fails. The remainder of the Secretary's taxing power argument exhibits a similar disregard of the ordinary meaning of words.

At times, the Secretary stresses that it is the function and not the form that should govern in determining whether the penalty is actually a tax. (Doc. 21 at 71). However, any review of the statutory text and relevant precedent reveals that, both in name and operation, the penalty is not a tax.

First, Congress itself called the penalty a "penalty." Elsewhere in PPACA, Congress levied taxes denominated as such, demonstrating that it knew how to draw the distinction. *See*, *e.g.*, PPACA §§ 9001; 9004; 9015; 9017; 10907. In the taxing arena, the Supreme Court has refused to permit litigants to denominate as a tax that which Congress has denominated an exercise of commerce power. *Bd. of Trustees of the University of Illinois v. United States*, 289 U.S. 48, 58 (1933).

Second, the penalty, speaking historically and 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 University of Virginia*, 515 U.S. 819, 841 (1995) (quoting *Butler*, 297 U.S. at 61). In contrast, the purpose of the penalty is to alter conduct in hopes that the penalty will not be collected at all.

The question whether an exaction is a tax or a penalty is itself justiciable. *United States v. La Franca*, 282 U.S. at 572. Although "an Act of Congress which on its face purports to be an exercise of the taxing power," and which is actually a tax and not a regulatory penalty, will be upheld without collateral inquiry into the regulatory motive of Congress, *Sonzinsky v. United States*, 300 U.S. 506, 511, 513-14 (1937), the PPACA penalty purports to be a penalty and not a tax.

For nearly a hundred years, 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, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.'" *Reorganized CF&I Fabricators*, 518 U.S. at 224 (quoting *La Franca*, 282 U.S. at 572). As the Court held, the word "tax" and the word "penalty"

> are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the

> essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled . . . .

La Franca, 282 U.S at 572. To prevail, the Secretary's taxing power argument requires that this Court first ignore Congress's express decision to denominate the individual mandate penalty 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 the Court rewriting the statute, as opposed to interpreting it, the Secretary's argument must fail.

The Secretary next argues that the "Constitution itself uses four different terms to refer to taxation: tax, impost, duties and excises." (Doc. 21 at 73). However, this cannot aid the Secretary because "penalty" is not one of those "four different terms" and, as discussed above, has consistently been held to be something distinct from a tax, whether or not the tax is called a tax, impost, duty or excise.

Inconsistently, having spent part of her opening brief arguing that it is function and not form that should govern a court's inquiry, the Secretary makes a form argument—that the location of the penalty in

the Internal Revenue Code essentially transforms it into a tax. (Doc. 21 at 71-72). However, that argument is barred by statute and by Supreme Court precedent. 26 U.S.C. § 7806(b) ("No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision of this title . . . ."); *Reorganized CF&I Fabricators*, 518 U.S. at 223 (holding that a payment specifically denominated in the Internal Revenue Code as a "tax" was actually a penalty and stating that "[n]o inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code.").

In making this formalistic argument, the Secretary also cites, without quotation or specific reference, this Court's decision in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), which involved the question of whether premiums required to be paid under the Coal Act were actually taxes. This Court, citing the Second Circuit's decision in *In re Chateaguay Corp.*, 53 F.3d 478 (2nd Cir. 1995), held that the premiums were taxes. However, the Coal Act, unlike PPACA, did not impose a "penalty." Rather, the

> purpose of the [Coal] Act was to establish a system whereby each current and former signatory operator--

> that is, each operator that "is or was a signatory to a coal wage agreement," as such agreements are defined in *section 9701(b)(1)* of the Act, *see § 9701(c)(1)* --is required to pay for the benefits provided to its own retirees and to share in the cost of providing benefits to orphaned retirees.

In re Leckie, 99 F.3d at 576. Thus, the Coal Act did not impose a "penalty" on coal companies, but rather, required them to pay annual benefit premiums consistent with their obligations under prior agreements. Specifically:

> The Coal Act restricts liability for medical benefit premiums to companies that (1) signed one or more Wage Agreements between 1950 and 1988, (2) continue to "conduct[] or derive[] revenue from any business activity, whether or not in the coal industry," and (3) actually employed at least one retiree currently receiving benefits. *Id.*, § 9701(c).

In re Chateaguay Corp., 53 F.3d at 486. Thus, unlike the penalty in PPACA, Coal Act payments were not imposed because of the failure of a party to comply with a government command. As the United States Supreme Court found in *Reorganized CF&I Fabricators*, that distinction is dispositive.

The Secretary also argues that any statute that is "productive of some revenue" is a tax. (Doc. 21 at 71-72). Given the Supreme Court's clear precedent that true monetary penalties, which, defintionally, are

"productive of some revenue," are not taxes, this is simply not an accurate statement of the law. Assuming that words are infinitely malleable, she also pronounces that the penalty is not really a penalty because it "does not impose 'punishment.'" (Doc. 21 at 74). This is easily refuted.

In *Kurth Ranch*, 511 U.S. at 776-77, the Supreme Court recognized that a civil penalty can constitute punishment for double jeopardy purposes. However, in the very same case, the Court expressly stated that civil penalties are separate and distinct from taxes, holding that "tax statutes serve a purpose quite different from civil penalties . . . ." *Id.* at 784. Accordingly, the Secretary's suggested formulation, that civil penalties that do not impose punishment sufficient to trigger double jeopardy are in fact taxes, has been expressly rejected by the Supreme Court.

The Secretary also argues that "a tax 'does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.' *United States v. Sanchez*, 340 U.S. 42, 44 (1950)." (Doc. 21 at 71). However, by its terms, the *Sanchez* rationale only applies to taxes, not to penalties. Moreover, even assuming that the

penalty had been denominated as a tax, it would still have to pass muster under an enumerated power other than the taxing power so long as it is really a regulatory penalty. *Child Labor Tax Case*, 259 U.S. at 20. *See also Butler*, 297 U.S. at 68; *Linder v. United States*, 268 U.S. 5, 17-18 (1925). These cases remain as binding authority. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

Ultimately, the Secretary's argument that these cases have fallen into desuetude rests on dicta contained in a footnote in *Bob Jones University v. Simon*, 416 U.S. 725, 741, n. 12 (1974). The footnote in question never mentions the *Child Labor Tax Case* (which is cited in the body of the case prior to the footnote) nor does it mention *Butler* or *Linder*, making it impossible to maintain that the footnote overruled those cases. *Id*. Second, the footnote, when read in its entirety, reveals itself as pure dicta:

> In support of its argument that this case does not involve a "tax" within the meaning of § 7421 (a), petitioner cites such cases as *Hill v. Wallace,* 259 U.S. 44 (1922) (tax on unregulated sales of commodities futures), and *Lipke v. Lederer,* 259 U.S. 557 (1922) (tax on unlawful sales of liquor). It is true that the Court in those cases drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. *E.g., Sonzinsky v. United States,* 300 U.S.

> 506, 513 (1937). **Even if such distinctions have merit, it would not assist petitioner, since its challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which clearly are intended to raise revenue.**

Id. (emphasis added). Finally, a review of the case cited in the footnote, *Sonzinsky*, reveals that it did not overrule the *Child Labor Tax Case* but instead treated it as binding precedent that had to be distinguished. Specifically, the *Sonzinsky* court wrote:

> The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. See *Child Labor Tax Case*, 259 U.S. 20, 35; *Hill v. Wallace*, 259 U.S. 44; *Carter v. Carter Coal Co.*, 298 U.S. 238.

Sonzinsky, 300 U.S. at 513. Simply put, the Supreme Court has never overruled the basic thrust of the *Child Labor Tax Case*: that a "purported tax" that is actually a penalty to force compliance with a regulatory scheme must be tied to an enumerated power other than the taxing power.

Moreover, the *Child Labor Tax Case* was cited with approval by the Supreme Court as recently as 1994:

> Yet we have also recognized that "there comes a time in the extension of the penalizing features of the so-

> called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.,* at 46 (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)).

Kurth Ranch, 511 U.S. at 779. Given that the Supreme Court, as recently as 1994, cited the *Child Labor Tax Case* for the very proposition for which the Commonwealth offers it, it cannot reasonably be said that it is no longer good law.

Ultimately, the problem with the Secretary's taxing power argument is that it is anti-textual, anti-historical and contrary to precedent. The mandate and penalty are neither the regulation of commerce nor taxation; they are an exercise of police power denied to the federal government.

IV. THE SEVERANCE RULING BELOW WAS ERRONEOUS.

In addressing the question whether or not the unconstitutional mandate and penalty are severable from the remainder of PPACA, the district court correctly noted that the court was required to determine

> whether the balance of the statute will function in a manner consistent with the intent of Congress in the wake of severance of the unconstitutional provision . . . [and] whether in the absence of the severed unconstitutional provision, Congress would have enacted the statute.

(J.A. 1113). While the district court correctly identified the standard for its analysis, it misapplied that standard.

Specifically, the district court ordered that the mandate and penalty be severed from the remainder of PPACA, stating that it "will sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501." (J.A. 1114). However, while there are many provisions of PPACA that even the Secretary concedes are "directly-dependent" on the mandate and penalty, no other provisions of PPACA make specific reference to § 1501. Thus, despite the language suggesting that other provisions were to fall with the unconstitutional mandate and penalty, the effect of the district court's ruling was to sever the mandate and penalty from the remainder of PPACA, leaving all other provisions in force. This was error.

As noted above, the Secretary made a significant concession regarding severance below. She conceded that, if the mandate and penalty were found unconstitutional, other "provisions of the Act plainly cannot survive." (J.A. 901). Specifically, she acknowledged that the "insurance industry reforms" contained in PPACA "cannot be severed from the" mandate and penalty, and therefore, had to be stricken if the

mandate and penalty were found to be unconstitutional. (J.A. 902). Given that the Secretary has conceded that the district court, having found that the mandate and penalty were unconstitutional, should have stricken all "insurance industry reforms" because their functioning in a manner consistent with the Congressional design was entirely dependent on the mandate and penalty, it was error for the district court not to strike those clearly dependent portions of PPACA.

However, the Secretary's concession represents the beginning rather than the end of the severance analysis. While the parties agree that the insurance industry reforms must fall with the mandate and penalty, the Commonwealth believes that the entirety of PPACA must also fall. While complete invalidity is the exception to the general rule, PPACA is, in this sense, exceptional.

Virginia has consistently maintained that severability issues must be resolved based on *Alaska Airlines*, 480 U.S. at 678. While the Court made clear in *Alaska Airlines* that "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently . . . [,]" *id.* at 684, such cases only represent a subset of

provisions that may not be severed. *Alaska Airlines* also establishes that all provisions of an enactment must be stricken, even provisions that are unquestionably legitimate exercises of congressional power, if the "statute created in (their) absence is legislation that Congress would not have enacted." *Id.* Specifically, citing a long line of cases, the Court wrote:

> "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"

Id. (citations omitted). The Court went on to note that, in determining severance questions, courts should be cognizant of the importance of the unconstitutional provisions to the overall "legislative bargain." *Id*. at 685.

In the case of PPACA, it is impossible to credibly maintain that the "legislative bargain" struck was not entirely dependent on the mandate and penalty. The tortured legislative process that was utilized to enact PPACA resulted in its passing the House by the margin of 219

to 212, a fact the Secretary concedes.[2] (J.A. 875). The legislative history reveals an awareness that no change could be made in the House because the margin necessary to invoke cloture in the Senate had been lost because an intervening special election for the United States Senate in Massachusetts. Hence, it is as well known as such a thing can ever be known, that any change, let alone a major change like the elimination of the mandate and penalty, would have caused PPACA to fail.

Furthermore, the Secretary herself has described the mandate and penalty as the "linchpin" of PPACA's insurance reforms. (J.A. 51). In one of her filings in Florida, the Secretary noted that the insurance reforms and the people they allegedly would protect were "a core objective of the Act" as a whole. Reply in Support of Defendants' Motion to Dismiss at 29 (No. 3:10-cv-91-RV-EMT), Doc. 74 (Aug. 27, 2010). Clearly, anything that is a "core objective of" PPACA is essential to the "legislative bargain" that produced it. Thus, under *Alaska Airlines*, it is

[2] The Secretary misapprehends the significance of the narrow margin for passage. It is true that a valid bill that passes by a one-vote margin is still validly passed. However, when trying to determine what portions of a law can be severed from an unconstitutional section, the margin is significant in determining whether the remainder of the law would have passed without the constitutionally offensive provision.

clear that a finding that the mandate and penalty are unconstitutional is fatal to the entirety of PPACA. *Cf. Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, at *118-36.

However, even if the mandate and penalty are severable from other parts of the act, it is clear that more than just the private "insurance industry reforms" must fall with the mandate and penalty. The Secretary has repeatedly argued that PPACA seeks to "regulate the diverse methods by which consumers pay for health care services . . ." (Doc. 21 at 28) and "regulates the means of payment for services in the interstate health care market . . . ." (*Id.* at 44-45). According to the Secretary, it seeks to accomplish this by not only making changes to private insurance (presumably the "insurance industry reforms" she has conceded are dependant on the mandate and penalty), but also by making changes to government programs, such as Medicare and Medicaid that the Secretary characterizes as "insurance." (Doc. 21 at 22) ("The federal government provides health insurance for older and disabled Americans under Medicare . . ."; "Federal and state governments provide health insurance for low income Americans through Medicaid . . . ."). As argued above, the mandate and penalty do

not themselves regulate methods of payment. But the associated changes in private insurance, Medicaid, and Medicare are related to the purpose stated by the Secretary.

The logical conclusion of the Secretary's argument is that PPACA includes a comprehensive attempt to "regulate the diverse methods by which consumers pay for health care services . . ." which are intended to work in concert with the mandate and penalty. Thus, when the mandate and penalty fail, the regulation will not "function in a *manner* consistent with the intent of Congress . . . . ," *Alaska Airlines*, 480 U.S. at 685, and therefore, all other related provisions fail as well.

Based on the foregoing, this Court should reverse the judgment of the district court related to severance and declare that the entirety of PPACA must fall given the unconstitutionality of the mandate and penalty. Alternatively, this Court should, based on the concession of the Secretary and the logic of her arguments, strike those provisions of PPACA that relate to health care financing, including the private insurance industry reforms, changes to Medicare and changes to Medicaid. At a bare minimum, as the Secretary concedes, the private insurance reforms should fall with the mandate and penalty.

CONCLUSION

For the reasons set forth above, the finding of unconstitutionality should be affirmed, the ruling on severance should be reversed, and the entirety of PPACA should be declared unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Century Schoolbook, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 13,871 words.

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CERTIFICATE OF SERVICE

This is to certify that on March 28, 2011, I electronically filed the foregoing APPELLEE'S OPENING AND RESPONSE BRIEF with the Clerk of Court using the CM/ECF System, which will send a notification of such filing to registered CM/ECF users. I further certify that on March 28, 2011, eight paper copies were hand-delivered to the Clerk's Office and two copies were mailed by first-class, postage prepaid, U.S. Mail upon the attorneys listed as follows:

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