**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

No. 11-11021-HH

STATE OF FLORIDA,

*Plaintiffs-Appellants / Cross-Appellee*, v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

*Defendants-Appellee / Cross-Appellant.*

On Appeal from the United States District Court
for the Northern District of Florida

# BRIEF OF AUTHORS OF *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (GARY LAWSON, ROBERT G. NATELSON & GUY SEIDMAN) AND THE INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE


David B. Kopel
*Counsel of record*
INDEPENDENCE INSTITUTE
13952 Denver West Pkwy., Suite 400
Golden, CO 80401
(303) 279-6536
*Counsel for* Amici Curiae

## CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the undersigned counsel certifies that the professor amici are individual persons, not corporations, and that the Independence Institute is a non-profit corporation, incorporated in Colorado. The Institute has no parent corporation, issues no stock, and there is no publicly held corporation that has an ownership interest of more than 10% in it.

Undersigned counsel further certifies that to the best of his knowledge, the list of persons and entities in the Briefs for Appellants and Appellees which may have an interest in the outcome of this case is complete, except that to these should be added:

Independence Institute

Gary Lawson

Robert G. Natelson

Guy Seidman

David B. Kopel

______________________

David B. Kopel

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## STATEMENT OF THE ISSUES

Does the Necessary and Proper Clause provide an independent and sufficient grant of power that can authorize the imposition of the individual mandate?

## STATEMENT OF AMICI INTERESTS

Amici are experienced constitutional scholars and recognized authorities on the Necessary and Proper Clause. They are coauthors of the only book devoted entirely to the subject—*The Origins of the Necessary and Proper Clause*, published by Cambridge University Press in 2010. Some of their other scholarship on the Clause is cited in the brief.

Gary Lawson is Professor of Law at Boston University. Robert G. Natelson is retired from his position as Professor of Law at the University of Montana, and is Senior Fellow in Constitutional Studies at the Independence Institute. Guy I. Seidman is Professor of Law at the Interdisciplinary Center Herzliya, Israel.

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts.

Counsel for the parties have consented to the filing of this brief.[1]

## SUMMARY OF ARGUMENT

The Necessary and Proper Clause was one of a large family of similar clauses commonly appearing in eighteenth-century legal instruments delegating authority from one party to another. Those clauses followed several possible formulae. The Necessary and Proper Clause is a specimen of the most restrictive of those formulae: It does not actually grant additional authority beyond that conveyed by other enumerated powers. Rather, it is a recital, designed to inform the reader of two legal default rules:

First, that express grants of enumerated powers, stated elsewhere, carry with them subsidiary incidental powers ("necessary").

Second, that congressional enactments must comply with standards of fiduciary obligation and administrative reasonableness ("proper").

[1] Pursuant to Fed. R. App. P. 29(c)(5), amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

This understanding of the Clause appears in the legal practices and leading cases at the time the Constitution was adopted, and also in the history of the Clause itself—the records of its drafting, in the ratification debates, in the Supreme Court's great case on the subject, M'Culloch v. Maryland, 17 U.S. 316 (1819), and in Chief Justice John Marshall's public explanations of *M'Culloch.*

Once the meaning of the Clause is understood, the implications for the individual mandate are clear:

The mandate is not "necessary" because power to impose it is not a subsidiary "incident" to Congress's Commerce Power. The power to compel the purchase of a product is as great or greater than the power to regulate voluntary commerce; therefore the mandate cannot be an incidental power regardless of how helpful it might be. For Congress to possess authority of that kind, it would have to be separately enumerated in the Constitution.

The mandate is not "proper" because it violates the fiduciary obligations of impartiality embedded in the word "proper." During the debates over ratification, participants recognized that a law chartering

a commercial monopoly would be “improper.” *A fortiori*, compelled purchase from favored oligopolists is improper.

Thus, to the extent that the constitutionality of the individual mandate depends upon the Necessary and Proper Clause, the mandate is unconstitutional.

# ARGUMENT

## I. The Necessary and Proper Clause is a standard recital informing the reader that the legal doctrine of Incidental Powers applies to the Constitution's enumerated grants of authority

A. *Under founding-era law and practice, when an instrument granted enumerated powers and then followed the enumeration with a clause authorizing "necessary" actions in furtherance thereof, the clause was a mere recital that the doctrine of incidental powers applied to the instrument.*

During the founding era, both the general public and governmental units made wide use of powers of attorney, trust instruments, corporate charters, commissions, and other fiduciary documents by which one or more persons or entities granted power to other persons or entities. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON, & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52-83, 144-76 (2010) (hereinafter "ORIGINS") (corporate charters and numerous other instruments). In preparing fiduciary documents, drafters followed certain conventions and customs. If the instrument listed express powers but did not by its terms limit the grantee only to the exercise of

those express powers (as did the Articles of Confederation),[2] the drafters customarily included one or more general clauses informing the reader of any further authority conveyed to the grantee.

The scope of that further authority depended on the wording of the clause. Such clauses fell into at least five separate formulae. ORIGINS at 72-78. The Necessary and Proper Clause is a specimen of the most restrictive formula from the point of view of powers granted. Specifically, it restrained the discretion of the power grantee (here, Congress) more than other formulae, and it required that congressional laws meet standards of propriety as well as necessity. ORIGINS at 77-78. (The requirement of propriety is discussed below.) Significantly, in other parts of the Constitution the Framers opted for clauses following wider formulae. *See* U.S. CONST. art. II, §3 (granting the President power to make such recommendations to Congress as "as he shall judge necessary and expedient"); U.S. CONST. art. V (granting Congress power

[2] ARTS. OF CONFED. art. II ("Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled") (emphasis added).

to propose amendments whenever it “shall deem it necessary”). But the Framers did not do so in the case of the Necessary and Proper Clause.

In the eighteenth century, the term “necessary” often signified incidence. ORIGINS at 61 n.26 (citing many examples). When a legal instrument conveyed express powers, and then authorized actions “necessary” to effectuate those powers, the word “necessary” confirmed that the instrument was subject to the prevailing common law *doctrine of incidental powers*. The doctrine of incidental powers widened the strict meaning of words sufficiently to carry out the intent of the parties to the instrument. For example, express grant of authority to manage a farm “and take further actions necessary thereto” might add incidental authority to sell the farm’s crops to the manager’s core responsibility to oversee operations on the land.

Absent an express declaration to the contrary, the doctrine of incidental powers was the default rule. Even so, many founding-era drafters found it helpful to inform readers of the doctrine by recital. As Lord Coke had explained, such recitals “declare and express to laymen . . . what the law requires in such cases.” *Boroughe’s Case* (K.B. 1596) 4

Co. Rep. 72b, 7b, 76 Eng. Rep. 1043, 1044-45 (reporter's commentary). The doctrine of incidental powers is discussed further below.

B. *The drafting history of the Clause also demonstrates its role as a recital of the incidental powers doctrine*

A majority of the delegates to the 1787 federal convention were or had been practicing lawyers. Many, if not most, of the non-lawyer delegates also were knowledgeable about law as a result of personal study, business and professional experience, and government service. ORIGINS at 85.

Most delegates wanted the new Constitution to grant incidental as well as express authority to the federal government. They believed that the failure of the Articles of Confederation to grant Congress such authority had been a mistake. Among those holding this view was John Dickinson of Delaware, who had, in addition to his public service, been a highly prominent practicing lawyer. Dickinson's outline for a new Constitution contained a forerunner of the Necessary and Proper Clause. SUPPLEMENT TO THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 86, 89 (James H. Hutson ed., 1987).

Actual drafting of the Necessary and Proper Clause was undertaken by the Committee of Detail. Like Dickinson, four of the five members of that Committee had prestigious legal backgrounds: Edmund Randolph, Oliver Ellsworth, John Rutledge, and James Wilson. ORIGINS at 85-86. The fifth member, Nathaniel Gorham, was a merchant and former president of Congress, and thus well acquainted with documents by which agents and other delegates were empowered. *Id.* at 85.

The first draft of the Clause, extant in Randolph's handwriting, expressly referenced the incidental power doctrine as a tool of judicial interpretation. 2 THE RECORDS OF THE FEDERAL CONVENTION 144 (Max Farrrand, ed., 1937) ("all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle"). The provision was replaced by one in Rutledge's handwriting, which substituted the most common legal label for incidental powers: "necessary." The new provision read, "a right to make all Laws necessary to carry the foregoing Powers into Execu-." *Id.* The Committee then added the words "and proper." After some polishing, the final result was approved by the Committee and the

Convention without significant controversy. Randolph subsequently confirmed publicly that the word "necessary" was a synonym for "incidental." ORIGINS at 88, n.28 (referencing U.S. Attorney General Randolph's opinion on the constitutionality of a proposed national bank).

C. *The ratification history of the Clause further demonstrates its role as a recital of the incidental powers doctrine.*

The Clause was much-discussed during the ratification debates. This was true in part because, for various reasons, the American public seems to have understood and appreciated fiduciary law to a considerable degree. Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 247-48 (2007) (discussing the fiduciary knowledge of the eighteenth-century general public and some reasons for it). That was why, for example, the floor leader of the Federalists at the North Carolina ratifying convention, James Iredell, could describe the Constitution as "a great power of attorney" and think such a characterization would be persuasive. 4 THE DEBATE IN THE

SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (Jonathan Elliot ed., 2d ed. 1891).

The leading concerns of "Anti-Federalists" opposing the Constitution during those debates were that the Constitution granted, or could be construed to grant, excessive authority to the federal government. They cited the Necessary and Proper Clause as an example. However, in the course of their argument, Anti-Federalists persistently misquoted the Clause as if it followed another of the common formulae for such clauses—a formula granting wider power. *E.g.*, 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 402 (Merrill Jensen, *et al.* eds. 1976) (anti-Federalist tract changing "necessary and proper" to "which the *Congress shall think necessary and proper*").

To correct this inaccuracy, leading Federalists—including but not limited to James Madison and Alexander Hamilton—explained to the ratifying public that the Clause as actually worded granted no substantive authority. They pointed out that the Framers inserted the Clause not as a power grant but merely from an abundance of caution: It was designed to avoid quibbling disputes about the extent of federal

authority and to clarify that the express grants in the Constitution (unlike those in the Articles of Confederation) should be read to include recognized, subsidiary means. ORIGINS at 97-108 (citing *The Federalist* and many other sources). The Federalists further emphasized that the legal effect would have been precisely the same if the Necessary and Proper Clause were not included, and that congressional authority was limited to the powers otherwise enumerated. *Id.* Several ratifying conventions recommended declaratory amendments to cement this understanding; these declarations were eventually adopted as the Ninth and Tenth Amendments. *Id.* at 113-14 (listing substance of amendments proposed).

In the most important decision on the Necessary and Proper Clause, *M'Culloch v. Maryland,* 17 U.S. 316 (1819), Chief Justice John Marshall applied the Clause as a recital of the incidental powers doctrine. In public writings explaining *M'Culloch*, Marshall explicitly endorsed that view of the Clause, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 166-176 (Gerald Gunther ed., 1969) (quoting Marshall's

language), and emphasized that it granted no additional power. *Id.* at 176.

In short, the legal background, drafting history, and ratification history all show that the Clause did not extend congressional authority beyond those otherwise granted. It merely affirmed the default rule that the express grants of power in the Constitution included the lesser, incidental powers necessary and proper to effectuate the express power.

## II. To qualify as "Incidental," a power had to be a subordinate power of the kind intended to accompany an express Power

A. *To qualify as "incidental," a power outside the strictest meaning of the words of the grant had to be of the kind intended by the makers of a document to accompany the stated powers.*

The incidental powers doctrine was an application of wider legal concepts governing principals and incidents. In the case of the incidental power doctrine, the express power was the principal and the implied power the incident or accessory. ORIGINS 60-67.

The bedrock obligation of the eighteenth-century fiduciary[3] was to act only within granted authority, as defined by the terms of the governing instrument. Although the instrument could limit authority granted only to that within its express terms, *e.g.*, ARTS. OF CONFED., art. II, in the absence of such specification, the default assumption was that the express grants carried with them incidental or implied authority. As William Blackstone wrote, "[a] subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *347 (1765-69).

The essential purpose of this rule was to assist the interpreter in arriving at results consistent with the probable intent of the parties. ORIGINS at 60-67, 82-83 (citing, among other sources, Chief Justice Marshall).

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[3] Because the Necessary and Proper Clause was drafted and ratified in the late eighteenth century, we discuss here only those principles applied during the founding era. In general, however, the underlying principles of founding-era fiduciary law were similar to those of fiduciary law today. *See generally* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders,* 11 TEX. REV. L. & POL. 239 (2007) (describing eighteenth-century fiduciary principles).

B. *To qualify as incidental to an express power, an unstated power had to be less valuable than, or subordinate to, it.*

An incident was "a thing necessarily depending upon, appertaining to, or following another thing that is more worthy or principal." GILES JACOB, A NEW LAW-DICTIONARY (10th ed. 1782) (unpaginated). To qualify as an incident,

> an interest had to be less important or less valuable than its principal. The term "merely" was often applied to incidents, as was the word "only." An incident was always subordinated to or dependent on the principal. The courts sometimes phrased the latter requirement by stating that an incident could not comprise a subject matter independent of its principal nor could it change the nature of the grant.

ORIGINS at 61-62.

For example, authority to manage lands might carry incidental authority to make short-term leases but not to sell a portion of the fee. The power to sell was independent of, or as "worthy" as, the power to manage. 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 235-36

(5th ed. Dublin, John Exshaw 1786), 3 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 538-40 (1742).[4]

C. *To qualify as "incidental" to an express power, a subsidiary power also had to be so connected to its principal by custom or necessity as to justify inferring that the parties intended the subsidiary to accompany the express power.*

Being dependent upon or inferior to a principal was a *precondition* to qualifying as an incident, but was not *sufficient*. As is illustrated by the above-quoted passages from Blackstone's *Commentaries* and Giles Jacobs' widely-used *A New Law Dictionary*, an additional requirement was *necessity*. The term "necessity," in this context, was well understood as a term of art. It referred to either of two situations. First, a power could be "necessary" by reason of factual necessity. Thus, it was potentially incidental if either indispensable to the use of the principal (e.g., *The King v. Richardson* (K.B. 1757) 2 Keny. 85, 119, 96 Eng. Rep. 1115, 1127) or so valuable to the principal that without it the principal

[4] Bacon's *Abridgment* was a digest, first published early in the eighteenth-century and periodically republished. It was highly popular during the founding era and has been cited in 55 Supreme Court cases, most recently in *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 2125 (2001). Viner's *Abridgment* (written by the man who arranged for

would have little value. Strong necessity falling short of indispensability sometimes was described by saying that absence of connection between two powers would lead to "great prejudice." 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW *406 (1786). For example, fish (personal property) are not absolutely necessary to the existence of the pond containing them (real property), but "they are so annexed to and so necessary to the well-being of the [real-property] inheritance, that they shall accompany the land wherever it vests . . . ." 2 BLACKSTONE, at *427-28.

In addition to factual necessity, pre-existing custom could serve as a form of fictional "necessity"—and therefore of incidence. For example, a factor (broker) enjoyed subsidiary power to extend credit if a broker of that kind customarily received that power. *See Anonymous* (K.B. 1701) 12 Mod. 514, 88 Eng. Rep. 1487.

Both customary and factual "necessity" made good sense, since they pointed toward the probable or constructive intent of the parties to the grant.

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William Blackstone's academic appointment) was the largest digest of the time.

## III. The individual mandate is not a "Necessary" law for executing the Commerce Power because it is not incidental to the regulation of commerce.

The Founding-Era history of the Necessary and Proper Clause demonstrates that to be truly incidental the regulation must be of the kind authorized by an intent-based construction of the instrument even in the *absence* of the Necessary and Proper Clause. This, in turn, requires as a threshold matter that the power be subsidiary to (less "worthy" than) the enumerated power. If that requirement is met, then the power is incidental only if it accompanies the principal power by virtue of custom or is necessary in fact. *Supra* at Part II.

It is clear that the individual mandate is neither a customary concomitant to the federal regulation of commerce (it is unprecedented) nor necessary in fact (as long-standing state health care regulations demonstrate). But there is no need to examine those questions because the individual mandate does not even meet the threshold test of subsidiarity.

The authority claimed by the government in this case—to compel private citizens to purchase approved products from other, designated

private persons—can be subsidiary to nothing. It is a power awesome in scope. Because such a power is more, not less, substantial than the power to regulate commerce, it cannot be incidental to the Commerce Clause.[5]

Consider an analogy: If one were to grant a power of attorney to a person to manage an apartment building, it could not be safely assumed (in absence of specific language) that the building manager also

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[5] The Supreme Court's modern cases upholding extensive regulation over economic matters generally rely, implicitly or explicitly, on the "necessary and proper" component of the commerce power rather than on the core express power to "regulate Commerce." *See, e.g.*, *Ashcroft v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (2005); *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89 (1942). In fact, the Court has not greatly altered the fairly narrow definition of the core power that prevailed at the Founding. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause,* 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause,* 55 ARK. L. REV. 847 (2003); Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 836-39 (2006) (all finding that "to regulate commerce" meant only to govern mercantile trade and certain closely-related activities). Therefore, a law claimed to be "incidental" to the regulation of commerce must be compared for "worthiness" with the scope of the core express power, not with "necessary and proper" economic regulation generally. To do otherwise would be to pile incidence upon incidence.

For this reason, the Court has developed tests to determine whether a law outside the core power is truly incidental to regulating commerce. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624 (1995)

received authority to sell the building. Because the power to sell a fee is not "less worthy" or less substantial than the power to manage, it cannot be incidental thereto. Thus, if a property owner also wishes to convey authority to sell, the authorizing instrument should so specify.

Similarly, if the Founders wished to grant Congress sweeping authority to compel all private citizens to do business with any other private persons, the Founders surely would have referred to it in the document.

*M'Culloch* confirms this analysis—that is, the need to determine, before addressing other aspects of necessity, whether authority claimed as incidental really is of an inferior or subsidiary character. In *M'Culloch*, the Court held that incorporation of a bank was a "necessary and proper" means for executing the principal powers to tax, borrow, regulate commerce, and maintain a military. However, the Court was careful to explain that incorporation was "not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other

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(requiring that the law address economic activity that substantially affects commerce).

powers." 17 U.S. at 417. Instead, incorporation "must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means . . . ."*Id.* at 421. Of course, it was not sufficient to uphold the constitutionality of the Bank that the power to incorporate was of this lesser dignity. Incorporation also had to be "necessary and proper" for executing federal power. However, its lesser character was, as Chief Justice Marshall recognized, a *threshold* requirement before inquiry could proceed on the questions of necessity and propriety. If the power to incorporate was as substantial as the principal powers, it would not matter how helpful or customary the bank might be.[6]

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[6] *M'Culloch* is sometimes misunderstood as authorizing more than it authorized because it stated that subsidiary means may be upheld under the Necessary and Proper Clause if they are "convenient," 17 U.S. at 413, or "appropriate," *id.* at 421, for executing express powers. However, both adjectives had distinctly narrower meanings when Marshall wrote than they do today. "Convenient" meant only "Fit; suitable; proper; well-adapted," SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (multiple editions, upaginated); *see also*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (unpaginated) (defining "convenient" as "Fit, suitable, proper"), and as Chief Justice Marshall himself noted, MARSHALL, DEFENSE, *supra*, at 106, "appropriate" signified "peculiar," "consigned to some particular use or person,"—"belonging peculiarly." *See also* JOHNSON, *supra* (defining "peculiar" as "appropriate; belonging to anyone with exclusion

If there were any doubt on this point, Marshall himself resolved it later the same year, when explaining *M'Culloch* to the general public. He specifically accepted, as a test of incidence, the requirement that an incident be less "worthy" than the enumerated powers it supported. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND at 171.

It is true that in rare cases, the Constitution authorizes, as incidents of enumerated powers, citizen participation requirements: jury service, military conscription, and eminent domain on payment of just compensation. However, those all are cases—like the power to tax—in which the citizen is required to enter a relationship with his or her *government*. All were, moreover, sovereign prerogatives recognized as such during the founding era. An unprecedented mandate requiring citizens to purchase a product from favored suppliers is quite another matter.

The individual mandate simply cannot quality as an incident of Congress's power to "regulate Commerce."

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of others" and "Not common to other things" and "Particular, single"); *cf*. SHERIDAN, (defining "appropriate" as "peculiar, consigned to some

## IV. The Necessary and Proper Clause also serves as a recital informing the reader that laws are subject to fiduciary constraints.

In addition to being "necessary," congressional enactments under the Necessary and Proper Clause must be "proper." That propriety was a separate requirement from necessity is confirmed by the decision of the Committee of Detail to add "proper" separately and at a later time than it inserted "necessary," 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144, and by a wealth of other textual, structural, and historical evidence. Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 249-55 (2005).

A law is "proper" within the meaning of the Necessary and Proper Clause only if the law conforms with the fiduciary norms of public trust—that is, with such duties as impartiality, good faith, and due care, and the duty to remain within the scope of granted authority. There are several reasons for believing this to be so.

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particular").

First, during the founding era, in the context of governmental power, the word "proper" often was used to describe actions peculiarly within the jurisdiction of the actor. Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). Moreover, during the federal convention, "proper" and "propriety" very frequently denoted compliance with fiduciary obligations of various kinds, while breaches of such obligations were described as "improper." ORIGINS at 89-91 (citing numerous examples). Ratification-era discussion included similar characteristics, with suggestions that laws violating the fiduciary obligations of Congress would be "improper," and therefore unconstitutional. *Id.* at 108-09.

Furthermore, the Constitution was seen as a kind of corporate charter—not surprisingly so, since founding-era corporate charters were often public or quasi-public instruments. ORIGINS at 147. Corporate charters very frequently contained language similar to that of the Necessary and Proper Clause. Although such provisions varied in their precise language, a scholarly survey of charters has confirmed that the

word "proper," particularly when coupled with "necessary," described compliance with fiduciary obligations. *Id*. at 173-74 (survey of 374 contemporaneous charters).

Finally, the status of the Clause as a recital strongly suggests that "proper" included the then-prevalent public law rule that grants of delegated discretionary authority had to be exercised *reasonably*, even when that requirement was not spelled out in the grant. This requirement of reasonableness overlapped with, and may have been identical to, fiduciary obligations.

The requirement of reasonableness in the exercise of delegated public power is typically traced to the 1598 decision in *Rooke's Case* (C.P. 1598) 5 Co. Rep. 99b, 77 Eng. Rep. 209.[7] In that case, a statute (23 Hen. 8, c. V, § 3, cl. 3 (1531)) had given sewer commissioners the power to assess landowners for the costs of repairing water-control projects as the commissioners "shall deem most convenient to be ordained." The commissioner used this statute to assess the full costs of a repair on a

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[7] On *Rooke's Case* as the foundational authority for the interpretation of delegated powers, see WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 293-94 (10th ed. 2009).

single landowner, even though other landowners were also benefited by the project. The court ruled for the assessed landowner because,

> notwithstanding the Words of the commission give Authority to the commissioners to do according to their Discretions, yet their Proceedings ought to be limited and bound with the Rule of Reason and law. For Discretion is a Science or Understanding to discern between Falsity and Truth, between Wrong and Right, between Shadows and Substance, between Equity and colourable Glosses and Pretences, and not to do according to their Wills and private Affections . . . .

5 Co. Rep. at 100b, 77 Eng. Rep. 210.

In other words, discretion, even when textually unlimited, had to be exercised reasonably and in a disinterested and impartial fashion.

Other decisions applied a similar principle regarding exercise of even very broadly worded grants of discretion. S*ee Keighley's Case* (C.P. 1709) 10 Co. Rep. 139a, 140a, 77 Eng. Rep. 1136, 1138 (statute authorizing sewer commissioner to make rules "after your own wisdoms and discretions" required the agent to exercise discretion "according to law and justice"). Still other cases extended the principle beyond sewer commissions to include all delegated power. *See Estwick v. City of London* (K.B. 1647) Style 42, 43, 82 Eng. Rep. 515, 516 ("wheresoever a commissioner *or other person* had power given to do a thing at his

discretion, it is to be understood of sound discretion, and according to law" (emphasis added)). This constraint on the exercise of delegated power, which in England has come to be called the *principle of reasonableness*, was firmly established by the end of the seventeenth century. STANLEY DE SMITH ET AL, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 297-98 (5th ed. 1995).

The principle of reasonableness in the exercise of delegated power was reiterated in 1773 in *Leader v. Moxon* (C.P. 1781) 2 Bl. W. 924, 96 Eng. Rep 546. Paving commissioners, under a statute giving them power to pave or repair streets "in such a manner as the commissioners shall think fit," ordered a road repair that effectively buried the doors and windows of plaintiff's house. In awarding damages to the homeowner, the court wrote that the agents "had grossly exceeded their Powers, which must have a reasonable construction. Their Discretion is not arbitrary, but must be limited by Reason and Law . . . . [H]ad Parliament intended to demolish or render useless some houses for the Benefit or Ornament of the rest, it would have given express Powers for the Purpose, and given an Equivalent for the loss that Individuals

might have sustained thereby." *Id.* at 2 Bl. W. at 925-26, 96 Eng. Rep. at 546-47.

These constraints on government discretion were simply part of what it meant to exercise delegated public power in the founding era. Accordingly, when the federal Constitution vested "executive Power" in the President, U.S. CONST. art. II, § 1, cl. 1, and "judicial Power" in the federal courts, *id.* art. III, § 1, those grants of power carried with them the principle of reasonableness as a limitation.

Because the principle of reasonableness in England was an assumption about Parliament's intentions in granting power to executive and judicial agents, the reasonableness principle did not apply to Parliament itself. One could account for that result in either of two ways: (1) because Parliament did not exercise delegated power or (2) because Parliament exercised *legislative* power and the principle of reasonableness applied only to executive and judicial power. If the reason for not applying the principle to Parliament was that Parliament did not exercise delegated power, then the principle of reasonableness would apply of its own force to Congress, because Congress under the

Constitution, unlike Parliament, does in fact exercise only delegated power. But if the reason for non-application was that the principle did not reach legislative power as such, then the principle might only apply to Congress if there were some specific textual indication that it did so.

The Necessary and Proper Clause is a textual vehicle for making clear that the principle of reasonableness applies to Congress's implementational powers, just as the principle applies of its own force to the President and the federal courts. It was not open to a drafter in the late eighteenth century simply to say that "the principle of reasonableness shall apply to Congress," because the label, "the principle of reasonableness," did not then exist; it is a relatively recent piece of nomenclature. ORIGINS at 121. Nor was the doctrine sufficiently well formulated at the time of the framing to be described by any other readily identifiable label. The contours of the doctrine, however, were very well described by the phrase "necessary and proper for carrying into Execution . . . ."

The case law through the eighteenth century applying what later came to be called the principle of reasonableness established that

discretion in governmental actors must be exercised impartially (*Rooke's Case; Keighley's Case*), with attention to causal efficacy (*Keighley's Case*), in a measured and proportionate fashion (*Leader v. Moxon*), and with regard for the rights of affected subjects (*Leader v. Moxon*). *See* ORIGINS at 120, 137-41 (elaborating the substantive requirements of reasonableness contained in the leading cases). Those requirements for governmental action are well encapsulated by a provision stating that laws for executing powers must be "necessary and proper." A clause empowering one to act in a "necessary and proper" manner affirmed that the actor had incidental powers, but only to the extent exercised in conformance with the full panoply of fiduciary duties. ORIGINS at 80.

In assessing such evidence, it must be understood that the generation that wrote and adopted the Constitution viewed government as properly constrained by obligations of fiduciary trust. Indeed, writers and speakers sometimes seem obsessed with the idea. Political discourse was filled with assessments of government rules and actions according to fiduciary standards. ORIGINS at 52-56; Robert G. Natelson,

*The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). This kind of discussion was prominent at both the federal and state ratifying conventions. *Id.* at 1083-86 (citing numerous examples).

## V. The individual mandate is not a "Proper" law for executing the Commerce Power.

As pointed out above, the founders sought to incorporate fiduciary standards into the Constitution. One way in which they did so was to require that federal laws be "proper." This requires, at the least, compliance with basic fiduciary norms, including fiduciary obligations and the overlapping, if not identical, requirements of "reasonableness."[8]

One of the most basic fiduciary norms is the obligation to treat all principals with presumptive equality when there is more than one principal. In *Keighley's Case*, *supra*, for instance, the sewer commissioners could not impose the full costs of projects or repairs on

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[8] The government—with no historical or conceptual warrant or argument—asserts that the individual mandate is "proper" because it "take[s] into account the societal judgment—reflected in state and federal law—that denying emergency care because the patient lacks insurance would be unconscionable." Brief for Appellants, at 36. However, as pointed out in this section, the word "proper" in the Necessary and Proper Clause does not depend on societal judgments regarding sound policy.

only some of the affected landowners, even when the governing statutes seemed to provide that discretion. Nor under *Leader v. Moxon* could the paving commissioners repair a road by burying one person's house.

The purpose of the individual mandate is to force people who choose not to buy insurance to enter the market in order to subsidize other people. Although Congress could fund an insurance subsidy program for high-risk individuals through general taxation, the individual mandate is not a tax but essentially a form of involuntary servitude. It is analogous to, for example, compelling physicians, under penalty of fine, to devote fifteen hours per week to providing health care to favored individuals. It also is analogous to relieving distress in the automobile industry by compelling citizens to buy cars. Similarly, Congress cannot use the Necessary and Proper Clause to force one class of citizens to buy a product to help others (even if Congress can provide that help directly through other constitutional powers).

Although the individual mandate is unprecedented, the Founders were familiar with a related, although less intrusive, commercial regulation: the government-chartered monopoly. When the government

chartered a monopoly, it limited the market to one provider—although unlike the individual mandate, citizens remained free to choose not to purchase goods or services from the monopolist. Grants of monopolies were unpopular, since by erecting a system of commercial favoritism they violated the government's fiduciary obligation to treat citizens impartially, and were held to violate common law. *Case of Monopolies* (Q.B. 1602) 11 Co. 84b, 77 Eng. Rep. 1260.

Leading Founders were split on whether the congressional power to regulate commerce included authority to establish monopolies. *Compare* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 616 (quoting James Wilson as stating that such authority was included), and at 633 (quoting Elbridge Gerry to like effect) with 616 (quoting George Mason to the contrary). Yet during the ratification debates, the Constitution's advocates asserted that any law creating a monopoly would be invalid as "improper" under the Necessary and Proper Clause. As a Federalist writer calling himself the "Impartial Citizen" pointed out:

> In this case, the laws which Congress can make . . . must not only be *necessary*, but *proper*—So that if those powers cannot be executed without the aid of a law, granting commercial monopolies. . . such a law would be manifestly *not proper*, it

> would not be warranted by this clause, without absolutely departing from the usual acceptation of words.

8 DOCUMENTARY HISTORY at 431.

The conclusion is clear: If a commercial monopoly—which citizens may avoid by not purchasing the product monopolized—is constitutionally void as "improper," then far more "improper" is a mandate for the benefit of a favored few and that none but a favored few may avoid.

## Conclusion

The decision of the District Court should be affirmed.

Respectfully submitted,

David B. Kopel
*Counsel of record*
INDEPENDENCE INSTITUTE
13952 Denver West Pkwy., Suite 400
Golden, CO 80401
(303) 279-6536

*Counsel for* Amici Curiae

## CERTIFICATE OF COMPLIANCE

I certify pursuant to the Federal Rules of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Century Schoolbook font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly 6,278 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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David B. Kopel

## CERTIFICATE OF SERVICE

I certify that on May 9, 2011, a true and correct copy of the foregoing brief, and the application for leave to file the brief, with first class postage prepaid, was deposited in the U.S. Mail and properly addressed to the persons whose names and addresses are listed below:

Neal Kumar Katyal
U.S. Department of Justice
950 Pennsylvania Ave., NW Room 5143
Washington, DC. 20530

David Boris Rivkin, Jr.
Lee Alfred Casey
Andrew Grossman
Baker & Hostetler LLP
1050 Connecticut Ave., N.W., Suite 1100
Washington, DC 20036

Carlos Ramos-Mrosovsky
Baker & Hostetler LLP
45 Rockefeller Plaza, 11th floor
New York, NY 10111

Larry James Obhof, Jr.
Baker & Hostetler LLP
1900 E. 9th Street, Suite 3200
Cleveland, OH 44114

Blaine H. Winship
Scott Douglas Makar
Timothy David Osterhaus
Office of the Attorney General, Florida
The Capitol, Suite PL-01
400 South Monroe Street
Tallahassee, FL 32399

Katherine Jean Spohn
Office of the Attorney General,
Nebraska
2115 State Capitol
Lincoln, NE 68509

William James Cobb III
Office of the Attorney General, Texas
209 W. 14th Street
Austin, TX 78711

Gregory Katsas
Jones Day
51 Louisiana Ave NW
Washington, DC 20001-210

________________________

David B. Kopel