

IN THE
United States Court of Appeals for the Eleventh Circuit

STATE OF FLORIDA, by and through Attorney General Pam Bondi, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, et al.,
Defendants-Appellants.

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

BRIEF *AMICUS CURIAE* OF THE CATO INSTITUTE
SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Eleventh Cir. R. 26.1-1, the Cato Institute declares that it is a nonprofit public policy research foundation dedicated in part to the defense of constitutional liberties secured by law. Cato states that it has no parent corporation and only issues a handful of shares that are privately held by its directors. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato.

Further, the undersigned counsel certifies that, in addition to the list of interested persons certified in the Appellants' Brief and supplemented by the certificates in the Briefs of the State Appellees-Cross-Appellants and the Private Plaintiffs-Appellees, the following persons may have an interest in the outcome of this case, and that to the best of his knowledge, the list of persons and entities in the Briefs for Appellants and Appellees are otherwise complete:

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*. It also files amicus briefs with the courts, including in cases focusing on the Commerce Clause and the Necessary and Proper Clause such as *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Comstock*, 130 S. Ct. 1949 (2010). The present case centrally concerns Cato because it represents the federal government’s most egregious attempt to exceed its constitutional powers.

ISSUE ADDRESSED BY *AMICUS CURIAE*

Whether the “individual mandate” provision of the Affordable Care Act is a valid exercise of Congress’s powers under the Commerce Clause and the Necessary and Proper Clause.

¹ Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, have consented to the filing of this brief. *Amicus* certifies that no counsel for any party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The individual mandate goes beyond Congress’s power to regulate interstate commerce under existing doctrine. The outermost bounds of the Supreme Court’s Commerce Clause jurisprudence—the “substantial effects” doctrine—prevent Congress from reaching intrastate *non-economic* activity regardless of whether it substantially affects interstate commerce. Nor under existing law can Congress compel an inactive person to participate in commerce even if it purports to do so pursuant to a broader regulatory scheme.

The Constitution does not permit Congress to conscript citizens into economic transactions in order to remedy the admitted shortcomings (which the government usually terms “necessities”) of a hastily assembled piece of legislation. Although the Necessary and Proper Clause allows Congress to execute its regulatory authority over interstate commerce, it is not a blank check permitting Congress to ignore constitutional limits by manufacturing necessities. “Salutatory goals and creative drafting have never been sufficient to offset an absence of enumerated powers.” *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 780 (E.D. Va. 2010). The individual health insurance mandate is not constitutionally warranted because it is “necessary” to make PPACA function properly.² Indeed, any law—

² “PPACA” refers to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1501(a)(1)-(2), 124 Stat. 119 (2010).

“necessary” or otherwise—that purports to compel otherwise inactive citizens to engage in economic activity is unconstitutional.

While the government emphasizes the “uniqueness” of the health care market and the wisdom of the legislation at issue, “this case is not about whether the Act is wise or unwise legislation...in fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.” *Florida v. United States Dept. of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at *6 (N.D. Fla. Jan. 31, 2011).

Moreover, what Congress is attempting to do here is quite literally unprecedented. As a district court ruling for the government recognized, “in every Commerce Clause case presented thus far, there has been some sort of activity. In this regard, the Health Care Reform Act arguably presents an issue of first impression.” *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882, 893 (E.D. Mich. 2010). Or, as another district court upholding the mandate conceded: “As previous Commerce Clause cases have all involved physical activity, as opposed to mental activity, *i.e.* decision-making, there is little judicial guidance on whether the latter falls within Congress’s power.” *Mead v. Holder*, No. 10-950 (GK), 2011 U.S. Dist. LEXIS 18592, at *55 (D.D.C. Feb. 22, 2011).

The Congressional Budget Office agrees: “The government has never required people to buy any good or service as a condition of lawful residence in the United States.” Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994). Nor has the government ever before imposed on every man and woman a civil penalty for declining to participate in the marketplace. And never before have courts had to consider such a breathtaking assertion of power under the Commerce Clause. Even in *Wickard v. Filburn*, 317 U.S. 11 (1942), the federal government claimed “merely” the power to regulate what farmers grew, not to *mandate* that people become farmers, much less to force people to purchase farm products.³ Even if *not* purchasing health insurance is considered an “economic activity”—which of course would mean that every aspect of human life is economic activity—there is no legal basis for Congress to require individuals to enter the marketplace to buy a particular good or service.

Amicus offers this brief to highlight that, although the substantial effects doctrine is often conceived as a Commerce Clause doctrine, it actually interprets the Necessary and Proper Clause in the context of the power to regulate interstate commerce. Consequently, the limitations of this doctrine mark the existing limit on the constitutional requirement that a law be “necessary” to the execution of the

³ So, too, in *Helvering v. Davis*, 301 U.S. 619 (1937), the federal government successfully defended the constitutionality of the Social Security Act in part by emphasizing that it did *not* compel economic activity. *See id.* at 621 (argument of Mr. Jackson) (“No compliance with any scheme of federal regulation is involved.”)

commerce power under the Necessary and Proper Clause. Because economic mandates do not fall under this existing doctrine, it is unconstitutional to impose economic mandates on the people under the guise of regulating commerce.

Even if economic mandates are deemed “necessary,” however, they are not a “proper” means of executing an enumerated power because they unconstitutionally “commandeer” individuals. Economic mandates alter the constitutional structure in an unprecedented way and thus do not “consist with the letter and spirit of the constitution.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

ARGUMENT

I. The Individual Mandate Exceeds the Scope of the Necessary and Proper Clause as Used to Execute the Power to Regulate Interstate Commerce Under the “Substantial Effects” Doctrine

A. The “Substantial Effects” Doctrine Applies the Necessary and Proper Clause to the Commerce Power and Allows Congress to Use Its Regulatory Authority While Cabining That Authority

Since the New Deal, the Supreme Court has asked whether a particular “economic activity substantially affects interstate commerce” when considering whether it falls under Congress’s Commerce Clause power. *Gonzalez v. Raich*, 545 U.S. 1, 25 (2005) (quoting *United States v. Morrison*, 529 U.S. 598, 610 (2000) (in turn quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995))). The New Deal cases in which the “substantial effects” doctrine was first developed,

however, found the authority for that doctrine not in the Commerce Clause itself but in its execution via the Necessary and Proper Clause. Although prevailing legal convention describes the New Deal cases as expanding the definition of the word “commerce,” a closer examination shows that this definition remained unchanged. Instead, the Court asked whether federal regulation of the activity in question was a necessary and proper means of exercising the power to regulate interstate commerce, because the regulated activity substantially affects that commerce. Congress has never been allowed to go beyond that point.

In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court considered the power of Congress to “prohibit the employment of workmen in the production of goods ‘for interstate commerce’ at other than prescribed wages and hours.” *Id.* at 105. Rather than stretching the definition of “commerce,” the Court focused on how congressional power “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate.” *Id.* The authority cited for this proposition did not come from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)—the Commerce Clause case that the Court had cited throughout its opinion—but from the foundational Necessary and Proper Clause case of *McCulloch v. Maryland*.

A year later, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court used the same reasoning—not that “commerce” was being redefined but that the challenged

measures were a necessary and proper means for regulating commerce as historically understood. Like *Darby*, *Wickard* explicitly relies on the Necessary and Proper Clause, citing *McCulloch* as authority for congressional power, *Wickard*, 317 U.S. at 130, n.29—even if Roscoe Filburn’s personal production of wheat “may not be regarded as commerce,” *id.* at 125. Thus, contrary to the conventional academic view, *Wickard* did not expand the Commerce Clause to include the power to regulate intrastate activity that, when aggregated, substantially affects interstate commerce. Instead, “like *Darby*, *Wickard* is both a Commerce Clause and a Necessary and Proper Clause case[,]” with the substantial effects doctrine reaching Roscoe Filburn’s wheat growing via the Necessary and Proper Clause. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L.L. 581, 594 (2011).

The above reading of Supreme Court jurisprudence is not novel; this court itself recently applied it. In *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008), this court found that a law limiting the liability of rental car companies was a valid exercise of federal power under the Necessary and Proper Clause as applied to the Commerce Clause. The court did not hold that the “Commerce Clause *per se*” authorized the regulation of automobiles as “instrumentalities of commerce.” *Id.* at 1250. Instead, it invoked the substantial effects doctrine, which it described as allowing Congress to “regulate both

interstate and intrastate instances of th[e] activity, the latter being necessary and proper to effective regulation of the former.” *Id.* at 1251. That power could only be used, however, “[s]o long as the underlying economic activity the federal statute aims to protect is within the commerce power[.]” *Id.* at 1252. In *Garcia*, the economic activity of renting a car certainly qualified.

The *Garcia* court also affirmed that “the Supreme Court has made clear that aggregation analysis is not always appropriate.” *Id.* at 1251. Namely, aggregation is inappropriate—improper—when the connection between the intrastate activity and the object of regulation (*i.e.*, interstate commerce) is too attenuated. In *United States v. Lopez*, for example, the Court found that aggregation could not apply except with regard to “economic activity.” 514 U.S. at 560. “Even *Wickard*, which is perhaps the most-far-reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not.” *Id.* And in *United States v. Morrison*, the Court held that the gender-motivated violence regulated by the Violence Against Women Act was not economic activity and thus had only an “indirect and remote” or “attenuated” effect on interstate commerce. 529 U.S. at 608 (quoting *Lopez*, 514 U.S. at 556-57 (in turn quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))), 615. As this Court recognized in *Garcia*, the *Lopez* and *Morrison* decisions, like *Wickard* and *Darby*, refined the criteria for deciding whether

Congress's means are necessary and proper to the end of regulating interstate commerce, but did not redefine "commerce." The Court clarified the substantial effects doctrine by setting the regulation of intrastate economic activity (in certain contexts) as the absolute limit of federal power under the Commerce and Necessary and Proper Clauses.

Chief Justice Rehnquist described that limit on Congress's power as follows: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. Conversely, non-economic activity cannot be regulated merely because it affects interstate commerce through a "but-for causal chain," or has, in the aggregate, "substantial effects on employment, production, transit, or consumption." *Morrison*, 529 U.S. at 615. Instead, the object of regulation must have a "close" qualitative "relation to interstate commerce," not merely a substantial "quantitative" impact on the national economy. *NLRB*, 301 U.S. at 37; *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 843 (4th Cir. 1999) (en banc), *aff'd sub nom United States v. Morrison*, 529 U.S. 598 (2000).

Adopting the distinction between economic and non-economic activity allowed the Court to determine whether legislation is "necessary" under the Necessary and Proper Clause without involving it in protracted, and arguably impossible, attempts to evaluate that legislation's "more or less necessity or

utility.” Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), in Legislative and Documentary History of the Bank of the United States 98 (H. St. Clair & D.A. Hall eds., reprinted Augustus M. Kelley 1967) (1832). This Necessary and Proper Clause doctrine limits congressional power when regulating *intrastate economic activity* to activities closely connected to interstate commerce. Limiting the scope of “necessary” in such a way avoids granting Congress what would be tantamount to a federal police power. *See, e.g., Lopez*, 514 U.S. at 567. Moreover, a power to regulate intrastate economic activity that has a substantial affect on interstate commerce is not so broad as to obstruct or supplant the states’ police powers.

In other words, to preserve the constitutional scheme of limited and enumerated powers, the Court drew a judicially administrable line beyond which Congress could not go in enacting “necessary” means to execute its power to regulate interstate commerce. The substantial effects doctrine, as limited in *Lopez* and *Morrison*, thus established the outer doctrinal bounds of “necessity” under the Necessary and Proper Clause.

As Professor Randy Beck has explained, “[g]iven the close relationship between intrastate and interstate economic activity, a statute regulating local economic conduct will usually be calculated to accomplish an end legitimately encompassed within the plenary congressional authority over interstate

commerce.” J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 625 (2002). In short, regulating intrastate economic activity can be a “necessary” means of regulating interstate commerce as that term is understood under the Necessary and Proper Clause. The obvious corollary is that regulating non-economic activity cannot be “necessary,” regardless of its effect on interstate commerce. And a power to regulate inactivity is even more remote from Congress’s power over interstate commerce.

Most recently, in *Gonzales v. Raich*, the Court found the cultivation of marijuana to be an economic activity that Congress could prohibit as a necessary and proper means of exercising of its commerce power. 545 U.S. at 22. *Raich* explicitly adhered to the economic/non-economic distinction set out in *Lopez* and *Morrison*. As Justice Stevens wrote for the majority, “Our case law firmly establishes Congress’s power to regulate purely local activities that are part of an *economic* ‘class of activities’ that have a substantial effect on interstate commerce.” *Id.* at 17 (emphasis added). *Raich*, therefore, reaffirmed that Congress’s ability to execute its commerce power through the Necessary and Proper Clause reaches only *economic activity* that happens to be intrastate.

Raich also rejected the government’s contention that it was Angel Raich’s or Roscoe Filburn’s non-purchase of a commodity traded interstate that brought their personal cultivation under congressional power. *See Barnett, supra*, at 602-03.

Instead, Justice Stevens invoked the Webster’s Dictionary definition of “economics”—“the production, distribution, and consumption of commodities,” *Raich*, 545 U.S. at 25—and thus refused to adopt sweeping theory the government advances here, that non-participation in the marketplace is itself economic activity.

B. Regulating Inactivity Transcends the Necessary and Proper Clause’s Limits to the Commerce Clause

There is no legal precedent interpreting the Necessary and Proper Clause or the Commerce Clause as allowing Congress to compel activity in the guise of a regulation of commerce. In *Wickard*, Roscoe Filburn was in the business of growing wheat and thus voluntarily engaged in economic activity. *See* 317 U.S. at 114-15. In *NLRB*, the Jones & Laughlin Steel Corporation was subject to regulatory schemes because it voluntarily engaged in the economic activity of steelmaking. *NLRB*, 301 U.S. at 26. The Civil Rights Cases concerned parties that voluntarily chose to engage in the economic activity of operating a restaurant, *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964), or a hotel, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). And finally, in *Raich*, Diane Monson and Angel Raich grew, processed, and consumed medicinal marijuana—all voluntary activities that the Supreme Court characterizes as a variety of “manufactur[ing].” *See* 545 U.S. at 22.

All these cases fall into two general categories. *Id.* at 35-38 (Scalia, J., concurring) (discussing the “two general circumstances” in which “the regulation

of intrastate activities may be necessary to and proper for the regulation of interstate commerce”—and limits thereto). First, if persons voluntarily engage in economic activity, for example by starting a business or participating in agriculture, manufacturing, or another commercial endeavor, Congress can *regulate* the manner by which their activities are conducted as a necessary and proper exercise of its power to regulate interstate commerce. Such regulation of voluntary economic activity may include conditional mandates such as recordkeeping requirements or public disclosures. But this doctrine has never included compelling people to engage in the economic activity itself, for example, by starting the business or by buying a product.

The second category, exemplified by *Raich*, concerns Congress’s power to *prohibit* a particular kind of commerce altogether, such as that involving illegal drugs. Beginning with the lottery case, *Champion v. Anderson*, 188 U.S. 321 (1903), the Court recognized that the commerce power included the power to prohibit activities. In *Raich*, the Court found that Congress may prohibit wholly intrastate instances of an activity as a “necessary” means of prohibiting a type of interstate commerce.

Under either theory, however, although Congress can regulate or even prohibit *voluntary* economic actions that substantially affect interstate commerce, it cannot *force* people to undertake such actions—even if such actions, when

voluntarily undertaken, would have been subject to regulation or prohibition. The distinguishing characteristic between a legitimate regulation within the constitutional scheme of enumerated powers, and a limitless federal police power capable of compelling whatever behavior Congress sees fit, is whether a person can, in principle, avoid federal regulations by choosing not to engage in the regulated activity. No such option exists with regard to the individual mandate; it cannot be avoided in principle. It is not, therefore, a regulation of commercial activity, but an unprecedented command that individuals engage in commerce.

II. The Individual Mandate Cannot be Justified as an “Essential Part of a Broader Regulatory Scheme” because Congress Cannot Regulate Inactivity

A. Congress Cannot Compel Activity as Part of a Broader Economic Scheme

Unable to justify the individual mandate under existing Commerce Clause and Necessary and Proper Clause doctrine (let alone the fallback taxing power theories that we do not discuss here), the government has resorted to a new theory: that the Necessary and Proper Clause authorizes Congress to mandate economic activity when doing so is an essential part of a broader regulatory scheme. In other words, while not itself a regulation of interstate commerce, nor a regulation of intrastate economic activity, nor even a regulation of intrastate non-economic

activity, the individual mandate is a necessary and proper means of exercising the lawful ends of regulating the interstate health insurance industry.

The government's theory rests on a sentence from *Lopez* and a concurring opinion by Justice Scalia in *Raich* that actually only identified circumstances in which Congress may reach wholly intrastate non-economic *activity*. See *Raich*, 545 U.S. at 35 (Scalia, J., concurring) (“Our cases show that the regulation of intrastate *activities* may be necessary to and proper for the regulation of interstate commerce in two general circumstances.” (emphasis added)). The first of these circumstances included the substantial effects doctrine, which he said is limited to reaching intrastate economic activity. He then identified a second Necessary and Proper Clause doctrine by which “Congress may regulate even non-economic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.* at 37 (emphasis added). These precedents do not justify mandating participation in commerce as part of a national economic plan.

Moreover, Congress lacks a general police power, as the Supreme Court has repeatedly emphasized. See *Morrison*, 529 U.S. at 618-19 (quoting *Lopez*, 514 U.S. at 566 (“The Constitution ... withhold[s] from Congress a plenary police power”)); and *Lopez*, 514 U.S. at 584-585 (Thomas, J., concurring) (“[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power”). Thus if the Commerce

Clause is interpreted as allowing Congress to mandate economic activity in service of a broader national scheme, the government must still identify some limiting principle. The distinction between *economic* and *non-economic* would obviously provide no limit to this doctrine, because all human behaviors have some ultimate economic consequences. The whole purpose for Justice Scalia's concurring opinion was to question the usefulness of such a distinction in dealing with the problems posed by *Raich*.

A more obvious line to draw is one between regulating activity—whether economic or non-economic—and inactivity. Such a distinction provides a judicially administrable limiting principle with a minimum of judicial intrusion into complicated political or economic analysis. It is also consistent with existing precedent. In *Lopez*, the Court discussed reaching intrastate non-economic activity when doing so is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated.” 514 U.S. at 561 (emphasis added). In *Raich*, Justice Scalia proposed that “Congress may regulate even non-economic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce.” 545 U.S. at 37 (emphasis added). Indeed, in his *Raich* opinion, Justice Scalia used the word “activity” or “activities” 42 times. See Jason Mazzone, *Can Congress Force You to Be Healthy?* N.Y. Times, Dec. 16, 2010, at A39. There is good reason to doubt

that Justice Scalia—who has referred to the Necessary and Proper Clause as “the last, best hope of those who defend *ultra vires* congressional action,” *Printz v. United States*, 521 U.S. 898, 923 (1997) (Scalia, J.)—would ever extend his proposed doctrine to reach inactivity. *See also United States v. Comstock*, 130 S. Ct. 1949, 1983 (2010) (Thomas, J., dissenting, joined in part by Scalia, J.).

Limiting Congress to regulating or prohibiting *activity* under *both* the “substantial effects” and the “essential to a broader regulatory scheme” doctrines would serve the same general purpose as the economic/non-economic distinction. Such a formal limitation would assure that exercises of the Necessary and Proper Clause to execute the commerce power would be truly incidental to that power and not remote, or mere “pretext[s]” for “the accomplishment of objects not entrusted to the government.” *McCulloch*, 17 U.S. (4 Wheat.) at 423. However imperfect, some such line must be drawn to preserve Article I’s structure of limited and enumerated powers. *See Lopez*, 514 U.S. at 575 (Kennedy, J., concurring) (“Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances.”). Because accepting the government’s theory in this case would effectively demolish that structure, the government’s theory is constitutionally unsatisfying.

To date, the government has offered no limiting principle on its asserted power to regulate when doing so is essential to a broader regulatory scheme. In place of any constitutional limitation, the government attempts to distinguish the health insurance business as “unique” in various respects. Br. for Appellants at 7-11. But examining the “uniqueness” of the market being regulated and the problems Congress chose to ameliorate is precisely the sort of inquiry into the “more or less necessity” of a measure that the Supreme Court has always rejected.

In the course of pointing to one particular “unique” aspect of health care, the government claims that the individual mandate is no different than requiring the advance purchase of health care. *Id.* at 27. Nearly everyone ultimately consumes health care—and consumption is clearly an economic act. Why then, the argument goes, wouldn’t the Commerce Clause allow the federal government to direct that health care be purchased now, by obtaining insurance, rather than later when the medical bill comes due? *Id.* In other words, buying health insurance is just a timing decision about when, not whether, to incur medical costs.

Instead of providing a constitutional limit on the power to impose economic mandates, again the government invites a judicial examination of the “more or less necessity” of congressional action: Virtually all forms of insurance represent timing decisions—paying up front for burial costs, loss of life, disability, supplemental income, credit default, business interruption, and more. *See Florida,*

2011 U.S. Dist. LEXIS 8822, at *100-01 (discussing cost-shifting and timing decisions in all insurance markets). Only a federal government of unbounded powers could mandate that every American insure against such risks. “There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes.” *Id.* at *102. And while it might be permissible to penalize an uninsured person who shows up at a hospital or doctor’s office demanding that his expenses be borne by the taxpayers, that is not what PPACA does. Instead, PPACA penalizes *all* uninsured persons, not just those who seek to be reimbursed by government for costs they should have borne themselves. *Id.* at *72 n.14. And PPACA does more than mandate coverage; it also prescribes certain provisions that each policy must include. Many Americans who prefer to insure using, for example, Health Savings Accounts with high deductible coverage, will be told by their federal overseers that such coverage isn’t adequate. *Id.*

The Supreme Court’s repeatedly affirmed requirement that there be a constitutional limit on federal power cannot be side-stepped by invoking the admitted importance of reforming health care or the cost-shifting aspects of that market. Because the courts will defer to Congress’s assessment of the rationality of addressing problems in the health care market, the retort that “health care is different” provides no judicially administrable limit on the new power to impose economic mandates on the people. Indeed, if Congress can force otherwise

inactive citizens to engage in economic transactions under the guise of regulating commerce, the claimed “uniqueness” of health care is no limiting principle because Congress has “plenary power” over “regulations of commerce.” *Darby*, 312 U.S. at 115. A “plenary power” over inactive citizens is hardly limited by the one-off exception the government urges here. By claiming that “health care is special” and that the unique features of health care regulation justify the individual mandate, the government ignores the unprecedented nature of the individual mandate and instead offers a novel method of constitutional interpretation that would have courts weighing *how necessary* a given measure is.

Striking down the individual mandate requires no such tortuous calculations and would affect no other law ever enacted by Congress. “[T]he 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).” *Raich*, 545 U.S. at 47-48 (O’Connor, J., dissenting). Congress could have reformed the health care system in any number of ways that may have been better or worse as a matter of policy—including the adoption of a Medicare-for-Everyone “single payer” scheme—that would have been legally unassailable under existing Commerce Clause doctrine. That it chose this particular regulatory scheme does not make every provision essential to its functioning automatically constitutional.

B. Inactivity Is Not a Type of Activity

The government and the lower courts ruling in its favor have implicitly acknowledged the requirement that Congress be regulating “activity” by redefining that word to include the making of an “economic decision,” or a decision not to act, or to remain uninsured, or numerous other “active” articulations of the status of someone not owning health insurance. For example, in the most recent decision upholding the individual mandate, a district court described the difference between activity and inactivity as “pure semantics,” and held that Congress can regulate any “mental activity, *i.e.*, decision-making,” which has an ultimate economic effect. *Mead*, 2011 U.S. Dist. LEXIS 18592, at *60. If a “decision” not to act is a federally regulable action, however, then inactivity is transformed into activity by a sort of linguistic alchemy that has at least three weaknesses.

First, the difference between activity and inactivity—or acts and omissions—is a genuine and long-respected one. *See, e.g., Prosser and Keeton on the Law of Torts* § 56 at 373 (5th ed. 1984) (“there runs through much of the law a distinction between action and inaction.”). It is a basic principle of tort law, for example, that one has no duty to act, and cannot generally be punished for nonfeasance, but has only a duty to act reasonably, and not commit misfeasance. This Court has recently reaffirmed this principle. *Ironworkers Local Union 68 & Participating Emplrs. Health & Welfare Funds v. AstraZeneca Pharms., LP*, No.

08-16851, 2011 U.S. App. LEXIS 4960, at *44 (11th Cir. Mar. 11, 2011). So, too, in criminal law, one cannot generally be convicted without engaging in some type of activity. *United States v. Duran*, 596 F.3d 1283, 1292-1293 (11th Cir. 2010). The activity/inactivity distinction is intuitively obvious and well understood by the ordinary person. It is also the foundation of moral philosophy relevant to debates over health care law and policy. *See, e.g.*, Philippa Foot, *Killing and Letting Die*, in *Moral Dilemmas* 78-87 (2002) (distinguishing between prohibited killing and allowable withholding of care). Contrary to the *Mead* court's holding, it is the redefinition of inactivity as a type of activity that is a semantic trick.

Second, while *activity* means engaging in a particular, definite act, *inactivity* means *not* engaging in a literally infinite set of acts. At any instant, there are innumerable economic transactions in which one is *not* entering. To allow Congress discretionary power to impose compulsory economic mandates within this infinite set of *inactions*—without constitutional constraint—would amount to granting the federal government a plenary and unlimited police power of the sort the Constitution specifically withholds. *See supra* at 15; *Lopez*, 514 U.S. at 552.

Finally, if inaction is deemed “economic” because of its economic effects, then the distinction between economic and non-economic activity established in *Lopez* and reaffirmed in *Morrison* and *Raich* would collapse. Indeed, *Lopez* and *Morrison* stand for the proposition that Congress may not regulate intrastate non-

economic activities even if, in the aggregate, they have substantial effects on interstate commerce. But *any* class of activity or inactivity, in the aggregate, can be said to have *some* economic consequences. To define inactivity as an economic activity would destroy the line the Supreme Court has time and again drawn between the intrastate economic activity that Congress may reach and the intrastate non-economic activity it may not. This Court should not so disregard the overwhelming precedent governing the scope of the Commerce and Necessary and Proper Clauses.

III. The Individual Mandate Constitutes a “Commandeering of the People” That Is Not “Proper” Under the Necessary and Proper Clause

The Supreme Court, in two cases presenting then-unprecedented assertions of power under the Commerce Clause, stated that Congress cannot use this power to mandate or “commandeer” state legislatures and executive officers. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). As the Court explained, doing so would be “fundamentally incompatible with our constitutional system of dual sovereignty,” and therefore improper under our federalist system. *Printz*, 521 U.S. at 935. The source of “residual state sovereignty” is the Tenth Amendment, which reiterates that the Constitution confers upon Congress “not all governmental powers, but only discrete,

enumerated ones.” *Id.* at 919. The mandate at issue in *Printz*, even if necessary, thus could not be justified under the Necessary and Proper Clause: “When a ‘la[w]...for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in” the Tenth Amendment and other constitutional provisions, “it is not a ‘La[w] . . . proper for carrying into execution the Commerce Clause.’” *Id.* at 923-24 (quoting U.S. Const. art. I, § 8, cl. 18) (emphasis added).

But the Tenth Amendment also recognizes that the *people* of the United States are sovereign: “The powers not delegated by the Constitution to the United States, nor prohibited by it to the states, are reserved to the states respectively, *or to the people.*” U.S. Const. amend. X (emphasis added). Just as mandating that states take action is improper commandeering, so too is mandating that individual citizens enter into transactions with private companies. This amounts to what Prof. Barnett has recently called an improper “commandeering of the people.” *See generally* Barnett, *supra*, at 621-34. In this way, the text of the Tenth Amendment protects not just state sovereignty, but also popular sovereignty.

As Chief Justice John Jay noted in *Chisholm v. Georgia*, the people are “truly the sovereigns of the country,” 2 U.S. (Dall.) 419, 471-72 (1793), and elected officials merely their deputies, exercising a delegated authority. Fellow Founder James Wilson agreed, recognizing that sovereignty starts with the individual citizen: “If one free man, *an original sovereign*, may do all this; why

may not an aggregate of free men, *a collection of original sovereigns*, do this likewise?” *Id.* at 456 (emphasis added). Although the Eleventh Amendment reversed the outcome of *Chisholm* and the Supreme Court has interpreted that Amendment as establishing state sovereignty, the Court has never repudiated the priority of popular sovereignty. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”); *accord Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (“In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.”).

Thus, just as the Constitution disallows the “commandeering” of states as a means of regulating interstate commerce, so too does it bar a “commandeering of the people” for this purpose. What very few mandates are imposed on the people by the federal government either derive from other clauses of the Constitution—such as responding to censuses, U.S. Const. art. I, § 2, cl. 3, serving on juries, U.S. Const. amend. VI & VII, or filing tax returns, U.S. Const. amend. XVI—or rest on the fundamental pre-existing duties that citizens owe that government. *See, e.g., Selective Draft Law Cases*, 245 U.S. 366, 378 (1918) (relying on the “supreme and noble duty of contributing to the defense of the rights and honor of the nation” to reject a Thirteenth Amendment claim). But citizens are not owned by the

government and cannot be generally presumed to be subject to an indefinite federal command. Various express provisions of the Constitution reflect this anti-commandeering principle. For example, persons may not be mandated to quarter soldiers in their homes in time of peace, to testify against themselves, to labor for another, or to yield up other rights not specifically enumerated in the Constitution. U.S. Const. amends. III, V, IX, XIII. In the United States, there is not even a duty to vote. So there is certainly no comparable pre-existing “supreme and noble duty” to engage in economic activity whenever doing so would be convenient to the congressional regulation of interstate commerce. To hold otherwise would be to deprive the people of the United States of the residual sovereignty recognized in the Tenth Amendment and to make them the servants, rather than the masters, of Congress. *Cf. The Federalist* No. 78 (Alexander Hamilton) at 467 (Clinton Rossiter, ed., 1961) (“[to say] that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon other departments” would “be to affirm that the deputy is greater than the principal; that the servant is above his master.”).

There are also pragmatic reasons to believe that the individual mandate is not “proper.” In *New York v. United States*, Justice O’Connor explained that mandates on states are improper because, “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public

disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” 505 U.S. at 169. That proposition applies to the commandeering of individuals as well: the individual mandate has allowed Congress and the president to escape political accountability for what amounts to a tax increase on persons making less than \$250,000 per year by compelling them to make payments directly to private companies. It is the evasion of political accountability that explains why the mandate was formulated as a regulatory “requirement” enforced by a “penalty.”

The individual mandate crosses the fundamental line between limited constitutional government and limitless power cabined only by the Congress’ political will—which is to say, not cabined at all. Congress would then be the sole judge of the extent of its own authority—a proposition which the Founders explicitly and repeatedly denied and which no federal court has ever endorsed.

In *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 617-18 (1870), for example, the Supreme Court rejected the proposition that Congress is the sole judge of what acts are necessary and proper to carrying out its enumerated powers. To admit that Congress has such unreviewable discretion,

and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to [be “necessary and proper”], would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers.... It would obliterate every

criterion which this court, speaking through the venerated Chief Justice [Marshall] in [*McCulloch*], established for the determination of the question whether legislative acts are constitutional or unconstitutional.

If the word “proper” is to be more than dead letter, it must at least mean that acts which destroy the very purpose of Article I—to enumerate and therefore limit the powers of Congress—are improper. If the federal power to enact “economic mandates” were upheld here, Congress would be free to require *anything* of the citizenry so long as it was part of a national regulatory plan. Unsupported by any fundamental, preexisting, or traditional duty of citizenship, imposing “economic mandates” on the people is improper, both in the lay and constitutional senses of that word. Allowing Congress to exercise such power would convert it from a government of delegated powers into one of general and unlimited authority.

CONCLUSION

For the first time in American history, the federal government has attempted to “commandeer the people” by imposing on them an “economic mandate” not derived from pre-existing duties of citizenship. Such economic mandates cannot be justified by existing Supreme Court doctrines defining and limiting the powers of Congress. Upholding the power to impose economic mandates “would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution

limits federal power.” Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—and Pose Serious Challenges*, 29 Health Affairs 1229, 1232 (June 2010). It would turn citizens into subjects.

As one district court recognized, “[n]ever before has the Commerce Clause and the associated Necessary and Proper Clause been extended this far.” *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 612 (E.D. Va. 2010). Only the Supreme Court is empowered to reconsider the outer bounds of federal power under the Commerce and Necessary and Proper Clauses, and the district court properly interpreted the existing doctrinal limits in this area. Accordingly, *amicus* respectfully asks this court to affirm the district court.

Respectfully submitted this 11th day of May, 2011,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,688 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2011, I filed the foregoing brief with this Court, by causing a copy to be electronically uploaded and by causing the original and six paper copies to be delivered by FedEx next business day delivery. I further certify that I caused this brief to be served on the following counsel by electronic mail, and by hard copy via first class mail on the counsel denoted with asterisks:

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