IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

STATE OF FLORIDA, by and through BILL McCOLLUM, *et al.*, Plaintiff,	)	
v.	)	
	)	**No. 3:10-cv-00091-RV/EMT**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendant.	)	

BRIEF AMICI CURIAE OF
THE AMERICAN CENTER FOR LAW & JUSTICE,
UNITED STATES REPRESENTATIVES PAUL BROUN, ROBERT ADERHOLT, TODD AKIN, RODNEY ALEXANDER, MICHELE BACHMANN, SPENCER BACHUS, ROB BISHOP, MARSHA BLACKBURN, MICHAEL BURGESS, DAN BURTON, ERIC CANTOR, JASON CHAFFETZ, MIKE COFFMAN, TOM COLE, MIKE CONAWAY, GEOFF DAVIS, JEFF FLAKE, JOHN FLEMING, VIRGINIA FOXX, TRENT FRANKS, SCOTT GARRETT, LOUIE GOHMERT, TOM GRAVES, RALPH HALL, GREG HARPER, JEB HENSARLING, WALLY HERGER, LYNN JENKINS, WALTER JONES, JIM JORDAN, STEVE KING, JOHN KLINE, DOUG LAMBORN, ROBERT LATTA, CYNTHIA LUMMIS, DAN LUNGREN, CONNIE MACK, DONALD MANZULLO, KENNY MARCHANT, KEVIN MCCARTHY, TOM MCCLINTOCK, CATHY MCMORRIS RODGERS, GARRY MILLER, JEFF MILLER, JERRY MORAN, RANDY NEUGEBAUER, PETE OLSON, RON PAUL, MIKE PENCE, JOE PITTS, BILL POSEY, TOM PRICE, GEORGE RADONOVICH, MIKE ROGERS (AL), STEVE SCALISE, PETE SESSIONS, JOHN SHADEGG, ADRIAN SMITH, LAMAR SMITH, TODD TIAHRT, ZACH WAMP, LYNN WESTMORELAND, AND JOE WILSON,
AND THE CONSTITUTIONAL COMMITTEE TO CHALLENGE THE PRESIDENT & CONGRESS ON HEALTH CARE
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Federal Rules of Appellate Procedure 29(c) and 26.1, the American Center for Law & Justice ("ACLJ") declares it is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the ACLJ's participation.

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The ACLJ is an organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice.[1]/ ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States and lower federal courts. The ACLJ currently represents the plaintiffs in *Mead v. Holder*, No. 1:10-cv-00950 (D.D.C. 2010), another case challenging Congress's authority to require people to purchase health insurance or pay a penalty (the "individual mandate").

This brief is also filed on behalf of the above-captioned sixty-three Members of Congress who are currently serving as United States Representatives in the One Hundred Eleventh Congress.

This brief is also filed on behalf of the Constitutional Committee to Challenge the President and Congress on Health Care, which consists of over 70,000 Americans from across the country who oppose the individual mandate.

Amici are dedicated to the founding principle that the federal government has limited enumerated powers and to the corollary precept that to interpret the Commerce Clause to empower Congress to enact the individual mandate provision of the Patient Protection and Affordable Care Act would constitute an

[1]/ This brief is being filed with leave of court. Doc. 99, Order.

unprecedented expansion of Congress's commerce power that would threaten Americans' individual economic liberty.

ARGUMENT

"The powers delegated . . . to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*, at 241 (James Madison) (George W. Carey & James McClellan eds., 2001). "In the first place, it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws: its jurisdiction is limited to certain enumerated objects. . . ." *The Federalist No. 14*, at 65 (James Madison) (*Id.*).

Put simply, Congress cannot pass any law that seems to most efficiently address a national problem. Every federal law must derive from one of the grants of authority found in the Constitution. The government insists that the power to "regulate Commerce . . . among the several states," U.S. Const. art. I, § 8, cl. 3, provides the authority to force people to purchase health insurance approved by the government. This unprecedented expansion of federal power reflected in the government's understanding of the commerce power is wrong and that expansion of power threatens individual liberty.

Although its Commerce Clause jurisprudence reflects a drift away from the Founders' vision of a limited federal government, the Supreme Court has

nonetheless steadily affirmed the foundational principle that limits on federal authority are essential to individual liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also United States v. Lopez*, 514 U.S. 549, 552 (1995) ("This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" (*quoting Ashcroft*, 501 U.S. at 458)).

Interpreting the commerce power to enable Congress to force American citizens to purchase health insurance would place Americans' economic liberty in serious jeopardy. There is no principled basis for limiting such power to health insurance purchases because every purchasing decision may have a rippling effect on interstate commerce. Moreover, the individual mandate is not severable from the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (§ 1501(a), to be codified at 42 U.S.C. § 18091, and § 1501(b), to be codified at 26 U.S.C. § 5000A) ("PPACA"). Therefore, if Congress lacks the power to enact the individual mandate, this Court

must invalidate the entire act.

I. THE COMMERCE CLAUSE DOES NOT EMPOWER CONGRESS TO COERCE INDIVIDUAL PURCHASES MERELY BECAUSE DECISIONS NOT TO PURCHASE AFFECT INTERSTATE COMMERCE

In the PPACA, Congress for the first time has asserted the power to coerce commercial transactions. But the Commerce Clause has never been understood to regulate inactivity. All of the Supreme Court's cases upholding legislation based on the Commerce Clause have involved laws regulating economic activity or "endeavor." *See United States v. Morrison*, 529 U.S. 598, 611 (2000).

Congress has the power "[t]o regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. But that power

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). After more than a half century of increasingly imaginative interpretation, in *Lopez* and *Morrison* the Court reaffirmed that there are limits to Congress's Commerce Clause power.

In *Lopez*, the Court held the Gun Free School Zones Act unconstitutional because it was a criminal statute that had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514

U.S. at 561. Nor was the Act "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* Surveying its Commerce Clause jurisprudence, the Court remarked that it had "upheld a wide variety of congressional Acts regulating intrastate economic *activity* where we have concluded that the activity substantially affected interstate commerce." *Id.* at 559 (emphasis added). The Court repeatedly emphasized that *economic activity* triggered Congress's Commerce Clause power to regulate. The Court concluded:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567-68 (citations omitted); *see also id.* at 580 (Kennedy, J., concurring) (the Court has a "duty to recognize meaningful limits on the commerce power").

In *Morrison,* the Court held a portion of the Violence Against Women Act beyond Congress's commerce power, 529 U.S. at 601-02, again because the class of activities regulated was not economic. *Id*. at 617. The Court reiterated that "where we have sustained federal regulation of intrastate activity based upon the

activity's substantial effects on interstate commerce, the activity in question has been some sort of economic *endeavor*." *Id.* at 611 (emphasis added).

Lopez and *Morrison* establish that the power to regulate commerce is the power to regulate commercial or economic activity, however local or trivial in scope (at least so long as that local activity in the aggregate could reasonably be thought to substantially affect interstate commerce). *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005) (regulation of marijuana grown for home use); *Wickard v. Filburn*, 317 U.S. 111 (1942) (regulation of wheat grown for personal consumption). But there must be activity. One does not engage in commerce by deciding not to engage in commerce. Not even the most expansive Supreme Court Commerce Clause cases support the notion that Congress can regulate inactivity or coerce commercial activity where none exists.

If Congress can coerce a commercial transaction simply by asserting, as it did in the PPACA, that coercing the transaction "is commercial and economic in nature, and substantially affects interstate commerce," PPACA, Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119 (2010), and listing a series of "[e]ffects on the National Economy and Interstate Commerce," *id.* § 1501(a)(2), *amended by* § 10106(a), then the universe of commercial transactions Congress could compel would be practically limitless. Under *Raich* and *Wickard*, very little commercial activity can be considered too trivial or local to elude the commerce power. When

that principle is coupled with the federal government's implicit assumption in the PPACA that Congress can regulate commercial inactivity by coercing citizens to purchase any given product, there is no obstacle to an economy completely controlled by the federal government.

For example, to try to stabilize the American automobile industry, the U.S. Treasury authorized loans to bail out General Motors and Chrysler. Press Release, U.S. Dep't of the Treasury, Secretary Paulson Statement on Stabilizing the Automotive Industry (Dec. 19, 2008), http://www.treas.gov/press/releases /hp1332.htm. Because selling more cars would help restore GM and Chrysler to profitability, Congress could rationally determine that requiring all Americans above a certain income level to purchase a new GM or Chrysler automobile would help ensure that the bailout's purpose—GM's and Chrysler's survival—is achieved. Under the government's reasoning, Congress would be acting within its commerce power. After all, the decision whether to buy a car would be, by the government's reckoning, "commercial and economic in nature, and [when aggregated with all similar decisions] would substantially affect[] interstate commerce."

Similarly, to shore up the financial services industry, Congress could compel Americans to make certain investments with distressed financial firms. Or Congress could rationally determine that a lack of exercise contributes to poor

health, which increases health care expenses and the cost of health care insurance, and threatens Congress's attempt to lower health care and health care insurance costs. If so, by the reasoning that would support finding the individual mandate a valid exercise of Congress's commerce power, Congress could require Americans to purchase health club memberships.

The government disputes this, positing that because virtually everyone at some point needs medical services, the uninsured will receive health care even if they cannot pay. *See* Doc. 82-1, Mem. in Supp. of Def.'s Mot. for Summary Judgment at 5 ("Def. Mem."); *see generally id.* at 24-28. In essence, the government posits that all Americans are present participants in the health care market, *see id.* at 5, so to decide whether to buy health insurance is really to decide how to pay for the health care one will inevitably receive. *See id.* at 24-28. The government argues that the individual mandate, therefore, regulates an economic activity by participants in a market the federal government has power to regulate.

The government's attempt to convert into commercial activity the decision not to engage in commercial activity is clever but unavailing. Finding the individual mandate to be a legitimate exercise of Congress's power to regulate interstate commerce even under the government's theory would allow Congress unprecedented power to control individual decisions concerning whether to participate in commercial activity. Take the GM and Chrysler example. It is at

best a stretch to say that a person who does not own an automobile and is not seeking presently to buy an automobile is participating in the automobile market. But the point of owning an automobile is to provide transportation, and everyone inevitably needs to get from one place to another. Thus, all people are participants in the broader market for transportation, a market that includes the automobile market. Deciding to forego buying a car and to depend instead on public transportation, taxis, or even walking is, by the government's reasoning, engaging in economic activity—that is, deciding which type of transportation to use or, put another way, deciding not whether but how to participate in the transportation market—that Congress may regulate because it is reasonable to conclude that the aggregate of those decisions substantially affects interstate commerce.

The upshot is that all private purchasing decisions (negative and affirmative) can be characterized under the government's theory as commercial and economic activity and will likely, in the aggregate, affect interstate commerce. Upholding the individual mandate to force private citizens to buy health insurance will thus strip any remaining limits on Congress's power to control individual economic behavior. When President Truman likewise sought to expand federal power over a substantial portion of the economy by seizing American steel mills, the Supreme Court was keenly aware of the threat to the Constitution and to Americans' liberty.

As Justice Frankfurter explained in his concurring opinion, to provide effective "limitations on the power of governors over the governed," this Nation's founders

> rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. . . . These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. . . . *The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority*.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) (emphasis added).

The principles of federalism and a limited federal government, like the separation of powers, are part of the system of checks and balances the *Youngstown* Court found essential to limiting governmental power and protecting liberty. Upholding the individual mandate would effectively confer upon Congress "a plenary police power," *Lopez*, 514 U.S. at 566, over all individual economic decisions and place Americans' economic liberty at risk.

II. BECAUSE THE INDIVIDUAL MANDATE IS NOT SEVERABLE FROM THE REMAINDER OF THE PPACA, THE ENTIRE ACT IS INVALID

Generally, holding one provision of a law unconstitutional does not invalidate the rest of the law if the unconstitutional provisions are severable. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). The individual mandate,

however, is not severable, so if the individual mandate is unconstitutional, the entire PPACA is invalid.

"The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). "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." *Alaska Airlines*, 480 U.S. at 684. A court must ask "whether [after removing the invalid provision] the [remaining] statute will function in a manner consistent with the intent of Congress." *Id.* at 685 (original emphasis omitted).

Two factors demonstrate that Congress did not intend the individual mandate to be severable: First, Congress removed a severance clause from an earlier version of national health care reform legislation; second, as the government itself asserts, the PPACA's remaining portions cannot function without the individual mandate.

The Affordable Health Care for America Act (H.R. 3962) passed the House on November 7, 2009. Open Congress, H.R. 3962–Affordable Health Care for America Act, http://www.opencongress.org/bill/111-h3962/show (last visited Sept. 17, 2010). That Act contained a severance clause that would have allowed other provisions to remain in force if any specific provision was found unconstitutional.

Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 255 (2009) (engrossed as agreed to or passed by House), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3962eh.txt.pdf. But Congress deleted the severability provision, and the bill finally enacted, the PPACA, lacks any severance clause. Pub. L. No. 111-148, 124 Stat. 119 (2010). That Congress decided not to include a severance clause in the final bill is strong evidence that Congress did not intend for the bill's individual provisions to be severable.

Sealing that conclusion is the government's own repeated assertion that the individual insurance mandate is related to the PPACA's other provisions in such a way that without it, the elaborate insurance scheme enacted by the PPACA could not function as intended. *See* Doc. 82-1, Def. Mem. at 19-22. Consistent with the Supreme Court's reasoning in *Alaska Airlines,* Congress could not have intended the individual mandate to be severable if severing it would allow an inoperable regulatory scheme to stand. *See* 480 U.S. at 684. As the government emphasizes, the PPACA forbids providers from refusing health insurance coverage to individuals because of preexisting conditions. Doc. 82-1, Def. Mem. at 18-19 (*citing* Pub. L. No. 111-148, § 1201, 124 Stat. 119 (2010) (amending 42 U.S.C. § 300gg et seq.)). Without the individual mandate, a person could refuse to purchase

health insurance until he incurred an actual injury or illness requiring medical care. As Congress recognized,

> Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no [individual mandate] requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold.

Pub. L. No. 111-148, § 1501(a)(2)(I), 124 Stat. 119 (2010), *amended by* § 10106(a).

Without the individual mandate, the resulting free-riding could soon cause any private or co-operative insurance provider that depends on premium dollars to become insolvent. The PPACA contains exchanges made up of insurance providers, but does not contain any plan completely administered and supported by the government. *See generally* Pub. L. No. 111-148, 124 Stat. 119 (2010). Because the envisioned insurance providers would depend upon premium dollars, the individual mandate is designed to bolster the providers' solvency in each insurance exchange and thus the operation of the entire regulatory scheme. *See*

Doc. 82-1, Def. Mem. at 19-22 (explaining how the individual mandate is connected to other parts of the PPACA).[2]/

Because the individual mandate is so essential to the PPACA's overall operation, the most reasonable conclusion to draw is that Congress could not have intended the individual mandate to be severable from the rest of the PPACA. In fact, it is fair to say that without the individual mandate, it is highly probable there would be no PPACA. These observations, along with the fact that Congress deleted a severance provision from an earlier version of the national health care

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[2]/ This is not to say that the connection between the individual mandate and the rest of the PPACA, while relevant to the severability issue, is a basis for concluding that the individual mandate is within Congress's power under the Commerce Clause or Necessary and Proper Clause. Although the Court noted in *Raich* that the laws upheld in *Wickard* and *Raich* were essential parts of a regulatory scheme, 545 U.S. at 18-19, *Raich* does *not* stand for the broad proposition that Congress may pass otherwise unconstitutional laws by connecting them to a larger regulatory program. *Wickard* and *Raich* held that federal regulation of a particular type of economic activity—producing and consuming a marketable commodity—can, in some circumstances, be applied to reach that type of existing economic activity at a purely local level when regulating that local economic activity, in the aggregate, is necessary to effective national regulation of that economic activity. *See id.* at 19.

Here, by contrast, Congress is not seeking to regulate existing local economic activity as a necessary component of regulating that type of economic activity nationwide, but rather has forced people who are not engaged in the economic activity of buying and maintaining health insurance to do so. The PPACA is thus akin to a law that would force people not presently farming to grow and sell wheat. Congress can find no support from *Wickard*, *Raich*, or other cases for the proposition that it can—for the first time in our Nation's history—declare that people who are not engaged in a particular economic activity must engage in that activity solely because other statutory provisions are attached to and connected with that mandate.

reform legislation, lead inexorably to one conclusion: the individual mandate is not severable from the PPACA's remaining provisions. Thus, if the individual mandate is unconstitutional, the entire PPACA is invalid.

CONCLUSION

Amici therefore respectfully request that the Court grant the Plaintiffs' Motion for Summary Judgment.

Respectfully submitted on this 19th day of November, 2010,

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CERTIFICATE OF COMPLIANCE

Pursuant to Judge Vinson's June 14, 2010, order on amicus briefs, and in compliance with Fed. R. App. P. 29(d) and 32(a)(7)(A), this brief is no longer than fifteen pages in length. Also, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point font.

Dated: November 19, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, I electronically filed the foregoing Amici Brief with the Clerk of Court using the CM/ECF system, which will send a notification of the filing to all counsel of record who are registered users of the Court's CM/ECF system, from which they may obtain a copy of this filing.

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