

Nos. 11-11021 & 11-11067

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

STATE OF FLORIDA, et al.,

Plaintiffs-Appellees / Cross-Appellants,

v.

**UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES, et al.,**

Defendants-Appellants / Cross-Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

**BRIEF OF REVERE AMERICA FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES / CROSS APPELLANTS**

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State of Florida, et al. v. United States Dep't of Health & Human Svcs., et al.

Nos. 11-11021 & 11-11067

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

The undersigned counsel certifies that, in addition to the persons and entities identified in the certificates of interested persons and corporate disclosure statement filed heretofore by the parties and other *amici*, the following persons and entities have an interest in the outcome of this case. The undersigned counsel also certifies that the *amicus curiae* associated with this brief is not a publicly held corporation, is not owned by a publicly held corporation, and does not issue stock:

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INTEREST OF AMICUS CURIAE¹

The Revere America Foundation is an advocacy organization dedicated to advancing common sense public policies rooted in America's traditions of individual freedom and free markets. Revere America supports reform of our health care system through measures that are compatible with these values, including improving access to medical care, providing incentives for innovation and encouraging competition. Revere America opposes stripping Americans of the freedom to make their own individual decisions about medical care by forcing people to purchase health insurance or to incur a government penalty.

STATEMENT OF THE ISSUES

Whether Congress' authority to regulate interstate commerce includes the power to compel individuals to enter into commerce, and buy products they do not want, so that the federal government may regulate them.

SUMMARY OF ARGUMENT

This case presents the Court with a rare instance in which it must face its "responsibility to confront the great questions of the proper federal

¹ The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation and submission of this brief. *See* Fed. R. App. P. 29.

balance in terms of lasting consequences for the constitutional design.”
United States v. Lopez, 514 U.S. 549, 578, 115 S. Ct. 1624, 1639 (1995)
(Kennedy, J., concurring). At issue is whether Congress has authority under the Commerce Clause and the Necessary and Proper Clause to enact, for the first time in American history, a law compelling individual Americans to purchase a consumer product that they do not want. Section 1501 of the Patient Protection and Affordable Care Act contains an individual mandate (“Individual Mandate”) that seeks to compel most people to purchase health insurance policies. *See* Pub. L. No. 111-148, § 1501(b), § 10106, 124 Stat. 119, 244, 907 (2010).

Although modern jurisprudence has gradually eliminated the distinction between interstate and intrastate commerce, the Supreme Court has never doubted its “duty to recognize meaningful limits on the commerce power of Congress,” *Lopez*, 514 U.S. at 580, 115 S. Ct. at 1640. (Kennedy, J., concurring), lest the limited powers enumerated in Article I become the general federal police power that the Framers deliberately withheld. The Individual Mandate is triggered not by any activity, but rather by an individual’s *decision not to engage in economic activity*. It regulates *inactivity*, conscripting unwilling individuals into the market to buy an unwanted product. The Individual Mandate thus introduces compulsory

commerce into the American economy – commerce that Congress not only regulates, but *creates*. If Congress has power to regulate *inactivity* in this fashion, then one is “hard pressed to posit any *activity* by an individual that Congress is without power to regulate.” *Id.* at 564, 115 S. Ct. at 1632 (emphasis added). Such sweeping regulatory power ousts the States of their reserved governmental powers and thereby violates the Tenth Amendment.

But the Individual Mandate commits a constitutional offense that is graver still, because it operates directly on individuals and thereby infringes the retained constitutional rights of the people – rights protected by the Ninth Amendment. Although it is difficult to posit what Congress could *not* do with the power it claims here, it is not hard to envision what it could do. Indeed, Congress’ own budget office, concerned that federally mandated private expenditures ought to be included in the federal budget, understood that implementation of such a power could lead to, “[i]n the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services. . . .”

CONGRESSIONAL BUDGET OFFICE MEMORANDUM: *Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 9 (1994) (“CBO MEMORANDUM”). Our Constitution grants Congress no such power.

ARGUMENT

**CONGRESS HAS NO POWER TO COMPEL AN UNWILLING
INDIVIDUAL TO ENTER THE STREAM OF COMMERCE
TO PURCHASE AN UNWANTED PRODUCT.**

I. THE INDIVIDUAL MANDATE IS WHOLLY UNPRECEDENTED.

The Individual Mandate regulates neither the “channels of interstate commerce” nor “instrumentalities[,] ... persons or things in interstate commerce,” *Gonzales v. Raich*, 545 U.S. 1, 16-17, 125 S. Ct. 2195, 2205 (2005), and the Government does not contend otherwise. Therefore the Mandate lies beyond Congress’ Commerce Clause power and can be sustained, if at all, only as an exercise of power under the Necessary and Proper Clause 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, 125 S. Ct. at 2205.

The Government, accordingly, defends the Individual Mandate not on its own terms, but as necessary to ensure the effectiveness of Congress’ *other* reforms of the health insurance market: extending coverage to those with preexisting medical conditions and preventing premiums based on individual medical history. Unless everyone is required by law to purchase health insurance (or to pay a penalty), the revenue base will be insufficient to underwrite the costs of insuring individuals presently deemed high risk or

uninsurable. Therefore, the Government reasons, insofar as Congress has power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, power to make that regulation effective by *creating commerce where none exists* – that is, to force unwilling individuals to enter the health-insurance market to buy a product they do not want.

An individual’s decision not to buy health insurance is not activity that Congress may regulate by imposition of the Individual Mandate. It is, instead, a decision *to refrain from activity*, to remain *outside* the stream of commerce by choosing *not* to purchase health insurance. The Government dismisses as “formalistic” the distinction between (i) regulating commerce that economic actors choose to engage in and (ii) dragging into the marketplace unwilling consumers who prefer to remain inactive and forcing them to purchase a product that they do not want. Govt. Brief at 20, 38. The Government reassures us that this sort of congressional legislation is nothing new, but merely “a quintessential exercise of the commerce power.” Govt. Brief 16.

But this supposedly “quintessential” exercise of commerce power is, in fact, without precedent in the nation’s history. “Never before has Congress required that everyone buy a product from a private company

(essentially for life) just for being alive and residing in the United States.” *Florida v. Department of Health and Human Services*, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) at *20. “Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.” *Virginia v. Sebelius*, 728 F.Supp.2d 768, 782 (E.D.Va. 2010).

Indeed, even the courts that have upheld the Individual Mandate have conceded that the Supreme Court has never sustained congressional power to regulate such inactivity. *See, e.g., Thomas More Law Center v. Obama*, 720 F. Supp.2d 882, 893 (E.D. Mich. 2010). This should come as no surprise. When legislation imposing an Individual Mandate was first considered by Congress 17 years ago, the Congressional Budget Office concluded that “[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States.” CBO MEMORANDUM at 1. *See also Florida v. Department of HHS*, 2011 WL 285683 at *20.

To be sure, the fact that legislation is unprecedented does not by itself render it unconstitutional; all federal legislation comes with a “presumption

of constitutionality.” *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 1748 (2000). However, the Supreme Court has explained that this presumption is weakened and that an “*absence of power*” may be inferred where, as here, “earlier Congresses avoided use of this highly attractive power.” *Printz v. United States*, 521 U.S. 898, 905, 908, 117 S. Ct. 2365, 2371 (1997). The power to fix perceived market distortions by mandating that consumers buy this or that product is stunningly versatile and infinitely applicable, and therefore the “ ‘the utter lack of statutes imposing obligations [like the Individual Mandate] (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence of such power.*’ ” *Florida v. Department of HHS*, 2011 WL 285683 at *20 (quoting *Printz*, 521 U.S. at 907-08, 117 S. Ct. at 2365) (original emphasis by the Supreme Court in *Printz*).

II. NONE OF THE SUPREME COURT’S COMMERCE CLAUSE DECISIONS AUTHORIZES REGULATION OF INACTIVITY BY COMPELLING UNWILLING INDIVIDUALS TO PURCHASE PRODUCTS THEY DO NOT WANT.

Despite the inability of Congress itself to identify any precedent for the Individual Mandate, the Government now purports to find support for it in the Supreme Court’s decisions in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942), and *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195 (2005).

But those cases involved federal regulation of individuals who voluntarily engaged in economic activity and thereby accepted the congressional regulation that accompanied their activity.

Wickard v. Filburn upheld a federal price-support program that penalized a participating farmer for growing more than his statutory allotment of wheat, even though he used it solely for his own family and livestock. The Court reasoned that Congress could rationally conclude that a decision by many farmers to grow their own wheat, rather than entering the marketplace to buy it, could in the aggregate affect prices and undermine the federal price-support program. By the reasoning of the Government here, an individual's "preference" for paying for her health-care needs out of pocket rather than by purchasing insurance is much like the preference of farmer Filburn for fulfilling his need for wheat by growing his own rather than by purchasing it. But the congressional scheme at issue in *Wickard* imposed a penalty not on farmer Filburn's mere passive "preference," but on his affirmative *activity of actually producing grain*. *Wickard*, 317 U.S. at 127-29, 63 S. Ct. at 90-91. Moreover, Filburn *chose* to participate in the federal price-support program and, in return for agreeing to abide by its production limits, he was guaranteed a price for the wheat that he did choose to sell that was nearly three times what the market price would otherwise have been.

Id. at 126, 130, 133, 62 S. Ct. at 89-93. “Thus the penalty” imposed on the plaintiff in *Wickard v. Filburn* “was contingent upon an act,” *id.* at 133, 63 S. Ct. at 93 (emphasis added), whereas the penalty imposed in this case is contingent upon *inactivity* – the individual decision *not* to participate in the federal government’s program to promote health insurance and the decision *not* to buy such health insurance.

Even putting to one side that stark difference in individual choice, a farmer’s production of wheat or any other commodity fits easily within the Supreme Court’s definition of “activities” that “are quintessentially economic. ‘Economics’ refers to ‘the production, distribution, and consumption of commodities.’ ” *Raich*, 545 U.S. at 25, 125 S. Ct. at 2211. *See also Lopez*, 514 U.S. at 556, 559-60, 115 S. Ct. at 1628, 1630 (describing *Wickard* as involving “intrastate economic activity” in the form of “production and consumption of homegrown wheat”). The regulation at issue in *Wickard*, unlike the Individual Mandate, did not command farmer Filburn to grow wheat, nor did it compel him, or anyone else, to buy it. Rather, Congress subjected Filburn to federal regulation only if, and when, he voluntarily participated in the federal price-support program and engaged in the *activity of producing wheat*.

The Government points to the problem of “free riders” – those who do not buy health insurance but then demand free treatment in hospital emergency rooms when they get sick, thereby shifting the cost of their care to the hospital, the government, or other insured parties (in the form of higher premiums), since hospitals that participate in Medicare are forbidden from refusing medical treatment on the basis of ability to pay. Govt. Brief at 26-27, 35-37. But *that* problem is of Congress’ own creation, and Congress cannot bootstrap itself into powers not enumerated by the Constitution simply because it deems the exercise of those powers expedient in light of other regulations that it has previously enacted. A federal program, for example, requiring federally subsidized grocers to provide free bread to those who cannot afford it would not authorize a federal regulation compelling Filburn and other farmers to grow wheat to ensure a low-cost supply. The quandary of what to do about people who are truly experiencing a medical emergency and who show up at a hospital ER without health insurance is undoubtedly significant – but that poignancy does not negate the limits on federal authority written into the Constitution.

Congress can, by constitutional means, avoid the harshness of turning away from emergency rooms those uninsured persons who are truly in peril. For example, Congress could – precisely as it has in the Affordable Care Act

– subsidize in advance the purchase of health insurance by those who cannot otherwise afford such insurance but who wish to buy it. If some individuals, despite the available public subsidy, nevertheless refuse insurance and prefer to take their chances, they have engaged in no activity subjecting them to federal commerce jurisdiction until they arrive in the ER demanding free services – at which point their transactions with the hospital can be subjected to congressional regulation. There is nothing either exceptional nor cruel in this arrangement: individuals who decline to purchase fire, flood or disability insurance are not entitled to be made whole from the public fisc when their gambles turn out badly and calamity comes their way, nor does the Commerce Clause grant Congress power to compel them to buy insurance that, in their wisdom or folly, they do not want. Thus, contrary to the Government’s repeated (and rather disingenuous) intimations, the Individual Mandate is not the only moral alternative available to Congress. Govt. Brief at 10-11, 19-20, 35-36, 40.

The Supreme Court’s decision in *Gonzales v. Raich* is equally inapposite. The legislation upheld there did not mandate that individuals engage in economic activity nor did it otherwise regulate their *inactivity* – rather, as the Government concedes, it regulated a “ ‘class of activity.’ ” Govt. Brief at 28 (quoting *Raich*, 545 U.S. at 18, 125 S. Ct. at 2206).

Marijuana growers, like wheat farmers, are voluntarily engaging in a classic form of economic activity – the production of an agricultural commodity. Thus, in both *Wickard* and *Raich*, “the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initiated change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.” *Virginia v. Sebelius*, 728 F.Supp.2d 768 (E.D.Va. 2010).

III. NONE OF THE GOVERNMENT’S OTHER SUPPOSED PRECEDENTS REGULATED INACTIVITY BY COMPELLING INDIVIDUALS TO PURCHASE PRODUCTS THEY DO NOT WANT.

In its quest for any precedent that would even obliquely support congressional power to compel individuals to buy products they do not want, the Government went to bizarre lengths in the court below. As that court observed, “[t]he mere fact that the defendants have tried to analogize the individual mandate to things like jury service, participation in the census, eminent domain proceedings, forced exchange of gold bullion for paper currency under the *Gold Clause Cases*, and required service in a ‘posse’ under the Judiciary Act of 1789 (all of which are obviously distinguishable) only underscores and highlights its unprecedented nature.” *Florida v. Department of HHS*, 2011 WL 285683 at *20. The Government apparently

now agrees that these analogies were indeed far-fetched, for it has dropped all of them on appeal and instead offers a new batch of unpersuasive precedents for congressional power to regulate inactivity and compel involuntary market transactions by unwilling consumers.

The only holdover from the arguments the Government offered below is the federal statute making gold bullion a form of contraband and requiring its surrender to the Treasury in exchange for official U.S. currency. Govt. Brief at 44 (citing *Nortz v. United States*, 294 U.S. 317, 328 (1935), 55 S. Ct. 428, 431 (1935)). But that law was an exercise of congressional power to establish currency and coin money for the United States under clauses 2 and 5 of section 8 of Article I, and it therefore says nothing about the power to impose mandates under the Commerce Clause and the Necessary and Proper Clause. In any event, the statute in *Nortz* was plainly regulating the instrumentalities of commerce and commercial activity – the possession and use of gold as money – and nobody in that case argued otherwise.

The Government also invokes other, equally inapposite contraband cases that provide no precedent for imposing an affirmative mandate on those who engage in no regulated activity. The Endangered Species Act makes it illegal to “take,” “possess,” or “sell” an endangered species, which are all activities, and such restrictions on them are a “commonly utilized[]

means of regulating commerce,” as the Government’s own authority attests; nobody in that case argued otherwise. *See Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1272 (11th Cir. 2007). Govt. Brief at 42, 44.

Similarly, the Government argues that congressional power to criminalize the voluntary acquisition or possession of child pornography somehow provides a precedent for congressional power to mandate the involuntary acquisition and possession of health insurance. Govt. Brief 41-42, 44 (discussing *United States v. Maxwell*, 446 F.3d 1210, 1217 (11th Cir. 2006), and 18 U.S.C. § 2252). Yet in *Maxwell* nobody disputed that a person voluntarily subjects himself to congressional regulation if he chooses to engage in the “activities” of “receipt, distribution, sale, production [and] possession” of “child pornography.” 446 F.3d at 1215-17. This analogy is just as absurd – and, quite frankly, just as offensive – as the Government’s argument below that a law-abiding citizen’s decision not to buy health insurance is a heinous form of inactivity subject to congressional regulation and penalty under the Commerce Clause, just like the refusal of a convicted child molester to register as a sex offender. *See Memorandum in Support of Defendant’s Motion for Summary Judgment* at 13, 30 (discussing the Sex Offender Registration Act)(“Govt. Summ. Judg. Mem.”).

These statutory regimes all involved congressional regulation of commercial transactions and other activities with respect to various forms of contraband; how the Government thinks them relevant is baffling. None of these is remotely a precedent for imposing a lifelong affirmative mandate to enter the marketplace to buy a product or service that one does not want.²

Finally, nothing in the various exercises of congressional authority cited by the Government “would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634. The Government’s ambitious and unbounded vision of the Commerce and the Necessary and Proper Clauses, in contrast, would effectively free the federal government of

² The Government also seeks refuge in *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995), which upheld congressional authority to prohibit the obstruction of access to clinics and thereby interfere with those who wished to enter the clinics to engage in commercial activity. Govt. Brief at 44. Although the protestors engaging in the obstructive activity were not engaging in commerce, the clinics and their customers certainly were, and in any event there was no suggestion that Congress was trying to regulate *inactivity* or to *compel unwanted entry into a marketplace*.

Finally, the Government cites the Second Militia Act of 1792 and its requirement that members of the militia obtain appropriate firearms. Govt. Brief at 44. This statute was an exercise not of the Commerce Clause power, but of congressional power under Article I, § 8, cls. 12-16 to raise, organize, regulate, arm and discipline the army and the militia. The Government fails to explain how this provides a precedent for regulating the inactivity of ordinary legal residents under the Commerce Clause and mandating that they purchase a product they do not want.

any meaningful limits on the scope of its commerce power, as we demonstrate below.

IV. THE GOVERNMENT PROFFERS NO GENUINE LIMITING PRINCIPLE TO CONTAIN A COMMERCE CLAUSE POWER THAT IS NOT TETHERED TO ANY ACTIVITY, LET ALONE TO ECONOMIC ACTIVITY.

In *Lopez*, the Supreme Court struck down a federal gun-possession statute because the Government’s “hip bone connected to the thigh bone” theory explaining why gun possession near schools affects interstate commerce had no limit: the Government could not identify a single activity that did not, under its theory, affect interstate commerce. Nor could the Court: “[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” 514 U.S. at 564, 115 S. Ct. at 1632. Upholding this claim of congressional power would thus negate the central premise of federalism: that the Constitution’s enumeration of congressional powers “ ‘presupposes something not enumerated.’ ” *Id.* at 566, 115 S. Ct. at 1633.

The Individual Mandate presents the same problem, and the Government’s *only* answer is that the health care market is “unique.” Govt. Brief at 7-9, 20, 34, 37. It argues that upholding the Individual Mandate will not open the floodgates to similar congressional mandates in other markets

because the supposedly distinctive characteristics of the health care market – a combination of universal need, unavoidable uncertainty, and the associated cost-shifting – make it unique. Govt. Brief at 34. The court below rejected this rationale, and rightly so, because this supposed limit on individual mandates fails both as a matter of principle and as a matter of fact.

As a matter of legal principle, Congress’ power to regulate activity under the Commerce and Necessary and Proper Clauses is not, and cannot be, conditioned on the “uniqueness” of the market at issue. Although the supposedly “distinctive characteristics” of the health care market, even if true, might provide *policy* reasons why Congress *would choose not* to enact individual mandates in other areas, they certainly are not *constitutional* reasons why Congress *could not*. Only the latter can provide a judicially enforceable principle to cabin Congress’ exercise of its commerce power.

The Government’s blithe assurance that a decision expanding invasive regulatory power to unprecedented lengths will be like “a restricted railroad ticket, ‘good for this day and train only,’ ” *County of Washington v. Gunther*, 452 U.S. 161, 183, 101 S. Ct. 2242, 2255 (1981) (Rehnquist, J., dissenting), is fanciful at best. As the court below noted, the Government already tried – and lost – this same “uniqueness” argument before the Supreme Court in *Lopez* itself. *Florida v. Department of HHS*, 2011 WL

285683 at *25. In *Lopez* the dissenting Justices likewise urged that congressional regulation of gun possession near schools was a “rare case,” due to the “particularly acute threat” to commerce posed by firearms and the “special way in which guns and education are incompatible.” 514 U.S. at 624, 115 S. Ct. at 1661-62 (Breyer, J., dissenting). The *Lopez* Court rightly rejected this supposed limiting principle as “devoid of substance.” *Id.* at 564-65, 115 S. Ct. at 1632.

The Government’s “uniqueness” argument also fails as a matter of fact – the markets for health insurance and health care are simply not unique in the ways the Government supposes. Let us start with other insurance markets. Remarkably, the Government itself concedes that “[i]t is hardly novel for the government to require the purchase of insurance.” Govt. Brief 34. Indeed, in the court below the Government argued that federal laws mandating the purchase of insurance are commonplace, which supposedly makes it well-settled that Congress may “require private parties to enter into insurance contracts where the failure to do so would impose costs on other market participants.” Govt. Summ. Judg. Mem. at 30 & n. 9 (citing nine statutes). But *every* statute cited by the Government applies to particular economic acts or endeavors, and requires any “owner” or “operator” of such property – ranging from railroads to coal mines – to buy particular types of

insurance covering risks attendant to such an activity. *See id.* In each case, the owner or operator entered the marketplace voluntarily and *chose* to buy or operate that property, and likewise remained free to avoid the insurance obligation by quitting the enterprise. Such laws do not regulate *inactivity* and they therefore provide no support for the Individual Mandate here. Nevertheless, it is noteworthy that the Government itself believes there are *many* insurance markets in which Congress may be eager to impose individual mandates, just as it has here.

Nor would the Government's rationale stop at mandates affecting insurance markets. Food, shelter, clothing, transportation, education, and communication are all basic necessities of modern life, and everyone must eventually participate in some way in the markets for these goods and services. The Government offers no *constitutional principle* that would prevent Congress from choosing to regulate these markets with individual mandates – it merely offers bland assurances that Congress would probably not choose to do so as a matter of *policy*. But under the Government's rationale, Congress would be empowered to regulate grain prices not only by penalizing wheat production in excess of the government's quota, as it did in *Wickard*, but by penalizing individuals who decide not to enter the market as consumers of bread and other grain products. *See Florida v. Department of*

HHS, 2011 WL 285683 at *24. Or the need to prop up the domestic auto industry, now owned in large part by the federal government, might lead Congress to impose a tax penalty on those who do not buy American cars. *See id.* Although the Government now dismisses this hypothetical automobile mandate as silly, Govt. Brief at 36-37, during oral argument in the court below the Government essentially conceded the point. *See Florida v. Department of HHS*, 2011 WL 285683 at *24. Moreover, even the district court’s hypothetical that Congress could mandate that everyone buy more broccoli – in order to support farm-produce prices, promote more healthful diets, and decrease health-care costs, *id.* – has been embraced by some of the Individual Mandate’s defenders. During recent Senate hearings, Harvard Professor Charles Fried, the former Solicitor General under President Ronald Reagan, testified – while *defending* the constitutionality of the Mandate – that “Congress could, indeed, mandate that everyone buy broccoli.” *See Florida v. Department of Health and Human Services*, 2011 WL 723117 (N.D. Fla. March 3, 2011) at *2 n.2 (citing both the Senate transcript and General Fried’s written testimony). Thus, according to the Individual Mandate’s own advocates, health care is no more “unique” a market than the fresh produce section of the local grocery store.

As the court below explained, “the contention that Commerce Clause power should be upheld merely because the government and its experts or scholars claim that it is being exercised to address a ‘particularly acute’ problem that is ‘singular[],’ ‘special,’ and ‘rare’ – that is to say ‘unique’ – will not by itself win the day. Uniqueness is not an adequate limiting principle as every market problem is, at some level and in some respects, unique. If Congress asserts power that exceeds its enumerated powers, then it is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.” *Florida v. Department of HHS*, 2011 WL 285683 at *25.

In short, market disruptions, inefficiencies, and cost-shifting are not unique to the health care and health insurance markets, and the Government provides no constitutional principle that would restrain Congress from addressing problems in other markets with its newly claimed power to compel individuals to enter the stream of commerce and buy products that they do not want. Long before this litigation arose, Congress’ own non-partisan Congressional Budget Office gave credence to an outlook very different from the brisk, rosy assurances offered by the Government here. When the CBO reviewed the first bill contemplating an individual mandate 17 years ago and concluded that such a measure was unprecedented, the

CBO observed that federal budgets have always distinguished between “resource allocation decisions that involve private choice, are made in a decentralized fashion, and are subject to the economic disciplines of the marketplace, and resource allocation decisions that are made in a centralized fashion at the federal level by the President and the Congress through the governmental budget process.” CBO MEMORANDUM at 4 (quotation marks and citation omitted). The CBO reasoned that “the essence of private choice is the ability *not* to act. Decisions about resource allocation are not private unless individuals can choose not to spend their money in response to market forces.” *Id.* at 7 (emphasis in original).

Congress’ budget experts had to confront these issues because enactment of a mandate would have required a decision about how the mandate should be treated for federal budget purposes. Given the degree of control that the federal government would exert over mandated purchases of health insurance by individuals who had been conscripted into commerce by congressional decree, the CBO was concerned that the cost to individuals of complying with the mandate ought to be counted as part of the federal budget. *Id.* at 6-7. The CBO then offered this warning:

Failure to record the cost of this compulsory activity in the budget would open the door to a mandate-issuing government taking control of virtually any resource allocation decision that would otherwise be left to the private sector, without the federal

budget recording any increase in the size of government. In the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services, could be instituted without any change in total federal receipts or outlays.

CBO MEMORANDUM at 9.

V. A STATUTE IS NOT “PROPER” UNDER THE NECESSARY AND PROPER CLAUSE IF IT WOULD NEGATE THE PURPOSE, EMBODIED IN ARTICLE I AND THE NINTH AND TENTH AMENDMENTS, OF ENUMERATING, AND THEREBY LIMITING, FEDERAL POWER.

The Government’s argument that the Individual Mandate is essential to its larger regulatory scheme for the interstate health-care market, Govt. Brief 28-31, even if credited, goes only to the “Necessary” element of the Necessary and Proper Clause.³ Even a “necessary” exercise of Commerce Clause authority must also be “a ‘Law ... *proper* for carrying into Execution the Commerce Clause.’ ” *Printz*, 521 U.S. at 923-24, 117 S. Ct. at 2379 (quoting Art. I, § 8, cl. 18) (emphasis added by the Court). In Chief Justice Marshall’s words, for a law to be “proper,” it must “consist with the letter and spirit of the Constitution.” *McCulloch v. Maryland*, 17 U.S. 316,

³ The “necessity” identified by the Government, at bottom, is the need for additional monetary resources. But the Internal Revenue Code is a testament to the innumerable ways in which revenues can be raised in accord with the Constitution, and thus a justification based on a need for additional resources is one of the least compelling showings of “necessity” imaginable. If Congress needs more money to pay for its health-care reforms, it has plenty of constitutional options available to it.

421 (1819). The Individual Mandate fails this test because it is inconsistent with – indeed, it negates – the “first principle[]” that Article I “creates a Federal Government of enumerated powers” that are “‘few and defined.’” *Lopez*, 514 U.S. at 552, 115 S. Ct. at 1626 (quoting THE FEDERALIST NO. 45). Under the Government’s theory, Congress can impress unwilling individuals into commerce and compel them to buy unwanted products whenever doing so is deemed by Congress to be essential to some larger regulatory plan.⁴

That makes this case actually easier to decide than *Lopez*, where the Court balked at the degree of attenuation between the regulated “actors” and the ultimate effect of “their conduct” on commerce. 514 U.S. at 580, 115 S. Ct. at 1640 (Kennedy, J., concurring); *see also id.* at 559-61, 565-67, 115 S. Ct. at 1630-31, 1632-34 (opinion of the Court). Although the Court admitted that “some of our prior cases have taken long steps down [the] road” toward granting Congress a general police power by “giving great deference to congressional” programs regulating activities with remote effects on commerce, *id.* at 567, 115 S. Ct. at 1634, the Court drew the line at “a criminal statute that by its terms has nothing to do with ‘commerce’ or

⁴ When the British navy impressed Americans into service in 1812, President James Madison deemed it *casus belli*.

any sort of economic enterprise, however broadly one might define those terms.” *Id.* at 561, 115 S. Ct. at 1630-31. “If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, we would go beyond the concern articulated in *Lopez* for it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate.” *Florida v. Department of HHS*, 2011 WL 285683 at *22 (original emphasis).

Thus the Individual Mandate strains the concept of commerce even more than the gun possession statute in *Lopez*, for it reflects not a difference *in degree* from prior exercises of Commerce Clause power, but a difference *in kind*. The Individual Mandate reaches beyond economic “actors” to command even those who have decided *not* to act. And, again, ordering unwilling individuals into the marketplace to buy unwanted products goes where even Congress has heretofore never ventured. Far from what Chief Justice Marshall described as “the natural, direct, and *appropriate* means, or the *known and usual means*, for the execution of a given power,” JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 186 (Gerald Gunther ed. 1969) (emphasis added), the Individual Mandate is the ultimate form of congressional bootstrapping: unwilling individuals are first coerced into the health insurance market and then their involuntary participation in that

market is used to justify the mandate as an exercise of the Commerce Clause.⁵ This is, in Alexander Hamilton’s phrase, “merely [an] act[] of usurpation” which “deserve[s] to be treated as such.” THE FEDERALIST NO. 33, at 204 (A. Hamilton) (Clinton Rossiter ed., 1961) (*quoted in Printz*, 521 U.S. at 924, 117 S. Ct. at 2379). And because this usurpation of general police power leaves no apparent “activity that the States may regulate but Congress may not,” *Lopez*, 514 U.S. at 564, 115 S. Ct. at 1632, the Individual Mandate encroaches on the reserved sovereign powers of the States in violation of the Tenth Amendment.

But that is not all. To uphold the claim of congressional power underlying the Individual Mandate would also fundamentally alter the very nature of the relationship between the federal government and the governed. That relationship is defined, in large part, by the limitations on federal regulation inherent in the Constitution’s enumeration of congressional

⁵ Indeed, Congress’ own staff warned that the Individual Mandate may exceed its powers, noting that it may “be questioned whether a requirement to purchase health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, *but for this regulation*, a part of the health insurance market.” CONGRESSIONAL RESEARCH SERVICE, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 6 (July 24, 2009) (emphasis added). See *Florida v. Dep’t of HHS*, 2011 WL 285683 at *23 (discussing CRS analysis at length).

powers. Central to the Framers' concept of republican government was the belief that the enumerated powers of the federal government are reciprocally related to the retained *rights* of the people. By delegating certain legislative powers to the national government, the people consented to abide by the laws enacted by the federal government pursuant to those powers. But as to those matters over which the national government had no enumerated power, the people had a retained right to do as they pleased, free of federal regulation. See Charles Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J. OF L. & POLITICS 63, 64 (1987). Indeed, many of the Framers opposed the incorporation of a Bill of Rights in the Constitution for fear that an attempt to "enumerate" the rights of the people would carry the risk that any omission from the list would be construed to grant Congress an implied, *unenumerated* power to legislate on the subject at issue. *Id.* at 69-70.⁶ The Framers' shield against this danger was the Ninth Amendment's guaranty that "[t]he enumeration in

⁶ This concern was succinctly expressed by James Wilson in the Pennsylvania ratifying convention: "If we attempt an enumeration [of rights], every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (reprint 1966) (J. Elliot 2d ed. 1836) (statement of J. Wilson at Pennsylvania Ratifying Convention, Oct. 28, 1787).

the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

In short, the limited and enumerated “powers granted” to the national government in Article I and the unlimited and unenumerated “rights retained” by the people in the Ninth Amendment are two sides of the same coin. *See* THE WRITINGS OF JAMES MADISON 432 (G. Hunt. Ed. 1904) (letter to G. Washington dated Dec. 5, 1789). The Framers conceived of the people’s reserved rights as ranging from the fundamental to the mundane, from the rights of free speech and assembly to an individual’s “right to wear his hat if he pleased.”⁷ There is little doubt that, somewhere along that continuum, the Framers would have placed the right of an individual to decide for herself which products and services she wishes to buy.⁸ After all,

⁷ During the debates on the Bill of Rights, Congressman Sedgwick of Massachusetts objected that no amendment protecting free assembly was needed, for “it is a self-evident, unalienable right which the people possess ... [and] that never would be called in question.” He argued that, if Congress were going to “descend to such minutiae,” it may as well “have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.” 1 ANNALS OF CONGRESS 759-60 (J. Gales & W. Seaton ed. 1834).

⁸ The right not to buy an unwanted product has an honored American pedigree. The colonists in Boston boycotted tea and other products bearing the imprimatur of the Crown, and even King George III did not claim a

as the Government concedes, the event that triggers imposition of the Individual Mandate – and its penalties – is a *decision not to act*. And even if the decision not to buy a product can fairly be characterized as an economic decision, the fact remains that the only regulated event is the naked decision itself – the mental process of *thinking*. Indeed, in a recent decision upholding the Individual Mandate, one district court has chillingly opined that the distinction between mental and physical activity is “pure semantics,” and therefore Congress is free to regulate “mental activity” under the Commerce Clause. *Mead v. Holder*, 2011 WL 611139 (D.D.C. Feb. 22, 2011) at *18. *See also Florida v. Department of HHS*, 2011 WL 723117 at *2 n.1 (noting the *Mead* ruling with dismay). The Government’s defense of the Individual Mandate thus rests on a twisted revision of Descartes’ syllogism: “I think (about commerce), therefore I am (engaging in commerce).” But the Constitution sounds in law, not metaphysics, and there

sovereign power to compel his American subjects to buy English products. As the court below explained, “[i]t is difficult to imagine that a nation which began ... as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place.” *Florida v. Dep’t of HHS*, 2011 WL 285683 at *22.

is no place in a federal government of limited and enumerated powers for this sort of Cartesian Commerce Clause.⁹

CONCLUSION

A federal law that conscripts state officials into participating in a federal regulatory regime enacted under the Commerce Clause infringes on the reserved state sovereignty protected by the Tenth Amendment. *See Printz*, 521 U.S. at 925, 928, 935, 117 S. Ct. at 2379-80, 2381, 2384. The Individual Mandate goes farther, invading not only the State's constitutionally protected sphere of sovereign autonomy, but the individual's. A nation that takes the first step along that path will find the second less difficult. And that path leads ultimately to a place where the "central authority," as Tocqueville warned, "monopolizes all activity and life," where "there are subjects still, but no citizens." 1 Alexis de Tocqueville, *DEMOCRACY IN AMERICA*, 93-94 (Perennial Classics ed. 2000).

If Congress' power to regulate interstate commerce is expanded to enable it to force individual citizens to buy products they do not want, then

⁹ Certainly the monetary punishment imposed by the federal government for *thinking* about not buying health insurance is no mere philosophical exercise. Although "governments need and have ample power to punish . . . acts," it "does not follow that they must have a further power to punish thought . . . as distinguished from acts." *Wieman v. Updegraff*, 344 U.S. 183, 193, 73 S. Ct. 215, 220 (1952) (Black, J., concurring).

little if anything will be left of the retained rights guaranteed by the Ninth Amendment, or of the distinction between a citizen and a subject.

Accordingly, *amicus curiae* respectfully submits that the judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,976 words as determined by the word-counting feature of Microsoft Word 2003 in 14-point Times New Roman.

May 11, 2011

/s/ David. H. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2011, by Federal Express next business day delivery, the original plus six true and correct copies of the foregoing amicus curiae brief were caused to be sent to the following:

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