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Seven-Sky v. Holder - Amicus Brief of CATO Institute et al.

CATO Institute

No. 11-5047

IN THE
United States Court of Appeals for the District of Columbia

SUSAN SEVEN-SKY, et al.,
Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF *AMICI CURIAE* OF THE CATO INSTITUTE, MOUNTAIN STATES LEGAL FOUNDATION, PACIFIC LEGAL FOUNDATION, COMPETITIVE ENTERPRISE INSTITUTE, GOLDWATER INSTITUTE, REVERE AMERICA, IDAHO FREEDOM FOUNDATION, AND PROFESSOR RANDY E. BARNETT SUPPORTING APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

PARTIES AND AMICI[*]

Except for the following, all parties, intervenors, and *amici* appearing in this court are listed in the Appellants' Brief:

Cato Institute

Mountain States Legal Foundation

Pacific Legal Foundation

Competitive Enterprise Institute

Goldwater Institute

Revere America

Idaho Freedom Foundation

Professor Randy E. Barnett

CORPORATE DISCLOSURES

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, *amici* state:

The Cato Institute (www.cato.org) is 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 promotes the principles of limited constitutional government that are the

[*] Pursuant to Circuit Rule 29(d), *amici* have made all efforts to avoid redundancy and combine similar arguments into this brief.

foundation of liberty. Cato has no parent corporation and only issues a handful of shares that are privately held by its directors.

The Mountain States Legal Foundation (www.mountainstateslegal.com) is a nonprofit public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has no parent corporation and issues no stock.

Pacific Legal Foundation (www.pacificlegal.org) is the nation's oldest nonprofit legal foundation defending economic liberty and limited government. PLF attorneys represent the plaintiff in *Sissel v. Dep't of HHS.*, No. 1:10-cv-01263-RJL (D.D.C.), challenging the constitutionality of PPACA on grounds substantially similar to those raised in this appeal. PLF has no companies or ownership interests to disclose.

The Competitive Enterprise Institute (www.cei.org) is a public interest group dedicated to free enterprise, limited government, and civil liberties. Senior Attorney Hans Bader was co-counsel in *Morrison v. United States*, 529 U.S. 598 (2000), the last Supreme Court decision to strike down a law as beyond Congress's Commerce Clause powers. CEI has no shareholders, parents, or subsidiaries.

The Goldwater Institute (www.goldwaterinstitute.org) is a nonprofit organization that advances nonpartisan public policies of limited government,

economic freedom, and individual responsibility. Goldwater has no parent companies and issues no shares or debt securities to the public.

The Revere America Foundation (www.RevereAmerica.org) is an advocacy organization dedicated to advancing common sense public policies rooted in America's traditions of individual liberty and free markets. Revere America is not a publicly held corporation, is not owned by a publicly held corporation, and does not issue stock.

Idaho Freedom Foundation (www.idahofreedom.net) is a nonprofit public policy research organization that develops and advocates the principles of individual liberty, personal responsibility, private property rights, economic freedom, and limited government. Because Idaho imposes fewer coverage mandates on insurance providers than any other state, its residents will arguably be those most dramatically affected by PPACA's individual mandate. IFF has no parent corporation or subsidiary and has issued no stock.

No publicly held corporation has a direct financial interest in the outcome of this case due to *amici*'s participation.

RULINGS UNDER REVIEW

References to the rulings at issue appear in the Appellants' Brief.

RELATED CASES

To the best of counsel's knowledge, listed below are the other cases challenging PPACA currently before other circuits, as well as two cases currently in the U.S. District Court for the District of Columbia:

N.J. Physicians Inc. v. Obama, No. 10-4600 (3d. Cir.)

Commonwealth of Virginia v. Sebelius, No. 11-1057 & 11-1058 (4th Cir.)

Liberty Univ. v. Geithner, No. 10-2347 (4th Cir.)

Thomas More Law Center v. Obama, No. 10-2388 (6th Cir.)

U.S. Citizens Ass'n v. Obama, No. 11-3327 (6th Cir.)

Kinder v. Dep't of Treasury, No. 11-1973 (8th Cir.)

Baldwin v. Sebelius, No. 10-56374 (9th Cir.)

Florida v. United States Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067 (11th Cir.)

Ass'n of Am. Physicians & Surgeons v. Sebelius, No. 1:10-cv-499-RJL (D.D.C.)

Sissel v. Dep't of HHS., No. 1:10-cv-01263-RJL (D.D.C.)

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GLOSSARY

PPACA - Patient Protection and Affordable Care Act, 111 Pub. L. No. 148, 124 Stat. 119 (2010)

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Appellants' Brief.

INTEREST OF *AMICI CURIAE*[1]

Amici groups are public-interest law firms and public policy research foundations dedicated to advancing individual liberty. By publishing reports, books, and articles, as well as through litigation, they have established themselves at the forefront of the movement for limited government and free markets.

Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center. Barnett has taught constitutional law, contracts, and criminal law, among other subjects, and has published more than 100 articles and reviews, plus nine books. He argued *Gonzales v. Raich,* 545 U.S. 1 (2005), before the Supreme Court and in 2008 was awarded a Guggenheim Fellowship in Constitutional Studies.

This case concerns *amici* because it represents the federal government's most egregious attempt to exceed its constitutional powers.

SUMMARY OF ARGUMENT

The individual mandate exceeds 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—stop

[1] Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no party or party's counsel made a monetary contribution to fund its preparation or submission.

Congress from reaching intrastate *non-economic* activity regardless of its consequences for the economy. Nor can Congress conscript an inactive person into commerce even if it purports to do so pursuant to a broader regulatory scheme.

The Constitution does not permit Congress to compel citizens into economic transactions to remedy the admitted shortcomings of a sloppily written law. Although the Necessary and Proper Clause allows Congress to adopt reasonable means to regulate interstate commerce, it is not a blank check permitting Congress to ignore constitutional limits by manufacturing necessities. Indeed, any law—"necessary" or otherwise—that would transform Congress's authority into a generalized police power 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 . . . in fact, it is not really about our health care system at all. It is principally about our federalist system, and . . . the Constitutional role of the federal government." *Florida v. United States Dep't 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).

What Congress has attempted here is literally unprecedented. As one 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 the lower court conceded: "previous Commerce Clause cases have all involved physical activity, as opposed to mental activity, *i.e*. decision-making, [so] 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 Congress ever before imposed on every person a civil penalty for declining to buy a product. Even in *Wickard v. Filburn*, 317 U.S. 11 (1942), the federal government claimed "merely" the power to regulate what farmers grew, not to force *mandate* that people become farmers or buy farm products.[2] Even if *not* buying health insurance is an "economic activity"—which of course would mean that every aspect of human life is economic activity—there is no constitutional warrant for Congress to force Americans to buy a particular good or service.

[2] 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.")

Although the substantial effects test is often conceived as a Commerce Clause doctrine, it actually interprets the Necessary and Proper Clause in the context of the power to regulate commerce. Consequently, the limitations of this doctrine mark the boundaries of necessity and propriety. Because economic mandates do not fall within this doctrine, it is unconstitutional to impose economic mandates on the people under the guise of regulating interstate commerce.

Even if economic mandates are deemed "necessary," however, they are not "proper" 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 Explicit Purpose of Article I is to Limit Congress's Powers

That Congress is limited to its enumerated powers has been universally accepted throughout American history. This sentiment was initially expressed in the Declaration of Independence, which explains that governments do not grant people rights, but, instead, are "instituted" to secure *pre-existing* rights. *The Declaration of Independence* para. 2 (U.S. 1776). Later, the Constitution's framers chose to grant Congress only "special and enumerated powers, and not . . . general

and unlimited powers." Joseph Story, *Commentaries on the Constitution of the United States* 2 § 906 (1833). Indeed, the text of the Constitution clearly creates a limited federal government of enumerated powers. Unlike Article II, which begins, "The executive Power shall be vested in a President," or Article III, which begins, "The judicial Power of the United States, shall be vested in one supreme Court," Article I begins, "All legislative Powers *herein granted* shall be vested in a Congress." U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. III, § 1, cl. 1; U.S. Const. art. I, § 1, cl. 1 (emphasis added). This language expressly denies Congress any generalized *power*, but authorizes only those *powers* that are "herein granted." *See United States v. Ho*, 311 F.3d 589, 596 (5th Cir. 2002) ("This clause necessarily implies that some legislative powers are not 'herein granted,' foremost among them 'the police power, which the Founders denied the National Government.'" (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)). Even the Commerce Clause was primarily meant to stop *state* regulatory abuse. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) ("The 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison.").

During the ratification debates, Federalists emphasized that their opponents needed not fear the new government because it would enjoy only limited powers. *See, e.g., The Federalist* No. 32, at 198 (Alexander Hamilton) (C. Rossiter, ed.,

1961) ("State governments would clearly retain all the rights of sovereignty which . . . were not, by [the Constitution] *exclusively* delegated to the United States."); *id.* No. 39, at 245 (James Madison) ("the proposed government['s] . . . jurisdiction extends to certain enumerated objects only."); *id.* No. 45, at 328 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); Oliver Ellsworth, Speech in the Connecticut Ratifying Convention (Jan. 7, 1788), *in* 2 Jonathan Elliot, *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution* 196 (1859) ("The Constitution defines the extent of the powers of the general government."); Archibald Maclaine, Remarks Before the Convention of the State of North Carolina (July 28, 1788), *in* 4 *id*. at 140 ("The powers of Congress are limited and enumerated. We . . . have given them those powers, but we do not say we have given them more.").

So critical was the principle of enumerated powers that many Founders believed it rendered a Bill of Rights superfluous—and even dangerous—because it might imply that the federal government's authority was not limited to those powers. *See Federalist* No. 84, *supra*, at 513-14 (Alexander Hamilton) ("Why declare that things shall not be done which there is no power to do?"). To explicitly refute this implication, and clarify that the federal government enjoys

only limited, enumerated powers, the Framers added the Ninth and Tenth Amendments. *See Griswold v. Connecticut*, 381 U.S. 479, 488-92 (1965) (Goldberg, J., concurring).

Given the Framers' clear intent to create a limited federal government of enumerated powers, it is unsurprising that the Supreme Court has consistently reaffirmed that the federal government does not enjoy a general police power. *See, e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 405; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824); *Kansas v. Colorado*, 206 U.S. 46, 87 (1907); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

II. 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 Congress can regulate it. *Gonzalez v. Raich*, 545 U.S. 1, 25 (2005). The New Deal cases which first developed the "substantial effects" doctrine, however, found the authority for that doctrine not in the Commerce Clause itself but in its execution via the Necessary and Proper Clause. Although often described as expanding the definition of the word "commerce," the cases show that the New

Deal Court actually asked whether federal regulation of the activity in question was *a necessary and proper means* of exercising the regulatory power, because the activity substantially affects that commerce. "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id*. at 34 (Scalia, J., concurring) (citing *United States v. Coombs*, 37 U.S. 72, 78 (1838); *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *United States v. E. C. Knight Co.*, 156 U.S. 1, 39-40 (1895) (Harlan, J., dissenting)). Congress has never been allowed to go further.

In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court considered Congress's power to "prohibit the employment of workmen in the production of goods 'for interstate commerce' at other than prescribed wages and hours." *Id*. at 105. Instead of 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*—the Commerce Clause case cited throughout *Darby*—but from *McCulloch*, the seminal Necessary and Proper Clause case.

A year later, in *Wickard*, the Court used the same reasoning: not redefining "commerce," but ruling that the challenged measures were a necessary and proper means for regulating commerce. Like *Darby*, *Wickard* explicitly relied on the Necessary and Proper Clause, citing *McCulloch*. *See* 317 U.S. at 130, n.29. *Wickard* did not expand the Commerce Clause, standing alone, 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). Thus the aggregation principle can only apply to economic activities the regulation of which is necessary and proper to effectuating Congress's legitimate regulatory power.

Accordingly, the Court in *Lopez* found that aggregation could apply only to economic activity: "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." 514 U.S. at 560. And in *Morrison*, the Court held that gender-motivated violence is not economic activity and thus fell outside Congress's power to regulate interstate commerce. 529 U.S. at 613. In these and other decisions, 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. "*Where economic activity* substantially affects interstate commerce, legislation regulating *that activity* will be sustained." *Lopez*, 514 U.S. at 560 (emphasis added).

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. The object of regulation must have a "close and substantial relation to interstate commerce," *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1, 37 (1937), and that relationship must be qualitative, not just quantitative. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 843 (4th Cir. 1999) (en banc), *aff'd sub nom Morrison*, *supra*; *accord, United States v. Bird*, 124 F.3d 667, 677, n. 11 (5th Cir. 1997).

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 complex, potentially insoluble evaluations of the "more or less of *necessity* or *utility*" of the law. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), *in Hamilton: Writings* 619 (J. Freeman, ed., 2001). This distinction limits

congressional power when regulating *intrastate economic activity* to activities closely connected to interstate commerce, thus withholding from Congress any unconstitutional police powers, *see*, *e.g.*, *Lopez*, 514 U.S. at 567, preserving the role of states in the federalist system, and minimizing the degree of judicial involvement in utilitarian considerations that are outside the courts' expertise.

In other words, to preserve the constitutional scheme of limited and enumerated powers, the Court drew a judicially administrable line beyond which Congress cannot go when choosing "necessary" means to execute its powers. The substantial effects doctrine, limited by *Lopez* and *Morrison* to economic activities, marks the outmost bounds of "necessity" under the Necessary and Proper Clause.

But if 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 *Raich*, the Court found the cultivation of marijuana to be an economic activity—indeed, a type of "manufacture," 545 U.S. at 22—that Congress could prohibit as a necessary and proper means of exercising of its commerce power. *Raich* explicitly adhered to the economic/non-economic

distinction set out in *Lopez* and *Morrison*. "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 also rejected the government's contention that it was Angel Raich's or Roscoe Filburn's non-purchase of an interstate-traded commodity that subjected them to federal law. *See* Barnett, *supra*, at 602-03. Instead, the Court invoked the Webster's Dictionary definition of "economics"—"the production, distribution, and consumption of commodities," *Raich*, 545 U.S. at 25—and refused to adopt the sweeping theory the government advances here, that non-participation in the marketplace is itself economic activity. This Court soon thereafter reaffirmed that definition of "economic" when it held in *United States v. Sullivan*, 451 F.3d 884, 891 (D.C. Cir 2006), that child pornography is "quintessentially economic" activity, "involv[ing] the manufacture and distribution of a commodity subject to the forces of supply and demand," and therefore properly subject to federal law.

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

No precedent allows Congress to *compel* activity in the guise of regulating commerce. Roscoe Filburn was actively growing wheat. *Wickard*, 317 U.S. at 114-15. The Jones & Laughlin Steel Corporation was voluntarily engaged in the economic activity of steelmaking. *NLRB.*, 301 U.S. at 26. The Civil Rights Era

cases concerned parties that chose to engage in the economic activity of operating a restaurant, *Katzenbach*, 379 U.S. at 296, or a hotel, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). The *Raich* plaintiffs grew, processed, and consumed medicinal marijuana—all voluntary activities the Court characterized as "manufactur[ing]." 545 U.S. at 22.

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"). First, if persons voluntarily engage in economic activity, for example by undertaking a commercial endeavor, Congress can *regulate the manner* by which their activities are conducted. Such regulation of voluntary economic activity may include *conditional* mandates such as recordkeeping requirements. The second category, exemplified by *Raich*, concerns Congress's power to *prohibit* a type of commerce altogether—a power the Court has recognized at least since *Champion v. Ames*, 188 U.S. 321 (1903). In *Sullivan*, therefore, this Court held that prohibiting intrastate possession of child pornography is within Congress's powers because there would otherwise be "a significant gap in Congress' comprehensive efforts to eliminate the market for sexually exploitative uses of children." 451 F.3d at 891.

Under either theory, however, Congress can regulate or prohibit *voluntary* economic actions, but cannot *force* people to undertake such actions—even if those actions would have economic consequences. 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—i.e.*, not engaging in an economic endeavor or obtaining contraband. 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.

C. The *Comstock* Factors That Are the Most Recent Articulation of the Necessary and Proper Clause's Limits Weigh Against the Individual Mandate

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), the Supreme Court reiterated the limits of the Necessary and Proper Clause, noting that a law which "confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States'" would not be necessary and proper. *Id.* at 1964 (quoting *Morrison*, 529 U.S. at 618). The *Comstock* Court upheld the federal civil commitment law at issue after weighing five factors: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal

involvement in criminal prosecution, (3) the "sound reasons" for the statute given the government's public safety goal, (4) "the statute's accommodation of state interests" and (5) its narrow scope. *Id.* at 1965.

The Court avoided referring to these factors as a "test"; nor did it explain how they inter-relate, which weigh most heavily, or what to do when different factors point in different directions. *See* Ilya Shapiro and Trevor Burrus, *Not Necessarily Proper: Comstock's Errors and Limitations*, 61 Syracuse L. Rev. 413, 415 (2011). Nevertheless, most of these factors—the lack of a deep history of federal involvement, PPACA's failure to accommodate state interests, and its extraordinarily broad scope—weigh *against* the constitutionality of the individual mandate. *See* Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 Cato Sup. Ct. Rev. 239, 260-67 (2010) (assessing *Comstock*'s implications on PPACA litigation).

First, although the Necessary and Proper Clause is "broad" in that it gives Congress leeway to choose the means for executing legitimate ends, it is not a grant of potentially endless power. Recall from *McCulloch* that only those means which are "within the scope of the constitution . . . which are not prohibited, [and which] consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) at 421-23. *Cf.* Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of The*

Sweeping Clause, 43 Duke L.J. 267, 297 (1993) ("executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights."). The breadth of the Necessary and Proper Clause thus does not warrant extending federal reach in a manner that contradicts fundamental constitutional principles like federalism and enumerated powers. Nor does the "breadth of the Clause" factor vary from case to case; it is a constant.

Second, there is no "long history" of federal involvement here, unlike in *Comstock*. Not only is the individual mandate without parallel in constitutional history, but federal involvement in private health insurance is an entirely modern phenomenon. *See, e.g.*, Jeannie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy* 67 (1997) ("[T]he bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years.").

Third, the individual mandate does not accommodate state interests. The civil commitment provision challenged in *Comstock* allowed states to assert authority over any individual committed under it, and indeed to prevent federal detention at the outset. 130 S. Ct. at 1962-63. The individual mandate, by contrast, does not allow states to assert authority or prevent the compulsory purchase of health insurance. Instead, it ejects states from their role as the primary authority for regulating citizens' health insurance purchases. And with over half the states suing to have PPACA declared unconstitutional, and many enacting

legislation to protect citizens from the individual mandate, it is clear that the states do not believe their interests are being accommodated.

Finally, the individual mandate is not narrow in scope. It unavoidably applies to every resident American, excepting only the impoverished, and prescribes a blanket rule: buy insurance or pay a fine. It asserts federal authority over *not engaging* in any activity that has ultimate economic consequences—hardly a "narrow" proposition.

The individual mandate fails the *Comstock* factors and therefore cannot pass muster under the Necessary and Proper Clause. It conflicts with fundamental principles of limited federal power, intrudes on traditional state autonomy, and essentially converts Congress' power to regulate commerce into a generalized police power with no principled limit. The Constitution does not authorize such power either directly or by implication.

III. The Individual Mandate Cannot be Justified as an "Essential Part of a Broader Regulatory Scheme" Because Congress Cannot Regulate Inactivity

Unable to justify the individual mandate under existing Commerce Clause or Necessary and Proper Clause doctrine (let alone the fallback taxing power theories not addressed 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, or a regulation of intrastate economic activity, or 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 argument 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 is limited to reaching intrastate economic activity. The second is the proposition that "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 expanding Congress's regulatory authority to allow it to compel economic activity.

A. Inactivity Is Not a Type of Activity

The government and the lower courts ruling in its favor have implicitly acknowledged that Congress can regulate only "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 not owning health insurance. For example, the decision below 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 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. *See, e.g.*, *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1511 (D.C. Cir. 1996). So too in criminal law one cannot generally be convicted without engaging in some activity. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) (the law "does not punish mere thought"); *United States v. Rhone*, 864 F.2d 832, 835 (D.C. Cir. 1989). The activity/inactivity distinction is intuitively obvious and 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 district 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 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.").

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.

B. The Activity/Inactivity Distinction Provides Judicially Manageable Standards with a Minimum of Judicial Policymaking

There must be some principled limit to Congress's regulatory authority to prevent it from laying claim to a general police power. The most 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 observed that Congress can regulate 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 called the Necessary and Proper Clause "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 extend his proposed doctrine to reach inactivity. *See also Comstock*, 130 S. Ct. at 1983 (Thomas and Scalia, JJ., dissenting).

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: ensuring that uses of the Necessary and Proper Clause to execute the commerce power are 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 enumerated and therefore limited 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, that theory is constitutionally unsatisfactory.

Instead of offering a limiting principle to its asserted power to compel activity as an essential part of a broader regulatory scheme, the government argues that the health insurance business is "unique" in various respects. *See, e.g.*, Brief for Appellants at 7-11, Florida v. United States Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067 (11th Cir. Apr. 1, 2011). But examining the "uniqueness" of the regulated market 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 as outside the judiciary's proper sphere. Courts must "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).

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. *See, e.g.*, Brief for Appellants at 27, Florida v. HHS, *supra*. Nearly everyone ultimately consumes health care—an economic act—so the federal government can direct that health care be (pre-)purchased now, by obtaining insurance, rather than later when the medical bill comes due. *Id.*

That argument does not provide a constitutional limit on Congress's power. 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. *Id.* at *102 ("There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes."). The government's "unique market" argument thus provides no legal limit on federal authority, instead inviting standardless judicial examination of "how necessary" a congressional action is. Courts should not be drawn into determining whether a particular market is "unique" or whether it "makes sense" to require that the product be paid for at one time or another.

Enforcing the activity/inactivity distinction, by contrast, requires no such judicial policymaking and would affect no other existing law. Congress could have reformed the health care system in many ways, for better or worse—including even a Medicare-for-Everyone "single payer" scheme—that would have been legally unassailable under existing Commerce Clause doctrine. That it chose a scheme so flawed as to require otherwise unconstitutional patches to make it function does not make those "essential" provisions automatically constitutional.

IV. The Individual Mandate Is Not "Proper" Under the Necessary and Proper Clause Because It Constitutes a "Commandeering of the People"

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, supra*; *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). In this way, the text of

the Tenth Amendment protects not just state sovereignty, but also popular sovereignty. 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 called an improper "commandeering of the people." *Supra* at 621-34.

As Chief Justice John Jay noted in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 471-72 (1793), the people are "truly the sovereigns of the country," and elected officials merely their deputies, exercising 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, it also bars a "commandeering of the people" for this purpose. The very few mandates 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 paying income taxes, 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. There is certainly no comparable pre-existing "supreme and noble duty" to engage in economic activity whenever doing so would be convenient to a congressional regulation of 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 *supra*, at 467 (Alexander Hamilton) ("[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*, 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 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).

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, so the district court here improperly interpreted the existing doctrinal limits in this area. Accordingly, *amici* respectfully ask this Court to reverse the district court.

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Dated: May 23, 2011

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I hereby certify that, on May 23, 2011, I filed the foregoing brief with this Court by causing a true digital copy to be electronically uploaded to the Court's CM/ECF system and by causing eight true and correct copies to be delivered by FedEx next business day delivery to the Court. 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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