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Virginia v. Sebelius - CATO Institute Amicus Brief

CATO Institute

Nos. 11-1057 & 11-1058

IN THE
United States Court of Appeals for the Fourth Circuit

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
in his official capacity as Attorney General of Virginia,

Plaintiff-Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health & Human Services, in her official capacity,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF *AMICI CURIAE* OF THE CATO INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, AND PROF. RANDY E. BARNETT SUPPORTING PLAINTIFF-APPELLEE/CROSS-APPELLANT AND AFFIRMANCE

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Prof. Randy E. Barnett is an individual to whom the corporate disclosure requirement is not applicable.

No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato, CEI, or Prof. Barnett.

/s/

Patrick M. McSweeney

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INTEREST OF *AMICI CURIAE*[1]

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

The Competitive Enterprise Institute is a public interest group founded in 1984 and dedicated to free enterprise, limited government, and civil liberties. It studies and publishes on a wide range of regulatory issues, including those involving health and safety, drugs, biotechnology, and medical innovation—as well as the regulation of insurance markets. CEI attorneys have argued or participated as *amicus curiae* in numerous constitutional cases before the Supreme

[1] Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, have consented to the filing of this brief.

Court and other federal courts. Senior Attorney Hans Bader was also co-counsel in *Morrison*, the last Supreme Court decision to strike down a law as beyond Congress's Commerce Clause powers.

Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center. Prof. Barnett has taught constitutional law, contracts, and criminal law, among other subjects, and has published more than 100 articles and reviews, as well as nine books. His book, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004), and other scholarship concerns the original meaning of the Commerce and Necessary and Proper Clauses and their relationship to the powers enumerated in the Constitution. His constitutional law casebook, *Constitutional Law: Cases in Context* (Aspen 2008), is widely used in law schools throughout the country. In 2004 he argued *Gonzales v. Raich* in the Supreme Court. In 2008, he was awarded a Guggenheim Fellowship in Constitutional Studies.

SUMMARY OF ARGUMENT

The individual mandate goes beyond Congress's power to regulate interstate commerce under existing doctrine. The outermost bounds of the Supreme Court's Commerce Clause jurisprudence—the "substantial effects doctrine"—prevent Congress from reaching intrastate *non-economic* activity regardless of whether it

substantially affects interstate commerce. Nor under existing law can Congress reach *inactivity* even if it purports to act pursuant to a broader regulatory scheme.

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

While the Secretary emphasizes the "uniqueness" of the health care system and the wisdom of the legislation at issue, "this case is not about whether the Act is wise or unwise legislation…in fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government." *Florida v. United*

[2] Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, §§ 1501(a)(1)-(2), 124 Stat. 119 (2010).

States Dept. of Health & Human Servs., No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822, at *6 (N.D. Fla. Jan. 31, 2011).

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

The Congressional Budget Office agrees: "The government has never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994). Nor has the government ever said that every man and woman faces a civil penalty for declining to participate in the marketplace. And never before have courts had to consider such a breathtaking assertion of raw power under the Commerce Clause. Even in *Wickard v. Filburn*, 317 U.S. 11 (1942), the federal government claimed "merely" the power to

regulate what farmers grew, not to *mandate* that people become farmers, much less to force people to purchase farm products. Even if *not* purchasing health insurance is considered an "economic activity"—which of course would mean that every aspect of human life is economic activity—there is no legal basis for Congress to require individuals to enter the marketplace to buy a particular good or service.

Amici offer this brief to highlight that, although the "substantial effects doctrine" is sometimes conceived as a "Commerce Clause" doctrine, it is actually based on the Necessary and Proper Clause in the context of the power to regulate interstate commerce. Consequently, the limitations of this doctrine mark the existing doctrinal limit on the constitutional requirement that a law be "necessary" to the execution of the commerce power under the Necessary and Proper Clause. Because economic mandates do not fall under this existing doctrine that governs necessity, it is unconstitutional to impose economic mandates on the people under the guise of regulating commerce.

Even if economic mandates are deemed "necessary," however, they fail constitutional muster because they are not a "proper" means of executing an enumerated power.

ARGUMENT

I. The Mandate is Unconstitutional Under the "Substantial Effects" Doctrine That Defines the Scope of the Necessary and Proper Clause in the Context of the Commerce Power

A. The "Substantial Effects" Doctrine Interprets the Necessary and Proper Clause in the Commerce Clause Context to Allow Congress to Exercise Its Regulatory Authority While Cabining That Authority

Since the New Deal, the Supreme Court has asked whether a particular "economic activity substantially affects interstate commerce" when considering whether it falls under Congress's Commerce Clause power. *Gonzalez v. Raich*, 545 U.S. 1, 25 (2005) (quoting *United States v. Morrison*, 529 U.S. 598, 610 (2000) (in turn quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995)). The New Deal cases in which the "substantial effects doctrine" was first developed, however, found the authority for it not in the Commerce Clause itself but in its execution via the Necessary and Proper Clause. Although prevailing legal convention describes the New Deal cases as expanding the definition of "commerce," a closer examination of these decisions shows that the definition of "commerce" remained unchanged. The Court instead asked whether federal regulation of the activity in question is a necessary and proper means for exercising the power to regulate interstate commerce because the activity substantially affects that commerce. Beyond that point Congress has never been able go.

In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court considered the power of Congress to "prohibit the employment of workmen in the production of goods 'for interstate commerce' at other than prescribed wages and hours." *Id.* at 105. Rather than stretching the definition of "commerce," the Court focused on how congressional power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.* The authority cited for this proposition did not come from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)—the Commerce Clause case that the Court had already cited throughout its opinion—but instead from the foundational Necessary and Proper Clause case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

A year after *Darby*, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court employed the same reasoning—that "commerce" was not being redefined but rather the challenged measures were a necessary and proper means for regulating commerce as historically understood. Like *Darby*, *Wickard* is explicit in its reliance on the Necessary and Proper Clause, citing *McCulloch*, *id.* at 130, n.29, as authority for congressional power—even if Roscoe Filburn's personal production of wheat "may not be regarded as commerce." *Id.* at 125. Thus, contrary to the conventional academic view, *Wickard* did not expand the Commerce Clause to

include the power to regulate intrastate activity that, when aggregated, substantially affects interstate commerce. Instead, "like *Darby*, *Wickard* is both a Commerce Clause and a Necessary and Proper Clause case[,]" with the substantial effects doctrine reaching Roscoe Filburn's wheat growing via the Necessary and Proper Clause. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L.L. 581, 594 (2011).

Fast forward 50 years, when the Court clarified the substantial effects doctrine by confining congressional power under the Commerce and Necessary and Proper Clauses to the regulation of intrastate *economic* activity. Again, as in *Wickard* and *Darby*, the Court did not redefine "commerce" but only refined its analysis of whether the means adopted by Congress were necessary and proper to the end of regulating commerce.

In *United States v. Lopez*, the Court found that "[e]ven *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. Five years later, in *United States v. Morrison*, the Court held that the gender-motivated violence regulated by the Violence Against Women Act was not itself economic activity and thus had only an "indirect and remote" or "attenuated" effect on interstate commerce. 529 U.S.

at 608 (quoting *Lopez*, 514 U.S. at 556-57 (in turn quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))), 615.

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

Adopting the distinction between economic and non-economic activity allowed the Court to determine when it was truly necessary to regulate intrastate commerce without involving it in protracted, and arguably impossible, attempts to evaluate the "more or less necessity or utility" of a measure. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), in Legislative and Documentary History of the Bank of the United States 98 (H. St. Clair & D.A. Hall eds., reprinted Augustus M. Kelley 1967) (1832). This

Necessary and Proper Clause doctrine limits congressional power to regulating intrastate economic activity because this category of activity is closely connected to interstate commerce, and limiting the scope of "necessary" in this way avoids implying a power tantamount to a federal police power that the Supreme Court has always denied existed. *See, e.g.*, *Lopez*, 514 U.S. at 567. Moreover, a power to regulate intrastate economic activity that has a substantial affect on interstate commerce is not so broad as to obstruct or supplant the states' police powers.

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

As Professor Randy Beck has explained, "[g]iven the close relationship between intrastate and interstate economic activity, a statute regulating local economic conduct will usually be calculated to accomplish an end legitimately encompassed within the plenary congressional authority over interstate commerce." J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 625 (2002). In short, regulating intrastate economic activity can be a "necessary" means of regulating interstate commerce as

that term is understood under the Necessary and Proper Clause. The obvious corollary is that regulating non-economic activity cannot be "necessary," regardless of its effect on interstate commerce. And a power to regulate inactivity is even more remote from Congress's power over interstate commerce.

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

Raich also rejected the government's contention that it was Angel Raich's or Roscoe Filburn's non-purchase of a commodity traded interstate that brought their personal cultivation under congressional power. *See* Barnett, *supra*, at 602-03. Instead, Justice Stevens invoked the Webster's Dictionary definition of "economics"—"the production, distribution, and consumption of commodities,"

Raich, 545 U.S. at 25—and thus refused to adopt the government's sweeping theory here that non-participation in the marketplace was itself economic activity.

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

Just as Chief Justice Rehnquist in *Lopez* surveyed all previous substantial effects cases to discern the line between economic and non-economic activity, if this court examines existing case law it will see that in none of them did Congress seek to regulate inactivity.

In *Wickard*, Roscoe Filburn was in the business of growing wheat and thus voluntarily engaged in economic activity. *Wickard*, 317 U.S. at 114-15. In *NLRB*, the Jones & Laughlin Steel Corporation was subject to regulatory schemes because it voluntarily engaged in the economic activity of steelmaking. *NLRB*, 301 U.S. at 26. The Civil Rights Cases concerned parties that voluntarily chose to engage in the economic activity of operating a restaurant and a hotel, respectively. *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). And finally, in *Raich*, Diane Monson and Angel Raich grew, processed, and consumed medicinal marijuana—all voluntary activities. *Raich*, 545 U.S. at 7.

All these cases fall into two general categories. *Raich*, 545 U.S. at 35-38 (Scalia, J., concurring) (discussing the "two general circumstances" in which "the regulation of intrastate activities may be necessary to and proper for the regulation

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

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

Under either theory, however, although Congress can *regulate* or even *prohibit* voluntary economic actions that substantially affect interstate commerce, it cannot *force* people to undertake such actions—even if such actions, when voluntarily undertaken, would have been subject to regulation or prohibition.

With the individual mandate, Congress implicitly acknowledged the requirement that Congress be regulating "activity," by redefining the word "activity" to include the activity of making a "decision," including a decision not to act. If this argument is accepted, however, the traditional distinction between acts and omissions would collapse. If a "decision" not to act is an act, then inactivity would be transformed into activity by linguistic alchemy.

Similarly, if inaction is deemed to be "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 also collapse. Indeed, *Lopez* and *Morrison* stand for the proposition Congress may not regulate such intrastate non-economic activities as gun possession and gender-motivated violence, notwithstanding a showing that in the aggregate this non-economic activity had substantial economic effects on interstate commerce. Since any class of activity (or inactivity), in the aggregate, can be said to have an economic effect, the line the Court drew between intrastate economic activity that Congress may reach and the intrastate non-economic activity which is outside its powers would be destroyed. A lower court has no authority to thwart existing Supreme Court doctrine governing the scope of the Commerce and Necessary and Proper Clause in this way.

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

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

The government's proposed theory that Congress may mandate economic activity rests on a sentence from *Lopez* and a concurring opinion by Justice Scalia in *Raich* that identify circumstances when Congress may reach wholly *intrastate non-economic activity*. In his concurring opinion, Justice Scalia affirmed our view that the substantial effects doctrine is a product of the Necessary and Proper Clause. "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." *Raich*, 545 U.S. at 35 (Scalia, J., concurring). The first of these circumstances included the substantial effects doctrine, which he said is limited to

reaching intrastate economic activity. He then identified a second Necessary and Proper Clause doctrine by which "Congress may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37.

If the Supreme Court decides to employ this theory for the first time, it will still need to identify a limiting principle, lest it leave Congress with a general police power, which is forbidden to it. *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 *id.* 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"). The distinction between economic and non-economic activity would obviously provide no limit to this doctrine. The whole purpose for Justice Scalia's concurring opinion was to question the usefulness of that distinction in dealing with the problems posed by *Raich*. The most obvious line to draw is that between regulating activity—whether economic or non-economic—and inactivity.

In *Lopez*, the Court discussed reaching intrastate non-economic activity when doing so is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." 514 U.S. at 561 (emphasis added). In *Raich*, Justice Scalia proposed

that "Congress may regulate even non-economic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce." 545 U.S. at 37 (emphasis added). Indeed, in his *Raich* opinion, Justice Scalia uses 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 would ever extend his proposed doctrine to reach inactivity. Scalia, after all, is the Justice who referred to the Necessary and Proper Clause as "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997) (Scalia, J.), a proposition he recently reaffirmed. *See United States v. Comstock*, 130 S. Ct. 1949, 1983 (2010) (Thomas, J., dissenting, joined in part by Scalia, J.).

The distinction between activity and inactivity provides the same type of judicially administrable limiting doctrine for what is "necessary" to execute the commerce power under an "essential to a broader regulatory scheme" theory as the economic/non-economic distinction provides for the substantial effects doctrine. Now that Congress has, for the first time, sought to reach inactivity, all the Supreme Court need do is look back at its previous substantial effects doctrine cases, as it did in *Lopez*, to see that every case decided until now involved the regulation of activity, not inactivity. As the district court said while striking down the individual mandate here, "[e]very application of Commerce Clause power

found to be constitutionally sound by the Supreme Court involved some sort of action, transaction, or deed placed in motion by an individual or legal entity." *Sebelius*, 728 F. Supp. 2d at 781.

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 purpose as the economic/non-economic distinction. Such a formal limitation would help assure that exercises of the Necessary and Proper Clause to execute the commerce power would be truly incidental to that power and not remote. Doing nothing at all involves not entering into a literally infinite set of economic transactions. Giving Congress discretionary power to pass broad regulatory schemes involving this infinite set of inactions would amount to granting a plenary and unlimited police power over inactions that are remote from interstate commerce. However imperfect, some such line must be drawn to preserve Article I's structure of limited and enumerated powers. *See Lopez*, 514 U.S. at 575 (Kennedy, J., concurring) ("Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances."). Because accepting the government's theory in this case would effectively demolish that structure, the government's theory is constitutionally unsatisfying.

To date, the government has offered no constitutional limiting principle on its asserted power to regulate when doing so is essential to a broader regulatory scheme. In place of any constitutional limitation, the government attempts to distinguish the health insurance business as "unique" in various respects. Defs.' Response to Pls'. Mot. Prelim. Inj. and Br. Supp. at 24 n.10, *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010) (No. 10-11156); Defs.' Reply to Pls.' Mot. Prelim. Inj. and Br. Supp. at 11-12, *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010) (No. 10-11156). But examining the "uniqueness" of the market being regulated and the problems Congress chose to ameliorate is precisely the sort of inquiry into the "more or less necessity" of a measure that has been rejected by the Supreme Court since *McCulloch*.

In the course of pointing to one particular "unique" aspect of health care, the Secretary claims that the individual mandate is no different than requiring advance purchase of health care. Nearly everyone ultimately consumes health care; and consumption is clearly an economic act. Brief for Appellant at 17, *Commonwealth ex rel. Cuccinelli v. Sebelius*, No. 11-1057 & 11-1058 (4th Cir. Feb. 28, 2011). Why then, so the argument goes, wouldn't the Commerce Clause allow the federal government to direct that health care be purchased now, by obtaining insurance, rather than later when the medical bill comes due? *Id*. at 18-19. In other words,

buying health insurance is just a timing decision about when, not whether, to incur medical costs. *Id*. at 7, 19-20.

Yet rather than provide a constitutional limit on the power to impose economic mandates, the government's argument invites a judicial examination of the "more or less necessity" of congressional action. Virtually all forms of insurance represent timing decisions—paying up front for burial costs, loss of life, disability, supplemental income, credit default, business interruption, and more. *See Florida*, 2011 U.S. Dist. LEXIS 8822, at *100-01 (discussing cost-shifting and timing decisions in all insurance markets). Only a federal government of unbounded powers could mandate that every American insure against such risks. And "[t]here will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes." *Id*. at *102. And while it might be permissible to penalize an uninsured person who shows up at a hospital or doctor's office demanding that his expenses be borne by the taxpayers, that is not what PPACA does. Instead, PPACA penalizes *all* uninsured persons, not just those who seek to be reimbursed by government for costs they should have borne themselves. *Id*. at *72 n.14. And PPACA does more than mandate coverage; it also prescribes certain provisions that each policy must include. Many Americans who prefer to insure using, for example, Health Savings Accounts with high deductible coverage, will be told by their federal overseers that such coverage isn't adequate. *Id*.

The Supreme Court's repeatedly affirmed requirement that there be a constitutional limit on federal power cannot be side stepped by invoking the admitted importance of reforming health care or the cost-shifting aspects of that market. Because the courts will defer to Congress's assessment of the rationality of addressing problems in the health care market, the retort that "health care is different" provides no judicially administrable limit on the new power to impose economic mandates on the people. By claiming that "health care is special" and that the unique features of the health care market and existing government regulations justify the individual mandate, the government asks courts to weigh the "more or less necessity or utility" of the new health care law. In doing so, it ignores the unprecedented nature of the individual mandate and, instead, offers a long-discarded method of constitutional interpretation.

Striking down the individual mandate requires no such tortuous calculations, and it would affect no other law ever enacted by Congress. "[T]he task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis)." *Raich*, 545 U.S at 47-48 (O'Connor, J., dissenting). And Congress could have reformed the health care system in any number of ways that may have been better or worse as a matter of policy—

including the adoption of a Medicare-for-Everyone "single payer" scheme—that would have been legally unassailable.

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

The Supreme Court, in two cases presenting then-unprecedented assertions of power under the Commerce Clause, stated that Congress cannot use this power to mandate or "commandeer" state legislatures and executive officers. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). As Justice Scalia 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. In *Printz*, Justice Scalia pointed to the Tenth Amendment as the source of "residual state sovereignty" in a constitutional system that confers upon Congress "not all governmental powers, but only discrete, enumerated ones." *Id.* at 919 (citing U.S. Const. amend. X). He then elaborated that the mandate at issue, even if necessary, 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).

Just as mandating that states take action is improper commandeering, so too is mandating that individual citizens enter into transactions with private companies an improper commandeering of the people. *See generally*, Barnett, *supra*, at 621-34. The Tenth Amendment reads: "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.

Chief Justice John Jay affirmed the priority of popular sovereignty in the first great constitutional case before the Supreme Court, *Chisholm v. Georgia*, noting that the "sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each state," as the people were "truly the sovereigns of the country." 2 U.S. (Dall.) 419, 471-72 (1793). 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) ("in 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.").

Just as the Constitution disallows the "commandeering" of states as a means of regulating interstate commerce, so too does it bar a "commandeering of the people" for this purpose. 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, U.S. Const. amend. III, to testify against themselves, *id*., amend. V, or to labor for another, *id*., amend. XIII.

What very few mandates are imposed on the people by the federal government all rest on the fundamental pre-existing duties that citizens owe that government. Such are the duties to register for the draft and serve in the armed forces if called, to sit on a federal jury, and to file a tax return. *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 claim founded on the Thirteenth Amendment). In the United States, there is not even a duty to vote. So there is certainly no comparable pre-existing "supreme and

noble duty" to engage in economic activity when doing so is convenient to the congressional regulation of interstate commerce.

There are also pragmatic reasons to believe that the individual mandate is not "proper." In *New York v. United States*, Justice O'Connor explained that mandates on states are improper because, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. 144, 169 (1992). That proposition applies to the commandeering of individuals as well: the individual mandate has allowed Congress and the president to escape political accountability for increasing taxes on persons making less than $250,000 per year by compelling them to make payments directly to private companies. It is the evasion of that accountability that explains why the mandate was formulated as a regulatory "requirement" enforced by a monetary "penalty."

The individual mandate crosses a fundamental line between limited constitutional government and limitless power cabined only by the vagaries of political will—which is to say, not cabined at all. If the word "proper" is to be more than dead letter, it at least means 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 in the name of a comprehensive 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 turn "citizens" into "subjects."

CONCLUSION

For the first time in American history, the federal government has attempted to "commandeer the people" by imposing on them an "economic mandate." Such economic mandates cannot be justified by existing Supreme Court doctrines defining and limiting the powers of Congress. Upholding the power to impose economic mandates "would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution limits federal power." Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—and Pose Serious Challenges*, 29 Health Affairs 1229, 1232 (June 2010). It would turn citizens into subjects.

As the district court recognized, "[n]ever before has the Commerce Clause and the associated Necessary and Proper Clause been extended this far." *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 612 (E.D. Va. 2010). Only the Supreme Court is empowered to reconsider the outer bounds of federal power under the Commerce

and Necessary and Proper Clauses, and the district court properly interpreted the existing doctrinal limits in this area. Accordingly, *amici* respectfully request this Court to uphold the district court.

Respectfully submitted this 4th day of April, 2011,

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CERTIFICATE OF COMPLIANCE

1. This memorandum complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5951 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/

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Dated: April 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that, I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing (NEF) to the appropriate counsel.

April 4, 2011

/s/

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