1-1-2011

Kinder v. Geithner - Reply Brief of Appellants

Timothy Geithner
United States Department of the Treasury

No. 11-1973

In the

United States Court of Appeals for the Eighth Circuit

PETER KINDER, MISSOURI LIEUTENANT GOVERNOR; DALE MORRIS; SAMANTHA HILL; JULIE KEATHLEY; and M.K.,

Plaintiffs-Appellants,

v.

TIMOTHY F. GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY; HOLDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL; and KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri- Cape Girardeau in No. 1:10-CV-00101-RWS (Hon. Rodney W. Sippel, U.S. District Judge)

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INTRODUCTION

"Properly formulated, we perceive the question before us to be whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives." *Florida v. HHS*, __ F.3d __, 2011 WL 3519178 at *44 (11th Cir. Aug. 12, 2011). "[W]hat Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die." *Id.*at *66.

So wrote the Eleventh Circuit in declaring the Individual Mandate (26 U.S.C. §5000) to be facially unconstitutional. The Sixth Circuit upheld this Mandate against a facial challenge but allowed for the possibility it would be found unconstitutional in an "as applied" challenge. This case presents that "as applied" challenge to the Individual Mandate.

ARGUMENT

I. Samantha Hill and Peter Kinder have standing to challenge the Individual Mandate.

A. Hill has standing to challenge the Individual Mandate because this law forces her to buy a product she does not want.

The Sixth Circuit noted, "[t]here are two potential theories of injury—'actual' present injury and 'imminent' future injury … " by which standing may be established. *Thomas More Law Center v. Obama,* __ F.3d __, (6th Cir. 2011)

2011 WL 2556039 at *3, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Injury in fact" is established by showing violation of a legally protected interest is actual *or* imminent. *Lujan*, 504 U.S. at 560; *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct."). When the plaintiff is the object of the challenged law, "there is ordinarily little question that the action or inaction has caused him injury." *Lujan*, 504 U.S. at 561-62.

In *Thomas More*, the Sixth Circuit noted:

> In view of the probability, indeed virtual certainty, that the minimum coverage provision will apply to the plaintiffs on January 1, 2014, no function of standing law is advanced by requiring plaintiffs to wait until six months or one year before the effective date to file this lawsuit.

Thomas More at *5.

> [T]he plaintiffs need not do anything to become subject to the Act. That, indeed, is their key theory—that mere "existence" should not be a basis for requiring someone to buy health insurance on the private market. Plaintiffs have standing to bring this claim.

Id. at *6.

Hill alleged, and affirmed in her affidavit, the Individual Mandate applies to her and that she does not want to comply with it. Pls' Br. at 16-29. This Court has

"entertained constitutional challenges where the statute clearly applies to the plaintiff, and the plaintiff has stated a desire not to comply with its mandate." *Gray v. City of Valley Park*, 567 F.3d 976, 987 (8th Cir. 2009).

Hill plead that she is "[an] 'applicable individual,' subject to the Individual Mandate provision of PPACA, which provides that if I fail to meet the individual mandate requirement for more than a month, a penalty is imposed that must be included in my tax return." (JA 195, ¶8, s*ee also* JA 43-45).

Hill declared, "I do not want to purchase any health insurance policy mandated by the PPACA." (JA 196, ¶14). The Individual Mandate "mandates that I purchase a certain health insurance policy which includes coverage I do not want to purchase." (JA 197, ¶16). Hill also stated, "I wish to exercise my legally protected right … to not purchase the health insurance policy mandated by [the Individual Mandate] … " (JA 197, ¶17). And, everyone acknowledges the Individual Mandate applies to Hill.

The government recognizes Hill's "plans for future financial obligations by forgoing spending today," Govt's Br. at 23. These and Hill's many other specific statements in her complaint and affidavit surpass the "relatively modest"[1] standard establishing standing her to challenge a law.

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[1] *Bennett v. Spear*, 520 U.S. 154, 170-71 (1997).

"[G]eneral factual allegations of injury resulting from the defendant's conduct" are sufficient to establish standing at the pleading stage because 'we presume that general allegations embrace those specific facts that are necessary to support [a contested] claim.'" *Constitution Party of South Dakota v. Nelson*, 639 F.3d 417, 420-21 (8th Cir. 2011), *quoting Lujan*, 504 U.S. at 561.

Hill is not required to say she will "forgo a five-year contract on a new car" or "forgo college savings" to establish her standing to challenge this law. *See* Govt's Br. at 22, n.2. Hill's statements that she plans for the future by "foregoing certain spending today so the necessary funds will be available in the future," and that she must know whether she will be assessed the penalty, satisfy the "relatively modest" burden to show "actual" injury from the Individual Mandate.

B. Hill also has standing because the Mandate infringes her rights under the Missouri Freedom Act.

The government claims, "Hill's invocation of the 'Missouri Health Care Freedom Act' … adds nothing to her standing argument." Govt's Br. at 25, n.4. The government's dismissive treatment of the Missouri Freedom Act is amazing.

The Freedom Act was passed by an overwhelming consensus of Missouri voters – Republican and Democrat. Pls' Br. at 32; (JA 432). This law guarantees Hill and other Missourians the right to be free from being forced to buy medical insurance.

When a federal law intrudes upon an area of state sovereignty, individual liberty interests can be infringed. *Bond v. United States*, 564 U.S. ____, 131 S.Ct. 2355 (2011). Far from "add[ing] nothing to her standing argument," the Individual Mandate directly infringes Hill's rights under The Freedom Act.

C. Peter Kinder also established standing to challenge the Individual Mandate.

Standing of only one plaintiff is needed to establish jurisdiction. Thus, since Hill has standing to challenge the Individual Mandate, this Court has jurisdiction. *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006); *Florida at* *3 ("The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim—as is the case here—we need not address whether the remaining plaintiffs have standing.").

But, Kinder also has standing to challenge the constitutionality of the Individual Mandate.

The government claims Kinder "cannot show that the minimum coverage provision is having a 'direct and immediate' impact on his conduct." Govt's Br. at 26. The government is wrong. A "direct and immediate impact" is not the standard. *See Bennett*, 520 U.S. at 170; *Constitution Party of South Dakota*, 639 F.3d at 420-21.

The enforcement of the Mandate is certain to occur in 2014. The very first allegation is that "Peter D. Kinder is a Missouri citizen …" (JA 84, ¶1). As a Missouri citizen, Kinder is subject to the Individual Mandate and its penalties, which infringe on his rights to be free from being forced to purchase a federally mandated health insurance policy. (JA 102, 113, 116, 118, 121, 135-36).

Kinder affirms he is an "applicable person" subject to the Individual Mandate. (JA 187, ¶13). While currently eligible for the state employee health plan, Kinder's eligibility depends on his position as lieutenant governor. This eligibility does not extend beyond his current term in office which ends in January 2013 - one year before Kinder is subject to the Individual Mandate's penalty provisions. (JA 187, ¶¶15-16). *See also Thomas More* at *5 ("The plaintiffs claim a constitutional right to be free of the minimum coverage provision, and the only thing saving them from it at this point is two and a half more years …").

Kinder need only show a realistic danger the Individual Mandate and its penalties would apply to him, which he has done. Kinder thus has standing.

The district court was therefore wrong to deny Hill and Kinder the right to challenge the Individual Mandate.

D. *New Jersey Physicians* does not cure the ills of the government's standing argument.

The government seeks succor from *New Jersey Physicians, Inc. v. President of the United States*, ___ F.3d. ___, 2011 WL 3366340 (3rd Cir. Aug. 3, 2011). Govt's Br. at 25. In *New Jersey Physicians*:

> The only allegations pertaining to any injury in fact suffered by [plaintiff] are as follows: (1) "Roe is a patient . . . who pay[s] himself for his care," and (2) Roe "is a citizen of the State of New Jersey who chooses who and how to pay for the medical care he receives . . . ."

New Jersey Physicians at *4.

That was the sum total of the "Roe" plaintiff's allegations.

Samantha Hill's allegations are nothing like the "Roe" plaintiff in *New Jersey Physicians*. Hill explained in more than two dozen separate allegations (1) why she is subject to the Individual Mandate, (2) why she does not want to comply with it, (3) how she will be assessed a penalty for her non-compliance with it, and (4) how its imposition on her infringes on her constitutionally protected rights. (JA 87-88; 117-18; 120-21; 136). These allegations are further supported by her detailed, sworn statements in her affidavit. (JA 194-98). What more could Hill have said to establish the point that (a) the Individual Mandate applies to her and (b) she does not want to comply with this mandate?

It is not Hill's burden to disprove a negative, *e.g.*, that some unforeseen, speculative happenstance could prevent the Individual Mandate from being enforced against her.

II. Assuming Kinder and Hill have standing, the government does not disagree that this Court should determine whether the Individual Mandate is constitutional.

This Court should address the merits of this constitutional challenge even though the trial court wrongly dismissed the case on standing and did not reach the merits. The government does not dispute this point.

This Court has proceeded to resolve cases on the merits when the issues were "well-developed" and "amenable to review," *U.S. Dept. of Labor v. Rapid Robert's, Inc.*, 130 F.3d 345, 348 (8th Cir. 1997), and where the parties had addressed the legal issues. *Pfoutz v. State Farm Mut. Auto. Ins. Co.*, 861 F.2d 527, 530 n.3 (8th Cir. 1988).

In this case, the constitutionality of the Individual Mandate has been prodigiously briefed by both sides and by the one hundred forty-one amici, which include twenty-one states, *qua* states, in support of the Plaintiffs, eleven states in support of the government, more than one hundred and fifty elected officials from states subject to this Court's jurisdiction, and numerous interest groups.

Remand would only delay an inevitable return to this Court. Any lower court decision on remand would be given no deference on a purely legal issue because questions on the constitutionality of federal statutes are reviewed *de novo*. *United States v. McMasters*, 90 F.3d 1394, 1397 (8th Cir. 1996).

A delay incident to an unnecessary remand would impose a considerable hardship on the parties and also a hardship on citizens and governments of those states subject to this Court's jurisdiction. *See* Brief of Amici Curiae Executive and Legislative Officials Of States Within the Eighth Circuit in Support of Appellants, filed July 18, 2011, pp. 12-22 (asking this Court to resolve this constitutional challenge on its merits).

III. The Individual Mandate exceeds Congress's power under the Commerce Clause.

We turn now to the heart of this case.

Our Constitution empowers Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with Indian Tribes." U.S. CONST. art. I, §8, cl. 3. This clause grants Congress power to "regulate Commerce." It does not grant Congress power to compel otherwise passive individuals to enter commerce and buy a product

The Individual Mandate represents an unprecedented – and unconstitutional - intrusion of the federal government into the lives of American citizens and it lies

beyond the broadest reach of that power granted Congress under the Commerce Clause.

"The government has never required people to buy any good or service as a condition of lawful residence in the United States." *Florida* at *45, *citing* CBO Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994). *See also Thomas More* at *26.

If the Individual Mandate is sustained - as the government argues - Congress has limitless power to force citizens to do or buy anything on the pretext that *not* doing or buying that "thing" affects interstate commerce. As the Eleventh Circuit recognized, the Individual Mandate is premised upon a view of the Commerce Clause that lacks any coherent limiting principle. *Florida* at *66-67.

If this Court accepts the government's argument, the federal government will no longer be the limited government of enumerated powers conceived of by our Founding Fathers. The constitutional "first principle" that those powers granted the federal government are "few and defined," while those remaining in the states are numerous and indefinite, would, for all practical purposes, cease to exist. *United States v. Lopez*, 514 U.S. 549, 552 (1995), *citing* The Federalist No. 45, pp. 292-93; *see also* U.S. CONST., amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Our Constitution withholds from Congress "a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566. (*See also* JA 436-440). Under the government's view, the Commerce Clause is effectively converted into a general police power. *See* Amicus Brief of Missouri Attorney General in *Florida*. (JA 436-440).

A. The Individual Mandate exceeds the outer limits of the Commerce Clause established in modern jurisprudence.

The Supreme Court has never held the Commerce Clause granted Congress power to force someone to enter commerce and purchase a specific federally designated product.

Wickard v. Filburn, 317 U.S. 111 (1942), did not involve a law forcing a farmer to grow wheat; it involved a law regulating how much wheat a farmer grew. *Gonzalez v. Raich*, 545 U.S. 1 (2005), did not involve a law compelling someone to grow marijuana; it involved a law prohibiting those already growing marijuana from doing so. In *Lopez*, the Court held the Commerce Clause did not grant Congress power to prohibit someone from carrying a gun at school. 514 U.S. 549. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court held the Commerce Clause did not grant Congress authority to grant victims of gender-motivated violence a civil remedy because doing so exceeded Congress's power because

"[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."

In all these cases, there was a common denominator – a certain activity was the subject of the challenged law. There is no case which has ever held Congress has the power under the guise of the Commerce Clause to compel an individual who does not desire to participate in commerce to do so or be punished.[2] *See, generally,* Brief of Amici Curiae Texas and Twenty Other States in Support of Appellants, filed July 18, 2011, pp. 3-18.

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[2] Judge Sutton in *Thomas More* sidesteps this important point by redefining the Individual Mandate. In Judge Sutton's view, the Individual Mandate is a regulation of those who pay for their health care through self-insurance. This re-styling of the Individual Mandate is why Judge Sutton upheld the provision. But, he erred because, by its own terms, that is not what §5000 does. Judge Sutton wrongly reframed the Individual Mandate as regulation of "self-insurance" by those already consuming health care. It is not. That is simply not how the law is written.

The mandate and penalty apply monthly. As the government acknowledges, the Individual Mandate "amends the Internal Revenue code to provide that a non-exempted individual who fails to maintain a minimum level of coverage shall pay a *monthly penalty* for so long as he fails to maintain that minimum coverage." Govt's Br. at 38 (emphasis supplied). Judge Sutton's presupposition that the Individual Mandate applies to those actively participating in the health care market is not correct. As written, the Individual Mandate applies monthly to Hill and Kinder regardless of whether they are receiving health care or not, *i.e.,* irrespective of whether they are "participants in the health care market."

The government never explains how "not having insurance" is any different than "not having a GM Volt" or "not having a house" or "not having a gun." *See Florida* at *44.

The government contends *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 222 (1938), held "[t]he Supreme Court has long rejected the contention that the commerce power cannot be exercised until after the harm to commerce takes place." Govt's Br. at 39.

Frankly, so what? This misses the point. In every Commerce Clause case, the Supreme Court has always focused on an activity as a predicate for Congress to exercise its regulatory authority. Never has the Supreme Court held Congress can compel an activity on the pretext that the absence of that activity substantially affects interstate commerce.

Consolidated Edison involved "reasonable preventive measures" to block unfair labor practices interfering with the right to form and join labor unions. Before upholding the law, the Supreme Court detailed the activities of the regulated utilities, including supplying electricity to railroads, ports, piers, telegraph and telephone companies, radio companies, an air field, and federal government operations. 305 U.S. at 220-21. "It cannot be doubted that these activities, while conducted within the State, are matters of federal concern." *Id.* at

221. Consolidated Edison, a large national utility company selling electricity, was clearly and obviously engaged in an interstate activity – selling electricity.

The desire of Samantha Hill and Peter Kinder to not buy a federally-mandated insurance policy bears no resemblance to Consolidated Edison selling electricity. *See Florida* at *50 n.100 (describing why *Consolidated Edison* is "wholly inapposite").

The government's reference to a federal law requiring motor carriers operating in interstate transportation to have insurance further illustrates how the government misperceives this issue. *See* Govt's Br. at 40 (referencing 49 U.S.C. §13906(a)).

The law the government cites regulates trucking companies already operating trucks in interstate commerce. This law is regulation of the "instrumentalities" in interstate commerce (i.e., trucks). It is not the third category of activities that "substantially affect" interstate commerce. The truck insurance law is, thus, inapposite to the Individual Mandate which is premised upon an extension of the "substantially affects interstate commerce" doctrine.

Unlike the interstate truck insurance law, the Eleventh Circuit considered the more analogous National Flood Insurance Act of 1968 as an apt illustration of how

Congress has traditionally (and constitutionally) sought to encourage commercial activity it favors. *Florida* at *46.

Congress recognized the substantial cost of flood-related losses. But, Congress did not require everyone with a house in a flood plain to buy flood insurance. Instead, Congress created incentives to encourage voluntary purchase of flood insurance. "[D]espite the unpredictability of flooding, the inevitability that floods will strike flood plains, and the cost shifting inherent in uninsured property owners seeking disaster relief funds, Congress has never taken the obvious and expedient step of invoking the power the government now argues it has and forcing all property owners in flood plains to purchase insurance." *Id.*

This contrast with the Flood Insurance Program demonstrates how the Individual Mandate compelling commercial activity is truly unprecedented. In passing this law, the 111th Congress has gone where no Congress has gone before, compelling otherwise inactive individuals to enter commerce and buy a federally mandated product.

B. Congressional "findings" do not cure the Individual Mandate's constitutional infirmities.

The government claims that because Congress said it was regulating activity that substantially affected interstate commerce, it must be so. Govt's Br. at 28-30.

The Supreme Court in *Morrison* anticipated this argument and warned us that Congress might try to use the Commerce Clause to "completely obliterate the Constitution's distinction between national and local authority." 529 U.S. at 615.

> [T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez,* "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" [citations] Rather, "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'"

Id. at 614 (internal citations omitted).

The Individual Mandate is even less viable than the law in *Morrison*. Here, Congress is trying to regulate the *absence* of activity based solely on that non-activity's supposed effect on interstate commerce. If regulating non-economic *activity* undermined the constitutionality of legislation in *Lopez* and *Morrison*, regulating non-activity would as well.

The government's "cost-shifting" argument does not change the analysis. Govt's Br. at 29. The Supreme Court has already rejected "cost-shifting" arguments made to defend laws that exceed Commerce Clause power. *Lopez*, 514 U.S. at 563-64; *Morrison*, 529 U.S. at 615.

"The wholesale deference the government would have us apply here cannot be squared with the Supreme Court's decisions in *Morrison* and *Lopez*. . . . It is highly instructive that the *Lopez* and *Morrison* Courts rejected a similar cost-shifting theory now propounded by the government." *Florida* at *56.

The government's timing and cost-shifting would apply equally to a law requiring every person to buy a coffin – or pre-paid funeral policy – simply because we will all one day die. Such a requirement would not pass constitutional muster, and neither does the Individual Mandate.

Similarly, Congress's "goals" are irrelevant to the constitutionality of the Individual Mandate.

"Plaintiffs support the laudable goal of assuring that every Missourian—and American—enjoy access to quality health care. Plaintiffs bring this case, however, because it is necessary that legislation seeking this objective be consistent with their rights under the United States and Missouri Constitutions." (JA 83).

It simply does not matter what Congress hoped to accomplish if it did so in violation of its constitutional authority. The Supreme Court explained how even lofty motives can be "insidious."

> The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or

> the harm which will come from breaking down recognized standards.

Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 (1922). See *also Florida* at *67, *citing New York v. United States*, 505 U.S. 144, 178 (1992), for the proposition "'[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority' to supersede its constitutionally imposed boundaries." (internal citations omitted).

The Eleventh Circuit explained how, in making this argument, the government skipped "important analytical steps." *Florida* at *55. In particular, courts must "examine whether the link between the regulated activity and interstate commerce is too attenuated, lest there be no discernible stopping point to Congress's commerce power." *Id.*

To hold this law – which forces Hill and Kinder to buy a specific insurance policy – as constitutional would eliminate any "discernible stopping point to Congress's commerce power" and would be a *de facto* recognition of a general federal police power. *Florida* at *55.

C. An unconstitutional act of Congress, like the Individual Mandate, is made no less unconstitutional by embedding it in a "larger regulatory scheme" or claiming it was adopted because there is a "crisis."

The government seems to believe that by attaching the label "crisis" to legislation, Congress can act beyond its constitutional limits. The government uses the word "crisis" throughout its brief to describe the "health care market."[3] For example, "[i]n responding to the *crisis* in the health care market, Congress confronted a market different from any other." Govt's Br. at 3 (emphasis supplied).

The government then contends the Individual Mandate is constitutional because it is "integral to broader economic regulation" adopted to meet this "crisis." Govt's Br. at 32. The government claims by imbedding the Individual Mandate in a "larger regulatory scheme" Congress made it constitutional.

The Eleventh Circuit considered the government's "larger regulatory scheme" argument at length and found it flawed:

> [T]he mere placement of a particular regulation in a broader regulatory scheme does not, *ipso facto*, somehow render that regulation essential to that scheme. It would be nonsensical to suggest that, in announcing its 'larger

[3] The current Administration has also declared all of the following (and more) situations to be a "crisis:" "swine flu crisis," "housing crisis," "banking crisis," "global warming crisis," "Gulf oil-spill crisis," "jobs crisis," and, most recently, the "Hurricane Irene crisis."

> regulatory scheme' doctrine, the Supreme Court gave Congress *carte blanche* to enact unconstitutional regulations so long as such enactments were part of a broader, comprehensive regulatory scheme. … Such a reading would eviscerate the Constitution's enumeration of powers and vest Congress with a general police power."

Florida at *64.

The government's discussion of state laws on emergency care (Govt's Br. at 42, n.6) only highlights how the Individual Mandate violates the fundamental principles of federalism. Traditionally, states have regulated health insurance pursuant to their police power. How states exercise their police power does nothing to change the fact that Congress does not have a general police power. *See Morrison*, 529 U.S. at 618 n.8 ("[T]he Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."); *id.* at 618-19, *citing Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring) (The Supreme Court has "always [] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.") (emphasis in original).

The government wrongly tries to shift to Hill and Kinder a burden to "identify a preferable regulatory alternative . . . ." Govt's Br. at 43. It is not Plaintiffs' responsibility to help Congress reform the nation's health care as a

precondition to challenging an unconstitutional law. Rather, it is Congress's responsibility to act within its constitutionally limited authority when it writes legislation.

D. The Necessary & Proper Clause is not an independent grant of power to Congress and it does not make the otherwise unconstitutional Individual Mandate constitutional.

Chief Justice John Marshall famously wrote, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

The "end" Congress sought with the Individual Mandate was to force Hill and Kinder to buy a specific – and expensive – insurance policy from a private company. So, is this end "legitimate"? Is this end "within the scope of the Constitution"? We think not. *See* Brief of Amici Curiae Texas and Twenty Other States, filed July 18, 2011, pp. 20-25 ("The lack of any limiting principle on this power and the reality that it amounts to a federal police power vitiates any reliance on the Necessary and Proper Clause." (*Id.* at p. 25)).

The "means" by which Congress sought to accomplish this "end" is the provision of the Individual Mandate that imposes a significant financial penalty on

Hill and Kinder for every month in which they have not purchased a federally mandated insurance policy. So, we ask, is this penalty imposed on Hill and Kinder "not prohibited" by the Constitution, and is this penalty consistent "with the letter and spirit of the Constitution"? Again, we think not. It is prohibited because it is an unconstitutional exaction (*See* Plf's Br. at 64-67). And, it is contrary to the letter and spirit of the Constitution. It is inconceivable the Founding Fathers assembled in Constitution Hall believed the Constitution they drafted granted Congress authority to force individuals to purchase a federally defined insurance policy.

The government seeks support from Justice Scalia's concurring opinion in *Raich* to argue Congress has "every power" to make certain regulations effective. Govt's Br. at 33. But the government conveniently omits the preceding sentences which reveal that *activities* are required:

> Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "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. This statement referred to those cases permitting the regulation of ***intrastate activities*** "which in a substantial way interfere with or obstruct the exercise of the granted power."

545 U.S. at 36 (Scalia, J., concurring) (emphasis added). There thus must still be some *activity* which is "regulated."

The most recent interpretation of the Necessary and Proper Clause was in *United States v. Comstock*, 560 U.S. ___, 130 S.Ct. 1949 (2010). The government made only passing reference to this case, failed to address any of the relevant factors, and did not dispute Plaintiffs' discussion of why *Comstock* undermines any justification of the Individual Mandate under the Necessary and Proper Clause. *Compare* Govt's Br. at 27, 39, 42 with Pls' Br. at 61-63.

In particular, the government does not rebut that the majority of the *Comstock* factors – particularly the Mandate's excessively broad scope, its conflict with state interests, and a lack of long-standing federal regulation in insurance – undermine any justification of the Individual Mandate.[4] Pls' Br. at 61-63. In short, *Comstock* provides the court no basis to uphold the Individual Mandate under the Necessary and Proper Clause.

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[4] The government makes much of *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944). In this case, the subject of the regulation was "interstate [fire] insurance companies" that conducted activities "back and forth across state lines." *Id.* at 545. The Court explained why these *companies* could be regulated, noting the extensive communications, payments, and "continuous and indivisible stream of intercourse" among the states. *Id.* at 541-42.

The government cannot honestly claim a case upholding regulation of multi-state insurance companies transacting business "back and forth across state lines" is precedent to support the federal government forcing unwilling individual state residents to enter commerce and buy a product they do not want.

The government's recourse to *United States v. Howell*, 552 F.3d 709 (8th Cir. 2009), does not support its argument. Govt's Br. at 46. In *Howell*, "Congress was focused on the interstate movement of sex offenders, not the intrastate activity of sex offenders." 552 F.3d at 716. This Court also noted how "Congress limited the enforcement of the registration requirement to only those sex offenders who were either convicted of a federal sex offense or who move in interstate commerce." *Id.* "Instead of creating a federal crime for failure to register regardless of interstate movement, Congress understood its limited interstate commerce power and reserved prosecution of wholly intrastate offenders to the states." *Id.*

E. The government reads Judge Sutton's concurrence too broadly.

The government claims Plaintiffs must show that under "no set of circumstances" would the Individual Mandate be valid. Govt's Br. at 47-48. The government is wrong.

This case is a challenge to the Individual Mandate "as it applies" to Hill and Kinder. The challenge in *Thomas More* and *Florida* was a facial challenge. While the Eleventh Circuit declared the Individual Mandate to be facially unconstitutional, the Sixth Circuit upheld the Individual Mandate. But, as Judge

Sutton noted, the Sixth Circuit expressly left open the possibility the Individual Mandate would be unconstitutional "as applied."

> The nature of this challenge – a pre-enforcement facial attack on the individual mandate in all of its settings, as opposed to just some of them – favors the government. In most constitutional cases, the claimant challenges the constitutionality of a statute "as applied" to specific parties and circumstances. That is 'the preferred route…'
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> * * *
>
> [N]othing about this view of the case precludes individuals from bringing as-applied challenges to the mandate as the relevant agencies implement it, and as the "lessons taught by the particular," prove (or disprove) that congress crossed a constitutional line in imposing this unprecedented requirement. Just as courts should refrain from needlessly pre-judging the *invalidity* of a law's many applications, they should refrain from doing the same with respect to their *validity*.

Thomas More at *23, 33 (emphasis in original).

This case is such an "as applied" challenge. And, as applied to Kinder and Hill, the Individual Mandate is unconstitutional.

F. The "health care is different" argument has no constitutional significance.

The government claims "health care is different." But, this "health care is different" argument lacks any constitutional significance. The government wants this Court to carve out a separate constitutional standard governing legislation concerning "health care." Our Constitution provides no basis upon which to

premise such a separate constitutional standard because health care is "different." As the Eleventh Circuit noted:

> Even in the face of a Great Depression, a World War, a Cold War, recessions, oil shocks, inflation, and unemployment, Congress never sought to require the purchase of wheat or war bonds, force a higher savings rate or greater consumption of American goods, or require every American to purchase a more fuel efficient vehicle.

Florida at *46.

The Constitution speaks of post offices, post roads, and military forces. But, there is no mention of health care. If the drafters had shared the government's present sentiment that "health care is different," such a provision could have been included in the Constitution (or could have been added by subsequent amendment). It was not.

The lack of historical precedent for the Individual Mandate highlights its constitutional defects. *Florida* at *46-47, *citing Printz v. United States*, 521 U.S. 898, 905, 907-08 (1997) ("[T]he utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.") (emphasis in original); *see also Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. __, 131 S.Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity."). And, "[I]f

... earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist." *Printz*, 521 U.S. at 905.

The government cannot exceed its constitutional authority to "regulate commerce" and compel Hill and Kinder to enter commerce and buy a product simply because "health care is different." The only thing "different" about the Individual Mandate is Congress's attempt to force unwilling individuals to be conscripted health insurance consumers.

Finally, the government insults the motives of those challenging the Individual Mandate: "[S]tripped of rhetorical excess, the practical right that plaintiffs seek to vindicate is the ability to consume health care services without insurance and to pass costs on to other market participants." Govt's Br. at 50. This demeaning quip presupposes Hill and Kinder seek to pass costs of their health care to others. Not so. Rather, Kinder and Hill do not want Congress to force them to buy an insurance policy for services they will never use. To wit: substance-abuse treatment and other such services.

IV. The Individual Mandate is not a "tax," and if it were, it would be an unconstitutional un-apportioned direct tax.

No court has accepted the government's tax-power argument. The Eleventh Circuit found *all* federal courts considering the government's taxing power argument have ruled against it "with clarion uniformity." *Florida* at *68. "[A]ll

have found, without exception, that the individual mandate operates as a regulatory penalty, not a tax." *Id.* (internal citations omitted).

So far, both appellate panels to have considered the constitutionality of the Individual Mandate soundly rejected the government's taxing power argument. The Eleventh Circuit held:

> The plain language of the statute and well-settled principles of statutory construction overwhelmingly establish that the individual mandate is not a tax, but rather a penalty. . . .The government would have us ignore all of this and instead hold that any provision found in the Internal Revenue Code that will produce revenue may be characterized as a tax. This we are unwilling to do.

Florida at *69. *See also id.*, at *83 n.1 (Marcus, J., concurring).

The Sixth Circuit identically held:

> At the end of the day, this penalty is not a "Tax[ ]" under Article I of the Constitution, and Congress's taxing power thus cannot sustain it.

Thomas More at *21. *See also id.* *34 (Graham, J., concurring in part) ("I concur with … Judge Sutton's opinion that the challenged statute is not an exercise of Congress's taxing power.").[5]

[5] The third judge declined to address the issue. *Id.* at *16 (Martin, J.) (declining to address "whether the provision could also be sustained as a proper exercise of Congress's power to tax and spend . . . .").

The *penalties* imposed on those who violate the Individual Mandate are decidedly *not* a "tax." *See* Pls' Br. at 66. Even if the penalties imposed on Kinder and Hill could be considered a "tax" (which they cannot), they are unconstitutional as an un-apportioned direct tax. *See* Pls' Br. at 64-65.

In sum, the "shared responsibility penalties" are just that: penalties. They are not a "tax." The government's argument that the Individual Mandate is a "tax" is without merit.

V. The Individual Mandate violates the right Missouri citizens enjoy under The Freedom Act.

Kinder and Hill are Missouri citizens. Under Missouri law they enjoy the right to decide – free from governmental coercion – whether or not to buy medical insurance and what medical insurance to buy. The Freedom Act was passed overwhelmingly by Missouri voters and provides "[n]o law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system." R.S.Mo. §1.330 (2010); Pls' Br. at 29-33; 67-68.

As the Eleventh Circuit noted, "it is undisputed that the Individual Mandate supersedes a multitude of states' policy choices in these areas of traditional state concern." *Florida* at *61. Missouri citizens acted consistent with this when they adopted The Freedom Act. But, the government is tone deaf to this central

principle of federalism and disregards the state-federal balance enshrined in the Constitution.

The Supremacy Clause does not apply because the presumption is that historic police powers of the States are not superseded by a federal act unless that is the clear and manifest purpose of Congress. *Id.* at 67, *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Moreover, the Supremacy Clause is construed narrowly in light of the presumption against pre-emption of state police power regulations. *Id., citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

The Supreme Court recently reaffirmed this point in *Bond*. "The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State." 131 S.Ct. at 2363-64. "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." *Id.* "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power

cannot direct or control their actions." *Id.* at 2364. "When government acts in excess of its lawful powers, that liberty is at stake." *Id.*

The Individual Mandate infringes on precisely this fundamental principle of state-federal balance enshrined in the Constitution. The requirement that these Missouri citizens buy a federally defined health-insurance policy violates their right under The Freedom Act to be free from such governmental intrusion into their personal health care decisions.

CONCLUSION

Congress could have constitutionally addressed a perceived "crisis" in health care. However, the means by which Congress chose to address this "crisis" exceeded its constitutional authority.

When Congress exceeds its constitutional authority – as it did by imposing the Individual Mandate on Kinder and Hill - it is rightly the role of this Court to overturn such a law.

Accordingly, this Court should reverse the district court's decision on standing (finding that Hill and Kinder to whom the Individual Mandate applies have standing to challenge the law) and proceed to hold that, under the clear text of our Constitution and the Supreme Court's Commerce Clause jurisprudence, the Individual Mandate is unconstitutional.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and Circuit Rule 25A(a), I hereby certify that on the 30th day of August 2011, I caused the foregoing brief to be filed with the Clerk of the Court through the Court's CM/ECF system, which will serve electronic copies on all registered counsel.

/s/ Mark F. ("Thor") Hearne, II
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The textual portion of the foregoing brief (exclusive of the tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,698 words as determined by the word counting feature of Microsoft Word. The font used is Times New Roman at 14-point type.

Under 8th Circuit Rule 28A(h), I also certify that the Brief and accompanying Addendum have been scanned for viruses and are virus-free.

Dated: August 30, 2011

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