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# Goudy-Bachman v. HHS - U.S. Response to Supplemental Brief

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constitutional principles that must undergird any decision on the constitutional status of the individual mandate.

The United States Court of Appeals for the Eleventh Circuit held, in an opinion issued in the appeal of *Florida v. Department of Health and Human Services*, \_\_\_ F.3d \_\_\_, 2011 WL 3519178, that the individual health insurance mandate imposed by the Affordable Care Act (hereinafter the “Act”) exceeds Congress’s power under the Commerce and Necessary and Proper Clauses of the United States Constitution. The Court’s scholarly and precedent based analysis (in stark contrast to large swaths of the 6<sup>th</sup> Circuit’s majority opinion) comprehensively rejected the government’s demand that Congress be granted a constitutional “mulligan” to exercise a generalized police power to compel market participation by virtually every resident within the United States to purchase an expensive health insurance product from January 2014 until the day they die. Nothing in defendants’ briefing or argument offer any basis for this Court to reject keys portions of the Eleventh Circuit’s expansive and landmark opinion.

As plaintiffs have consistently argued, the majority opinion recognized “two overarching considerations within the Supreme Court’s Commerce Clause jurisprudence: (1) preserving the federal-state balance; and (2) withholding from Congress a general police power.” Op. at p. 168; citing *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *United States v. Lopez*, 514 U.S. 549, 566-68 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). “These concerns undergird the Constitution’s dual sovereignty structure, ensuring that the federal government remains a government of enumerated powers.” Op. at p. 168. The Court recognized that:

“We cannot ignore these structural limits on the Commerce Clause because of the seriousness and intractability of the problem Congress sought to resolve in the Act. The Supreme Court has often found itself forced to strike down congressional enactments even when the law is designed to address particularly difficult and universally acknowledged problems....The fact that constitutional tools sometimes ‘prove insufficient[] cannot validate an otherwise unconstitutional device’ because ‘the Constitution’s structure requires a stability which transcends the convenience of the moment.”

Op. at pp. 169-70; citing *Clinton v. City of New York*, 524 U.S. 417, 453 (1998). Accordingly, the Eleventh Circuit's opinion provides this Court a compelling analysis to support the Court's ruling that the individual health insurance mandate imposed by the Act is unconstitutional.

However, in ruling that the individual mandate is unconstitutional, the Eleventh Circuit failed to sever the other insurance related provisions from the Act. If this Court finds the individual health insurance mandate unconstitutional the parties to this action agree that this Court should also sever the other insurance related provisions (especially the community rating and pre-existing coverage mandate) contained in the Act. This Court has the unique opportunity to be the first to establish the proper severance analysis in this case.

## I. ARGUMENT

### A. **The Individual Mandate Exceeds the Outer Boundary of Congress's Commerce Clause Power**

Recognizing that the Supreme Court's Commerce Clause jurisprudence is limited to addressing congressional efforts to regulate "pre-existing chosen classes of activity" the Court was "not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive answer in this case" and moves, instead, to focus on the subject matter Congress seeks to regulate in the Act. Op. at p. 109. The Court determined, that while the decision not to purchase health insurance is a "financial decision that has more of an economic patina than the gun possession in *Lopez* or the gender-motivated violence in *Morrison*" the subject matter sought to be regulated by the individual mandate "cannot be neatly classified under either the 'economic activity' or 'noneconomic activity' headings." Op. at pp. 110-11. The Court reasons that the Supreme Court's reluctance to adopt a mechanistic Commerce Clause test is "animated by one overarching goal: to provide courts with meaningful, judicially administrable limiting principles by which to assess Congress's exercise of Commerce Clause power." Op. at p. 112. Judges Dubina and Hull

determine that classification of the status of the uninsured is not necessary to determine that the individual mandate is an unconstitutional exercise of the commerce power because the Supreme Court has warned:

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

Op. at pp. 101-02; *citing NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). The Court determined the individual mandate exceeds the outer bounds of Congress’s commerce power because: (1) the unprecedented nature of the individual mandate; (2) the individual mandate fails to provide a meaningful limitation on Congress’s exercise of its commerce authority; and (3) the individual mandate’s threat to undermine or supplant the federal structure of dual sovereigns necessary to defend liberty.

The Eleventh Circuit’s analysis is consistent with plaintiffs’ argument to this Court that, without regard to any impact the uninsured’s financial decisions may have on interstate commerce in the future, there is an ultimate cap or outer boundary placed by the Supreme Court on the commerce power. The broad exercise of an unbounded police power under the Commerce Clause is, without more, an unconstitutional exercise of the enumerated power. The actor’s activity/inactivity is not the issue – the issue is that Congress is itself seeking to compel action where none already exists which is a quintessential exercise of police power withheld from Congress by the states.

**B. Economic Decisions Are Not Amenable to Aggregation**

The majority opinion explains: “Aggregation may suffice to bring otherwise non-regulable, ‘trivial’ instances of intrastate activity within Congress’s reach if the cumulative effect of this class of activity (i.e., the intrastate activity ‘taken together with that of many others similarly situated’) substantially affects interstate commerce.” Op. at p. 123, *citing Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). The majority then notes that the Supreme Court declined in *Morrison* and *Lopez* to apply aggregation to the noneconomic

activity at issue, “reasoning that ‘in every case where we have sustained federal regulation under the aggregation principle in [*Wickard*], the regulated activity was of an apparent commercial character.” Op. at p. 124, citing *Morrison*, 529 U.S. at 611 n.4. The majority concluded:

“Applying aggregation principles to an individual’s decision not to purchase a product would expand the substantial effects doctrine to one of unlimited scope....any...decision not to purchase a good would, when aggregated, substantially affect interstate commerce in that good. From a doctrinal standpoint, we see no way to cabin the government’s theory only to decisions not to purchase health insurance.”

Op. at pp. 124-25.

**C. Congress’s Unprecedented Assertion of Power**

The Eleventh Circuit’s opinion addresses one of the key arguments against the individual mandate: that it represents an attempt by Congress to regulate economic inactivity, the *decision* not to purchase health insurance from the private insurance market. In addressing this nettlesome issue which has tied other court’s up in knots, Judges Dubina and Hull pivot to a broader point: that whether or not the *decision* to opt out of the private health insurance market is or is not economic activity sufficient to trigger Congress’s commerce power, there can be no doubt that the individual mandate represents an unprecedented assertion of federal power. “The Supreme Court,” they explain, “has always described the commerce power as operating on already existing and ongoing activity,” but:

“the Court has never expressly held that activity is a precondition for Congress’s ability to regulate commerce – perhaps, in part, because it has never been faced with the type of regulation at issue here....What the Court has never done is interpret the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate.”

Op. at pp. 109-115.

This Court has the opportunity to expand this point further to make clear that even for those engaged in obvious and open commerce, neither Congress nor the Court have ever applied the Commerce Clause to allow Congress to impose a mandate that those engaged in commerce must continue to make those financial decisions in the future. In America (unlike other nations with command economies), those who choose to

engage in commerce always have the option to quit commercial intercourse when they see fit. No proper reading of any Commerce Clause case has ever authorized Congress to force those who have engaged in commerce to continue such conduct for the rest of their lives.<sup>1</sup> If the foregoing is true, decisions not to enter a market are even further removed from the commerce power. The Eleventh Circuit makes it clear that, no matter how financial decisions or choices are classified (as either activity or non-activity), Congress does not have the power to dictate to the rest of the country which financial decisions they must make.

Judges Dubina and Hull note that in 1994 when the individual mandate was first considered by Congress, the Congressional Budget Office stated that a “mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action...[Congress] has never required people to buy any good or service as a condition of lawful residence in the United States.” Op. at p. 115. The majority opinion then properly instructs:

“[t]he fact that Congress has never before exercised this supposed authority is telling (though not dispositive)...Few powers, if any, could be more attractive to Congress than compelling the purchase of certain products. Yet even if we focus on the modern era, when congressional power under the Commerce Clause has been at its height, Congress still has not asserted this authority. 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 (even by Mr. Filburn) 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.”

Op. at pp. 116-17.

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<sup>1</sup> Plaintiffs’ counsel made this exact point (though, in a less artful manner) at oral argument. A consumer that purchases a light bulb (an admitted act of commerce) does not place himself under eternal Commerce Clause jurisdiction. Congress cannot tether the decision to engage in commerce to an unending power to command that individual to make such purchases for the rest of their lives. If Congress lacks this power over an individual that made an economic decision to actually enter a commercial market to engage in a commercial act, then Congress’s power to impose the individual mandate on those who have made a financial decision not to enter a commercial market is even further removed from a valid exercise of the commerce power.

By further way of example, the majority opinion notes an analogous “free-rider” problem addressed by the government with flood disasters. Despite the fact that Washington has spent large sums of money on flood disaster relief:

“Congress did not require everyone who owns a home in a flood plain to purchase flood insurance. In fact, Congress did not even require anyone who chooses to build a new house in a flood plain to buy insurance. Rather, Congress created a series of incentives designed to encourage voluntary purchase of flood insurance....without an ‘individual mandate,’ the flood insurance program has largely been a failure.”

Op. at p. 118. Despite the long-standing and intractable policy failures on the issue of flood relief, Congress never sought to claim the attractive power to mandate the purchase of flood insurance to accomplish an important policy objective.

The majority opinion also addresses a critical point of interrogation between this Court and defendants’ counsel at oral argument – that the government’s argument that the uninsured are “in the market” is based on future contingent commercial transactions that the presently uninsured might seek uncompensated care in the future. Op. at p. 146. The government’s commerce power argument is tethered to a contingent factual nexus never before supported under Commerce Clause jurisprudence. First, on this point, the majority opinion explains:

“prior Commerce Clause cases all deal with already-existing activity – not the mere *possibility* of *future* activity....However, the premise of the government’s position – that most people will, *at some point in the future*, consume health care – reveals that the individual mandate is even further removed from traditional exercises of Congress’s commerce power.”

Op. at pp. 128-29. The majority then explains: “Although health care consumption is pervasive, the plaintiffs correctly note that participation in the market for health care is far less inevitable than participation in markets for basic necessities like food and clothing.” Op. at p. 129, n.99. The Supreme Court has “never had to address any temporal aspects of congressional regulation. However, the premise of the government’s position – that most people will, at some point in the future, consume health care – reveals that the



individual mandate is even further removed from traditional exercises of Congress's commerce power."

Op. at p. 129.

**D. The Government's Fabricated and False Cost-Shifting Rational for the Mandate**

Judges Dubina and Hull then do what no prior court has done – they take the time to examine the assertion that the individual mandate is necessary to solve the mythical "free-rider problem," wherein the uninsured obtain free care through hospital emergency rooms shifting the cost of their care to society. The majority makes the key point, so rarely made, but one made by plaintiffs in this case (supported, in fact, by plaintiffs' pleadings), that many individuals who go without insurance do pay for their own health care. Data show the uninsured paid on average 37% of their health care costs out of pocket in 2007, and 46.01% in 2008, while third parties pay another 26% on their behalf. Indeed, 39% of the uninsured have incomes above \$50,000 a year with the median income level in 2000 was \$41,214.

"In this regard, the individual mandate's attempt to reduce the number of uninsureds and correct the cost shifting problem is woefully overinclusive. The language of the mandate is not tied to those who do not pay for a portion of their health care. Rather, the language of the mandate is unlimited, and covers even those who do not enter the health care market at all."

Op. at p. 127.

More importantly, the majority correctly point out that the mandate *exempts* the population most likely to seek uncompensated care. Of the \$43 billion a year in uncompensated care, 19% (\$8.1 billion) is consumed by illegal aliens and other non-residents who are not subject to the mandate. Op. at p. 139. Another \$15 billion, or 35% of the total, is consumed by low-income individuals who are either covered by the Medicaid expansion or exempted from the mandate because of their income level. *Id.* An additional 20% (\$8.7 billion) of uncompensated care are thought to be uninsured because of pre-existing conditions, which the Act intends to cover by a separate mandate on the insurance industry. Op. at p. 140. Another \$3.3 billion, or 8%, of uncompensated care is given to people who actually have insurance, but who refuse

to pay their out-of-pocket costs. In total \$35.1 billion of the \$43 billion in uncompensated care – 82% of the total – goes to individuals who are not subject to the individual mandate (excluding overlaps). *Id.*

In a \$2.5 trillion health care market, the \$7.9 billion of uncompensated care that the individual mandate might actually reach is a paltry 0.316% of the entire health care market. *See* 42 U.S.C. §18091(a)(2)(B). The Commerce Clause threshold standard, of course, is a “substantial effect” on interstate commerce. Plaintiffs would strongly suggest to this Court that subject matter (especially mere economic decisions) having a mere 0.316% effect on an interstate market does not satisfy the substantial effect test established by the Supreme Court.

Judges Dubina and Hull further explain that: “To the extent the data show anything, the data demonstrate that the cost-shifters are largely persons who either: (1) are exempted from the mandate, (2) are exempted from the mandate’s penalty [because of unaffordable premiums], or (3) are now covered by the Act’s Medicaid expansion.” *Op.* at p. 139. The Eleventh Circuit then, for the first time in any court opinion, call the government’s bluff (and what plaintiffs in this case have advanced from the start):

“In reality, the primary persons regulated by the individual mandate are not cost-shifters but healthy individuals who [temporarily] forgo purchasing insurance....Congress sought to mitigate its reforms’ regulatory costs on private insurers by compelling healthy Americans outside the insurance market to enter the private insurance market and buy the insurers’ products. This starkly evinces how the Act is forcing market entry by those outside the market.”

*Op.* at pp. 140-41.

Plaintiffs additionally advance to this Court that the decision of a 25 year old to forego costly health insurance (\$3,000 to \$4,000 per annum) is a rational economic choice – a choice that he/she ought to be allowed to make without congressional dictate. Those in their mid-20s and early 30’s are just starting out in life and there are many other more compelling financial expenses the young need to make in order to become fully functioning citizens – in fact we as a society want them (and need them) to make these initial expenditure decisions to get their own lives on track. Education, transportation, housing and the process of

finding a mate and marriage are far more pressing and important financial decisions than the purchase of health insurance that, in most cases, will go unused (and, in fact, because health care resources are scarce, we don't really want to expend them on the young and healthy lest the costs for the elderly and sick go up even further). In this way, market forces are the best mechanisms to guide the young on when to decide to make secondarily important purchases such as health insurance. Further, even in the relatively rare situation that such a young uninsured does become sick and become a cost-shifter, the cost-shifting is a lesser economic burden on society as a whole than the macro-economic costs associated with forcing an entire generation to ration other essential expenditures that need to be made early in life to get that individual economically on track to become productive taxpayers and citizens. Do we really, as a society, want young individuals to forgo or delay: education, advancement of their career, procreation within marriage, or the purchase of a house – all at the altar that they must purchase an expensive health insurance product because some of them might shift some of their health care costs onto society (and so that the radical left can check-off one of their long sought after agenda items that they have propagandized is necessary in any advanced society). Congress (and more particularly the Left) have already mortgaged the future of the young to the tune of \$14.9 trillion dollars (and counting – rapidly), Congress has raided their social security with little hope that there will be anything left for them when they retire. Now, Congress, through the individual mandate, seek to commandeer their meager youthful resources and mortgage or delay their near term opportunities to pay for yet another expensive social program (the pre-existing coverage mandate) by forcing them into an insurance market they don't need or want to enter. This is not the purpose of the Commerce Clause. Such enactments are only proper under the Taxing and Spending Clauses of the United States Constitution.

The majority opinion also ruled that purchasing health insurance is not the same thing as purchasing health care.

“The individual mandate does not regulate behavior at the point of consumption. Indeed, the language of the individual mandate does not truly regulate ‘how and when health care is paid for’...It does not even require those who consume health care to pay for it with insurance when doing so. Instead, the language of the individual mandate in fact regulates a related, but different, subject matter: ‘when health insurance is purchased’...If an individual’s participation in the health care market is uncertain, their participation in the insurance market is even more so.”

Op. at p. 130. “In sum,” the majority concludes:

“the individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so). It is overinclusive in when it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future. The government’s position amounts to an argument that the mere fact of an individual’s existence substantially affects interstate commerce, and therefore Congress may regulate *them* at every point of their lives. This theory affords no limiting principles in which to confine Congress’s enumerated power.”

Op. at 130-31.

And, of course, as plaintiffs have argued throughout, the Supreme Court has expressly rejected cost-shifting analysis as “unworkable if we are to maintain the Constitution’s enumeration of powers.” Op. at p. 143-46, *citing Morrison*, 529 U.S. at 615. Specifically, the majority notes that virtually all insurance entail decisions about timing and planning for unpredictable events with high associated costs:

“insurance protecting against loss of life, disability from employment, business interruption, theft, flood, tornado, and other natural disasters, long-term nursing care requirements, and burial costs. Under the government’s proposed limiting principles, there is no reason why Congress could not similarly compel Americans to insure against any number of unforeseeable but serious risks.”

Op. at p. 133.

**E. Eleventh Circuit Exposes the “Heath Care is Unique” Canard**

The majority opinion does an excellent job of exposing the constitutional irrelevance of the government’s argument that the individual mandate is necessary because health care is somehow unique (or, to put it more precisely, that health care is uniquely unique). The government posits that health care is unique because: (1) everyone eventually consumes it (not true); (2) our need for health care is unpredictable

(not always true); (3) it is expensive (not always true if “expensive” means beyond the person’s ability to pay); (4) Congress requires hospital emergency rooms to stabilize everyone, regardless of ability to pay (a “free-rider” and disruption of rational markets *caused by Congress – one which Congress can eliminate by statute*); and (5) this requirement leads to cost-shifting (not always true, but when it is true *it is Congress’s own fault*). *See e.g.*, Op. at pp. 131-32.

As the majority opinion points out, even if the government’s argument for “uniqueness” is factually correct (which plaintiffs contend it is not) - who cares? “The first problem with the government’s proposed limiting factors is their lack of constitutional relevance. These five factual criteria comprising the government’s ‘uniqueness’ argument are not limiting principles rooted in any constitutional understanding of the commerce power.” Op. at p. 132.

With great respect, plaintiffs suggest that his Court cannot, on the one hand, reject the activity/inactivity Commerce Clause line because the Supreme Court has never expressly held activity a necessary predicate to the proper exercise of the commerce power (despite the Court having described commerce as “intercourse”), and then on the other hand, adopt the government’s wholly novel “uniqueness” argument granting Congress a constitutional “mulligan” to exercise broad police power under the Commerce Clause. This Court has to be fair and consistent. If plaintiffs don’t get activity/inactivity then the Court must similarly reject the government’s invitation to adopt “uniqueness” as a valid constitutional limiting standard. Plaintiffs’ can prevail without this Court’s adoption of the activity/inactivity Commerce Clause distinction; defendants, however, cannot prevail if their “uniqueness” doctrine is rejected – defendants have no limiting standard argument in the alternative to back-stop rejection of “uniqueness.”

In addition, the majority correctly explains that the government’s uniqueness argument is factually incorrect. “Virtually all forms of insurance entail decisions about timing and planning for unpredictable events with high associated costs....Under the government’s proposed limiting principles, there is no reason

why Congress could not similarly compel Americans to insure against any number of unforeseeable but serious risks.” Op. at p. 133.

The majority opinion explains that accepting the government’s theory that health care is special and therefore warranting extension of the commerce power, mean that “courts would sit in judgment over every economic mandate issued by Congress, determining whether the level of participation in the underlying market, the amount of cost-shifting, the unpredictability of need or the strength of the moral imperative were enough to justify the mandate.” Op. at p. 134. If Congress can do this, what can’t it do?

The majority is blunt on this point. “At root, the [government] relies upon a convenient sleight of hand to deflect attention from the central issue in the case: what is the nature of the conduct being regulated by the individual mandate, and may Congress reach it?” Op. at p. 135. The government goes out of its way to downplay the far-reaching implications of the mandate – because the government knows full well the mandate is the broadest possible exercise of police power under the Commerce Clause; hence, the whole health care is unique argument. As explained by the majority: “Accordingly, the government adroitly and narrowly re-defines the regulated activity as the uninsured’s health care consumption and attendant cost-shifting, or the timing and method of payment for such consumption.” Op. at p. 136.

“Ultimately,” the majority writes: “the government’s struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none. Op. at p. 137. “The federal government’s assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits and imperils our federalist structure.” Op. at p. 171.

## **II. CONCLUSION**

The Eleventh Circuit’s majority is a tour de force. The majority calls out the government’s dishonest conflation of health insurance with future health care consumption, and challenge the factual rationale for

the Act's unprecedented expansion of congressional power after the Supreme Court has clearly indicated a halt to further Commerce Clause expansion in *Lopez* and *Morrison*.

In an ideal world, it would not be necessary for judges to become health care policy wonks in order to overturn constitutional insults. But judges are human. Judges Dubina and Hull's work identifying the individual mandate's flaws both from a constitutional and policy standpoint will help the moderates on the Supreme Court (Justice Kennedy) repudiate the mandate with a clear conscience.

As to this Court's pending decision, defendants' briefing and argument contain no counter to the Eleventh Circuit's surgical dissection of their arguments in support of the mandate. The mandate is an exercise of police power in its broadest form. The police power was retained by the states and withheld from the Congress. The Supreme Court has expressly and unambiguously instructed inferior courts that the Commerce Clause shall not be interpreted in a manner that sanctions a general police power in Congress. Exercise of the mandate obliterates the traditional domain and power of the states in both the insurance and health care markets. The mandate is an unbounded and virtually limitless extension of federal power. No policy goal, no matter how important and intractable, may be allowed to upset the constitutional balance of dual sovereigns inherent in our constitutional system designed to protect individual liberty. The individual mandate is unconstitutional. Accordingly, plaintiffs' pending motion for summary judgment should be granted. Further, all insurance related provisions of the Act should be severed.

Respectfully submitted,

Date: August 19, 2011

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on August 19, 2011, he personally caused to be served upon the following via the Court's ECF system, a true and correct copy of the foregoing supplemental brief on:

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