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Florida v. HHS - Amicus Brief of Justice and Freedom Fund

Justice and Freedom Fund

Nos. 11-11021, 11-11067

In the
United States Court of Appeals
for the Eleventh Circuit

STATE OF FLORIDA, by and through Attorney General, STATE OF SOUTH CAROLINA, by and through Attorney General, STATE OF NEBRASKA, by and through Attorney General, STATE OF TEXAS, by and through Attorney General, STATE OF UTAH, by and through Attorney General, et. al.,
Plaintiffs – Appellees/Cross-Appellants,

versus

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF THE TREASURY, SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY, UNITED STATES DEPARTMENT OF LABOR, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,
Defendants – Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Florida

AMICUS CURIAE BRIEF OF JUSTICE AND FREEDOM FUND IN SUPPORT OF APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

The undersigned counsel certifies that in addition to the persons and entities identified in the certificate of interested persons and corporate disclosure statement provided by Defendants/Appellants in their opening brief, the following persons and entities have an interest in the outcome of this case. The undersigned counsel also certifies that none of the amici curiae associated with this brief is a publicly-held corporation, is owned by a publicly-held corporation, or issues stock:

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Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the District Court decision should be affirmed.

Justice and Freedom Fund ("JFF") is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens. JFF is interested in striking down the Patient Protection and Affordable Health Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("the Act" or "PPAHCA") in order to preserve the individual liberties guaranteed by the Bill of Rights and restrict congressional authority to the powers enumerated in the U.S. Constitution.

JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

The parties have consented to the filing of this brief.

FED. R. APP. P. 29(C)(5) STATEMENT

No party's counsel has authored this brief in whole or in part, and no party or party's counsel has contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its

counsel, contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUES

I. Whether the District Court properly concluded that Section 1501 of the Act exceeds the powers of Congress under Article I of the U.S. Constitution; and

II. Whether the District Court properly concluded that Section 1501 is not severable from the remainder of the Act, and therefore, the entire Act should be stricken as unconstitutional.

Amicus curiae contends that the District Court was correct on both points.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amicus curiae Justice and Freedom Fund concurs with the District Court that the Commerce Clause does not grant Congress authority to compel every American to purchase health insurance. The Necessary and Proper Clause cannot salvage the Act, because Congress itself created the financial "necessity" for the individual mandate—its centerpiece. The mandate is "necessary" but manifestly improper—it exceeds congressional powers under the Commerce Clause and jeopardizes fundamental freedoms that Americans cherish.

The District Court rightly struck down the entire Act. While this may appear to encroach on legislative territory, it actually preserves the separation of

powers by not entangling the court in the extensive rewriting necessary to ferret out the sections that can and cannot be sustained after the mandate is excised.

I. NEITHER THE COMMERCE CLAUSE NOR THE NECESSARY AND PROPER CLAUSE CAN SALVAGE THE PERVERSE "NECESSITY" CONGRESS ITSELF CREATED.

The text and history of the Commerce Clause do not support the Act's breathtaking expansion of congressional authority. An individual decision *not* to purchase insurance is *in*activity—not *activity* that substantially affects interstate commerce. Lacking the power to enact the mandate, Congress cannot manufacture a "necessity" and then use the Necessary and Proper Clause to jump-start the Act:

> [R]ather than being used to implement or facilitate enforcement of the Act's insurance industry reforms, *the individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself*. Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that *the more dysfunctional the results of the statute are, the more essential or "necessary" the statutory fix would be*.

Florida v. United States Dep't. of Health & Human Services, No. 3:10-cv-91-RV/EMT, *110-111 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011) ("*Florida v. HHS*").

Congress cannot generate regulatory power merely because it sees a national problem in need of repair. "[T]he Framers considered Congress to be the most dangerous branch of government...." David B. Rivkin, Jr., Lee A. Case, and Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158

U. Pa. L. Rev. PENNumbra 93, 96 (2009) ("*A Healthy Debate* "). The Constitution grants Congress "defined and limited" powers, and "those limits may not be mistaken or forgotten." *Marbury v. Madison,* 5 U.S. 137, 176 (1803) (Marshall, C.J.).

Lopez and *Morrison* rest on the principle of enumerated powers—not merely the presence or absence of economic activity. *A Healthy Debate*, 158 U. Pa. L. Rev. PENNumbra at 99; *see United States v. Lopez,* 514 U.S. 549, 568 (1995) (Kennedy, J., concurring). The exercise of Commerce Clause power demands a "meaningful limiting factor." *A Healthy Debate,* 158 U. Pa. L. Rev. PENNumbra at 99. No such factor is apparent when examining the Act.

A. Federal Regulation Of The Insurance Industry Is On The Outer Perimeter Of Commerce Clause Authority.

Regulation of the insurance business is a modern expansion of Commerce Clause power. Insurance contracts were previously outside the ambit of the Clause because they are not "transaction[s] of commerce," objects of "trade or barter," or "commodities to be shipped" or sold interstate. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868).

This has changed. Congress may now regulate the insurance industry under the Commerce Clause. *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944). But the McCarran-Ferguson Act, enacted in 1945, declared that state regulation of the insurance business is in the public interest. 15 U.S.C.

§ 1011. Since then the insurance industry has been regulated almost exclusively by the states. *Florida v. HHS.*, 2011 U.S. Dist. LEXIS 8822, *44 n. 11. But while Congress *may* regulate the insurance business, core state police powers include authority to protect the health of its citizens. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954).

1. The *Individual* Mandate Is Not Rationally Related To The Implementation Of Congressional Power To Regulate The Health Insurance *Industry*.

The Court must "look to see whether the [mandate] constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010). "Rationally related" and "rational basis" are terms to employ with caution. *Id.* at 1966 (Kennedy, J., concurring). "Rational basis" is commonly employed in connection with due process. In the Commerce Clause context, there should be a "tangible link to commerce, not a mere conceivable rational relation." *Id.* at 1967.

The District Court zoomed in on the *individual* decision about health insurance and considered whether *that* activity—or inactivity—can be regulated. Power to regulate the *insurance industry* does not embrace the authority to compel *individuals* to do business with that industry. Even if more customers are "necessary" to prevent the industry's financial collapse, it is not proper to forcibly enroll them. This case thus contrasts with *Nat'l Labor Relations Bd. v. Jones &*

Laughlin Steel Corp., 301 U.S. 1 (1937), upholding an injunction requiring employers to deal only with their employees' chosen representatives. Unlike PPAHCA, the National Labor Relations Act did not compel any agreement between private parties. *Id*. at 44-45. But unlike the *NLRB* employers and employees, who remained free to negotiate individual contracts, *all* Americans (with rare exception) will soon be compelled to purchase a government-defined product.

2. The Individual Mandate Is Hardly A "Modest" Addition To Any Existing Exercise Of Federal Power. Many Portions Of The Constitution Would Be Superfluous If Congress Could Arbitrarily Regulate Anything Under The Commerce Clause Umbrella.

In *Comstock*, the Supreme Court upheld a "modest addition" to a preexisting set of federal prison-related mental-health statutes. *United States v. Comstock*, 130 S. Ct. at 1958. But the Court cautioned that "even a longstanding history of related federal action does not demonstrate a statute's constitutionality." *Id.*

The insurance mandate is not anchored to any existing federal power and it erodes basic American freedoms. Never before has the federal government required every *individual* to purchase a particular product or service as a "necessary" adjunct to its regulation of the *industry* that supplies it. The power to regulate an industry does not clothe Congress with authority to command every American to do business with that industry. If the Commerce Clause stretched that

far, "many of Congress' other enumerated powers under Art. I, § 8, [would be] wholly superfluous"—bankruptcy laws (cl. 4), coining money (cl. 5), fixing weights and measures (cl. 5), punishing counterfeiters (cl. 6), post offices and roads (cl. 7), patents and copyrights (cl. 8). *United States v. Lopez*, 514 U.S. at 588-589 (Thomas, J., concurring). These powers overlap and affect interstate commerce, but their express enumeration cautions restraint in the extension of Commerce Clause power. That Clause cannot swallow all the other federal powers and sweep within its scope any law Congress wants to pass.

3. The *Individual* Mandate Is Not An Appropriate Means To Reform The *Insurance Industry*. The Link Is Too Attenuated.

Congress has considerable discretion to enact laws that are conducive to its exercise of legitimate authority. *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 778 (E.D. Va. 2010; *United States v. Comstock*, 130 S. Ct. at 1956; *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 304, 408 (1819). If Congress appropriates funds under its Spending Clause authority, Art. I, § 8, cl. 1, "it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars...are in fact spent for the general welfare, and not frittered away...." *Sabri v. United States*, 541 U.S. 600, 605 (2004). But even though "necessary" does not mean "absolutely necessary," there still must be an "appropriate link" between a constitutional power and a law Congress enacts.

United States v. Comstock, 130 S. Ct. at 1970 (Alito, J., concurring). Here, the link is a thin thread.

The connection between means and end must not be so attenuated as to require a court to "pile inference upon inference." *United States v. Lopez*, 514 U.S. at 567; *United States v. Comstock*, 130 S. Ct. at 1963. Analysis of the causal chain should consider not only "the number of links" but also "the strength of the chain." *Id.* at 1966 (Kennedy, J., concurring). The *Comstock* majority found the statute at issue was a "reasonably adapted and narrowly tailored means" to pursue a legitimate government interest. *Id.* at 1965.

To sustain the Act's mandate would require this Court to "pile inference upon inference"—an approach the Supreme Court has rejected:

> [T]he mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce (not "slight," "trivial," or "indirect," but no impact whatsoever).

Florida v. HHS, 2011 U.S. Dist. LEXIS 8822, *92. The Government can only make the connection to interstate commerce by heaping up inferences and speculating about future contingencies in the lives of the uninsured. *Id.* at *93.

B. The Regulated "*Activity*"—The Decision *Not* To Purchase Health Insurance—Is Actually *Inactivity*.

The mandate does not *regulate* activity—it *commands* activity and penalizes inactivity. Its validity hinges on whether *inactivity*—the decision not to enter the health insurance market—is *activity*. *Commonwealth of Virginia v. Sebelius*, 728

F. Supp. 2d at 781; *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *81. The mandate is imposed on every American for merely existing—not for engaging in any *activity*. This is even less defensible than the legislation struck down in *Lopez* and *Morrison*—both involved *activity*. *A Healthy Debate,* 158 U. Pa. L. Rev. PENNumbra at 99.

Never before has a Commerce Clause case involved a federal mandate that every American buy a certain product or contract with a private party. Cases always implicate pre-existing *activity*—never *inactivity*. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *80-81; *Commonwealth of Virginia v. Sebelius*, 728 F. Supp. 2d at 781. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (navigation); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (milk distribution); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256-257 (1964) (collecting cases); *Perez v. United States*, 402 U.S. 146 (1971) ("loan sharking"); *United States v. Lopez*, 514 U.S. 549 (gun possession in school zone); *Gonzales v. Raich*, 545 U.S. 1 (2005) (marijuana).

The term *activity* runs like a thread through all the Commerce Clause cases. Congress may regulate economic *activities*—even intrastate *activities*—that substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942); *Perez v. United States*, 402 U.S. at 151; *United States v. Lopez*, 514 U.S. at 559; *United States v. Morrison*, 529 U.S. 598, 610 (2000); *Gonzales v.*

Raich, 545 U.S. at 17-18. Even a noneconomic local *activity* may be regulated if it is an essential component of a larger regulatory scheme. *United States v. Lopez,* 514 U.S. at 561. Economic *activity* in illegal products may be regulated. *Gonzales v. Raich,* 545 U.S. at 26 (marijuana).

As a threshold matter, courts must define the regulated activity. Moreover, the inquiry under *Lopez* and *Morrison* is not about the effect of a *regulation* on commerce, but whether the *regulated activity itself* affects commerce. *United States v. Morrison,* 529 U.S. at 614-615, quoting *United States v. Lopez,* 514 U.S. at 557 n. 2 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.")

Here, the subject of regulation is the *health insurance* market, not the *health care* market. *Florida v. HHS,* 2011 U.S. Dist. LEXIS 8822, *84-85 n. 18. Even if health care services—an *activity*—affect interstate commerce, it does not follow that the regulated *inactivity*—the decision not to purchase insurance—affects commerce. Congress' own attorneys warned that it was questionable "whether a requirement to purchase health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, but for this regulation, a part of the health insurance market. CRS Analysis, supra, at 3, 6." *Id.* at *82.

The implications are staggering. Under the Government's expansive view of its authority, "if the decision to forego insurance qualifies as activity, then presumably the decision to not use that insurance...is also activity." *Id.* at *102-103. Extending that rationale, Congress could manufacture the power to regulate *economic* decisions "not to go to the doctor for regular check-ups and screenings" because healthier Americans are more productive. *Id.* at, *103. This possibility is not "irrelevant [or] fanciful" but part of a serious discussion among legal scholars. *Id.* at *87-88. It is difficult to imagine *any* limitations on federal power if Congress can compel participation in a market. *See Commonwealth of Virginia v. Sebelius*, 728 F. Supp. 2d at 781 ("This broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence."); *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *97-98 ("The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that—when aggregated with similar economic decisions—affect the price of that particular product or service and have a substantial effect on interstate commerce."); *United States v. Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

C. Congress Does Not Have Unlimited Power To Regulate Every Individual Decision Merely Because It Has Potential Economic Consequences.

Many decisions have economic consequences. A contribution to charity is economic and may even impact interstate commerce, but Congress may not regulate it under the Commerce Clause. A grandmother's interstate birthday gift to her grandchild is "economic" and impacts commerce when the child spends it at the mall—but again, Commerce Clause regulation is inappropriate. Americans make a myriad of monetary decisions that impact the economy, but not all are subject to federal regulation. *Economic* is not equivalent to *commercial* and not every economic decision is an *activity* subject to Commerce Clause power. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *102.

Moreover, the decision to forego health insurance is not necessarily a "calculated decision to engage in market timing" as the Government contends. *Id.* at *96. It may be based on religion, conscience, the ability to pay out of pocket, or exercise of the constitutional right to refuse medical care. Health care decisions are highly personal and cannot be hastily lumped with commercial or even economic activity. The mandate is a "bridge too far" that has no logical limits and far exceeds existing Commerce Clause boundaries. *Id.* at *104. Supreme Court precedent rejects the "but-for causal chain" as a rationale to justify the regulation

of anything that might possibly affect interstate commerce. *United States v. Morrison*, 529 U.S. at 615.

D. The Necessary and Proper Clause Is Not A Separate Grant Of Authority That Congress Can Use To Penalize Americans Who Decline To Purchase Health Insurance.

The Government seeks solace in the Necessary and Proper Clause. *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 776, 778. But that Clause cannot save the law. The mandate is "necessary" to the Act but constitutionally *improper*. Since the Government may regulate and reform the *insurance business*, it presumes that it may also compel *individuals* to purchase policies, in order to make the law financially viable and prevent economic catastrophe. This reasoning is flawed. The Government's warped application of the Necessary and Proper Clause converts it to the "hideous monster with devouring jaws" that Hamilton assured us it was not, rather than the "perfectly harmless" part of the Constitution he assured us it was. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *115, citing The Federalist No. 33, at 204-205.

The Necessary and Proper Clause is not a stand-alone provision but rather "a *caveat*" granting Congress the necessary means to carry out its enumerated powers. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). Decades of precedent support this principle. *United States v. Comstock*, 130 S. Ct. at 1956-1957; *Alden v. Maine*, 527 U.S. 706, 739 (1999); *Carter v. Carter Coal Co.*, 298

U.S. 238, 291 (1936); *McCulloch v. Maryland*, 17 U.S. at 421-422; *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

The Act prevents insurers from denying coverage or charging discriminatory rates for persons with preexisting conditions. Congress could impose reporting requirements on insurers to monitor compliance with these legitimate reforms, since Congress is "entrusted with ample means" to execute its enumerated powers. *McCulloch v. Maryland*, 17 U.S. at 408.

But if the objective is illegitimate, the fit between means and end is irrelevant. Congress has limited, carefully articulated powers:

> The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.

Carter v. Carter Coal Co., 298 U.S. at 291. The federal government can only claim the powers "expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 14 U.S. at 326. No power, express or otherwise, undergirds the Act's individual mandate.

II. THE INDIVIDUAL MANDATE IS IMPROPER BECAUSE IT ERODES INDIVIDUAL LIBERTIES AT THE CORE OF AMERICAN FREEDOM.

The Framers of the Constitution divided authority—among the three branches of government, and between the federal and state governments—"to ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse from either front." *United States v. Lopez,* 514 U.S. at 552, quoting *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991). To the Framers, these structural limitations were even more vital than the Bill of Rights in safeguarding our freedoms. *A Healthy Debate,* 158 U. Pa. L. Rev. PENNumbra at 95. In addition to "affirmative delegation," the Framers limited federal powers "by the principle that they may not be exercised in a way that violates other specific provisions of the Constitution." *Saenz v. Roe,* 526 U.S. 489, 508 (1999). The Act stretches the Commerce Clause to the breaking point with its novel *expansion* of federal power and its unprecedented *restriction* of individual liberties.

The Act has profound implications for our fundamental liberties, which "are inextricably entwined with our idea of physical freedom and self-determination." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring). *It requires Americans to enter a contract to pay for a service—medical treatment—they are constitutionally privileged to refuse.* This is no more constitutional than compelling Americans to donate funds to a church they

are not required to attend or otherwise support. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

However "necessary" the mandate may appear, it must "consist with the letter and spirit of the Constitution" (*McCulloch v. Maryland*, 17 U.S. at 421) and not violate or infringe another independent constitutional provision. *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 778; *United States v. Comstock*, 130 S. Ct. at 1956-1957; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976); *United States v. Darby*, 312 U.S. 100, 115 (1941).

The mandate collides with the right of every competent adult to refuse medical treatment. This principle is the "logical corollary of the doctrine of informed consent." *Cruzan*, 497 U.S. at 270. *See also Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (prisoner has significant liberty interest in avoiding unwanted psychotropic drugs); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests).

American notions of liberty encompass free choice even in "mandatory markets" like food, housing, transportation, and health care. Everyone must eat but may choose what to eat—some are vegetarians, some nutrition conscious, others wary of food allergies. Everyone needs lodging but may choose where to live, whether to rent or buy, and whether to live alone or with others. *See Moore v.*

East Cleveland, 431 U.S. 494 (1977). Everyone needs transportation, but may choose whether to travel by car, motorcycle, bus, train, airplane, bicycle, or even horse and buggy. Americans may lease or own a vehicle and select the brand, size, and color. In the same way, Americans may choose whether or not to undergo medical treatment, and if so, how they will pay for it. The government cannot make vegetables more affordable by requiring everyone to buy spinach or eliminate homelessness by demanding that every American purchase a residence. *See Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *86 (applying the government's logic to *Wickard*, Congress could have increased the demand for wheat and raised its price by requiring everyone to buy and eat wheat bread).

Congress has improperly usurped authority. Coupled with its massive taxing and spending habits, the trend is to "turn everybody into a ward of the state, unable to exercise individual choices." *A Healthy Debate*, 158 U. Pa. L. Rev. PENNumbra at 101. This is unacceptable in a country of "liberty and justice for all."

A. All Constitutional Rights Have Costs.

Unlike the monarchies of past centuries or totalitarian regimes of today, America guarantees liberty—free speech, press, association, religion, and the freedom to make numerous everyday decisions free of government compulsion. But these freedoms have a price. Free speech requires exposure to the ideas of

others. *United States v. Ballard*, 322 U.S. 78, 95 (1944). ("The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."); *Elk Grove United School District v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring) ("[T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree.").

The Government argues that uninsured persons impose *costs* on third parties when they need health care and cannot pay for it. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *84 ("if the costs incurred cannot be paid ...they are passed along (cost-shifted) to third parties"). This is similar to reasoning the Supreme Court has rejected. *United States v. Lopez*, 514 U.S. at 564 ("The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.")

Congress cannot bypass the Constitution merely because it is costly to comply with it. America is not a socialist or communist country where economic equality is either possible or desirable. Such equality endangers the liberty that uniquely characterizes America.

B. *Heart of Atlanta* Facilitated The Exercise Of Fundamental Individual Rights. The Act Severely Restricts Basic Freedoms That Americans Cherish.

In *Heart of Atlanta*, the Supreme Court validated use of the Commerce Clause to implement Title II of the Civil Rights Act of 1964. The inability to find adequate lodging interfered with the right to interstate travel. The Act addressed racial discrimination against travelers. *Heart of Atlanta*, 379 U.S. at 244. The applicability of Title II was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people." *Id*. at 250. The Necessary and Proper Clause applied because elimination of discrimination was a legitimate objective under the Thirteenth, Fourteenth, and Fifteenth Amendments. *Id*. at 276-277 (Black, J., concurring). In fact, the Enforcement Clause of the Fourteenth Amendment was a source of power independent of the Commerce Clause. *Id*. at 276-280 (Douglas, J., concurring).

In stark contrast, the insurance mandate is an extraordinary restriction of the individual liberties that uniquely characterize American government. It is only "necessary" because the Act's insurance industry reforms created a "necessity." Unlike *Heart of Atlanta*, which paved the way for racial minorities to exercise their constitutional rights, the Act dismantles cherished American freedoms.

C. The Act Is Not Narrowly Tailored To Achieve A Compelling Government Purpose.

The Fourteenth Amendment "forbids the government to infringe...fundamental liberty interests at all...unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). In exceptional circumstances the state may override the right to refuse medical treatment. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (mandatory smallpox vaccine to contain epidemic). But "[t]he regulation of constitutionally protected decisions...must be predicated on legitimate state concerns other than disagreement with the choice the individual has made...." *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990).

The Government's cost-shifting arguments include the observation that many hospitals are obligated to provide emergency screening and services regardless of ability to pay. *Liberty Univ., Inc. v. Geithner*, No. 6:10cv15, 2010 U.S. Dist. LEXIS 125922, *43 n. 15 (W.D. Va. Nov. 30, 2010), citing the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd. But the minimum coverage provisions of PPAHCA extend far beyond mandatory *emergency* treatment. This is hardly the "narrow tailoring" the Constitution requires.

Congress could enable health care reform using narrowly tailored means that would not trample individual rights. New tax incentives could be crafted to encourage individuals and employers to purchase health insurance. These are easy

to administer and more cost-effective than enforcing the mandate and penalties. Uninsured persons could be denied non-emergency services if they cannot pay. Insurance companies could be granted flexibility to charge higher premiums for new enrollees with preexisting conditions. Congress should be sent back to the drawing board to consider constitutional solutions for health care reform.

III. THE DISTRICT COURT CORRECTLY STRUCK DOWN THE ENTIRE ACT IN ORDER TO PROTECT THE DOCTRINE OF SEPARATION OF POWERS AS MANDATED BY THE CONSTITUTION.

Severance is a matter of judicial restraint. *Florida v. HHS,* 2011 U.S. Dist. LEXIS 8822, *117; *Free Enter. Fund v. Public Co. Accounting Oversight Bd.,* 130 S. Ct. 3138, 3161 (2010). Courts honor separation-of-powers principles by carefully severing flawed statutes while leaving the remainder intact. But if the court must carve up, rearrange, and rewrite too much—it is best to invalidate the entire scheme.

Severability dates back to *Marbury v. Madison*, where the Supreme Court shaved one unconstitutional section from the Judiciary Act of 1789 and left the rest intact. C. Vered Jona, *Note: Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 Geo. Wash. L. Rev. 698, 701 (April 2008) ("*Cleaning Up*"); David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 661-662 (2008) ("*Judicial Lawmaking*"). Severance is appropriate unless it disrupts

legislative intent. *Bank of Hamilton v. Dudley's Lease*, 27 U.S. (2 Pet.) 492, 526 (1829); *Allen v. Louisiana*, 103 U.S. 80, 84 (1880). Courts must not effectively make new laws rather than enforcing old ones. *United States v. Reese*, 92 U.S. 214, 221 (1875); *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922).

Severability "is not a rigid and inflexible rule"—particularly in a novel case. *Florida v. HHS*, 2011 U.S. Dist. Lexis 8822, *118. The Act radically exceeds the powers of Congress and assaults individual liberty. But striking down *only* the individual mandate would leave the Act in shambles. The District Court properly eschewed judicial rewriting and remanded the Act to Congress.

A. The Court Cannot Conform The Act To The Constitution Without Performing Radical Surgery—A Quintessentially *Legislative* Function.

Severance shapes the contours of judicial relief after a court has found a statute unconstitutional in part. Courts must guard against rewriting a law as they try to salvage it. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *130; *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 329-330 (2006); *Virginia v. American Booksellers Ass'n., Inc.*, 484 U.S. 383, 397 (1988). Conventional wisdom suggests that striking the entire Act would be more intrusive than merely severing invalid parts. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 672. But like a Presidential veto, total invalidation "functions like a remand" (*id*. at 673) and "preserves [the] court's role as an adjudicatory rather than a legislature body."

Cleaning Up, 76 Geo. Wash. L. Rev. at 712. Reconfiguring this massive, 2700-page Act is "a far more serious invasion of the legislative domain" than any court should undertake. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *131-132, quoting *Ayotte*, 546 U.S. at 329-330.

The Act is not a series of short statutes arranged together for convenience and thus easily severed or fine-tuned, but rather a "carefully-balanced and clockwork-like statutory arrangement comprised of pieces that all work toward one primary legislative goal." *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *118-119. The invalid mandate is the glue that holds the Act together. The Act has too many interdependent moving parts to carve out the mandate without doing violence to the entire scheme. *Id*. The mandate is a legislative lynchpin "inextricably bound" to the remaining provisions. Sometimes the connection is obvious—the limited exemptions, employer mandates, and contents of a minimum benefits package. Other provisions may not hinge on the individual mandate. As Judge Vinson noted, e.g., it is impossible to know whether the revenue generating Form 1099 provision would "stand independently of the insurance reforms." *Id*. at *133-134. The Act "must stand or fall as a single unit." *Id*. at *135-136.

The Supreme Court recently declined to "blue-pencil" legislation, noting some possibilities but leaving it to Congress to sort out the options. *Free Enterprise Fund*, 130 S. Ct. at 3162. The Court cannot foresee how Congress

might revamp the Act in response to its constitutional flaws. *Randall v. Sorrell*, 548 U.S. 230, 262 (2006). In *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995), the Court refused to craft a new "nexus requirement" when considering an honoraria ban applied to federal employees, finding that would involve "a far more serious invasion of the legislative domain" than the simple fix applied in *United States v. Grace*, 461 U.S. 171, 180-183 (1983) (striking down ban on expression in the Supreme Court building and grounds, but only as applied to public sidewalks around the Court).

There is inevitably some overlap among the branches of government. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 653; Paul M. Bator, *Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 265 (1990). But courts must avoid encroaching on legislative territory by using "radical surgery" to save a statute. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 689. Here, removal of the mandate would impermissibly entangle the Court in legislative alterations.

B. The Presumption Of Severability Should Be Abandoned Because Congress Had Knowledge Of The Act's Constitutional Flaws.

Legislators take an oath to "support [the] Constitution." U.S. Const. art. VI. But sometimes Congress enacts legislation that "even supporters acknowledge poses serious constitutional concerns." Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. on Legis. 227, 277 (2004) (citing

Joel Mowbray, The Bush Way of Compromise, Wash. Times, Apr. 12, 2002, at A23).

This case is a striking example of legislators flouting their constitutional oath. Instead of examining the constitutional implications, this "2,700 page bill was rushed to the floor for a Christmas Eve vote." *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 789. Even Congress' own attorneys warned that legal challenges might have merit. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *124; *see* Jennifer Staman & Cynthia Brougher, Congressional Research Service, Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis, July 24, 2009, at 3, 6 ("whether Congress can use its Commerce Clause authority to require a person to buy a good or a service" raises a "novel issue" and "most challenging question").[1] A severability clause included in an early version of the Act was ultimately excised. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *123-124. There is strong evidence that Congress deliberately demanded inclusion of the controversial mandate—fully aware it had flaws.

Severability allows legislators to pass laws without being held to a standard of perfection, knowing that "courts will not throw out the baby with the bath water." *Cleaning Up*, 76 Geo. Wash. L. Rev. at 654. But *inseverability* is an appropriate presumption where Congress purposely enacts defective legislation.

[1] Available at http://assets.opencrs.com/rpts/R40725_20090724.pdf.

Cleaning Up, 76 Geo. Wash. L. Rev. at 700. That presumption would encourage legislators to draft constitutional laws, promote accountability to constituents, and discourage judicial redrafting. *Id*.

C. Severance Would Thwart The Objectives Of Congress.

Striking down a statute "frustrates the intent of the elected representatives of the people." *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *130, quoting *Ayotte*, 546 U.S. at 329-330. Courts sever to avoid circumventing legislative intent. *Id*. But in this case, severance would frustrate that intent.

Critical questions must be addressed. Would Congress have passed the Act without the mandate? Would it prefer a truncated Act—or no statute at all? If the mandate is severed, can the remaining provisions function independently and still serve congressional intent? *See Free Enterprise Fund*, 130 S. Ct. at 3161-3162; *United States v. Booker*, 543 U.S. 220, 246 (2005); *New York v. United States*, 505 U.S. 144, 186 (1992); *Ayotte*, 546 U.S. at 330; *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Buckley v. Valeo*, 424 U.S. at 108-109; *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932); *Allen v. Louisiana*, 103 U.S. at 83-84.

1. It Is Virtually Certain That Congress Would Not Have Passed The Act Without The Individual Mandate.

Language in the Act itself exposes congressional intent: "The [mandate] is essential to creating effective health insurance markets...." Act § 1501(a)(2)(I).

Severance is appropriate where legislative goals would still be served. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *122; *New York v. United States*, 505 U.S. at 187. A small uncontroversial provision is normally severable. *Alaska Airlines*, 480 U.S. at 694 n. 18, 696 (duty-to-hire provisions severed from unconstitutional regulations). But where the legislature would *not* have enacted the legislation without a lynchpin provision, severance is improper.

The District Court concluded that the mandate is "indisputably essential to what Congress was ultimately seeking to accomplish." *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *122. Defendants concede the point. *Id*. at *125. Recent decisions all describe the mandate as central: *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 776 ("necessary measure to ensure the success of its larger reforms of the interstate health insurance market...without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to 'implode'"); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 886 (E.D. Mich. 2010) ("[i]ntegral to the legislative effort...essential part of this larger regulation of economic activity"); *Liberty Univ., Inc. v. Geithner*, at *48, *82 (essential); *Goudy-Bachman v. U.S. Dep't. of Health & Human Servs.*, No. 1:10-CV-763, 2011 U.S. Dist. LEXIS 6309, *5 (M.D. Pa. Jan. 24, 2011) ("backbone provision").

However misguided the constitutional analysis, congressional intent is clear: The mandate is mandatory—the Act unravels without it.

2. Even If The Remaining Provisions Could Function Independently—A Truncated Act Would Not Serve Congressional Purposes.

It is a closer question as to whether the remaining provisions could function independently. Some sections are only remotely related to health care and could stand alone. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *119-120. But the more critical inquiry is whether an abridged version of the Act would function "in a manner consistent with the intent of Congress." *Id*. at *120-121, quoting *Alaska Airlines*, 480 U.S. at 685.

Sometimes a legislative scheme can survive judicial surgery and still serve the legislature's purposes. *Free Enterprise Fund*, 130 S. Ct. at 3161 (tenure restrictions severed); *Reno v. ACLU*, 521 U.S. 844, 882-883 (1997) (overbroad Communications Decency Act salvaged by striking the words "or indecent"); *Alaska Airlines*, 480 U.S. at 684 (legislative veto easily severed); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 591, 506-507 (1985) (severing mandatory penalties for persons dealing in obscenity and prostitution); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (20-year limit on religious use restrictions violated Establishment Clause but not essential to the statutory scheme). In *New York v. United States*, the Court severed a punitive "take title" provision without

demolishing the legislative scheme, which included independent incentives for States to dispose of radioactive waste. *New York v. United States*, 505 U.S. at 186-187.

This case is different. The District Court analogized the Act to "a defectively designed watch" that "needs to be redesigned and reconstructed by the watchmaker." *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *134-135. The Court properly declined to undertake the massive task of trying to salvage the Act by sorting through its myriad provisions.

3. The Absence Of A Severability Clause Weighs Against Preserving The Remaining Provisions.

A severability clause—if the Act contained one—would signal an intention to make the Act divisible. *Champlin*, 286 U.S. at 235. But such a clause merely creates a rebuttable presumption. *Id.* 286 at 235. It is not an "inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924).

Even on the legislature's cue, severance "enmeshes courts in...quintessentially legislative policy work." *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 687. On the other hand, the absence of a severability clause creates no presumption. *Alaska Airlines*, 480 U.S. at 686; *New York v. United States*, 505 U.S. at 186. The omission does not "dictate the demise of the entire [Act]." *Tilton v. Richardson*, 403 U.S. at 684.

The Act has no severability clause. Although there is no presumption, the omission constitutes evidence that severability was not a priority on the minds of legislators and logically presents a stronger case against severability than if the clause had been included. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *122. And there is additional persuasive evidence. A severability clause was included in an earlier draft of the Act but ultimately removed. *Id*. at *123-124. The mandate was controversial during the drafting of the Act, and challenges were on the horizon. *Id*. at *124. The District Court action was filed just minutes after the President signed the Act. *Id*. at *6.

Even if the Act contained a severability clause, that would not settle the issue. Nearly a century ago, the Supreme Court found the valid provisions of the Future Trading Act "so interwoven with those [unconstitutional] regulations that they [could] not be separated"—in spite of a severability clause. *Hill v. Wallace*, 259 U.S. at 70; *Cleaning Up*, 76 Geo. Wash. L. Rev. at 702. PPAHCA is similar—hundreds of detailed interrelated provisions.

Neither the presence nor the absence of a severability clause conclusively dictates the outcome. But the Act's complexity, its multitude of interwoven provisions, and the intentional removal of a severability clause all reinforce the wisdom of remanding the entire scheme to Congress. In fact, if a severability clause were invoked "to salvage parts of a comprehensive, integrated statutory

scheme, which parts, standing alone, are unworkable and in many aspects unfair, [that would] exalt a formula at the expense of the broad objectives of Congress." *Buckley v. Valeo,* 424 U.S. at 255 (Burger, C.J., dissenting). In the absence of such a clause, it is all the more appropriate to avoid dissecting this mammoth piece of legislation.

CONCLUSION

The District Court decision, striking the Act in its entirety, should be affirmed.

Respectfully submitted,

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CERTIFICATES PURSUANT TO FED. R. APP. P. 32

I certify that the foregoing amici curiae brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). In reliance on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 6,871 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is no more than one-half the maximum length of 14,000 words authorized by Fed. R. App. P. 29(d), 32(a)(7)(B)(i).

The foregoing amici curiae brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on May10, 2011, by Next Day service, the original plus six true and correct copies of the foregoing amici curiae brief were caused to be sent to the following:

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