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Florida v. HHS - Amicus Brief of Republican U.S. Senators

Mitch McConnell
United States Senate

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

STATE OF FLORIDA, by and through BILL McCOLLUM, *et al.*	)	
Plaintiffs,	)	
v.	)	**Case No.: 3:10-cv-91-RV/EMT**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,	)	
Defendants.	)	

BRIEF FOR MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICI*

Amici Curiae United States Senate Republican Leader Mitch McConnell, and Senators Orrin Hatch, John Barrasso, Kit Bond, Sam Brownback, Jim Bunning, Richard Burr, Saxby Chambliss, Tom Coburn, Thad Cochran, Susan Collins, Bob Corker, John Cornyn, Mike Crapo, Jim DeMint, John Ensign, Mike Enzi, Chuck Grassley, Kay Bailey Hutchison, James Inhofe, Johnny Isakson, Mike Johanns, Jon Kyl, George LeMieux, John McCain, James Risch, Pat Roberts, Richard Shelby, Olympia Snowe, John Thune, David Vitter, and Roger Wicker are all United States Senators of the One Hundred Eleventh Congress.

As United States Senators, *amici* have a keen interest in the constitutional issues at stake in this litigation that transcends any opposition they may have voiced to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (hereinafter "PPACA" or "Act") on policy grounds. All Members of Congress have taken oaths to uphold the Constitution of the United States. While our constitutional system is built on both vertical and horizontal checks and balances, Members of Congress are, by virtue of their oath, under a responsibility of their own to uphold the Constitution of the United States and to ensure that the Legislative Branch stays within the bounds of the powers afforded it by the Constitution.

Amici are cognizant of their responsibility to uphold the Constitution, and as a result they raised two constitutional points of order during consideration of the health care bill. On December 23, 2009, Senator Ensign raised a point of order that the bill would violate the Constitution because Congress' enumerated powers in Article I, section

8 do not give it the authority to mandate that people engage in activity (i.e., buy insurance meeting federal requirements) or be fined. The same day, Senator Hutchison raised a point of order that the bill would violate the Tenth Amendment, which states that "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." U.S. CONST. amend. X. Each point of order received the support of all senators who voted against the legislation (with the exception of one senator who was absent from the votes on these two points of order).

Where, as in this case with respect to the PPACA's Individual Mandate, Congress legislates without authority, it damages its institutional legitimacy and precipitates divisive federalism conflicts like the instant litigation. The long term harms that the PPACA may do to our governmental institutions and constitutional architecture are at least as important as are the specific consequences of the PPACA.

ARGUMENT

I. The Individual Mandate Exceeds The Commerce Power.

This nation was founded on and continues to be characterized by its unique system of dual sovereignty, in which the federal government is limited to exercising the enumerated powers granted it by the Constitution, while states retain the general police power. *See generally* THE FEDERALIST No. 45 (Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined" while "[t]hose which are to remain in the State Governments are numerous and indefinite."). This balance of power was conceived by the Framers of the Constitution to "ensure protection

of our fundamental liberties" by "prevent[ing] the accumulation of excessive power," thus "reduc[ing] the risk of tyranny and abuse from either" state or federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). As Chief Justice Marshall observed:

> Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it ... is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

McCulloch v. Maryland, 4 Wheat. 316, 405 (1819) (*quoted in United States v. Lopez*, 514 U.S. 549, 566 (1995)). In modern times, debate has arisen particularly over the scope of the power granted to the federal government "[t]o regulate Commerce ... among the several States...." U.S. CONST. art. I, § 8, cl. 3.

While the past century has seen a general expansion of the subject matter committed to the federal government under the Commerce Clause, in recent years the Supreme Court has rejected the notion of an infinitely elastic clause, recognizing the potential for it to be stretched to eliminate any meaningful limits on the federal government's power. *See United States v. Lopez*, 514 U.S. 549, 556-57 (1995); *United States* v. *Morrison*, 29 U.S. 598, 607-08 (2000). Defendants' arguments in this case threaten to undermine the remaining limits on Commerce Clause power, harming the Constitution's framework by allowing the federal government to overreach its enumerated powers and invade the legitimate province of the States.

A. The Commerce Clause Power Does Not Authorize Congress To Mandate The Purchase Of A Particular Product, Only To Regulate Commercial Activity In Which People Are Engaged.

The Individual Mandate provides that, subject to certain very narrow exceptions, "an . . . individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual . . . is covered under minimum essential coverage for such month." *See* PPACA § 1501(b). Noncompliance results in the assessment of a monetary penalty. *See* PPACA § 1501(b)(1). The Mandate therefore compels otherwise passive individuals to engage in economic activity against their will, by requiring them to obtain health insurance regardless of whether or not they wish to purchase a policy. As such, the Mandate dramatically oversteps the bounds of the Commerce Power which has always been understood as a power to regulate, and not to compel, economic activity.[1]

The Supreme Court noted in *United States v. Lopez* that Congress' power to "regulate Commerce . . . among the several States" has three permissible applications:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate commerce. Finally, Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce.

[1] Indeed, this is the only meaning compatible with the plain meaning of the Constitutional text. In the Eighteenth Century, as today, to "regulate" was defined in terms that presuppose action upon some object or activity that already is already extant. *See* 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "regulate" as "(1) to adjust by rule or method. (2) to direct."). *See also Merriam Webster's Collegiate Dictionary* 985 (10th ed. 1996) (defining "regulate" variously as "to govern or direct according to rule," "to bring under the control of law or constituted authority," "to make regulations for or concerning," "to bring order, method, or uniformity to," to fix or adjust the time, amount, degree, or rate of"). A regulator comes to an existing phenomenon and orders it.

Lopez, 514 U.S. at 558-59 (emphasis added, internal citations omitted). Commercial *activity* that is local and intrastate may be regulated if, in the aggregate, such "activity" exerts a "substantial economic effect" on the interstate economy. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Furthermore, under the third prong of *Lopez*, the test is not whether *the regulation itself* would substantially affect interstate commerce, but whether *the activity regulated* so affects commerce.

Congress' findings explicitly and exclusively invoke its power under the Commerce Clause as the constitutional authority for the Individual Mandate, and they make clear that it is the third *Lopez* prong upon which the Mandate is supposedly based. *See* PPACA §1501(a). However, these findings misstate the *Lopez* test and strongly suggest that Congress misunderstood the nature of its authority. *Compare* PPACA §1501(a) (emphasis added) (finding that "*The individual responsibility requirement* provided for in this section . . . is commercial and economic in nature, and *substantially affects* interstate commerce") *with Lopez* 514 U.S. at 558-59 (emphasis added) ("Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce"). In short, Congress did not find that the "activity" (really, the "inactivity" or lack of activity) substantially affects commerce. Rather, Congress found that the regulation – the Mandate itself – affects commerce. This puts the constitutional cart before the horse, and the Supreme Court has never embraced such reasoning.

Indeed, in more than 200 years of debate as to the proper scope of the Commerce Power, the Supreme Court has never suggested that the Commerce Power allows Congress to impose affirmative obligations on passive individuals, or to punish individuals for failing to purchase a particular product. To the contrary, every landmark Commerce Clause case has dealt with congressional efforts to regulate different kinds of activity under the Commerce power. In every significant Commerce Clause case the Supreme Court has always had to decide whether Congress may regulate a given form of activity. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824) (considering whether interstate navigation was "commerce"); *Kidd v. Pearson*, 128 U.S. 1 (1888) (whether manufacturing was "commerce"); *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), 301 U.S. 1 (whether labor relations could be regulated as "commerce"); *Wickard*, 317 U.S. 111 (whether economic activity was too "local" to be regulated under the Commerce Power); *Lopez*, 514 U.S. 549 (whether carrying a weapon in a "school zone" could be regulated on the basis of supposed effects on commerce); *Morrison*, 29 U.S. 598 (whether gender-motivated violence could be regulated under the Commerce Clause). Though the Court's decisions in these cases reflect different and evolving views of the Commerce Power, not one can be read to even hint at a power to impose affirmative obligations. All are concerned with the regulation of activity that is already ongoing, not with the antecedent, and frankly unprecedented, question of whether it is constitutional for the federal government to force someone to engage in commercial activity to begin with.

Inasmuch, then, as the Individual Mandate regulates (and punishes) a decision not to engage in an activity, it falls beyond the settled scope of the Commerce Clause. There is simply no precedent for Congress using the Commerce Power to compel economic activity by inactive persons. Indeed, Congress' own analyses have repeatedly recognized this.

For example, Congress has charged the Congressional Budget Office with providing it with objective and nonpartisan analyses of federal programs. *See* http://www.cbo.gov/aboutcbo/factsheet.cfm. The CBO has noted that in 200 years, Congress has "never required people to buy any good or service as a condition of lawful residence in the United States." *See* Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994).

More recently, and as this Court has noted, another non-partisan office within Congress has reached much the same conclusion. The Congressional Research Service has been called Congress' "think tank." See *State of Florida v. United States Department of Health and Human Services*, Order and Memorandum Opinion on motion to dismiss, October 14, 2010 at 61 [hereinafter "10/14/2010 Mem. Op."]. Among its responsibilities, the CRS provides Congress with non-partisan analyses of the constitutionality of proposed federal laws. It has questioned whether the Commerce Clause "would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009 at 3 (cited in 10/14/2010 Mem. Op.,

at 61-62). In fact, the CRS has called the constitutionality of the individual mandate "the most challenging question" and moreover has noted that "it is a novel issue whether Congress may use the clause to require an individual to purchase a good or service." *Id.*

Since the enactment of PPACA, the CRS has reiterated its questions about the constitutionality of the Individual Mandate under the Commerce Clause. In fact, the day after this Court issued its Memorandum Opinion on Defendants' Motion to Dismiss, the CRS updated its analysis of the PPACA, again noting the novelty of what Congress was doing by way of the Individual Mandate. *See* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* October 15, 2010, at 8-9. It then noted that, in 'general, Congress has used its authority under the Commerce Clause to regulate individuals, employers, and others who *voluntarily* take part in some type of economic activity." *Id.* at 11 (emphasis added). And it questioned whether, like in the PPACA, "regulating a *choice* to purchase health insurance is" such an activity at all. *Id.* (emphasis added). In short, the CRS observed that the Individual Mandate in PPACA is a difference in kind, not just in degree, from the type of power that Congress in the past has relied upon the Commerce Clause to exert:

> While in *Wickard* and *Raich*, the individuals were participating in their own home activities . . . , they were acting on their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, [under the Individual Mandate] a requirement could be imposed on some individuals *who do not engage in any economic activity* relating to the health insurance market. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of *required participation* can be considered economic activity.

Id. (emphasis added) (citing *Wickard*, 317 U.S. 111, and *Gonzales v. Raich*, 545 U.S. 1 (2005)). The CRS opined that, quite simply, "it may seem like too much of a bootstrap to force individuals into the health insurance market and then use their participation in that market to say they are engaging in commerce." *Id.* at 11-12.

This Court has already found that "the power that the individual mandate seeks to harness is simply without prior precedent," and "the Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before." 10/14/2010 Mem. Op., at 61. Likewise, the federal court hearing a similar challenge brought by the Commonwealth of Virginia has ruled that the individual mandate exceeds the "high watermark" of the Commerce Power. *See Virginia v. Sebelius*, No. 3:10-cv-188, Mem. Op. at 18 (E.D. Va. Aug. 2, 2010).

Indeed, every court to consider this issue has found it to be novel and unprecedented. Even the only court to uphold the constitutionality of the individual mandate thus far has noted the case as one of "first impression" since "[t]he [Supreme] Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in *every* Commerce Clause case presented thus far, there has been *some sort of activity*." *Thomas More Law Center v. Obama*, No. 10-CV-11156, Mem. Op. at 15 (E.D. Mich. Oct. 7, 2010) (emphasis added).

As the Supreme Court has stated several times, the "utter lack" of such statutes for more than 200 years strongly suggests the "*absence* of such power." *Printz v. United States*, 521 U.S. 898, 908 (1997) (emphasis in original); *id.* at 905 (if "earlier Congresses

avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist"); *id.* at 907-908 ("the utter lack of statutes imposing obligations [like the one in *Printz*] (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power") (emphasis in original); *id.* at 918 ("almost two centuries of apparent congressional avoidance of the practice [at issue in *Printz*] tends to negate the existence of the congressional power asserted here").

B. Defendants' Efforts To Characterize The Individual Mandate As Regulating "Activity" Fail Because They Destroy All Limits On the Commerce Power.

In defending the Mandate, the Defendants have shied away from arguing that Congress may regulate inactivity under the Commerce Clause. Instead, Defendants have tried to advance several overlapping theories as to why the decision not to buy insurance is in fact a form of regulable economic activity. They have variously suggested that the choice not to obtain health insurance is activity subject to federal regulation because it is a "volitional economic decision," Def. Mem. in Support of Mot. to Dismiss at 43, *see also* Def. Mem. In Support of Mot. For Sum. Judgment at 16, 27-28; or because individuals will "almost certainly" need health care in the future, Def. Mem. In Support of Mot. To Dismiss at 35; or because the failure to obtain insurance is some form of supposedly active "self-insurance," *see* Def. Reply Mem. in Support of Mot. to Dismiss at 18, *see also* Def. Mem. In Support of Mot. For Sum. Judgment at 41.

These semantically clever arguments must fail because they "prove" far too much. To uphold the Individual Mandate on any of these bases would represent the boldest

expansion of the Commerce Power in history. It would also defy the Supreme Court's clear signal, in cases like *Lopez* and *Morrison*, that it will once again police the limits of the Commerce Power. If Congress can use the Commerce Power to punish a decision not to engage in a private activity, on the basis that the future consequences of this choice, in the aggregate, would substantially affect interstate commerce, there is seemingly *no* private decision Congress could *not* regulate or *no* activity it could not force private citizens to undertake (subject, presumably to the protections of the Bill of Rights) when, in the aggregate, it concludes that doing so would benefit the economy. For example, this same rationale would allow Congress to punish individuals for not purchasing health-related products, like vitamin supplements, on the ground that their failure to do so would increase health care costs by not ameliorating or preventing health conditions, like osteoporosis.

This is precisely the type of reasoning criticized by the Supreme Court in *Lopez*, where it warned that, under the Government's theories,

> it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if 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.

514 U.S. at 564; *accord Morrison*, 529 U.S. at 613 (to allow regulation of non-economic activity at issue would enable the federal government to regulate almost any activity, including "family law and other areas of traditional state regulation.").

Such a result would yield Commerce Clause jurisprudence both unrecognizable and incompatible with the Founder's vision of Congress' powers being limited and enumerated. *See generally* THE FEDERALIST No. 45 (Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined" while "[t]hose which are to remain in the State Governments are numerous and indefinite."). The Court has warned of the risks that such an expanded Commerce Clause would pose to our system of dual sovereignty:

> the scope of the interstate commerce 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.'

Jones & Laughlin Steel, 301 U.S. 1 at 37 (*quoted in Lopez*, 514 U.S. at 557).[2]

II. Defendants Would Turn The Commerce Power Into An Impermissible Federal Police Power.

A. The Mandate Is A Classic Exercise Of The Police Power.

Almost every affirmative legal obligation binding on citizens arises under a state's police powers. For example, compulsory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11, 12, 24-25 (1905); drug rehabilitation, *Robinson v. California*, 370 U.S. 660, 665 (1962); and the education of children, *cf. Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), have all been upheld on the basis of state police powers.

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[2] Similar consequences would attend acceptance of Defendants' apparent theory that Congress may regulate *anticipated commerce* rather than incidents of actual commerce. *See* Def. Mem. in Support of Mot. to Dismiss at 35. Such an understanding would permit Congress to manufacture its own potentially limitless jurisdiction.

A state's police power is also the basis for the only other "Individual Mandate" that requires individuals to obtain health insurance. Massachusetts law requires most adult residents to obtain health insurance amounting to "creditable coverage" and, analogously to the PPACA, imposes a penalty for failure to do so. *See* Mass. Gen. Laws ch. 111M, §2 (2008) (upheld pursuant to state "police power" in *Fountas v. Comm'r of Dep't of Revenue*, 2009 WL 3792468 (Mass. Super. Ct. Feb. 6, 2009) (dismissing suit), *aff'd*, 922 N.E.2d 862 (Mass App. Ct. 2009), *review denied*, 925 N.E.2d 865 (Mass. 2010)). Congress' findings in support of the Individual Mandate note the existence of a "similar requirement" in Massachusetts and make clear that Congress' intent in enacting the Mandate was to emulate this state measure. *See* PPACA § 1501(a)(2)(D) (finding that "[i]n Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.").

By contrast, in the rare instances where Congress imposes affirmative obligations on passive individuals, it does so pursuant to enumerated powers other than the power to regulate interstate commerce. A classic example is the draft, authorized by Congress' power "to raise and support Armies." *See* U.S. CONST. art. I, § 8, cl. 12; *Selective Service Cases*, 245 U.S. 366, 383, 390 (1918). Congress has never before attempted to impose an affirmative obligation to purchase a product or service, or participate in any kind of activity through the Commerce Clause.

B. The Supreme Court Has Foreclosed Conversion of the Commerce Power Into A Federal Police Power.

The fundamental problem with Defendants' theories, therefore, is that they would result in the conversion of the Commerce Power into a federal "police power" – a result which the Supreme Court has repeatedly held constitutionally impermissible.

The Supreme Court has been vitally concerned with policing – and preserving – the boundary between the federal commerce power and the state's police powers. This boundary, the Court has explained, is an important bulwark for liberty and an integral feature of our non-unitary constitutional order which, the Supreme Court has explained, favors liberty. *See Lopez*, 514 U.S. at 576 (Kennedy, J. and O'Connor, J. concurring) (explaining that limits on commerce power essential to fulfilling the "theory that two governments accord more liberty than one" which "requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States"). Accordingly, the *Lopez* Court warned of extending the Commerce Clause so far as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *See id.* at 557. *See also Morrison*, 529 U.S. at 617-19 (explaining that "[t]he Constitution . . . withholds from Congress a plenary police power") (internal citations omitted).

If, however, a decision *not* to engage in an activity which substantially affects interstate commerce renders individuals subject to coercive regulation under the Commerce Clause, there will not only cease to be a limit on Congress' own power under

the Commerce Clause, there will also cease to be a workable distinction between Congress' broad but bounded Commerce Power and the states' general police powers, hemmed in only by the Bill of Rights and the supremacy of federal legislation. Such a ruling would, as the Supreme Court warned in *Lopez*, "obliterate the distinction between what is national and what is local." 514 U.S. at 557. This result would be incompatible with the federal design of our Constitution and should be rejected by the Court.

CONCLUSION

For all the foregoing reasons, *amici curiae* Members of the United States Senate respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment.

Dated November 18, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2010, a copy of the foregoing Brief of Members of the United States Senate as *Amici Curiae* in Support of Plaintiffs' Motion for Summary Judgment was served on counsel of record for all counsel of record in this case through the Court's Notice of Electronic Filing system.

/s/ Carrie L. Severino
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