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No. 10-2347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation;
MICHELE G. WADDELL; JOANNE V. MERRILL,

Plaintiffs-Appellants,

v.

TIMOTHY GEITHNER, Secretary of the Treasury of the United States, in his official capacity; KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; HILDA L. SOLIS, Secretary of the United States Department of Labor, in her official capacity; ERIC HOLDER, JR., Attorney General of the United States, in his official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF REVERE AMERICA FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Brian S. Koukoutchos
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

Charles J. Cooper
Counsel of Record
David H. Thompson
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 Fax

Attorneys for Revere America Foundation

January 25, 2011

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-2347 Caption: Liberty University et al. v. Geithner et al.

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Anita Leigh Staver
Mathew D. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons
Maitland, FL 32751-0000

Stephen Melvin Crampton
LIBERTY COUNSEL
P. O. Box 11108
Lynchburg, VA 24506-1108

s/ Charles J. Cooper
(signature)

1/25/2011
(date)

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INTEREST OF *AMICUS CURIAE*[1]

The Revere America Foundation ("Revere America") is an advocacy organization dedicated to advancing common sense public policies rooted in America's traditions of individual freedom and free markets. Revere America supports and advocates reform of our health care system through measures that are compatible with these values, including improving access to medical care, providing incentives for innovation and encouraging competition. Revere America opposes stripping Americans of the freedom to make their own individual decisions about medical care by forcing people to purchase health insurance or incur a government penalty.

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation and submission of this brief. *See* Fed. R. App. P. 29.

INTRODUCTION AND SUMMARY OF ARGUMENT

The importance of this case cannot be overstated, for it presents this Court with a rare instance in which it must face its "responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). At issue is whether Congress has authority under the Commerce Clause and the Necessary and Proper Clause to enact, for the first time in American history, a law compelling individual Americans to purchase a consumer product that they do not want. Section 1501 of the Patient Protection and Affordable Care Act contains an individual mandate ("Individual Mandate") that seeks to compel most people to purchase health insurance policies by 2014. *See* Pub. L. No. 111-148, § 1501(b), § 10106, 124 Stat. 119, 244, 907 (2010).

Although the Supreme Court's modern Commerce Clause jurisprudence has gradually eliminated the distinction between interstate and intrastate commerce, the Court has never doubted its "duty to recognize meaningful limits on the commerce power of Congress," *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring), lest the limited and enumerated powers granted in Article I become the general federal police power that the Framers deliberately withheld. The Court has insisted, accordingly, that

Congress' commerce power be confined to the regulation of "economic activity." *See id.* at 567 (opinion of the Court).

The Individual Mandate, however, is triggered not by economic activity, but rather by an individual's private *decision* not to engage in economic activity. Section 1501 regulates *in*activity, conscripting unwilling individuals into the commercial market to buy an unwanted product. The Individual Mandate thus introduces compulsory commerce into the American economy – commerce that Congress not only regulates, but *creates*. If Congress has power to regulate *inactivity* in this fashion, then one is "hard pressed to posit any *activity* by an individual that Congress is without power to regulate." *Id.* at 564 (emphasis added). Such a sweeping regulatory power effectively ousts the states of their reserved governmental powers and thus violates the Tenth Amendment.

But the Individual Mandate commits a constitutional offense that is graver still. For the Individual Mandate operates directly on individuals, and to the extent that it exceeds Congress' enumerated powers, it infringes on the retained constitutional *rights* of the people, rights specifically protected by the Ninth Amendment. And while it is difficult to posit what Congress could not do with the regulatory power it claims here, it is not at all difficult to posit what it could do. Indeed, Congress' own budget office, concerned

that federally mandated private expenditures ought to be included in the federal budget, understood that implementation of such a power could lead to, "[i]n the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services. . . ." CONGRESSIONAL BUDGET OFFICE MEMORANDUM: *Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 9 (1994) ("CBO MEMORANDUM"). Our Constitution grants Congress no such power.

ARGUMENT

THE INDIVIDUAL MANDATE EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE AND THE NECESSARY AND PROPER CLAUSE.

I. THE GOVERNMENT CONCEDES THAT THE INDIVIDUAL MANDATE LIES AT THE OUTER LIMITS OF THE COMMERCE CLAUSE, AS AUGMENTED BY THE NECESSARY AND PROPER CLAUSE.

The court below upheld the Individual Mandate as "within Congress' authority under the Commerce Clause" standing alone, and therefore found it "unnecessary to consider whether the provision[] would be [a] constitutional exercise[] of power pursuant to … the Necessary and Proper Clause." *Liberty Univ. v. Geithner*, 2010 U.S. Dist. LEXIS 125922, at *39 (W.D. Va. Nov. 30, 2010). This is plainly wrong. The Government itself conceded below that it must rely on the Necessary and Proper Clause to

sustain the Individual Mandate. Govt. Mem. in Support of Motion to Dismiss at 1, 23, 27; Govt. Reply Mem. at 7. The Individual Mandate regulates neither the "channels of interstate commerce" nor "instrumentalities[,] … persons or things in interstate commerce," *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005), and the Government does not contend otherwise. Therefore the mandate lies beyond Congress' Commerce Clause power and can be sustained, if at all, only as an exercise of power under the Necessary and Proper Clause to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id*. at 17. *See* Govt. Mem. at 27. "[U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as [the Supreme Court] has acknowledged since at least *United States v. Coombs,* 37 U.S. 72 (1838), Congress' regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment). *See, e.g., Katzenbach v. McClung,* 379 U.S. 294, 301-02 (1964).

The Government, accordingly, seeks to defend the Individual Mandate as necessary to ensure the effectiveness of Congress' principal reforms of the interstate health care and health insurance markets: extending coverage to those with costly preexisting medical conditions and preventing premiums based on individual medical history. Unless everyone is required by law to purchase health insurance (or to pay a penalty), the revenue base will be insufficient to underwrite the costs of insuring individuals presently deemed high risk or uninsurable. Therefore, the Government reasons, insofar as Congress has power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, power to make the regulation effective by imposing the Individual Mandate. Govt. Mem. at 26-29.

As we demonstrate below, however, if Congress has power to regulate "commerce" in the health insurance market by commanding unwilling individuals to engage in specific commercial transactions in that market, there is no principled reason why it cannot likewise regulate commerce by issuing similar commands in virtually any other market for goods and services. And such a breathtaking, wholly unprecedented regulatory power would "bid fair to convert congressional authority under the Commerce

Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

II. CONGRESS HAS NO POWER TO COMPEL AN UNWILLING INDIVIDUAL TO ENTER THE STREAM OF COMMERCE TO PURCHASE AN UNWANTED PRODUCT.

A. None of the Supreme Court's Commerce Clause Decisions Authorizes Regulation of *Inactivity*.

The Supreme Court's decision in *Lopez*, provides the framework for analyzing assertions of congressional power that lie at the outermost reaches of the Commerce and the Necessary and Proper Clauses – particularly assertions that are without precedent. In *Lopez*, the Court invalidated a federal statute criminalizing possession of guns near schools. Noting that "even the[] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits," *id*. at 556-57, the Court found in those precedents the common feature that they all involved the regulation of some type of "economic activity" that affected interstate commerce, *id*. at 559. *See id*. at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity."). *See also United States v. Morrison*, 529 U.S. 598, 613 (2000) ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. . . . [T]hus far in our Nation's history our cases have upheld

Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

The activity at issue in *Lopez* fell outside these precedents because it was not meaningfully "connected with a commercial transaction" or otherwise economic in nature. 514 U.S. at 561. And because the Government could offer no limiting principle that would prevent congressional authority to regulate noneconomic activity under the Commerce Clause from becoming "a general federal police power," *id*. at 564, the federal ban on gun possession near schools could not be squared with the fundamental principle that the congressional "powers enumerated in the Constitution" must be "interpreted as having judicially enforceable outer limits." *Id.* at 566. "[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." *Id.* at 564.

The *Lopez* Court thus distilled from precedent the rule that the subject of the challenged congressional regulation must involve "economic activity." 514 U.S. at 559, 560, 561, 567. The *Lopez* analysis compels invalidation of the Individual Mandate. For even assuming that an individual's decision not to buy health insurance is *economic* in nature, it is plainly not *activity*. It is, indeed, a decision to refrain from activity, to

remain outside the stream of commerce by choosing not to purchase health insurance. It is, in short, *in*activity. And Congress has never sought to regulate a commercial market by commanding unwilling individuals to enter it. To the contrary, "[e]very application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity." *Commonwealth v. Sebelius*, No. 10-188, 2010 U.S. Dist. LEXIS 130814, at *37-38 (E.D.Va. Dec. 13, 2010). *See id.* at *39 ("Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market."). Indeed, when legislation imposing an Individual Mandate was first considered (but not enacted) by Congress 16 years ago, the Congressional Budget Office ("CBO") concluded that "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States." CBO MEMORANDUM at 1.

The court below agreed that federal commerce power is limited to the regulation of "activities," *Liberty Univ.*, 2010 U.S. Dist. LEXIS 125922, at

*39-44, but it nevertheless adopted the Government's position that an individual's decision *not* to enter the marketplace constitutes the requisite "activity." The court reasoned that almost everyone will eventually need health care and that, by choosing to finance such care by means other than buying insurance now, "one becomes an active market participant, not a passive bystander," in the health care market. *Id*. at *43. Thus, "an individual's decision not to purchase health insurance is a form of economic activity." *Id*. at *44. This conclusion, according to the district court, "follows from the Supreme Court's rulings" in *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005). *Id.* at *50. It does not.

Wickard upheld a federal price-support program that penalized a farmer for growing more than his statutory allotment of wheat, even though he used it solely for his own family and livestock. The Supreme Court reasoned that Congress could rationally conclude that a decision by many farmers to grow their own wheat, rather than entering the marketplace to buy grain, could in the aggregate affect prices and undermine the congressional program. Here, according to the court below, "Plaintiffs' preference for paying for health care needs out of pocket rather than by purchasing insurance on the market is much like the preference of the plaintiff farmer in

Wickard for fulfilling his demand for wheat by growing his own rather than by purchasing it." *Id.* But the congressional scheme at issue in *Wickard* imposed a penalty not on farmer Filburn's mere passive "preference," but on his affirmative *activity of actually producing grain*. *Wickard*, 317 U.S. at 127-29. Production of wheat or any other commodity fits easily within the Supreme Court's definition of "activities" that "are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.' " *Raich*, 545 U.S. at 25. *See also Lopez*, 514 U.S. at 559-60 (describing *Wickard* as involving "intrastate economic activity" in the form of "production and consumption of homegrown wheat"). The regulation at issue in *Wickard*, unlike the Individual Mandate, did not command farmer Filburn to grow wheat, nor did it compel him, or anyone else, to buy it. Rather, Congress subjected farmer Filburn to federal regulation only if, and when, he voluntarily engaged in the *activity of producing wheat*.

The district court points to the problem of "free riders" – those who do not buy health insurance but then demand free treatment in hospital emergency rooms when they get sick, thereby shifting the cost of their care to the hospital, the government, or other insured parties (in the form of higher premiums), since hospitals that participate in Medicare are forbidden

from refusing medical treatment on the basis of ability to pay. *Liberty Univ.*, 2010 U.S. Dist. LEXIS 125922, at *41-43. But *that* problem is of Congress' own creation, and it cannot bootstrap itself into powers not enumerated by the Constitution simply because it deems the exercise of those powers to be useful in light of other regulations that it has previously enacted. A federal program, for example, requiring federally subsidized grocers to provide free bread to those who cannot afford to buy it would not authorize a federal regulation compelling Filburn and other farmers to grow wheat to ensure a low-cost supply. Congress can constitutionally address the harshness of turning away those without health insurance in a variety of ways, including subsidizing – as it does currently in the Affordable Care Act – those who cannot otherwise afford such insurance.

The Supreme Court's decision in *Raich*, which was controlled by *Wickard*, is equally inapposite. Marijuana growers, like wheat farmers, are voluntarily engaging in a classic form of economic activity – the production of an agricultural commodity. *See Commonwealth v. Sebelius,* 2010 U.S. Dist. LEXIS 130814, at *35 (in *Wickard* and *Raich,* "the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initiated change of position

voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.”).

The Government also relies on *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243, 251 (1964), which held that Congress has Commerce Clause power to ban racial discrimination in public accommodations whose operations directly affect interstate travel. The Government contends that, because the motel owner was compelled to engage in commercial transactions with a class of travelers he did not want to serve, Congress was regulating *in*activity. But the motel owner *chose* to enter the stream of commerce by operating an inn, thereby assuming the legal duties, both federal and state, imposed on such “public accommodations.” *See* 379 U.S. at 259-60 & n.8; *id*. at 284-85 (Douglas, J., concurring).[2]

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[2] Under the Government’s sweeping theory of commerce power, Congress would presumably have been free, upon finding that there was an acute shortage of hotel rooms available to black travelers, to mandate that *all* homeowners turn their homes into boarding houses and make rooms available to travelers. *See Heart of Atlanta*, 379 U.S. at 252-53 (recounting congressional findings of just such a shortage). Yet in *Heart of Atlanta*, Congress mandated nondiscriminatory accommodations only by “those establishments which had certain commercial characteristics,” 379 U.S. at 288 (appendix to opinion of Douglas, J., concurring), and specifically exempted any establishment with no more than five rooms to rent “which is actually occupied by the proprietor of such establishment as his residence.” *Id*. at 262 (appendix to the opinion of the Court)(quoting §201(b)(1) of the Civil Rights Act).

B. The Government's Supposed Statutory and Lower Court Precedents Likewise Involved No Regulation of Inactivity.

Remarkably, the Government insists that federal laws mandating the purchase of insurance are commonplace, which supposedly makes it "well-settled that Congress may require private parties to enter into insurance contracts where failing to do so would impose costs on other market participants." Govt. Reply Mem. at 13 & n.10 (citing nine statutes). But *every* statute cited by the Government applies to particular economic acts or endeavors, and requires any "owner" or "operator" of such property – ranging from railroads to coal mines to property in flood zones – to buy particular types of insurance covering risks attendant to such an activity. *See id*. In each case, the owner or operator entered the marketplace voluntarily and *chose* to buy or operate that property, and likewise remained free to avoid the insurance obligation by quitting the enterprise. Such laws, even if they had ever been sustained over a constitutional challenge – and the Government cites no such judicial authority – do not regulate *inactivity* and they therefore provide no support for the Individual Mandate here.

In its quest for precedents for the Individual Mandate, the Government travels even farther afield, pointing out that, under the Superfund Act, a property owner cannot avoid strict liability for

environmental clean-up costs by showing that he did not cause the toxic-waste leak. Govt. Reply Mem. at 13-14. This, says the Government, proves that the Commerce Clause empowers Congress to impose mandates on those who are "passive" or "inactive." But any owner of a facility subject to Superfund regulation voluntarily entered the stream of commerce and thereby accepted the risk of strict liability imposed by federal regulation in connection with that economic *activity.*[3]

The Government also touts a case sustaining the Child Support Recovery Act, which "affirmatively requires child support payments in interstate commerce." Govt. Reply Mem. at 13 & n.9 (citing *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996)). But that statute merely provides a federal mechanism for enforcing state-court child-support orders when a parent leaves the state and defaults on his legal responsibilities. In such cases the *duty* to make child-support payments is imposed by *state*, not federal, law. *See Sage*, 92 F.3d at 103-04. And states have plenary police power to

[3] The only superfund case cited by the Government that presented a Commerce Clause question – although not the question presented here – is *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997). There the court rejected the defendant's assertions that a statute must regulate commercial activity "directly" in order to satisfy the Commerce Clause, and that the government had to show that defendant's activities, in particular, affected interstate commerce. *See id.* at 1510-11. The case raised no question about congressional power to impose mandates that compel persons to enter the stream of commerce and buy products they do not want.

mandate affirmative duties; the Commerce and Necessary and Proper Clauses grant no such power to Congress. The Government's reliance on this example is thus telling, for it reveals that the Government does not grasp the "first principles" that the Supreme Court stressed in *Lopez*: "The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const. Art. I, § 8. As James Madison wrote, 'the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292-293 (C. Rossiter ed. 1961)).

The Government's next supposed precedent for the Individual Mandate is congressional use of "eminent domain to compel the private transfer of land in aid of the regulation of interstate commerce." Govt. Reply Mem. at 14. But the distinctions between eminent domain and the Individual Mandate subvert, rather than support, the Government's position. First, the power of eminent domain inheres in sovereignty and is steeped in centuries of common law dating back to Magna Carta. The Government identifies no similar pedigree for the Individual Mandate, nor could it, since even congressional authorities concede that this assertion of federal power is wholly unprecedented. *See* CBO MEMORANDUM at iv, 1-2. Second, federal

eminent domain power cannot be doubted, for the Fifth Amendment expressly provides that private property cannot "be taken for public use without just compensation." Congressional eminent domain authority is thus tantamount to an enumerated power, as the Supreme Court explained more than a century ago. *See Bauman v. Ross*, 167 U.S. 548, 574 (1897) ("In the Fifth Article of the earliest amendments to the Constitution of the United States … the inherent and necessary power of the Government to appropriate private property to the public use is recognized."). Third, the eminent domain power imposes a mandate more on the government than on the individual. Far from imposing a coercive monetary penalty on property owners, as the Individual Mandate does, the Fifth Amendment requires that the federal government pay just compensation to property owners. Moreover, those owners entered the stream of commerce voluntarily by acquiring their property, and although owners can be compelled to sell their property for public use, not even the Government argues that eminent domain would allow Congress to compel an individual to *buy* property that he does not want. The contrasts between the Individual Mandate and the Fifth Amendment's eminent domain power are stark – and dispositive.

The other examples of affirmative mandates invoked by the Government are likewise rooted in specific provisions enumerated in the

Constitution. *See Commonwealth v. Sebelius*, 2010 U.S. Dist. LEXIS 130814, at *34. The power to impose a military draft arises from Congress' power to raise an army and navy. *See* U.S. Const. Art. I, § 8, cls. 12-13. The power to compel the filing of tax returns arises from Congress' power to levy taxes, including taxes on individuals. *See* U.S. Const. Art. I, § 8, cl. 1; U.S. Const. Amend. XVI. The power to require the filing of census forms arises from Congress' duty to conduct an "enumeration" of the population every ten years, in order to ensure fair democratic representation. *See* U.S. Const. Art. I, § 2, cl. 3. And the power to compel service on a jury is rooted in the federal government's duty to provide jury trials for both civil and criminal disputes. *See* U.S. Const. Amends. VI and VII. The Government can offer no remotely comparable constitutional foundation for the Individual Mandate.

Finally, nothing in these constitutional mandates "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. The Government's unbounded vision of the Commerce and the Necessary and Proper Clauses, in contrast, would effectively free the federal government of any meaningful limits on the scope of its commerce power, as we demonstrate below.

C. The Government Proffers No Genuine Limiting Principle to Contain a Commerce Clause Power That Is Not Tethered To Any Activity, Let Alone to Economic Activity.

1. The Government's assertion that the health care market is "unique" does not furnish a limiting principle and, in any event, is wrong.

In *Lopez*, as noted earlier, the Supreme Court struck down a federal gun-possession statute because the Government's "hip bone connected to the thigh bone" theory explaining why gun possession near a school substantially affects interstate commerce had no articulable limits; the Government could not identify a single activity that did not, under its theory, substantially affect interstate commerce. Nor could the Court: "[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." 514 U.S. at 564. *See also id.* at 565 (the dissent's "rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial"). Upholding Congress' claimed authority to regulate noneconomic activity that is not even remotely connected to interstate commerce, such as simple gun possession, would thus negate the central premise of federalism: that the Constitution's enumeration of congressional powers " 'presupposes something not enumerated.' " *Id.* at 566 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 70 (1824)).

The Individual Mandate presents the same problem, and the Government's *only* answer is that the health care market is "unique." It argues that upholding the Individual Mandate will "not open the floodgates" to similar congressional mandates in other markets because "[t]he distinctive characteristics of the health care market – a combination of universal need, unavoidable uncertainty, and the associated cost-shifting – make it unique." Govt. Reply Mem. at 12. The court below adopted this rationale. *Liberty Univ.,* 2010 U.S. Dist. LEXIS 125922, at *48-51.

This supposed limit on individual mandates fails both as a matter of principle and as a matter of fact. Congress' exercise of its power to regulate economic activity under the Commerce and Necessary and Proper Clauses is not conditioned on the "uniqueness" of the market at issue. Accordingly, although the supposedly "distinctive characteristics" of the health care market, even if true, might provide *policy* reasons why Congress *would choose not* to enact individual mandates in other areas, they certainly are not *constitutional* reasons why Congress *could not*. Only the latter can provide a judicially enforceable principle to cabin Congress' exercise of its commerce power. And the Government's blithe assurance that a decision expanding invasive regulatory power to unprecedented lengths will be like "a restricted railroad ticket, 'good for this day and train only,' " *County of Washington v.*

Gunther, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting), is fanciful at best. Indeed, in *Lopez* the dissenting Justices likewise urged that congressional regulation of gun possession near schools was a "rare case," due to the "particularly acute threat" posed by firearms and the "special way in which guns and education are incompatible." 514 U.S. at 624 (Breyer, J., dissenting). The *Lopez* Court rejected the supposed "rare case" limitation as "devoid of substance." *Id*. at 564-65.

In any event, the markets for health insurance and health care are plainly not unique. Let us start with other insurance markets. Ironically, on the very page after it asserts that health insurance is unique, and is therefore the only market in which Congress could impose an individual mandate, the Government trumpets a host of federal statutes mandating various forms of casualty, liability, and unemployment insurance for those who choose to engage in particular economic enterprises. Govt. Reply Mem. at 13 & n.10. Although we have already demonstrated that these laws provide no precedent for the Individual Mandate at issue here, *see supra* Part II.B, it is noteworthy that the Government itself believes there are many insurance markets in which Congress may impose individual mandates for the benefit of "other market participants." Govt. Reply Mem. at 13.

Nor would the Government's rationale stop at mandates affecting the insurance markets. Food, shelter, clothing, transportation, education, and communication are all basic necessities of modern life, and everyone must eventually participate in some way in the markets for these goods and services. The Government offers no reason why Congress could not choose to regulate these markets with individual mandates. Under the Government's rationale, for example, Congress would be empowered to regulate grain prices not only by penalizing wheat production in excess of the government's quota, as it did in *Wickard*, but by penalizing individuals who decide not to enter the market as consumers of bread and other grain products.

In short, market disruptions, inefficiencies, and cost-shifting are not unique to the health care and health insurance markets, and the Government provides no *constitutional principle* that would restrain Congress from addressing problems in other markets with its newly claimed power to compel individuals to enter the stream of commerce and buy products that they do not want. Long before this litigation arose, Congress' own non-partisan Congressional Budget Office gave credence to an outlook very different from the brisk, rosy assurances offered by the Government here. When the CBO reviewed the first bill contemplating an individual mandate

16 years ago and concluded that such a measure was unprecedented, the CBO observed that federal budgets have always distinguished between "resource allocation decisions that involve private choice, are made in a decentralized fashion, and are subject to the economic disciplines of the marketplace, and resource allocation decisions that are made in a centralized fashion at the federal level by the President and the Congress through the governmental budget process." CBO MEMORANDUM at 4 (quotation marks and citation omitted). The CBO reasoned that "the essence of private choice is the ability *not* to act. Decisions about resource allocation are not private unless individuals can choose not to spend their money in response to market forces." *Id.* at 7 (emphasis in original). Congress' budget experts had to confront these issues because enactment of a mandate would have required a decision about how the mandate should be treated for federal budget purposes. With the degree of control that the federal government would exert over mandated purchases of health insurance by individuals who had been conscripted into commerce by congressional decree, the CBO was concerned that the cost to individuals of complying with the mandate ought to be counted as part of the federal budget. *Id.* at 6-7. The CBO then offered this chilling warning:

> Failure to record the cost of this compulsory activity in the budget would open the door to a mandate-issuing government

> taking control of virtually any resource allocation decision that would otherwise be left to the private sector, without the federal budget recording any increase in the size of government. In the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services, could be instituted without any change in total federal receipts or outlays.

CBO MEMORANDUM at 9.

2. A statute is not "proper" under the Necessary and Proper Clause if it would negate the purpose, embodied in Article I and the Ninth and Tenth Amendments, of enumerating, and thereby limiting, federal power.

The Government's argument that the Individual Mandate is "essential" to its "larger regulatory scheme for the interstate health care market," *Liberty Univ.*, 2010 U.S. Dist. LEXIS 125922, at *52, even if credited, goes only to the "Necessary" element of the Necessary and Proper Clause.[4] Even a "necessary" exercise of Commerce Clause authority must also be "a 'Law … *proper* for carrying into Execution the Commerce Clause.' " *Printz v. United States*, 521 U.S. 898, 923-24 (1997) (quoting

[4] The "necessity" identified by the Government, at bottom, is the need for additional monetary resources. But the Internal Revenue Code is a testament to the innumerable ways in which revenues can be raised in accord with the Constitution, and thus a justification based on a need for additional resources is one of least compelling showings of "necessity" imaginable. If Congress needs more money to pay for its health care reforms, it has plenty of constitutional options available to it.

Art. I, § 8, cl. 18) (emphasis added by the Court).[5] In Chief Justice Marshall's words, for a law to be "proper," it must "consist with the letter and spirit of the Constitution." *McCulloch v. Maryland,* 17 U.S. 316, 421 (1819). The Individual Mandate fails this test because it is inconsistent with – indeed, it negates – the "first principle[]" that Article I "creates a Federal Government of enumerated powers" that are " 'few and defined.' " *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45). Under the Government's theory, Congress can impress unwilling individuals into commerce and compel them to buy unwanted products whenever doing so is deemed by Congress to be essential to some larger regulatory plan.[6]

That makes this case actually easier to decide than *Lopez.* There, the Supreme Court balked at the degree of attenuation in the causal connection between the regulated "actors" and the ultimate effect of "their conduct" on commerce. 514 U.S. at 580 (Kennedy, J., concurring); *see also id*. at 559-61, 565-67 (opinion of the Court). Although the Court admitted that "some of our prior cases have taken long steps down [the] road" toward granting Congress a general police power by "giving great deference to

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[5] It is this sort of catch-all analysis that has made the Necessary and Proper Clause the "last, best hope of those who defend *ultra vires* congressional action." *Printz*, 521 U.S. at 923.

[6] When the British navy impressed Americans into service in 1812, President James Madison deemed it *casus belli*.

congressional" programs regulating activities with remote effects on commerce, *id*. at 567, the Court drew the line at "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561.

But the Individual Mandate strains the concept of commerce even more than the gun possession statute in *Lopez*, for it reflects not a difference *in degree* from prior exercises of Commerce Clause power, but a difference *in kind.* Again, the Individual Mandate reaches beyond economic "actors" to command even those who have decided *not* to act; it regulates not "activity" but inactivity. And ordering unwilling individuals into the marketplace to buy unwanted products goes where even Congress has heretofore never ventured.[7] Far from what Chief Justice Marshall described as "the natural, direct and *appropriate* means, or the *known and usual means*, for the execution of a given power," JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 186 (Gerald Gunther ed. 1969) (emphasis

[7] Indeed, Congress' own staff warned that the Individual Mandate may exceed its powers, noting that it may "be questioned 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." CONGRESSIONAL RESEARCH SERVICE REPORT, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 6 (2009) (emphasis added).

added), the Individual Mandate is the ultimate form of congressional bootstrapping: unwilling individuals are first drafted into the health insurance market and then their involuntary participation in that market is used to justify the mandate as an exercise of the Commerce Clause.

This is, in Alexander Hamilton's phrase, "merely [an] act of usurpation" which "deserves to be treated as such." THE FEDERALIST NO. 33**,** at 204 (*quoted in Printz*, 521 U.S. at 924). And because this usurpation of general police power leaves no apparent "activity that the States may regulate but Congress may not," *Lopez*, 514 U.S. at 564, the Individual Mandate encroaches on the reserved sovereign powers of the States in violation of the Tenth Amendment.

But that is not all. To uphold the claim of congressional power underlying the Individual Mandate would also fundamentally alter the very nature of the relationship between the federal government and the governed. That relationship is defined, in large part, by the limitations on federal regulation inherent in the Constitution's enumeration of congressional powers. Central to the Framers' concept of republican government was the belief that the enumerated powers of the federal government are reciprocally related to the retained *rights* of the people. By delegating certain legislative powers to the national government, the people consented to abide by the

laws enacted by the federal government pursuant to those powers. But as to those matters over which the national government had no enumerated power, the people had a retained right to do as they pleased, free of federal regulation. *See* Charles Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons,* 4 J. OF L. & POLITICS 63, 64 (1987). Indeed, many of the Framers opposed the incorporation of a Bill of Rights in the Constitution for fear that an attempt to "enumerate" the rights of the people would carry the risk that any omission from the list would be construed to grant Congress an implied, *unenumerated* power to legislate on the subject at issue. *Id.* at 69-70.[8] The Framers sought to protect against this danger with the Ninth Amendment's guaranty that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

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[8] This concern was succinctly expressed by James Wilson in the Pennsylvania ratifying convention: "If we attempt an enumeration [of rights], every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (reprint 1966) (J. Elliot 2d ed. 1836) (statement of J. Wilson at Pennsylvania Ratifying Convention, Oct. 28, 1787). Wilson thought that "an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people." *Id.* at 436-437.

In short, the limited and enumerated "powers granted" to the national government in Article I and the unlimited and unenumerated "rights retained" by the people in the Ninth Amendment are two sides of the same coin. *See* THE WRITINGS OF JAMES MADISON 432 (G. Hunt. Ed. 1904) (letter to G. Washington dated Dec. 5, 1789). And the Framers conceived of the people's reserved rights as ranging from the fundamental to the mundane, from the rights of free speech and assembly to an individual's "right to wear his hat if he pleased."[9] There is little doubt that, somewhere along that continuum, the Framers would have placed the right of an individual to decide for herself which products and services she wishes to buy.[10] After all, as the Government concedes, the event that triggers imposition of the

[9] During the debates on the Bill of Rights, Congressman Sedgwick of Massachusetts objected that no amendment protecting free assembly was needed, for "it is a self-evident, inalienable right which the people possess … [and] that never would be called in question." He argued that, if Congress were going to "descend to such minutiae," it may as well "have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed." 1 ANNALS OF CONGRESS 759 (J. Gales & W. Seaton ed. 1834).

[10] The right not to buy an unwanted product has an honored American pedigree. The colonists in Boston and elsewhere boycotted tea and other products bearing the imprimatur of the Crown, and even King George III did not claim a sovereign power to compel his American subjects to buy English products.

Individual Mandate – and its penalties – is a *decision not to act*. And even if the decision not to buy a product can fairly be characterized as an economic decision, the fact remains that the only regulated event is the naked decision itself – the mental process of *thinking*. The Government's defense of the Individual Mandate thus rests on a twisted revision of Descartes' syllogism: "I think (about commerce), therefore I am (engaging in commerce)." But the Constitution sounds in law, not metaphysics, and there is no place in a federal government of limited and enumerated powers for this sort of Cartesian Commerce Clause.[11]

CONCLUSION

A federal law that conscripts state officials into participating in a federal regulatory regime enacted under the Commerce Clause infringes on the reserved state sovereignty protected by the Tenth Amendment. *See Printz*, 521 U.S. at 925, 928, 935. The Individual Mandate goes farther,

[11] Certainly the monetary punishment imposed by the federal government for *thinking* about not buying health insurance is no mere philosophical exercise. Although "governments need and have ample power to punish . . . acts," it "does not follow that they must have a further power to punish thought . . . as distinguished from acts." *Wieman v. Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring). Contemplating even the most heinous crime is not punishable until one commits an overt act or actively conspires with others. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) (the law "does not punish mere thought; the criminal agreement itself is the *actus reus*").

invading not only the State's constitutionally protected sphere of sovereign autonomy, but the individual's. If Congress' power to regulate interstate commerce is expanded to enable it to force individual citizens to buy products they do not want, then little if anything will be left of the retained rights guaranteed by the Ninth Amendment, or of the distinction between a citizen and a subject.[12] Accordingly, *amicus curiae* respectfully submits that the judgment of the court below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

s/Charles J. Cooper
Charles J. Cooper
Counsel of Record
David H. Thompson
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 Fax

Brian S. Koukoutchos
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

Attorneys for Revere America Foundation

[12] "[T]he term citizen brings into prominence the rights and privileges of the status, rather than its correlative obligations, while the reverse is the case with the term subject." John William Salmond, JURISPRUDENCE § 39 (2d ed. 1907).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Anita Leigh Staver
Mathew D. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons
Maitland, FL 32751-0000

Stephen Melvin Crampton
LIBERTY COUNSEL
P. O. Box 11108
Lynchburg, VA 24506-1108

s/Charles J. Cooper