1-1-2011

Thomas More Law Center v. Obama - Amicus Brief of American Center for Law and Justice

American Center for Law & Justice

CASE NO. 10-2388

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS MORE LAW CENTER, et al.,
Plaintiffs/Appellants,

vs.

BARACK HUSSEIN OBAMA, et al.,
Defendants/Appellees.

Appeal from the U.S. District Court, Eastern District of Michigan
Case No. 2:10-cv-11156 (Hon. George C. Steeh, presiding)

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, FILED WITH THE CONSENT OF ALL PARTIES, IN SUPPORT OF PLAINTIFFS/APPELLANTS AND URGING THE REVERSAL OF THE DISTRICT COURT'S JUDGMENT

Jay Alan Sekulow*
Stuart J. Roth*
Colby M. May**
James M. Henderson Sr.*
American Center for Law & Justice
201 Maryland Avenue, NE
Washington, DC 20002
202-546-8890
Co-counsel for amicus curiae

Edward L. White III*
Erik M. Zimmerman**
Miles L. Terry*
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
734-662-2984
Co-counsel for amicus curiae

December 15, 2010

***Admitted to Sixth Circuit Bar**
****Not admitted to Sixth Circuit Bar**

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1

The amicus curiae, the American Center for Law & Justice ("ACLJ"), is a non-profit organization with no parent corporation. No public corporation owns any part of the ACLJ, and the ACLJ issues no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution, Statutes, and Rules

Other Authorities

I. IDENTITY AND INTEREST OF THE AMICUS CURIAE

The amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g., Pleasant Grove City v. Summum,* 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). ACLJ attorneys also have participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court and lower federal courts.

The ACLJ has been active in the litigation concerning the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). The ACLJ filed amici curiae briefs on behalf of itself, Members of Congress, and the Constitutional Committee to Challenge the President and Congress on Health Care in *Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va. 2010), and *State of Florida v. United States Dep't of Health & Human Servs.,* No. 3:10-cv-91-RV/EMT (N.D. Fla. 2010), two other cases challenging the constitutionality of the PPACA's individual mandate.

Also, the ACLJ represents the plaintiffs in *Mead v. Holder*, No. 1:10-cv-00950 (D.D.C. 2010), another case challenging the individual mandate's constitutionality on the grounds that it exceeds Congress's power to regulate interstate commerce. The ACLJ, thus, has an interest that may be affected by the instant case in that any decision by this court would be persuasive authority in *Mead*.

In short, the ACLJ has developed an expertise in the area of the law involved in this case. Its expertise will benefit this court in deciding this case. The proper resolution of this case is a matter of substantial concern to the ACLJ and to its clients in *Mead*.

II. SUMMARY OF ARGUMENT

The Commerce Clause authorizes Congress to regulate economic activity, not economic decisions. As such, the Commerce Clause does not authorize Congress to regulate the *inactivity* of American citizens by requiring them to buy a good or service (such as health insurance) as a condition of their lawful residence in this country. Because the individual mandate provision of the PPACA requires citizens to purchase health insurance or be penalized, the PPACA exceeds Congress's authority under the Commerce Clause.

Although an earlier version of the health care legislation contained a severability clause, the PPACA does not, and the PPACA's remaining provisions

cannot function without the individual mandate. These two factors lead inexorably to the conclusion that Congress would not have passed the PPACA without the individual mandate. Consequently, because the individual mandate provision is unconstitutional and not severable from the remainder of the PPACA, the entire PPACA must be held invalid.

III. ARGUMENT

A. SECTION 1501 OF THE PPACA IS UNCONSTITUTIONAL BECAUSE IT EXCEEDS CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE

The Supreme Court has noted that

> 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."

United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting *The Federalist No. 45*, pp. 292-93 (C. Rossiter ed. 1961)).

1. Section 1501 is not authorized by the Commerce Clause

Article I, Section 8, of the Constitution grants Congress the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Although the scope of this power has been broadened from the original understanding of a power to "prescribe the rule by which commerce is to be governed," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824), the Supreme

Court has consistently held that Congress's assertion and exercise of this power is not unlimited.

A review of four key Commerce Clause cases demonstrates that Section 1501 of the PPACA exceeds the outer bounds of Congressional power and underscores that the district court's decision upholding the PPACA under the Commerce Clause was wrong.

In particular, the Commerce Clause does not authorize Congress to "regulate" inactivity by requiring individuals to buy a good or service (such as health insurance) as a condition of their lawful residence in the United States, nor does it ignore the line between abstract *decision-making* and concrete economic or commercial *activity* that substantially affects interstate commerce. In addition, the Commerce Clause does not license Congress to force new participants into a market in order to benefit existing, willing market participants, nor does it give Congress *carte blanche* to include unconstitutional provisions within a larger scheme of regulation of commercial activity.

a. *Wickard v. Filburn*, 317 U.S. 111 (1942)

In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court upheld provisions of the Agricultural Adjustment Act that authorized a penalty to be imposed on the plaintiff for growing more wheat than the marketing quota set for his farm. The Act limited wheat production to limit supply and stabilize market

prices. *Id.* at 115-16. The plaintiff grew more than twice the quota for his farm; he typically sold a portion of his wheat in the marketplace, used a portion for feeding his livestock and home consumption, and kept the rest for future use. *Id.* at 114-15. He argued that the Act exceeded Congress's Commerce Clause power because the activities regulated were local and had only an indirect effect upon interstate commerce. *Id.* at 119. The Court upheld the Act, stating "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125.

The Court reviewed a summary of the economics of the wheat industry, which outlined the interrelationship between market prices and wheat supply in local communities, the United States, and the world, *id.* at 125-28, and observed that "[t]he effect of the statute before us is to restrict the amount [of wheat] *which may be produced for market* and the extent as well to which one may forestall resort to the market by producing to meet his own needs." *Id.* at 127 (emphasis added). In other words, the penalty targeted farmers who, like the plaintiff, grew far more wheat than the amount needed to fill their own demand in order to *sell most of the excess in the market.*

As such, *Wickard* does not stand for the proposition that Congress may regulate *non-economic activity*, or *inactivity*, that may have some relationship to

interstate commerce so long as it is related to a "broad scheme[] regulating interstate commerce," as the district court here wrongly concluded. (R. 28, Order at 13.) Rather, the Court held that Congress may regulate purely local *economic activity* (growing a marketable commodity that may be sold in the market or consumed by the grower) when that economic activity, taken in the aggregate, is directly tied to and substantially effects interstate commerce.

Wickard provides no support for Section 1501. The statute in *Wickard* targeted a specific *economic activity*—the over-production of wheat, the excess of which was often sold in the market—which substantially affected prices in the interstate market for that commodity. Congress could not have dealt with the issue of low wheat prices by declaring that all Americans must buy a specific amount of wheat or pay a penalty for failing to do so. An individual's decision to not buy a specific amount of wheat, when viewed in the aggregate, would certainly have impacted overall demand for wheat as well as wheat prices, yet the power "[t]o regulate commerce . . . among the several States," U.S. Const. art. I, § 8, would not authorize a mandate that individuals who do not want to buy wheat must do so. Similarly, *Wickard* provides no support for Section 1501's mandate that individuals who do not want to engage in a commercial transaction (purchasing health insurance) must do so or suffer a penalty, and, thus, does not support the district court's incorrect conclusion that Congress's Commerce Clause power

extends to regulating economic *decisions* rather than economic *activities*. (*See* R. 28, Order at 17-19); *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius,* 2010 U.S. Dist. LEXIS 130814, at *38 (E.D. Va. Dec. 13, 2010) (rejecting the government's expansive interpretation of "activity" as lacking logical limitation or support from Commerce Clause jurisprudence.)

b. *United States v. Lopez*, 514 U.S. 549 (1995)

United States v. Lopez, 514 U.S. 549 (1995), illustrates that Section 1501 exceeds Congress's authority. In *Lopez*, the Court held that the Gun Free School Zones Act, which prohibited the possession of a firearm within 1,000 feet of a school, *exceeded* Congress's Commerce Clause authority because it had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. The Court discussed *Gibbons v. Ogden*—the Court's first comprehensive review of the Commerce Clause—which stated, "'[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'" *Id.* at 553 (quoting *Gibbons*, 22 U.S. at 189-90). The *Gibbons* Court observed that the power to "regulate" commerce is the power to "'prescribe the rule by which commerce is to be governed'" and noted that "'[t]he enumeration [of the power] presupposes something not enumerated.'" *Id.* (quoting *Gibbons*, 22

U.S. at 194-95, 196); *see also id.* at 585-88 (Thomas, J., concurring) (noting that the original understanding of the Commerce Clause was much more limited than the Court's modern interpretation).

The *Lopez* Court reiterated the observation made in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), that the Commerce Clause "'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.'" *Id.* at 557 (citation omitted). The Court identified three "categories of activity" that the Commerce Clause authorizes Congress to regulate:

> 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 activities. Finally, Congress' commerce authority includes the power to regulate those activities . . . that substantially affect interstate commerce.

Id. at 558-59 (citations omitted).

The Court summarized cases dealing with the third category of activity as holding that, "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560 (emphasis added). The Act exceeded Congress's authority because gun possession was not economic

activity, nor was the Act

> an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561. The Court found it significant that the Act "'plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.'" *Id.* at 563 (citation omitted).

The government argued that the Court should focus on whether, through a chain of inferences, possession of guns in a school zone may, in the aggregate, substantially affect interstate commerce, rather than focusing on whether the statute targeted economic activity. For example, the government cited *the cost-shifting impact on the insurance system*, arguing that gun possession may lead to violent crime, and "the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population." *Id.* at 563-64. In rejecting these arguments, the Court responded by stating:

> We pause to consider the implications of the Government's arguments. 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. . . . Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of

> § 922(q), 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*.

Id. (emphasis added).

The Court noted, in rejecting the government's unduly expansive view of congressional power, that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation," *id*. at 566, and stated,

> [t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . To [expand the scope of the Commerce Clause] would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567-68 (citations omitted); *see also id.* at 577-78 (Kennedy, J., concurring) (noting the importance of federalism principles in interpreting the scope of the Commerce Clause).

Section 1501 does not withstand scrutiny under *Lopez*. Being lawfully present within the United States, like possessing a gun within 1,000 feet of a school, is not a *commercial or economic activity* that substantially affects interstate commerce. The cases *Lopez* relied upon referred to *ongoing commercial or*

economic activities that Congress may regulate,[1]/ and provide no support for the assertion that the power to "'prescribe the rule by which commerce is to be governed'" includes the power to force those who do not want to engage in a commercial or economic activity to do so. *See id.* at 553 (quoting *Gibbons*, 22 U.S. at 196). As in *Lopez*, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

A review of Section 1501's findings illustrates that Congress's assertion of Commerce Clause power is unprecedented in its reach. First and foremost, Congress sought to obscure entirely the distinction between inactivity and economic activity, stating "[t]he requirement *regulates activity* that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." PPACA § 1501(a)(2)(A), as amended by § 10106(a) (emphasis added). In other words, Congress asserted that being lawfully present in the United States without health insurance is the economic activity of deciding to not buy health insurance; as such, Congress may "regulate" that economic activity by requiring individuals to make a

[1]/ *See, e.g., United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *United States v. Darby*, 312 U.S. 100, 118 (1941); *Gibbons*, 22 U.S. at 196.

different economic decision, that is, to buy health insurance. Under this reasoning, virtually any decision to not buy a good or service would be "economic activity" that can be targeted by a law requiring individuals to buy that good or service.

The district court wrongly concluded that inaction and economic action are no different for Commerce Clause purposes. (*See* R. 28, Order at 17-19.) The district court's conclusion is fundamentally flawed because it equates abstract economic *decision-making* with concrete economic *activity*. Most American adults make numerous choices on a daily basis concerning when and whether to spend money on an array of goods and services. A person may choose to buy X and choose not to buy Y. Under Congress's reasoning, so long as Congress has the authority to regulate the interstate market for Y (which is often the case), it can mandate that all individuals take part in the market for Y as consumers. Congress would merely need to assert that decisions about whether to purchase Y are commercial and economic in nature, and that individuals' decisions to not buy Y substantially affect interstate commerce.

In addition, Congress stated that "[t]he economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured," and Section 1501 would "significantly reduce this economic cost." PPACA § 1501(a)(2)(E), as amended by § 10106(a). If the economic impact of Americans' poorer health and shorter lifespans provided a sufficient basis for

Congress to mandate that individuals buy health insurance, then Congress could also mandate that individuals take other actions that Congress deems necessary to improve health and lengthen life expectancies—such as requiring Americans to buy a gym membership, maintain a specific body weight, or eat a healthier diet—or pay penalties for failing to do so.

Congress also alleged that Section 1501 would lower the cost of health insurance premiums because "[t]he cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008," which was passed on to private insurers and individuals who have private insurance. PPACA § 1501(a)(2)(F), as amended by § 10106(a). The government made a virtually identical cost-shifting argument in *Lopez*,[2]/ but the Supreme Court held that Congress can only reach "*economic activity*" that substantially affects interstate commerce; neither gun possession nor lawful presence in the United States is economic activity.

Moreover, Congress declared that requiring individuals to buy health insurance will benefit those who participate in the health insurance market by "increasing the supply of, and demand for, health care services," "reduc[ing] administrative costs and lower[ing] health insurance premiums," "broaden[ing] the

---

[2]/ The government stated in its merits brief in *Lopez*, "[t]he economic consequences of criminal behavior are substantial . . . and, through the mechanism of insurance, spread throughout the population." Brief of the United States, at *28, n.9, *United States v. Lopez*, 514 U.S. 549 (No. 93-1260), 1994 U.S. S. Ct. Briefs LEXIS 410 (footnote omitted).

health insurance risk pool to include healthy individuals," and "creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." PPACA § 1501(a)(2)(C), (I), (J), as amended by § 10106(a). The Commerce Clause has never been understood, however, to allow Congress to force unwilling buyers into a market to remedy perceived market shortcomings, and Congress has never previously tried to do so. As Judge Henry Hudson noted in a case involving the PPACA, Section 1501 "literally forges new ground and extends Commerce Clause powers beyond its current high water mark." *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 609 (E.D. Va. 2010). Judge Roger Vinson agreed with this point in another challenge to the PPACA, in which he wrote, based on the pertinent Commerce Clause and Necessary and Proper Clause cases, that the "power that the individual mandate seeks to harness is simply without prior precedent."[3]/ *State of Florida v. United States Dep't of*

---

[3]/ Judge Vinson properly distinguished *Wickard* and *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964), cases the district court relied on here, by explaining that those cases

> involved activities in which the plaintiffs had chosen to engage. All Congress was doing was saying that if you *choose* to engage in the activity of operating a motel or growing wheat, you are engaging in interstate commerce and subject to federal authority.
>
> But, in this case we are dealing with something very different. The individual mandate applies across the board. People have no choice

(Text of footnote continues on the following page.)

Health & Human Servs., 2010 U.S. Dist. LEXIS 111775, at *114 (N.D. Fla. Oct. 14, 2010).

There have been many times throughout American history when changing market conditions was a desirable goal, yet

> never before has [Congress] used its commerce power to mandate that an individual person engage in an economic transaction with a private company. Regulating the auto industry or paying "cash for clunkers" is one thing; making everyone buy a Chevy is quite another. Even during World War II, the federal government did not mandate that individual citizens purchase war bonds.

Randy E. Barnett, *Is health-care reform constitutional?*, WASH. POST., Mar. 21, 2010, at B2. Although the PPACA is the first federal law to cross the line between *encouraging* increased market activity and *mandating* individual purchases, it will certainly not be the last if it is upheld.

c. *United States v. Morrison*, 529 U.S. 598 (2000)

United States v. Morrison, 529 U.S. 598 (2000), also demonstrates that Section 1501 exceeds Congress's power. In *Morrison*, the Court held that a portion of the Violence Against Women Act, which provided a civil remedy for victims of gender-motivated violence, exceeded Congress's Commerce Clause

---

> and there is no way to avoid it. Those who fall under the individual mandate either comply with it, or they are penalized. It is not based on an activity that they make the choice to undertake. Rather, it is based solely on citizenship and on being alive.

State of Florida, 2010 U.S. Dist. LEXIS 111775, at *117-*118.

authority because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, *economic activity*." *Id.* at 613 (emphasis added). Congress found that gender-motivated violence deters interstate travel and commerce, diminishes national productivity, increases medical costs, and decreases the supply of and demand for interstate products, *id.* at 615, but the Court rejected the argument "that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617-18. The Court noted that cases in which it had upheld an assertion of Commerce Clause authority due to the regulated activity's substantial effects on interstate commerce involved the regulation of "commerce," an "economic enterprise," "economic activity," or "some sort of economic endeavor." *Id.* at 610-11. The Court observed that the government's attenuated method of reasoning was similar to the reasoning offered in *Lopez* and raised concerns that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615.

Morrison illustrates that Section 1501 exceeds Congress's Commerce Clause authority for the same reasons cited above with respect to *Lopez*. Following the attenuated chain of inferences offered in support of Section 1501 would lead to an unchecked federal police power allowing Congress to, for the first

time in our country's history, mandate a host of purchases by its citizens.[4]/

d. *Gonzalez v. Raich*, 545 U.S. 1 (2005)

Gonzales v. Raich, 545 U.S. 1 (2005), also does not support Section 1501. In *Raich*, the Court considered "whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Id.* at 9. The Controlled Substances Act (CSA) created a "closed regulatory system" governing the manufacture, distribution, and possession of controlled substances in order to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id.* at 12-13. Under the CSA, the manufacture, distribution, or possession of marijuana was a criminal offense. *Id.* at 14.

California residents who wanted to use marijuana for medicinal purposes under state law brought an as-applied challenge to the CSA. Importantly, the Court emphasized that

> Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. . . . *Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority*. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition

[4]/ In ruling the individual mandate unconstitutional, Judge Hudson properly explained that the unchecked expansion of Congressional power as suggested by the individual mandate "would invite unbridled exercise of federal police powers." *Sebelius,* 2010 U.S. Dist. LEXIS 130814, at *58-*59.

> of the manufacture and possession of marijuana *as applied to the intrastate manufacture and possession of marijuana for medical purposes* pursuant to California law exceeds Congress' authority under the Commerce Clause.

Id. at 15 (emphasis added).

The Court held that "[t]he CSA is a valid exercise of federal power, even as applied to the troubling facts of this case." *Id.* at 9. The Court stated, "[o]ur case law firmly establishes Congress' power 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 (citations omitted) (emphasis added). Moreover, "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* (citing *Perez*, 402 U.S. at 154-55). As such, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* (citation omitted).

The Court stated that *Wickard*'s key holding was that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18. The Court declared that in both *Wickard* and the case before it, "the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply

and demand in the national market for that commodity." *Id.* at 19. Moreover, "the activities regulated by the CSA *are quintessentially economic*. . . . The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26 (emphasis added).

The Court reiterated that, "'[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'" *Id.* at 23 (quoting *Perez*, 402 U.S. at 154). Since the manufacture and distribution of marijuana was an *economic class of activity* that Congress could regulate,

> Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." . . . That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

Id. at 22. The Court described the marijuana ban as "merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 24-25 (quoting *Lopez*, 514 U.S. at 561).

Raich provides no support for Section 1501. Unlike *Raich*, this is not an as-

applied challenge to a concededly valid regulatory scheme. Rather, Plaintiffs here contend that Section 1501 exceeds Congress's authority and should be declared unconstitutional. (R. 1, Complaint at ¶ 6.) Thus, *Raich*'s emphasis on the reluctance of courts to prohibit individual applications of a valid statutory scheme due to the *de minimis* nature of the impact of the plaintiff's local conduct is not implicated by this case.

In addition, the statute in *Raich* (like the statute in *Wickard*) sought to discourage an ongoing "quintessentially economic" activity: "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26. The Court repeatedly emphasized that the substantial effects test governs the authority of Congress to target "activities that are part of an *economic 'class of activities*.'" *Id.* at 17 (emphasis added) (citation omitted). Since the statutory scheme was concededly valid, the Court presupposed that "the [regulated] class of activities . . . [was] within the reach of federal power." *Id.* at 23. By contrast, Section 1501 does not regulate an ongoing economic class of activities "within the reach of federal power." *See id.* Lawful presence in the United States, without more, is not an economic class of activities akin to the production and distribution of a marketable commodity. *Raich* does not support the idea that the targeted economic class of activities does not need to consist of *activity* but includes abstract decisions to not purchase a

good or service.

2. The district court misinterpreted Supreme Court case law

Although the district court correctly noted that the PPACA's constitutionality presents a matter of first impression, (R. 28, Order at 15), the court's interpretation of the above-referenced Supreme Court cases was incorrect. Through the PPACA, Congress is not seeking to regulate existing local economic activity as a necessary component of regulating that type of economic activity nationwide, but rather is forcing individuals who are not engaged in the economic activity of buying and maintaining health insurance to do so. The district court erred in concluding that *Wickard*, *Raich*, or other cases support the proposition that Congress can—for the first time in our Nation's history—declare that individuals who are not engaging in a particular economic activity must do so solely because other statutory provisions are attached to and connected with that mandate. (*See* R. 28, Order at 16-19.)

In addition, statements in *Lopez* and *Raich* concerning Congress's ability to enact a regulatory scheme targeting interstate economic activity that encompasses some purely local economic activity have no bearing upon Section 1501. Although the Court noted in *Raich* that the laws upheld in *Wickard* and *Raich* were essential parts of a regulatory scheme, *Raich* does *not* stand for the broad proposition that Congress has free reign to pass otherwise unconstitutional laws by including them

within a larger regulatory program. *Wickard* and *Raich* held only that federal regulation of a particular type of economic activity—the production and consumption of a marketable commodity—can, in some circumstances, be applied to reach that type of existing economic activity at a purely local level when doing so is necessary and proper to the effective national regulation of that economic activity.

Lopez and *Morrison* establish that the power to regulate commerce is the power to regulate commercial or economic activity, however local or trivial in scope (at least so long as that local activity in the aggregate could reasonably be thought to substantially affect interstate commerce). *One does not engage in commerce by deciding not to engage in commerce.* Not even the most expansive Supreme Court Commerce Clause cases support the notion that Congress can regulate inactivity or coerce commercial activity where none exists.

If Congress can coerce a commercial transaction simply by asserting, as it did in the PPACA, that coercing the transaction "is commercial and economic in nature, and substantially affects interstate commerce," PPACA § 1501(a)(1), and listing a series of "[e]ffects on the National Economy and Interstate Commerce," *id.* § 1501(a)(2), as amended by § 10106(a), then the universe of commercial transactions that Congress could force Americans to engage in would be practically limitless. Under *Raich* and *Wickard*, very little commercial activity can be

considered too trivial or local to elude the commerce power. When that principle is coupled with the federal government's implicit assumption in the PPACA that Congress can regulate commercial inactivity by coercing citizens to purchase any given product, there is no constitutional obstacle to the complete federal government micro-management of Americans' financial decision-making.

For example, to try to stabilize the American automobile industry, the United States Treasury authorized loans to bail out General Motors and Chrysler. Press Release, United States Dep't of the Treasury, Secretary Paulson Statement on Stabilizing the Automotive Industry (Dec. 19, 2008), http://www.treas.gov/press/releases/hp1332.htm. Because selling more cars would help restore GM and Chrysler to profitability, Congress could rationally determine that requiring all Americans above a certain income level to purchase a new GM or Chrysler automobile would help ensure that the bailout's purpose—GM's and Chrysler's survival—is achieved. Under the district court's reasoning, Congress would be acting within its commerce power. After all, the decision whether to buy a car would be, by the district court's reckoning, commercial and economic in nature, "viewed in the aggregate," that Congress can regulate under the Commerce Clause. (*See* R. 28, Order at 16.)

Similarly, to shore up the financial services industry, Congress could compel Americans to make certain investments with distressed financial firms. Or

Congress could rationally determine that a lack of exercise contributes to poor health, which increases health care expenses and the cost of health insurance, and threatens Congress's attempt to lower health care and health insurance costs. If so, by the district court's reasoning that allowed it to conclude that the individual mandate is a valid exercise of Congress's commerce power, Congress could require Americans to purchase health club memberships, lose weight, or open up a money market account.

Take again the GM and Chrysler example. It is at best a stretch to say that a person who does not own an automobile and is not seeking presently to buy an automobile is participating in the automobile market. But the point of owning an automobile is to provide transportation, and everyone inevitably needs to get from one place to another. Thus, all people are participants in the broader market for transportation, a market that includes the automobile market. Deciding to forego buying a car and to depend instead on public transportation, taxis, or even walking is, by the district court's reasoning, engaging in economic activity—that is, deciding which type of transportation to use or, put another way, deciding not whether but how to participate in the transportation market—that Congress may regulate because it is reasonable to conclude that the aggregate of those decisions substantially affects interstate commerce.

The upshot is that all private purchasing decisions (negative and affirmative) can be characterized under the district court's reasoning as commercial and economic activity and will likely, in the aggregate, affect interstate commerce. If this court upholds the individual mandate to force private citizens to buy health insurance, the effect would be to strip any remaining limits on Congress's power to control individual economic behavior.

When President Truman likewise sought to expand federal power over a substantial portion of the economy by seizing American steel mills, the Supreme Court was keenly aware of the threat to the Constitution and to Americans' liberty. As Justice Frankfurter explained in his concurring opinion, to provide effective "limitations on the power of governors over the governed," this Nation's founders

> rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. . . . These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. . . . *The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority*.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) (emphasis added).

The principles of federalism and a limited federal government, like the separation of powers, are part of the system of checks and balances essential to

limiting centralized governmental power and protecting liberty. Upholding the individual mandate would effectively confer upon Congress "a plenary police power," *Lopez*, 514 U.S. at 566, over all individual economic decisions and place Americans' economic liberty at risk. *See Sebelius,* 2010 U.S. Dist. LEXIS 130814, at *38, *58-*59.

In sum, the district court misconstrued Supreme Court precedent in reaching its conclusion that the individual mandate does not exceed Congress's Commerce Clause authority. This court should reverse the final decision and judgment of the district court.[5]/ (R. 28-29.)

B. BECAUSE SECTION 1501 IS NOT SEVERABLE FROM THE REMAINDER OF THE PPACA, THE ENTIRE ACT IS INVALID

Generally, holding one provision of a law unconstitutional does not invalidate the rest of the law if the unconstitutional provisions are severable. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987). Section 1501 is not severable, however, so the PPACA is invalid in its entirety because Section 1501 is unconstitutional.

---

[5]/ The Necessary and Proper Clause does not save the individual mandate. That clause "grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power." Because the individual mandate is unconstitutional, the Necessary and Proper Clause "may not be employed to implement this affirmative duty to engage in private commerce." *Sebelius,* 2010 U.S. Dist. LEXIS 130814, at *39-*40.

"The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684. A court must ask "whether [after removing the invalid provision] the [remaining] statute will function in a manner consistent with the intent of Congress." *Id.* at 685 (original emphasis omitted).

Two factors demonstrate that Congress did not intend Section 1501 to be severable: First, Congress removed a severability clause from an earlier version of health care reform legislation; second, the PPACA's remaining portions cannot function "in a manner consistent with the intent of Congress" without Section 1501. *See id.*

The Affordable Health Care for America Act (H.R. 3962), which the House approved on November 7, 2009, contained an individual mandate section as well as a provision that stated, "[i]f any provision of this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of the provisions of this Act and the application of the provision to any

other person or circumstance shall not be affected."[6]/ H.R. 3962's severability provision, however, was not included in the final version of the PPACA. That Congress decided not to include a severability clause in the PPACA as enacted is strong evidence that Congress did not intend for the statute's individual provisions to be severable.

Consistent with the Supreme Court's reasoning in *Alaska Airlines,* Congress could not have intended the individual mandate to be severable if severing it would allow an inoperable or counterproductive regulatory scheme to stand. *See* 480 U.S. at 684; *accord Free Enter. Fund. v Pub. Co. Accounting Oversight Bd.,* 130 S. Ct. 3138, 3161-62 (2010). The PPACA forbids providers from refusing health insurance coverage to individuals because of preexisting conditions. PPACA § 1201. Without the individual mandate, a person could refuse to purchase health insurance until he incurred an actual injury or illness requiring medical care. Without the individual mandate, the resulting free-riding could soon cause any private or co-operative insurance provider that depends on premium dollars to become insolvent. The PPACA contains exchanges made up of insurance providers, but does not contain any plan completely administered and supported by

[6]/ H.R. 3962, § 255, 111th Cong., 1st Sess., *Bill Summary & Status*, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3962: (click on "Text of Legislation," then the link for "Affordable Health Care for America Act (Engrossed in House [Passed House]-EH)").

the government. Because the envisioned insurance providers would depend upon premium dollars, the individual mandate is designed to bolster the providers' solvency in each insurance exchange and thus the operation of the entire regulatory scheme.[7]/ (*See* R. 28, Order at 18-19.)

Because the individual mandate is so essential to the PPACA's overall operation, the most reasonable conclusion to draw is that Congress could not have intended the individual mandate to be severable from the rest of the PPACA. In fact, it is fair to say that without the individual mandate, it is highly probable there would be no PPACA. These observations, along with the fact that Congress deleted a severability provision from an earlier version of the national health care reform legislation, lead inexorably to one conclusion: the individual mandate is not severable from the PPACA's remaining provisions. Thus, because the individual mandate is unconstitutional, this court should rule the entire PPACA invalid.[8]/

---

[7]/ This is not to say that the connection between the individual mandate and the rest of the PPACA, while relevant to the severability issue, is a basis for concluding that the individual mandate is within Congress's power under the Commerce Clause, as argued previously in this brief.

[8]/ The district court characterized the sanction imposed by the PPACA on those who do not obtain insurance coverage as a penalty that Congress may impose incidentally under the Commerce Clause rather than a tax. (R. 28, Order at 19-20.) Since the sanction is a penalty, rather than a valid tax, it also exceeds Congress's authority because the individual mandate itself is unconstitutional.

IV. CONCLUSION

This court should reverse the district court's final decision and judgment, (R. 28-29), and declare the PPACA unconstitutional.

Respectfully submitted,

AMERICAN CENTER
FOR LAW & JUSTICE

/s/ Edward L. White III

Edward L. White III*
Erik M. Zimmerman**
Miles L. Terry*
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
734-662-2984
Co-counsel for amicus curiae

Jay Alan Sekulow*
Stuart J. Roth*
Colby M. May**
James M. Henderson Sr.*
American Center for Law & Justice
201 Maryland Avenue, NE
Washington, DC 20002
202-546-8890
Co-counsel for amicus curiae

*Admitted to Sixth Circuit Bar
**Not admitted to Sixth Circuit Bar

December 15, 2010

CERTIFICATE OF WORD COUNT COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

I certify that the attached amicus 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 6,997 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 attached 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.

Respectfully submitted,

AMERICAN CENTER
FOR LAW & JUSTICE

/s/ Edward L. White III

Edward L. White III
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
734-662-2984
ewhite@aclj.org
Co-counsel for amicus curiae

December 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that the foregoing amicus curiae brief of the American Center for Law & Justice was electronically submitted on December 15, 2010, to the Office of the Clerk for the United States Court of Appeals for the Sixth Circuit via the court's CM/ECF system, which will generate and send by e-mail a Notice of Docket Activity to all CM/ECF registered attorneys participating in this case. Counsel for appellants and appellees are registered CM/ECF users.

Respectfully submitted,

AMERICAN CENTER
FOR LAW & JUSTICE

/s/ Edward L. White III
Edward L. White III
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
734-662-2984
ewhite@aclj.org
Co-counsel for amicus curiae