No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

vs.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, 119 MEMBERS OF THE UNITED STATES CONGRESS, AND MORE THAN 144,000 SUPPORTERS OF THE ACLJ IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE ON THE MINIMUM COVERAGE PROVISION, OTHERWISE KNOWN AS THE INDIVIDUAL MANDATE, ISSUE

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amici Curiae

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[redacted]

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INTEREST OF THE AMICI CURIAE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law.[1] ACLJ attorneys have argued before this Court and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003). ACLJ attorneys have also participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the Patient Protection and Affordable Care Act of 2010 ("ACA" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010), in particular, with regard to the minimum coverage provision, otherwise known as the "individual mandate," 26 U.S.C. § 5000A, which requires millions of Americans to purchase and maintain Federal Government-approved health insurance from a private company for the remainder of their lives or be

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

penalized annually. The ACLJ has participated as an amicus curiae in briefs filed in support of the following challenges to the ACA: *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.), and Nos. 11-1057, 11-1058 (4th Cir.); *TMLC v. Obama*, No. 10-2388 (6th Cir.); and *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV-EMT (N.D. Fla.), Nos. 11-11021-HH, 11-11067-HH (11th Cir.), and Nos. 11-393, 11-400 (U.S.).

Additionally, the ACLJ represents the plaintiffs in a challenge to the individual mandate: *Mead v. Holder*, No. 1:10-CV-00950-GK (D.D.C.), *appeal sub. nom. Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.). The ACLJ has recently filed a petition for a writ of certiorari in *Seven-Sky v. Holder*, No. 11-679 (U.S. Nov. 30, 2011). Accordingly, the ACLJ has an interest that may be affected by the instant case.

This brief is also filed on behalf of United States Representatives Paul Broun, Robert Aderholt, Todd Akin, Rodney Alexander, Mark Amodei, Steve Austria, Michele Bachmann, Spencer Bachus, Lou Barletta, Roscoe Bartlett, Joe Barton, Rob Bishop, Diane Black, Marsha Blackburn, Charles Boustany, Kevin Brady, Mo Brooks, Larry Bucshon, Michael Burgess, Dan Burton, Francisco "Quico" Canseco, Eric Cantor, Steve Chabot, Howard Coble, Mike Coffman, Tom Cole, Mike Conaway, Chip Cravaack, Geoff Davis, Scott DesJarlais, Jeff Duncan, Blake Farenthold, Stephen Fincher, Chuck Fleischmann, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Cory Gardner, Scott Garrett, Bob Gibbs, Phil

Gingrey, Louie Gohmert, Bob Goodlatte, Tom Graves, Tim Griffin, Michael Grimm, Ralph Hall, Gregg Harper, Andy Harris, Vicky Hartzler, Jeb Hensarling, Wally Herger, Tim Huelskamp, Bill Huizenga, Randy Hultgren, Lynn Jenkins, Bill Johnson, Walter Jones, Jim Jordan, Mike Kelly, Steve King, Adam Kinzinger, John Kline, Raul Labrador, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Billy Long, Blaine Luetkemeyer, Cynthia Lummis, Dan Lungren, Connie Mack, Donald Manzullo, Kenny Marchant, Kevin McCarthy, Michael McCaul, Tom McClintock, Thaddeus McCotter, Cathy McMorris Rodgers, Gary Miller, Jeff Miller, Randy Neugebauer, Alan Nunnelee, Pete Olson, Ron Paul, Steve Pearce, Mike Pence, Joe Pitts, Ted Poe, Mike Pompeo, Bill Posey, Tom Price, Ben Quayle, Denny Rehberg, Reid Ribble, Scott Rigell, Phil Roe, Todd Rokita, Dennis Ross, Ed Royce, Steve Scalise, Jean Schmidt, David Schweikert, Adrian Smith, Lamar Smith, Marlin Stutzman, Lee Terry, Scott Tipton, Michael Turner, Tim Walberg, Joe Walsh, Daniel Webster, Lynn Westmoreland, Joe Wilson, Rob Woodall, and Don Young, who are 119 members of the United States House of Representatives in the One Hundred Twelfth Congress. In addition, this brief is filed on behalf of more than 144,000 supporters of the ACLJ who specifically requested that they be included in this brief as an expression of support for the ACLJ's efforts to overturn the ACA.

Amici curiae are dedicated to the founding principles of a limited Federal Government and the belief that the Constitution contains meaningful boundaries

that Congress may not trespass – no matter how serious the nation's healthcare problems. Amici curiae believe that the Constitution does not empower Congress to require Americans to purchase and maintain health insurance from a private company for the rest of their lives or pay an annual penalty. Amici curiae are deeply troubled by the fundamental alteration to the nature of our federalist system of government that would be required to recognize a novel Congressional power to mandate that citizens buy a product from a private company. Amici curiae urge this Court to rule the individual mandate unconstitutional and to declare the entire ACA invalid, since the unconstitutional individual mandate cannot be severed from the ACA.

SUMMARY OF THE ARGUMENT

This Court should affirm the United States Court of Appeals for the Eleventh Circuit's judgment that the individual mandate is unconstitutional. The individual mandate exceeds the outermost bounds of Congress's Article I authority and is inconsistent with the constitutional system of dual sovereignty that divides power between the federal and State governments. The individual mandate's unprecedented requirement to buy a product from a private company is inconsistent with our constitutional tradition. Although the ACA is the first federal law relying on the Commerce Clause to cross the line between *encouraging* increased market activity and *mandating*

individual purchases, it will certainly not be the last if the individual mandate is upheld.

ARGUMENT

THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S ENUMERATED POWERS.

"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*). This Court has emphasized the importance of dual sovereignty, observing that "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992); *see also Bond v. United States,* 131 S. Ct. 2355, 2364-66 (2011) (discussing the importance of federalism); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. . . . It was the genius of [the Founders] that our citizens would have two political capacities, one State and one federal, each protected from incursion by the other."). The

individual mandate, 26 U.S.C. § 5000A, is unconstitutional because it exceeds the few and defined powers of Congress, including those provided by the Commerce and Necessary and Proper Clauses. The Eleventh Circuit's decision should be affirmed on this point.

A. The individual mandate is not authorized by the Commerce Clause.

Congress has the power "[t]o regulate commerce . . . among the several States." U.S. Const. art. I, § 8. 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), this Court has consistently held that Congress's exercise of this power is limited.

Federal statutes are presumed to be constitutional, *United States v. Morrison*, 529 U.S. 598, 607 (2000), but the unprecedented nature of the individual mandate is strong evidence that the Commerce Clause does not authorize Congress to require an individual to buy something from a private company. In *Printz v. United States,* 521 U.S. 898 (1997), this Court observed that "[t]he utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power." *Id.* at 907-08; *see also id.* at 905 ("if . . . earlier Congresses avoided use of this highly attractive

power, we would have reason to believe that the power was thought not to exist."); *id.* at 918 (finding significant the "almost two centuries of apparent congressional avoidance of the practice"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (agreeing that "[p]erhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity"). The individual mandate is the first instance in our Nation's history where Congress has compelled American citizens to buy a product or service from a private company based solely on their status of lawfully residing in this country.

1. *Lopez* and *Morrison* emphasized that Congress may regulate *voluntary economic activity*, but the individual mandate regulates a person's *inactivity*.

A purported exercise of the Commerce Clause power must be predicated upon the regulation of existing, voluntary commercial or economic activity to be valid – not the failure to purchase a product. Because the individual mandate applies to individuals regardless of whether they are presently engaged in any specific commercial or economic activity, it exceeds the Commerce Clause power.

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

In *Lopez*, this 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 was a law that "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. The *Lopez* Court reiterated that the Commerce Clause "'must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

This Court identified three "categories of activity" that the Commerce Clause authorizes Congress to regulate, including "activities that substantially affect interstate commerce," the only category relevant here. *Id.* at 558-59. The Court summarized previous cases dealing with this category as holding that, "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560 (emphasis added). This Court concluded that the Act exceeded Congress's authority because possessing a gun in a school zone 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." *Id.* at 561.

In *Lopez,* the Federal Government argued that Congress may regulate non-economic activity (possessing guns in a school zone) that, in the aggregate, substantially affects interstate commerce. Of note, the Federal 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, this Court responded by stating:

> We pause to consider the implications of the Government's arguments. The Government admits . . . that Congress could regulate not only all violent crime, but all activities that might lead to violent crime. . . . [as well as] 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 . . . it is difficult to perceive any limitation on federal power. . . . 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. at 564 (emphasis added).

This Court noted 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. . . . [That] 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 Commerce Clause interpretation).

The individual mandate 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. No support exists 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 [would require] . . . convert[ing] congressional authority under the Commerce Clause to a

general police power of the sort retained by the States." *Id.* at 567.

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

Morrison also demonstrates that the individual mandate exceeds Congress's power. There, this Court held that Section 13981 of the Violence Against Women Act, which provided a civil remedy for victims of gender-motivated violence, was unconstitutional because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613. Congress determined that gender-motivated violence substantially affects interstate commerce, *id.* at 615, but this 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. This Court observed that cases in which it had upheld an assertion of Commerce Clause authority due to the regulated activity's substantial effect on interstate commerce involved the regulation of "commerce," an "economic enterprise," "economic activity," or "some sort of economic endeavor." *Id.* at 610-11.

Like *Lopez*, *Morrison* further illustrates that the individual mandate exceeds Congress's Commerce Clause authority. Accepting the Federal Government's arguments would lead to a federal police power allowing Congress – for the first time in our history – to mandate a host of purchases by American citizens.

c. The individual mandate exceeds the Commerce Clause power because it does not regulate existing commercial or economic activity.

Through the individual mandate, Congress sought to obscure entirely the distinction between activity and inactivity, stating that Section 5000A "*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." 42 U.S.C. § 18091(2)(A) (emphasis added). Put differently, Congress asserted that being lawfully present in the United States without health insurance *is itself economic activity* that Congress can regulate.

American adults decide daily whether to spend money on an array of goods and services. A person may choose to buy X and not Y. Under the Federal Government'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 purchase Y. Congress would merely need to assert that the "mental activity" of deciding not to purchase Y is economic in nature, and that the failure to buy Y substantially affects interstate commerce. For example, Congress could cite its authority to regulate the stock market to justify a mandate that all individuals above a certain income level buy stocks or pay annual penalties.

Moreover, although at times a person's failure to buy a particular product is the result of a deliberate decision-making process, far more often, the individual has not contemplated buying the particular product at all. There is a vast and diverse array of services and products available for sale, many of which an individual will never make an active decision not to purchase. The progression from a Congressional power to regulate commerce among the several States to a power to regulate a person's failure to buy a good or service, *even one that the person has never thought about*, is staggering, and bears no connection to the Commerce Clause's text or the Constitution's system of dual sovereignty.

2. *Wickard* and *Raich* do not suggest that Congress's authority to regulate local economic activity, as an essential part of a national scheme to regulate that activity, gives rise to a newly-minted power to force unwilling individuals into a market.

Wickard v. Filburn, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), stand for the proposition that federal regulation of a particular type of existing economic activity, such as producing a marketable commodity, can reach that activity at a purely local level when doing so is necessary and proper to effectively regulating that activity nationally. Neither *Wickard* nor *Raich* suggests that Congress may compel people to join a market involuntarily as

an "essential" part of a scheme to regulate that market.

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

In *Wickard*, this Court upheld provisions of the Agricultural Adjustment Act that authorized a penalty to be imposed on farmers who grew more wheat than the quotas set for their farms as a means of limiting supply and stabilizing market prices. 317 U.S. at 115-16. Roscoe Filburn 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 for home consumption, and kept the rest for future use. *Id.* at 114-15. Filburn argued that the Act exceeded Congress's power because his activities were local and had only an indirect effect upon interstate commerce. *Id.* at 119.

This Court upheld the Act, stating that "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. This Court observed that the statute effectively "restrict[ed] 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.

Wickard does not suggest that Congress may regulate *inactivity* that has some impact upon interstate commerce; rather, the Court held that Congress

may regulate local *economic activity* (growing a marketable commodity) when that economic activity, taken in the aggregate with similar economic activity, substantially affects interstate commerce.

The law at issue in *Wickard* penalized overproduction of wheat, *a quintessential voluntary economic activity*, not the failure to make a purchase in the wheat market. *Wickard* did not hold that Congress could have dealt with the issue of low wheat prices by forcing all Americans to buy a specific amount of wheat or pay a penalty for failing to do so, even though virtually all Americans will inevitably eat wheat at some point, and Americans' failure to buy a specific amount of wheat, when viewed in the aggregate, would substantially affect overall demand for wheat and wheat prices. To do so, Congress would have violated the Commerce Clause as it has through the individual mandate.

In short, unlike the law at issue in *Wickard*, the individual mandate is not triggered by any voluntary economic activity, nor can an individual avoid its application by ceasing an ongoing economic activity. It is, therefore, unconstitutional.

b. *Gonzales v. Raich*, 545 U.S. 1 (2005)

Raich does not support the individual mandate either. In *Raich*, individuals who wanted to use marijuana for medicinal purposes brought an as-applied challenge (not a facial challenge as is the case here) to the Controlled Substances Act (CSA),

which created a "closed regulatory system" governing the manufacture, distribution, and possession of controlled substances to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." 545 U.S. at 9, 12. Importantly, the *Raich* plaintiffs did not contend (as Plaintiffs do here with the ACA) "that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority." *Id.* at 15. As such, the narrow issue before the *Raich* Court was "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.

This Court held that "[t]he CSA is a valid exercise of federal power, even as applied to the troubling facts of this case." *Id.* 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 (emphasis added) (citing *Perez v. United States*, 402 U.S. 146, 151 (1971)). 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 and quotation marks omitted).

This 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. Unlike the non-economic activities at issue in *Lopez* and *Morrison*, "the activities regulated by the CSA *are quintessentially economic*. . . . The CSA . . . regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26 (emphasis added). In addition,

> 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. . . .

Id. at 22. This 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).

Significantly, unlike *Raich*, the instant case does not involve an as-applied challenge to a concededly valid regulatory scheme; rather, Plaintiffs contend that the individual mandate exceeds Congress's

authority on its face. *Raich* relied heavily on the key differences between cases, such as *Lopez* and *Morrison*, alleging that a federal law exceeds Congress's power (facial challenges) and cases, such as *Raich*, challenging a specific application of an admittedly valid law (as-applied challenges). *See Raich,* 545 U.S. at 23. *Raich* considered the distinction between facial and as-applied challenges to be "pivotal." *Id.* Thus, *Raich*'s emphasis on the reluctance of courts to prohibit individual applications of a valid statutory scheme to local economic conduct is not implicated here.[2]

Also, the statute in *Raich* discouraged 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. This Court repeatedly emphasized Congress's authority to target an ongoing economic class of activities. *Id.* at 17. By contrast, the individual mandate does not regulate an ongoing economic class of activities "within the reach of federal power." *See id.* at 23. Lawful presence in the United States, without more, is not an economic activity akin to producing and distributing a

[2] The standard for facial challenges set forth in *United States v. Salerno,* 481 U.S. 739 (1987), does not apply here. Section 5000A is *ultra vires* and is unconstitutional in all applications. *TMLC v. Obama,* 651 F.3d 529, 566 (6th Cir. 2011) (Graham, J., dissenting) ("*Lopez* and *Morrison* struck down statutes as facially unconstitutional under the Commerce Clause and did so without reference to *Salerno*.").

marketable commodity. *Raich* does not suggest that the targeted economic class of activities may include the failure to buy something.

In addition, statements in *Raich* concerning Congress's ability to enact a comprehensive regulatory scheme targeting ongoing economic activity have no bearing on the individual mandate. *Raich* held only that federal regulation of economic activity – such as producing and consuming a marketable commodity – can, in some circumstances, reach that economic activity at a local level when doing so is necessary and proper to the effective national regulation of that economic activity. *Raich* and other Commerce Clause cases do not suggest that Congress can – for the first time in our Nation's history – use its Commerce Clause power to require individuals who are not engaging in a particular economic activity to do so solely because other statutory provisions are connected with that mandate.

3. Cases affirming Congress's power to regulate an economic class of activities, in the aggregate, do not support the conclusion that Congress can regulate *all* uninsured individuals now because *some* will receive health care that they cannot pay for in the future.

The aggregation principle allows Congress to regulate individuals who are voluntarily engaged in economic activity when their individual conduct, taken in the aggregate with the similar conduct of others,

substantially affects interstate commerce. *See, e.g., Lopez*, 514 U.S. at 561; *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 277 (1981) (stating that local activity "may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States. . . ."). Under this line of cases, the "class" that Congress can regulate consists of individuals who are *voluntarily* engaged in the relevant economic activity; Supreme Court jurisprudence does not suggest that Congress may reach individuals *who are not engaged in the relevant economic activity*. *See Raich*, 545 U.S. 1 (upholding regulation of individuals who grew marijuana); *Katzenbach v. McClung*, 379 U.S. 294, 300-02 (1964) (upholding regulation of individuals who operated restaurants); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (upholding regulation of individuals who operated motels).

In *Perez v. United States*, 402 U.S. 146 (1971), a loan shark argued that a federal law prohibiting extortionate credit transactions could not be applied to his local activities. This Court stated 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 154 (citation omitted). This Court observed that, as a loan shark, "Petitioner is clearly *a member of the class which engages in 'extortionate credit transactions'* as defined by Congress. . . ." *Id.* at 153 (emphasis added). In other words, the relevant

"class" subject to regulation consists of those *who actually engage in the relevant economic conduct*. *See also United States v. Bruce*, 405 F.3d 145, 148 (3d Cir. 2005) ("The Supreme Court . . . reasoned that, as long as Perez was a 'member of the class which engages in 'extortionate credit transactions' as defined by Congress,' then the statute was properly applied.").

The Federal Government erroneously imputes the future conduct of a small subset of uninsured individuals to the entire group of uninsured individuals, holding that Congress may force all uninsured individuals to maintain health insurance indefinitely because some uninsured individuals will engage in a certain type of economic activity in the future. The Federal Government's broad expansion of the aggregation principle finds no support in this Court's cases. While Congress has broad authority "[*w*]*here the class of activities is regulated* and that class is within the reach of federal power," *Raich*, 545 U.S. at 23 (emphasis added), the individual mandate does not regulate a class of economic activities; its application is not tied to any specific commercial transaction or economic conduct. Under the Federal Government's analysis, Congress could have regulated all individuals present within Montgomery County, Ohio, because some of those individuals (such as Roscoe Filburn, a party in *Wickard*) would grow too much wheat in the future, and, inevitably, they would all eat American-grown wheat at some point in their lives. The Federal Government's approach ignores the fact that, while Filburn subjected himself to

Congressional authority by growing wheat, the application of the individual mandate is not triggered by any voluntary economic activity.

Moreover, in cases such as *Heart of Atlanta Motel* and *Katzenbach*, an individual's voluntary economic activity (operating a hotel, restaurant, etc.) is what brought him or her within the reach of Congress's regulatory power, and only for the duration of that economic activity. 379 U.S. 241; 379 U.S. 294. Congress could not have imposed regulatory mandates upon all Americans who have business degrees on the theory that Americans with business degrees, in the aggregate, operate (or may operate in the future) many businesses that substantially affect interstate commerce.

If, for the first time in our country's history, the Commerce Clause is interpreted to authorize Congress to regulate all Americans, for their entire lives, regardless of the lack of relevant current economic or commercial activity by those regulated, Congress would have "a plenary police power that would authorize enactment of every type of legislation," one "of the sort retained by the States." *Lopez*, 514 U.S. at 566-67.

4. There is no support for the Federal Government's conclusion that Congress can regulate all Americans now, and indefinitely for their entire lives, based on their "inevitable" future participation in a market.

The perceived inevitability of an individual's participation in a market at some point in his or her lifetime does not give Congress plenary authority to regulate that individual *for his or her entire lifetime*. The implications of this unprecedented line of reasoning are stunning. There are countless markets in which virtually all Americans will, at some point in their lives, take part, such as markets for food, water, clothing, transportation, housing, education, jobs, utilities, and recreation, to name a few. Congress has no authority to regulate the intricacies of all Americans' daily lives and mandate their purchases simply because they will, at some point, participate in the market for these items and services. Congress may regulate commercial or economic activities *when they occur*; Congress cannot impose onerous mandates on all Americans, owing to their mere existence, on the premise that all Americans will engage in interstate commerce at some point.

5. As in *Lopez* and *Morrison*, the Federal Government's arguments lack a judicially-enforceable limiting principle and, if accepted, would give rise to a federal police power.

As the Eleventh Circuit properly noted, this Court has emphasized the need to identify clear limiting principles when assessing a purported exercise of the Commerce Clause power to prevent the conversion of that power into "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *see also id.* at 578 (Kennedy, J., concurring) (stating that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). The Constitution's creation of a system of dual sovereignty is based upon the premise that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also Morrison*, 529 U.S. at 616, n.7 (characterizing the principle of dual sovereignty as a "central principle of our constitutional system. . . . crafted . . . so that the people's rights would be secured by the division of power").

The Federal Government's novel theory of virtually unlimited Commerce Clause power is at odds with the Constitution's delegation of a few, limited

powers to the federal government. As James Madison noted in *Federalist No. 45*,

> [t]he 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. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 241 (James Madison) (George Carey & James McClellan eds., 2001). The Federal Government's analysis of the Commerce Clause would bestow upon Congress "numerous and indefinite" powers to regulate "the lives, liberties, and properties of the people," while leaving the States to regulate only that which Congress declines, for the moment, to regulate. *See id.*

A purported limiting principle that the Federal Government has offered is the fact that federal law mandates that doctors and hospitals provide certain services, regardless of the recipient's ability to pay, 42 U.S.C. § 1395dd, while Congress has not imposed similar mandates outside of the health care system. This purported limiting principle is illusory, as it is based solely upon the fact that, at present, Congress has elected to impose a provider mandate regarding emergency health care but not other goods or services. This Court rejected a similar argument in

Morrison. Although the statute prohibited its application in family law cases, this Court noted, "[u]nder our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616; *see also id.* at 616, n.7 (noting that courts have the authority to decide whether Congress has *exceeded the outer bounds of its power*, while "political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds*"). Congress cannot support an unconstitutional assertion of power by simply making a non-binding promise not to go even further in the future. *Cf. United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

The findings Congress set forth to support the individual mandate also illustrate the limitless bounds of Congress's power under the Federal Government's theory. 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 declared that the individual mandate would "significantly reduce this economic cost." 42 U.S.C. § 18091(2)(E). If the economic impact of Americans' poor health provided a sufficient basis for Congress to mandate that individuals buy health insurance, Congress could also mandate that individuals take other actions considered necessary to improve health and lengthen life expectancies – such as requiring

Americans to buy a gym membership, keep a specific body weight, or maintain a healthier diet – or pay penalties for failing to do so.

Congress also alleged that the individual mandate would lower the cost of health insurance premiums for those who buy insurance by reducing cost-shifting. 42 U.S.C. § 18091(2)(F). The Federal Government made a similar cost-shifting argument in *Lopez*, 514 U.S. at 563-64, but this 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.

In a similar vein, Congress declared that requiring individuals to buy health insurance will benefit those who participate in the health insurance market in various ways, such as by "creating effective health insurance markets in which improved health insurance products . . . can be sold," "reduc[ing] administrative costs[,] and lower[ing] health insurance premiums." 42 U.S.C. § 18091(2)(I), (J). Similar arguments, however, could be made for virtually any market, as forcing unwilling participants into a market would likely benefit voluntary market participants in a variety of ways.

In sum, the individual mandate's unprecedented requirement to buy a product from a private company is inconsistent with our constitutional tradition. Although the ACA is the first federal law relying on the Commerce Clause to cross the line between

encouraging increased market activity and *mandating* individual purchases, it will certainly not be the last if the individual mandate is upheld.

B. The individual mandate is not authorized by the Necessary and Proper Clause.

Article I, Section 8 grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The individual mandate exceeds Congress's authority under this Clause, a provision that this Court has characterized as "the last, best hope of those who defend *ultra vires* congressional action." *Printz*, 521 U.S. at 923.

Although the Federal Government has focused its attention on the alleged necessity of the individual mandate to avoid negative consequences that other portions of the ACA would create, *necessity* is only half of the equation; a federal law must also be *proper* (*i.e.*, consistent with the letter and spirit of the Constitution and our system of dual sovereignty) to be within the scope of the Necessary and Proper Clause. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); *see also Printz*, 521 U.S. at 923-24 (noting that a law is not "proper" if it "violates the principle of state sovereignty"). Given the wide-ranging implications of the arguments offered in support of the

individual mandate, the fact that the Commerce Clause does not authorize the individual mandate (as discussed previously) is strong evidence that it also exceeds the scope of the Necessary and Proper Clause.

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), this Court upheld a federal civil commitment statute that authorized the continued detention of mentally ill, sexually dangerous federal prisoners beyond their normal release date. This Court based its conclusion "on five considerations, taken together":

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.

Id. at 1965.

Regarding the first factor, this Court stated that "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation." *Id.* at 1956. This Court quoted *McCulloch*, which stated, "'[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" *Id.* (quoting *McCulloch*, 17 U.S. at 421). A statute based

upon the Necessary and Proper Clause must be "a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.*

With regard to the second and third factors, this Court characterized the statute as "a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id.* at 1958. The statute was a relatively minor supplement to another statute "which, since 1949, has authorized the post-sentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise)." *Id.* at 1961. The statute satisfied " 'review for means-end rationality' " because it "represent[ed] a rational means for implementing a constitutional grant of legislative authority." *Id.* at 1962. This Court held that the statute was "reasonably adapted" to "Congress' power to act as a responsible federal custodian." *Id.* at 1961.

This Court also held that the statute met the fourth factor of "properly account[ing] for state interests." *Id.* at 1962. The statute "require[d] *accommodation* of state interests" by providing the State in which the prisoner lived or was tried with a right to assume responsibility for the prisoner, which would end federal government involvement. *Id.* at 1962; *see also id.* at 1967-68 (Kennedy, J., concurring) ("It is of fundamental importance to consider whether essential attributes [of federalism] are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that

the power is not one properly within the reach of federal power.").

Finally, this Court held that "the links between [the statute] and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope." *Id.* at 1963. The link between the power to imprison offenders and the power to ensure that they do not endanger the safety of other prisoners or the public is a close one. *Id.* at 1964. Importantly, this Court's holding would not "confer[ ] on Congress a general 'police power, which the Founders denied the National Government and reposed in the States'" because the statute was "narrow in scope." *Id.* (quoting *Morrison*, 529 U.S. at 618). The statute had "been applied to only a small fraction of federal prisoners," and its reach was "limited to individuals already in the custody of the Federal Government." *Id.* (citations omitted). As such, this Court concluded that the statute was "a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." *Id.* at 1965.

The individual mandate fails the *Comstock* factors and, therefore, exceeds Congress's authority under the Necessary and Proper Clause. Unlike the statute at issue in *Comstock*, the individual mandate is not "a modest addition" to previous federal law but rather is "sweeping in its scope." *Id.* at 1958, 1963. There is no history at all of congressional mandates based upon the Commerce Clause requiring

individuals to purchase a good or service from a private company for the rest of their lives. *See also Lopez*, 514 U.S. at 563 (finding it significant that the Act "plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation."). It takes an immense (and unconstitutional) leap to go from imposing regulations upon the health insurance industry to mandating individual participation in the health insurance market.

Moreover, the individual mandate tramples upon State interests. Before the individual mandate, States were free to determine whether to adopt a mandatory insurance system similar to Massachusetts's or maintain a voluntary free market system. *See* 42 U.S.C. § 18091(2)(D). That is no longer the case. If the individual mandate is upheld, many similar federal laws requiring individuals to buy goods or services would be possible (perhaps likely), further eroding State and local government authority in favor of a broad federal police power.

In addition, the Constitution does not give Congress *carte blanche* to enact any provision of its choosing so long as it bears some connection to a larger regulatory scheme. *See generally Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring) ("The Necessary and Proper Clause does not give Congress *carte blanche*."). The individual mandate's findings section declares: "[T]he Federal Government has a significant role in regulating health insurance. [The individual mandate] is an essential part of this larger regulation of economic activity, and the absence of the requirement

would undercut Federal regulation of the health insurance market." 42 U.S.C. § 18091(2)(H). Congress made a similar argument with respect to the individual mandate's connection to ACA provisions prohibiting insurance companies from denying coverage based upon preexisting medical conditions. 42 U.S.C. § 18091(2)(I). The implications of this line of reasoning are far-reaching for the reasons stated above with respect to the Commerce Clause. Such a broad, unprecedented assertion of power clearly fails the test for "means-end rationality," *see Comstock*, 130 S. Ct. at 1961-62, and is by no means "appropriate" or "consist[ent] with the letter and spirit of the constitution," *McCulloch*, 17 U.S. at 421. In a word, the individual mandate is not *proper*. It is unconstitutional, and the Eleventh Circuit's ruling on this point should be affirmed.[3]

[3] Section 5000A is not supported by Congress's taxing power either. The character of Section 5000A's penalty is not one of a tax, but one of a regulatory penalty: (1) Congress replaced the term "tax" with the term "penalty" in the final version of Section 5000A; (2) Congress used the term "tax" to describe other exactions in the ACA; (3) Congress expressly relied on its Commerce Clause power, not its taxing power, to enact Section 5000A; (4) Congress deleted traditional IRS enforcement methods (such as criminal penalties, liens, and levies) for failure to pay the penalty; and (5) Congress did not identify in the ACA any revenue that would be raised from this penalty, whereas Congress specifically listed seventeen other revenue-generating provisions in the ACA. *E.g.*, *Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1139-40 (N.D. Fla. 2010); *U.S. Citizens Ass'n v. Sebelius,* 754 F. Supp. 2d 903, 911-24 (N.D. Ohio 2010).

CONCLUSION

Amici curiae respectfully request that this Court affirm the Eleventh Circuit's judgment that the individual mandate is unconstitutional.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR
LAW & JUSTICE
[redacted]

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Counsel for Amici Curiae