CASE NOS. 11-1057, 11-1058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official CAPACITY AS ATTORNEY GENERAL OF VIRGINIA,
Plaintiff-Appellee/Cross-Appellant
vs.
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her OFFICIAL CAPACITY,
Defendant-Appellant/Cross-Appellee.

Appeal from the U.S. District Court, Eastern District of Virginia
Case No. 3:10-cv-00188-HEH (Hon. Henry E. Hudson, presiding)

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, FORTY NINE MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AND THE CONSTITUTIONAL COMMITTEE TO CHALLENGE THE PRESIDENT & CONGRESS ON HEALTH CARE IN SUPPORT OF PLAINTIFFS/APPELLEES

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March 28, 2011

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

The undersigned counsel for the American Center for Law & Justice ("ACLJ"), various members of Congress, and the Constitutional Committee to Challenge the President & Congress on Health Care in the above-captioned action, certifies that there are no parents, trusts, subsidiaries and/or affiliates of the ACLJ that have issued shares or debt securities to the public.

Pursuant to Fourth Circuit Local Rule 26.1, the ACLJ declares it is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the ACLJ's participation.

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IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending 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. Ctr. 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 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 in *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), *appeal filed*, No. 10-2388 (6th Cir. Dec. 15, 2010), and *Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d. 1120 (N.D. Fla. 2010).

Additionally, the ACLJ represents the plaintiffs in *Mead v. Holder*, 2011 U.S. Dist. LEXIS 18592 (D. D.C. February 22, 2011), *appeal filed*, No. 11-5047 (D.C. Cir. Mar. 1, 2011), another case challenging the individual mandate's

[1] This brief is filed with the consent of the parties.

constitutionality on the grounds that it exceeds Congress's Commerce Clause power. The ACLJ has an interest that may be affected by this case because any decision by this court would be persuasive authority in *Mead*.

This brief is also filed on behalf of United States Representatives Paul Broun, Robert Aderholt, Todd Akin, Michele Bachmann, Spencer Bachus, Roscoe Bartlett, Rob Bishop, John Boehner, Larry Bucshon, Dan Burton, Francisco "Quico" Canseco, Eric Cantor, Steve Chabot, Mike Conaway, Blake Farenthold, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Ralph Hall, Tim Huelskamp, Bill Johnson, Walter Jones, Mike Kelly, Steve King, Jack Kingston, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Donald Manzullo, Thaddeus McCotter, Cathy McMorris Rodgers, Gary Miller, Jeff Miller, Randy Neugebauer, Steve Pearce, Mike Pence, Joe Pitts, Mike Pompeo, Scott Rigell, Phil Roe, Ed Royce, Lamar Smith, and Tim Walberg, all members of the United States House of Representatives in the One Hundred Twelfth Congress.

This brief is also filed on behalf of the Constitutional Committee to Challenge the President and Congress on Health Care, which consists of over 70,000 Americans from across the country who oppose the individual mandate. Amici are dedicated to the founding principles of limited government, and to the corollary precept that the Commerce Clause contains boundaries that Congress

may not trespass no matter how serious the nation's healthcare problems. These amici believe that the Commerce Clause does not empower Congress to require that people purchase government-approved health insurance or pay a penalty.

SUMMARY OF ARGUMENT

The Supreme Court has held that the Commerce Clause authorizes Congress to regulate economic activity. Contrary to the government's thesis, the Commerce Clause has never been understood to encompass all "conduct" that affects interstate commerce. To the contrary, the Supreme Court has twice repudiated the argument that the Commerce Clause is that elastic. 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. The decision not to engage in interstate commerce is not interstate commerce. 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.

The individual mandate's unconstitutionality requires the entire PPACA to fall. Although an earlier version of the health care legislation contained a severability clause, the PPACA does not, and, by the government's admission, 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.

ARGUMENT

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

The Supreme Court has recognized 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*, at 292–93 (James Madison) (C. Rossiter ed., 1961)).

When President Harry Truman 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

> [R]ested 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). Federalism, and the restriction of Congress's power to certain enumerated ends, is as much a part of the constitutional plan to limit "the power of the governors over the governed" as the separation of powers. By acting beyond its enumerated powers in forcing Americans to buy government-approved health insurance or pay a penalty, Congress has disregarded the constitutional restrictions that are meant to protect individual liberty.

A. Section 1501 Far Exceeds the Boundaries of Congress's Commerce Clause Power as Delineated in Supreme Court Precedents.

Article I, Section 8, cl. 3 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 this power's scope has been held to be 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 has limits.

A review of four key Commerce Clause cases demonstrates that Section

1501 of the PPACA exceeds the outer bounds of Congressional power under the Commerce Clause and underscores that the district court correctly decided that the individual mandate is unconstitutional.

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 the clause ignore the line between abstract *decision-making* and concrete economic or commercial *activity* that substantially affects interstate commerce. The Commerce Clause does not license Congress to force new participants into a market to benefit existing, willing market participants, nor does it give Congress *carte blanche* to include unconstitutional provisions within a larger scheme regulating commercial activity.

1. Neither *Wickard* nor *Raich* supports a power to regulate inactivity.

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 Filburn for growing more wheat than the marketing quota set for his farm. The Act restricted wheat production to limit supply and stabilize market prices. *Id.* at 115. Filburn grew more than twice the quota for his farm. He typically sold a portion of his wheat in the marketplace, used a portion to feed his livestock and family, 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 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.

The Court reviewed a summary of wheat industry economics that 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 Filburn, grew far more wheat than the amount needed to fill their own demand in order to *sell most of the excess in the market.*

Wickard does not support Section 1501. The statute in *Wickard* targeted a specific *economic activity*—over-producing wheat, the excess of which was often sold in the market—which substantially affected prices in the interstate market for that commodity. The statute regulated farmers who were growing and selling wheat. *Wickard* thus does not stand for the proposition that Congress may regulate

all "conduct"—including the "act" of deciding not to engage in commerce—that has, in the aggregate, a substantial effect on interstate commerce, as the government argues. Br. for Appellant 17, 30-34. Rather, the Court, in *Wickard*, 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, in the aggregate, is directly tied to and substantially affects interstate commerce. *See also Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1164 (N.D. Fla. 2010) (rejecting similar argument that *Wickard* expanded the Commerce Clause to encompass "economic decisions" affecting interstate commerce). In short, all economic activity is conduct, but not all conduct is economic activity for Commerce Clause purposes.

Gonzales v. Raich, 545 U.S. 1 (2005), the case most relied upon by the government, goes no further than *Wickard* did. In *Raich*, the Court considered whether Congress could regulate marijuana grown and consumed within a state as part of a broader scheme regulating interstate markets for marijuana. *Id.* at 9. Under the Controlled Substances Act (CSA), which created a "closed regulatory system," manufacturing, distributing, or possessing marijuana was a criminal offense. *Id.* at 14. California residents who wanted to use marijuana for medicinal purposes under state law brought a suit alleging that "the CSA's categorical prohibition 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 rejected the plaintiffs' challenge. The Court noted that the plaintiffs did not contend that Congress lacked the power to regulate manufacture and possession of marijuana. *See id.* at 9. From that premise, the Court went on to note that "[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 v. United States*, 402 U.S. 146, 154–55 (1971)). 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. Importantly, the Court emphasized that "the activities regulated by the CSA [including the plaintiffs' activities] *are quintessentially economic*. . . ." *Id.* at 25 (emphasis added).

Because 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." U.S. Const. Art. I, § 8. 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 *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

In contrast to *Raich*, this case 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. Thus, *Raich*'s emphasis on courts' reluctance 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 inapposite to 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 activity akin to producing and distributing a marketable commodity. *Raich* does not support the idea that Congress may regulate abstract decisions to not purchase a good or service—that is, to not engage in commerce—and force people to purchase that good or service.

Wickard and *Raich* held only that federal regulation of a particular type of

economic activity—producing and consuming 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. They do *not* stand for the broad proposition that Congress has free reign to pass otherwise unconstitutional laws by including them within a larger regulatory program.

2. *Lopez* and *Morrison* repudiate the government's argument the Congress's Commerce Clause power encompasses all "conduct" that substantially affects interstate commerce.

The Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) establish that the Commerce Clause cannot be stretched to encompass all "conduct" that affects interstate commerce. In *Lopez*, the Court held that the Gun Free School Zones Act, which prohibited possessing 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." 541 U.S. at 561. The Court discussed *Gibbons v. Ogden*—the Court's first comprehensive review of the Commerce Clause—which stated that "'[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

> [M]ust 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.

Lopez, 541 U.S. 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. 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 in *Lopez* that the Court should focus on whether, through a chain of inferences, possessing guns in a school zone could, in the aggregate, be reasonably thought to substantially affect interstate commerce, rather than focusing on whether the statute targeted economic activity. Additionally, 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; *see also* Brief for the United States, at *28, *United States v. Lopez*, 514 U.S. 549 (No. 93-1260), 1994 U.S. S. Ct. Briefs LEXIS 410 (footnote omitted).

In rejecting the government's unduly expansive view of congressional power, the Court found significant

> 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. at 564 (emphasis added).

The Court concluded 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 that

> To 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 [so expand the clause's scope] 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.

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

United States v. Morrison, 529 U.S. 598 (2000), reinforced *Lopez*'s teaching that the Commerce power does not extend to all "conduct" that substantially affects interstate commerce. In *Morrison*, the Court held that a portion of the

Violence Against Women Act, which provided a civil remedy for victims of sexually-motivated violence, exceeded Congress's Commerce Clause 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 sexually-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. 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.

Section 1501 does not withstand scrutiny under *Lopez* and *Morrison*. 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*. The cases *Lopez* relied upon

referred to *ongoing commercial or economic activities* that Congress may regulate,[2] 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," 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.

As the district court rightly concluded, Section 1501 "literally forges new ground and extends Commerce Clause powers beyond its current high watermark." *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." *Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1163 (N.D. Fla. 2010). There have been many times throughout American history when changing market conditions was a desirable goal, yet

[2] *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.

> 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.

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. Even the most expansive Supreme Court Commerce Clause cases do not support the notion that Congress can regulate inactivity or coerce commercial activity where none exists.

B. The Government's Argument that the Commerce Clause Empowers Congress to Regulate All "Conduct" that Affects Interstate Commerce Swallows All Meaningful Limits on Commerce Clause Power.

Although the government refers repeatedly to the decision not to purchase health insurance as "conduct" within the scope of Congress's Commerce Clause power, that elastic label is no more availing than the term "economic decisions"

was in *Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1163 (N.D. Fla. 2010) (holding that economic decisions should not be equated with economic activity for Commerce Clause purposes). Both terms are fatally flawed because they destroy any remaining boundaries on Congress's power under the Commerce Clause.

Applying the government's argument to obesity illustrates the point. Although genetic predisposition plays a role, the exponential increase in obesity results in significant part from human *conduct*: overeating, poor food choices, sedentary lifestyle habits. The link between obesity and rising health care costs is indisputable. In September 2010, the Congressional Budget Office reported that health care spending per capita for obese adults exceeded spending for non-obese adults by about 8 percent in 1987 and by about 38 percent in 2007.[3] CBO projected that if current levels of obesity do not diminish, "[P]er capita spending on health care for adults would rise by 65 percent—from $4,550 in 2007 to $7,500 in 2020."[4]

[3] Congressional Budget Office, *Economic and Budget Issue Brief: How Does Obesity in Adults Affect Spending on Health Care?* 1 (Sep. 8, 2010), *available* at http://www.cbo.gov/ftpdocs/118xx/doc11810/09-08-Obesity_brief.pdf.

[4] *Id.*

The Center for Disease Control has estimated the health care costs associated with obesity at $147 billion annually.[5] Another study done recently by the National Bureau of Economic Research estimates annual obesity-related costs at closer to $167 billion, or nearly 17% of total health care costs.[6]

Moreover, the rise in health care costs caused by obesity is shifted onto other consumers in much the same way that increased costs stemming from uninsured persons are shifted. In fact, obesity adds about $2,800 to the average person's annual health care costs.[7] As another study concluded, "Obesity also has externalities associated with it—namely, mortality and health insurance costs. Because medical costs are higher for the obese and premiums do not depend on weight, lighter people in the same pool pay for the food/exercise decisions of the obese."[8]

The market incentives to regulate obesity among American citizens are

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[5] Press Release, Centers for Disease Control and Prevention, *Study Estimates Medical Cost of Obesity May Be As High as $147 Billion Annually* (July 27, 2009), *available at* http://www.cdc.gov/media/pressrel/2009/r090727.htm.

[6] John Cawley & Chad Meyerhofer, *The Medical Care Costs of Obesity: An Instrumental Variables Approach*, 1 (Nat'l Bureau of Econ. Research Working Paper No. 16467, 2010), *available* at http://www2.binghamton.edu/economics/research/Meyerhoefer.pdf

[7] *Id.*

[8] Jay Bhattacharya & Neeraj Sood, *Health Insurance, Obesity, and Its Economic Costs*, *in* The Economics of Obesity: A Report on the Workshop Held at USDA's Economic Research Service 21, 21 (Tomas Philipson et al. eds., 2004), *available* at http://www.ers.usda.gov/publications/efan04004/efan04004.pdf.

arguably as compelling as those motivating the individual mandate. If, as the government argues, the Commerce Clause empowers Congress to regulate all "conduct" that, in the aggregate, affects the health care market, Congress could impose federal limitations on body-mass index, the measure that standardizes weight according to height. Such a law would be justified with the same arguments the government uses to defend Section 1501.

Similarly, Congress could determine that a lack of exercise—sedentary conduct—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. Thus, under the government's reasoning, Congress could require Americans to purchase health club memberships.

While the foregoing scenarios might seem farfetched, a recent hearing before the Senate Judiciary Committee on the PPACA's constitutionality revealed they are not. The possibility of a "vegetable mandate" and compelled gym memberships were discussed at this hearing. While defending the individual mandate's constitutionality, former Solicitor General and Harvard law professor Charles Fried testified that under the view of the commerce power that would justify the mandate, Congress could, indeed, mandate that everyone buy vegetables

and join a health club.[9] *Cf. Mead v. Holder*, 2011 U.S. Dist. LEXIS 18592, at *55–56 (D.D.C. February 22, 2011) (finding for Commerce Clause purposes little distinction between economic activity and "mental activity, i.e., decision-making").

As noted, 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 Virginia ex rel. Cuccinell v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010). This court should reject the government's invitation to recognize such a broad power.

II. 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.

[9] *The Constitutionality of the Affordable Care Act Before the S. Comm. on the Judiciary*, 112th Congress 4 (2011) (statement of Charles Fried, Professor, Harvard University), *available at* http://judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf

Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987). Section 1501 is not severable. Therefore, the PPACA is invalid in its entirety. .

"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 (alteration in original) (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* (original emphasis omitted).

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."[10] However, Congress did not include H.R. 3962's severability provision in the final version. 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. *See Russello v. United States*, 464 U.S. 16, 23–24 (1983) ("Where Congress includes [specific] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted provision] was not intended") (alteration in original).

Second, Congress itself believed the individual mandate is absolutely essential to PPACA's primary purpose of making health insurance universally available and affordable.

> [I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care. . . . The [individual mandate] is essential to 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)(I), as amended by § 10106(a). 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

[10] 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)").

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 became injured or ill and required 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 the government. Because the envisioned insurance providers would depend upon premium dollars, the individual mandate is essential to bolster the providers' solvency in each insurance exchange and thus the operation of the entire regulatory scheme.[11] *See Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1162–63 (N.D. Fla. 2011) (collecting numerous statements in government briefs highlighting the essential role the individual mandate played in Congress's effort to reform the health insurance industry).

[11] 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.

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 hold that the entire PPACA invalid.

CONCLUSION

This court should affirm the district court's judgment that PPACA is unconstitutional, and reverse its judgment that the individual mandate is severable from the rest of the statute.

Respectfully submitted,

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March 28, 2011

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

I certify that the attached amici curiae brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). In reliance on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 6,014 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,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing amici curiae brief was electronically submitted on March 28, 2010, to the Office of the Clerk for the United States Court of Appeals for the Fourth 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.

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