APPEAL NOS. 11-11021-HH & 11-11067-HH
DISTRICT COURT NO. 3:10-CV-00091-RV/EMT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, by and through PAM BONDI, et al.,
Plaintiffs/Appellees/Cross-Appellants,

vs.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, et al.,
Defendants/Appellants/Cross-Appellees.

Appeal from the U.S. District Court for the Northern District of Florida

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AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, SEVENTY-FOUR MEMBERS OF CONGRESS, AND THE CONSTITUTIONAL COMMITTEE TO CHALLENGE THE PRESIDENT & CONGRESS ON HEALTH CARE IN SUPPORT OF PLAINTIFFS/ APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART OF THE DISTRICT COURT'S JUDGMENT

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Dated: May 4, 2011

State of Florida v. U.S. Department of Health & Human Services

11th Cir. Appeal Nos. 11-11021-HH & 11-11067-HH

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that in addition to the persons and entities identified in the certificate of interested persons and corporate disclosure statement provided by Defendants/Appellants in their opening brief, the following persons and entities have an interest in the outcome of this case. The undersigned counsel also certifies that none of the amici curiae associated with this brief is a publicly-held corporation, is owned by a publicly-held corporation, or issues stock:

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State of Florida v. U.S. Department of Health & Human Services

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State of Florida v. U.S. Department of Health & Human Services

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State of Florida v. U.S. Department of Health & Human Services

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I.

IDENTITY AND INTEREST OF THE AMICI CURIAE

AND CERTIFICATES PURSUANT TO FED. R. APP. P. 29

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); *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, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). The ACLJ filed amici curiae briefs in the following challenges to the PPACA: *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.); *Florida v. United States Dep't of Health & Human Servs.,* No. 3:10-CV-91-RV/EMT (N.D. Fla.); *TMLC v. Obama*, No. 10-2388 (6th Cir.); and *Virginia v. Sebelius*, Nos. 11-1057, 11-1058 (4th Cir.).

Additionally, the ACLJ represents the plaintiffs in *Mead v. Holder*, No. 1:10-CV-00950-GK (D.D.C.), *appeal filed*, *Seven-Sky v. Holder,* No. 11-5047 (D.C. Cir.), another case challenging the PPACA. As such, the ACLJ has an

interest that may be affected by the instant appeal because any decision by this court would be persuasive authority in *Seven-Sky*.

Moreover, this brief is filed on behalf of amici curiae United States Representatives Paul Broun, Robert Aderholt, Todd Akin, Steve Austria, Michele Bachmann, Spencer Bachus, Roscoe Bartlett, Marsha Blackburn, Larry Bucshon, Dan Burton, John Campbell, Francisco "Quico" Canseco, Eric Cantor, Mike Conaway, Scott DesJarlais, Blake Farenthold, Stephen Fincher, Chuck Fleischmann, John Fleming, Bill Flores, Virginia Foxx, Trent Franks, Scott Garrett, Bob Gibbs, Phil Gingrey, Louie Gohmert, Tom Graves, Tim Griffin, Gregg Harper, Vicky Hartzler, Wally Herger, Tim Huelskamp, Randy Hultgren, Lynn Jenkins, Bill Johnson, Walter Jones, Jim Jordan, Mike Kelly, Steve King, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Cynthia Lummis, Donald Manzullo, Kenny Marchant, Kevin McCarthy, Tom McClintock, Thaddeus McCotter, Cathy McMorris Rodgers, Gary Miller, Jeff Miller, Randy Neugebauer, Richard Nugent, Alan Nunnelee, Pete Olson, Ron Paul, Steve Pearce, Mike Pence, Joe Pitts, Mike Pompeo, Bill Posey, Ben Quayle, Scott Rigell, Phil Roe, Steve Scalise, Bobby Schilling, Lamar Smith, Marlin Stutzman, Tim Walberg, Joe Walsh, Daniel Webster, and Don Young, who are seventy-four 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 curiae are dedicated to the founding principles of limited government and to the corollary precept that Article I of the Constitution contains 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 government-approved health insurance or pay a penalty.

Pursuant to Federal Rule of Appellate Procedure 29(a), amici curiae certify that the parties have consented to the filing of this brief. Also, pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici curiae certify that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amici and its counsel, make a monetary contribution to the preparation and submission of this brief.

II.

STATEMENT OF THE ISSUES

I. Whether the district court properly concluded that Section 1501 of the PPACA exceeds Congress's authority under Article I of the Constitution. Answer: Yes.

II. Whether the district court properly concluded that Section 1501 is not severable from the remainder of the PPACA, and, therefore, the entire PPACA is unconstitutional. Answer: Yes.

III.

SUMMARY OF ARGUMENT

Amici curiae address only two parts of the district court's final decision and judgment and urge affirmance of those two parts: first, the district court's conclusion that Section 1501 (also referred to as "the individual mandate") is unconstitutional, and second, the district court's conclusion that Section 1501 is not severable from the rest of the PPACA, thus making the entire PPACA unconstitutional.

First, the district court properly concluded that the individual mandate exceeds Congress's authority under Article I of the Constitution. The Commerce Clause authorizes Congress to regulate voluntary economic activity, *not economic*

decisions, as the federal government maintains.[1]/ The Commerce Clause does not authorize Congress to regulate the *inactivity* of American citizens by compelling them to buy a good or service (such as health insurance) as a condition of their lawful residence in this country or pay a penalty. Because the individual mandate requires citizens to purchase health insurance or be penalized, the PPACA exceeds Congress's Constitutional authority.

Second, the district court properly concluded that the individual mandate is not severable from the remainder of the PPACA, which, therefore, is invalid in full. Although an earlier version of the health care legislation contained a severability clause, the PPACA does not, and the PPACA's remaining provisions cannot function without the individual mandate. These two factors lead to the conclusion that Congress would not have passed the PPACA without the individual mandate. Consequently, because the individual mandate is unconstitutional and not severable from the remainder of the PPACA, the entire PPACA must be held invalid, as the district court so ruled.

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[1]/ The federal government argued in the district court that the individual mandate is constitutional because, among other things, it "regulates *economic decisions* regarding the way in which health care services are paid for." Doc. 55-1 at 35 (emphasis added); *see also* Doc. 82-1 at 2, 25; Doc. 150 at 52-56. Although on appeal the federal government emphasizes the argument that the individual mandate regulates conduct or activity, the importance of the distinction between decisions and activity is still critical to the proper resolution of this case and will be discussed herein.

IV.

ARGUMENT

A.

THE DISTRICT COURT CORRECTLY DETERMINED THAT SECTION 1501 OF THE PPACA IS UNCONSTITUTIONAL BECAUSE IT EXCEEDS CONGRESS'S ARTICLE I AUTHORITY

The Supreme Court has noted that

> The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const. art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

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

1.

Section 1501 Exceeds The Boundaries Of Congress's Article I Power

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

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

A review of four key Commerce Clause cases demonstrates that Section 1501 exceeds the outer bounds of Congressional power and underscores that the district court properly ruled that Section 1501 is unconstitutional. *United States v. Lopez,* 514 U.S. 549 (1995); *United States v. Morrison,* 529 U.S. 598 (2000); *Wickard v. Filburn,* 317 U.S. 111 (1942); *Gonzales v. Raich,* 545 U.S. 1 (2005).

a.

Lopez And _Morrison_ Repudiate The Federal Government's Argument That The Commerce Clause Power Encompasses Economic Decisions That Substantially Affect Interstate Commerce

United States v. Lopez, 514 U.S. 549 (1995), and *United States v. Morrison,* 529 U.S. 598 (2000), illustrate that the Commerce Clause cannot be stretched to authorize Section 1501. These two recent cases set the outer limits of Congress's Commerce Clause power. According to these two cases, Congress can only control voluntary economic/commercial activity (for example, the production, distribution, and consumption of commodities) and cannot control non-economic activity under the Commerce Clause. Because Congress cannot control non-economic activity, Congress obviously cannot control the non-activity of

Americans and certainly cannot control their economic decisions not to purchase a product, here, health insurance.

In *Lopez*, the Court held that the Gun Free School Zones Act, which prohibited the possession of a firearm within 1,000 feet of a school, *exceeded* Congress's Commerce Clause authority because it had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez,* 514 U.S. at 561. The Court discussed *Gibbons v. Ogden*—the Court's first comprehensive review of the Commerce Clause—which stated, "'[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'" *Id.* at 553 (quoting *Gibbons*, 22 U.S. at 189-90). The *Gibbons* Court observed that the power to "regulate" commerce is the power to "'prescribe the rule by which commerce is to be governed'" and noted that "'[t]he enumeration [of the power] presupposes something not enumerated.'" *Id.* (quoting *Gibbons*, 22 U.S. at 194-95, 196); *see also id.* at 585-88 (Thomas, J., concurring) (noting that the original understanding of the Commerce Clause was much more limited than the Court's modern interpretation).

The *Lopez* Court reiterated the observation made in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), that the Commerce Clause "'must be

considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 557 (quoting *NLRB,* 301 U.S. at 37). The *Lopez* 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 (the only category at issue here) as holding that, "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560 (emphasis added). The Act exceeded Congress's authority because gun possession was not economic activity, nor was the Act

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

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

The federal government argued in *Lopez* that the Court should focus on whether, through a chain of inferences, possession of guns in a school zone may, in the aggregate, substantially affect interstate commerce, rather than focusing on whether the statute targeted economic activity. For example, the 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, the Court responded by stating:

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . . Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. *Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate*.

Id. at 564 (emphasis added).

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

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

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

Section 1501 does not withstand scrutiny under *Lopez*. Being lawfully present within the United States, like possessing a gun within 1,000 feet of a school, is not voluntary *commercial or economic activity* that substantially affects interstate commerce. The cases *Lopez* relied upon referred to *ongoing commercial or economic activities* that Congress may regulate,[2]/ and provide no support for the

[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.

assertion that the power to "'prescribe the rule by which commerce is to be governed'" includes the power to force those who do not want to engage in a commercial or economic activity to do so. *See id.* at 553 (quoting *Gibbons*, 22 U.S. at 196). As in *Lopez*, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

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

targeted by a law requiring individuals to buy that good or service.

The federal government incorrectly contends that inaction and voluntary economic action are no different for Commerce Clause purposes. The federal government's conclusion is fundamentally flawed because it equates abstract economic *decision-making* with concrete voluntary economic *activity*. Most American adults make numerous choices on a daily basis concerning when and whether to spend money on an array of goods and services. A person may choose to buy X and choose not to buy Y. Under 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 take part in the market for Y as consumers—whether they want to or not. Congress would merely need to assert that because decisions about whether to purchase Y are commercial and economic in nature, that individuals' *decisions* to not buy Y substantially affect interstate commerce. Such a view, if accepted by this court, would give Congress an unprecedented license to regulate American citizens at the expense of the Constitution's system of limited powers.

In addition, Congress stated in the PPACA that "[t]he economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured," and Section 1501 would "significantly reduce this economic cost." PPACA § 1501(a)(2)(E), as amended by § 10106(a). Poorer health and shorter life

spans are often the result of *decisions* made by Americans regarding their health, for example, *deciding* to smoke, not exercise, and/or eat a high fat diet. If the economic impact of Americans' poorer health and shorter lifespans provided a sufficient basis for Congress to mandate that individuals buy health insurance, then Congress could also mandate that individuals take other actions that Congress deems necessary to improve health and lengthen life expectancies—such as requiring Americans to buy a gym membership, maintain a specific body weight, or eat a healthier diet—or pay penalties for failing to do so.

Congress also alleged that Section 1501 would lower the cost of health insurance premiums because "[t]he cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008," which was passed on to private insurers and individuals who have private insurance. PPACA § 1501(a)(2)(F), as amended by § 10106(a). The federal government made a virtually identical cost-shifting argument in *Lopez*,[3]/ but the Supreme Court held that Congress can only reach "*economic activity*" that substantially affects interstate commerce; neither gun possession nor lawful presence in the United States is economic activity.

Moreover, Congress declared in the PPACA that requiring individuals to

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

buy health insurance will benefit those who participate in the health insurance market by "increasing the supply of, and demand for, health care services," "reduc[ing] administrative costs and lower[ing] health insurance premiums," "broaden[ing] the health insurance risk pool to include healthy individuals," and "creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." PPACA § 1501(a)(2)(C), (I), (J), as amended by § 10106(a). The Commerce Clause has never been understood, however, to allow Congress to force unwilling buyers into a market to remedy perceived market shortcomings, and Congress has never previously tried to do so, underscoring Congress's previous restraint in respecting the limits of its Constitutional power. *See Printz v. United States,* 521 U.S. 898, 908-18 (1997) (recognizing that the absence of statutes in our history imposing certain obligations suggests Congress's understanding of a lack of such power).

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

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

Randy E. Barnett, *Is health-care reform constitutional?*, WASH. POST., Mar. 21,

2010, at B2. Although the PPACA is the first federal law to cross the line between *encouraging* increased market activity and *mandating* individual purchases, it will certainly not be the last if it is upheld.

In addition to *Lopez, United States v. Morrison*, 529 U.S. 598 (2000), demonstrates that Section 1501 exceeds Congress's power. In *Morrison*, the Court held that a portion of the Violence Against Women Act, which provided a civil remedy for victims of gender-motivated violence, exceeded Congress's Commerce Clause authority because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, *economic activity*." *Id.* at 613 (emphasis added). Congress found that gender-motivated violence deters interstate travel and commerce, diminishes national productivity, increases medical costs, and decreases the supply of and demand for interstate products, *id.* at 615, but the Court rejected the argument "that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The Court noted that cases in which it had upheld an assertion of Commerce Clause authority due to the regulated activity's substantial effects on interstate commerce involved the regulation of "commerce," an "economic enterprise," "economic activity," or "some sort of economic endeavor." *Id.* at 610-11. The Court observed that the government's attenuated method of reasoning was similar to the reasoning offered in *Lopez* and raised concerns that "Congress might use the

Commerce Clause to completely obliterate the Constitution's distinction between national and local authority. . . ." *Id.* at 615.

Morrison illustrates that Section 1501 exceeds Congress's Commerce Clause authority for the same reasons cited above with respect to *Lopez*. Following the attenuated chain of inferences offered in support of Section 1501 would lead to an unchecked federal police power allowing Congress, for the first time in our country's history, to mandate under its Commerce Clause power a host of purchases by American citizens.

b.

Neither *Wickard* Nor *Raich* Supports A

Congressional Power To Regulate Inactivity

Wickard v. Filburn, 317 U.S. 111 (1942), and *Gonzales v. Raich,* 545 U.S. 1 (2005), two cases the federal government chiefly relies on, do not support its position that Section 1501 is constitutional or that Congress can control the inactivity or economic decisions of American citizens.

In *Wickard,* the Supreme Court upheld provisions of the Agricultural Adjustment Act that authorized a penalty to be imposed on the plaintiff for growing more wheat than the marketing quota set for his farm. The Act limited wheat production to limit supply and stabilize market prices. *Wickard,* 317 U.S. at 115-16. The plaintiff grew more than twice the quota for his farm; he typically

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

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

As such, *Wickard* does not stand for the proposition that Congress may regulate *non-economic activity*, or *inactivity*, that may have some relationship to interstate commerce so long as it is related to a broad scheme regulating interstate

commerce, as the government would want this court to believe. Rather, the Court held that Congress may regulate purely local *economic activity* (voluntarily growing a marketable commodity that may be sold in the market or consumed by the grower) when that economic activity, taken in the aggregate, is directly tied to and substantially effects interstate commerce.

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

Commonwealth of Virginia v. Sebelius, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010) (rejecting the government's expansive interpretation of "activity" as lacking logical limitation or support from Commerce Clause jurisprudence.)

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

California residents who wanted to use marijuana for medicinal purposes under state law brought an *as-applied challenge* to the CSA, not a facial challenge as here. Importantly, the Court emphasized that

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

> *purposes* pursuant to California law exceeds Congress' authority under the Commerce Clause.

Id. at 15 (emphasis added).

The Court held that "[t]he CSA is a valid exercise of federal power, even as applied to the troubling facts of this case." *Id.* at 9. The Court stated, "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are *part of an economic 'class of activities'* that have a substantial effect on interstate commerce." *Id.* at 17 (citations omitted; emphasis added). Moreover, "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* (citing *Perez 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 *Raich*, "the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." *Id.* at 19. Moreover, "the

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

Raich provides no support for Section 1501. Unlike *Raich*, Plaintiffs here are not bringing an as-applied challenge to a concededly valid regulatory scheme. Rather, Plaintiffs contend that Section 1501 on its face exceeds Congress's authority and should be declared unconstitutional. Thus, *Raich*'s emphasis on the reluctance of courts to prohibit individual applications of a valid statutory scheme due to the *de minimis* nature of the impact of the plaintiff's local conduct is not implicated by this case.

In addition, the statute in *Raich* (like the statute in *Wickard*) sought to discourage an ongoing "quintessentially economic" activity: "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26. The Court repeatedly emphasized that the substantial effects test governs the authority of Congress to target "activities that are part of an *economic 'class of activities*.'" *Id.* at 17 (emphasis added) (citation omitted). Since the statutory scheme was concededly valid, the Court presupposed that "the [regulated] class of activities . . . [was] within the reach of federal power." *Id.* at 23. By contrast, Section 1501 does not regulate an

ongoing voluntarily economic class of activities "within the reach of federal power." *See id.* Lawful presence in the United States, without more, is not an economic class of activities akin to the production and distribution of a marketable commodity. *Raich* does not support the idea that the targeted economic class of activities does not need to consist of *activity* but includes abstract decisions to not purchase a good or service.

In sum, Supreme Court Commerce Clause jurisprudence does not support a ruling that Section 1501 is constitutional. As the district court here properly concluded, "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If [Congress] has the power to compel an otherwise passive individual into a commercial transaction with a third party . . . Congress could do almost anything it wanted." Doc. 150 at 42.

2.

Congress Seeks Federal Police Powers

If Congress can coerce a commercial transaction simply by asserting, as it did in the PPACA, that a decision to not enter the transaction "is commercial and economic in nature, and substantially affects interstate commerce," PPACA § 1501(a)(1), and by listing a series of "[e]ffects on the national economy and interstate commerce," *id.* § 1501(a)(2), as amended by § 10106(a), the universe of

commercial transactions that Congress could force Americans to engage in would be practically limitless. Very little commercial activity that Congress decided to require individuals to engage in would be considered too trivial or local to elude the commerce power. When that principle is coupled with the assumption in the PPACA that Congress can regulate commercial inactivity by coercing citizens to purchase any given product, there is no constitutional obstacle to the complete federal government micro-management of Americans' financial decision-making.

For example, to try to stabilize the American automobile industry, the United States Treasury authorized loans to bail out General Motors and Chrysler.[4]/ Because selling more cars would help restore GM and Chrysler to profitability, Congress could rationally determine that requiring all Americans above a certain income level to purchase a new GM or Chrysler automobile would help ensure that the bailout's purpose—GM's and Chrysler's survival—is achieved. Under the federal government's reasoning, Congress would be acting within its commerce power. After all, the *decision* whether to buy a car would be, by the federal government's reasoning, a commercial and economic one, viewed in the aggregate, that Congress can regulate under the Commerce Clause. This especially would be true, under the federal government's reasoning, if Congress passed a law that no

[4]/ Press Release, United States Dep't of the Treasury, Secretary Paulson Statement on Stabilizing the Automotive Industry (Dec. 19, 2008), http://www.treas.gov/press/ releases/hp1332.htm.

one could be refused the purchase of a car (similar to the existing law that no one may be refused emergency room care).

Likewise, under the federal government's reasoning, Congress could rationally determine that a lack of exercise contributes to poor health, which increases health care expenses and the cost of health insurance, and threatens Congress's attempt to lower health care and health insurance costs. If so Congress could require Americans to purchase health club memberships, lose weight, or open up a money market account.

These are not far-fetched conclusions, especially when one considers the response by the federal government's attorney to a question by the district court here and the statements of two prominent *supporters* of the constitutionality of the PPACA. During oral argument, the district court asked the federal government's attorney whether Law Professor and Dean Erwin Chemerinsky was correct in saying, while defending the individual mandate, that "'Congress could use its commerce power to require people to buy cars.'" The federal government's attorney responded that "maybe Dean Chemerinsky is right.'" Doc. 150 at 46-47. Also, during the February 2, 2011, hearing before the Senate Judiciary Committee on the PPACA's constitutionality, the possibility of a "broccoli mandate" and compelled gym memberships were discussed. 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 individual mandate, Congress could compel everyone to buy broccoli and join a health club.[5]/

In short, all private decisions to not purchase something can be characterized under the federal government's reasoning as commercial and economic activity and will likely, in the aggregate, affect interstate commerce. If this court upholds the individual mandate to force private citizens to buy health insurance, the effect would be to strip any remaining limits on Congress's power to control individual economic behavior. As Judge Hudson properly explained, in ruling the individual mandate unconstitutional, the unchecked expansion of Congressional power as suggested by the individual mandate "would invite unbridled exercise of federal police powers." *Sebelius,* 728 F. Supp. 2d at 788.

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

[5]/ Senate Judiciary Committee Hearing on the Constitutionality of the Affordable Care Act, February 2, 2011, *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=4964; Doc. 167 at 4-5 n.2.

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

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

The principles of federalism and a limited federal government, like the separation of powers, are part of the system of checks and balances essential to limiting centralized governmental power and protecting liberty. Upholding the individual mandate would effectively confer upon Congress "a plenary police power," *Lopez*, 514 U.S. at 566, over all individual economic decisions and place Americans' economic liberty at risk. *See Sebelius,* 728 F. Supp. 2d at 781, 788. This court should soundly reject that result and affirm the district court's ruling that Section 1501 is unconstitutional.[6]/

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[6]/ The Necessary and Proper Clause does not save the individual mandate. That Clause "grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power." *Sebelius,* 728 F. Supp. 2d at 782. Because the individual mandate is unconstitutional, the Necessary and Proper Clause "may not be employed to implement this affirmative duty to engage in private commerce." *Id.*

B.

BECAUSE SECTION 1501 IS NOT SEVERABLE FROM THE REMAINDER OF THE PPACA, THE ENTIRE ACT IS INVALID, AS THE DISTRICT COURT PROPERLY DECIDED

"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 v. Brock*, 480 U.S. 678, 684 (1987). A court must ask "whether [after removing the invalid provision] the [remaining] statute will function in a manner consistent with the intent of Congress." *Id.* at 685 (original emphasis omitted).

Two factors demonstrate that Congress did not intend Section 1501 to be severable, and support the affirmance of the district court's conclusion in that regard: First, Congress removed a severability clause from an earlier version of health care reform legislation, and no such severability clause appears in the enacted version of the PPACA. Second, the PPACA's remaining portions cannot function "in a manner consistent with the intent of Congress" without Section 1501. *See id.*

The Affordable Health Care for America Act (H.R. 3962), which the House approved on November 7, 2009, contained an individual mandate section as well as a severability provision.[7]/ H.R. 3962's severability provision, however, was not included in the final version of the PPACA. Because Congress *consciously* decided not to include a severability clause in the PPACA, Congress obviously did not intend for the statute's individual provisions to be severable.

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

[7]/ Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 255 (2009), available at *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)").

completely administered and supported by the federal government. Because the envisioned insurance providers would depend upon premium dollars, the individual mandate is designed to bolster the providers' solvency in each insurance exchange and thus the operation of the entire regulatory scheme.[8]/

Because the individual mandate is a foundation of the PPACA's overall operation, 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, 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 only to one conclusion: the individual mandate is not severable from the PPACA's remaining provisions. Thus, because the individual mandate is unconstitutional, this court should rule the entire PPACA invalid, as did the district court.

[8]/ This does not mean 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 or Necessary and Proper Clauses, as argued previously in this brief.

IV.

CONCLUSION

This court should affirm the district court's final decision and judgment as they relate to the district court's ruling (1) that Section 1501 is unconstitutional and (2) that Section 1501 is not severable from the rest of the PPACA, thereby causing the PPACA to be invalid in full.

Respectfully submitted,

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CERTIFICATES PURSUANT TO FED. R. APP. P. 32

I certify that the foregoing 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 6,869 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 foregoing amici curiae 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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Dated: May 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2011, by Federal Express next business day delivery, the original plus six true and correct copies of the foregoing amici curiae brief were caused to be sent to the following: Clerk of Court, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, and two true and correct copies of the foregoing amici curiae brief was caused to be sent to each of the following counsel of record for the parties: Alisa B. Klein, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 7235, Washington, D.C. 20530, and Scott D. Makar, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050.

Upon direction from the Clerk of Court, an identical electronic copy of the foregoing amici curiae brief (with the only difference being the electronic signature of the undersigned substituted for the handwritten signature of the undersigned) shall be uploaded to the court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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