No. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVS., ET AL.,

Petitioners,

v.

FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., AND INDIVIDUAL PHYSICIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(INDIVIDUAL MANDATE ISSUE)

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608
aschlafly@aol.com

DAVID P. FELSHER
Counsel of Record
488 MADISON AVE.
NEW YORK, NY 10022
(212) 308-8505
dflaw@earthlink.net

Counsel for Amici

QUESTIONS PRESENTED

1. When Congress simultaneously presented conflicting versions of the "Individual Mandate" to the President, pursuant to Sections 1501 and 10106, did it violate the Presentment Clause?
2. Without a party and a counterparty, is there "Commerce" for Congress "To regulate" as required by the text and structure of Article I, Section 8, Clause 3?
3. Assuming *arguendo* the "Individual Mandate" is unconstitutional, did Congress fail to exercise its taxing power because the "Penalty Amount" is triggered solely by non-compliance with the unconstitutional "Individual Mandate"?

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Constitution

Statutes

Legislative Materials

Articles, Books and Brief

Internet

No. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVS., ET AL.,

Petitioners,

v.

FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are individual physicians and a national association of physicians. *Amici* file this brief to assist the Court in defining and resolving the "Individual Mandate" issue, one of four issues for which this Court has directed the parties, and any interested *amicus curiae*, to brief. Order dated, December 8, 2011 ("Briefing Order").[2]

[1] This brief is filed with the written consent of all parties. Those blanket consents are filed with the Clerk of this Court. Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici Curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici*, members of *Amicus* AAPS, or *Amici*'s counsel make a monetary contribution to the preparation or submission of this brief.

[2] The Court has also directed separate briefing regarding the following issues: (1) the constitutionality of the Medicaid Expansion provisions; (2) the applicability of the Anti-Injunction Act;

Since 1943, *Amicus* The Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief). Because AAPS has also commenced an action against several Respondents which contains overlapping allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, Case No. 1:10-cv-0499-ABJ (D.D.C.).

Amicus Leah S. McCormack, M.D., privately practices dermatology in New York City, New York. She earned certification from the American Board of Dermatology and is a fellow of the American Academy of Dermatology. She is the immediate Past-President of the Medical Society of the State of New York.

Amicus Guenter L. Spanknebel, M.D., privately practiced gastroenterology. He is a Past-President of the Massachusetts Medical Society and is currently chair of its History Committee. He has served as a Trustee of the Health Foundation of Central Massachusetts and on the faculties of the medical schools at Tufts University and the University of Massachusetts.

---

and (3) severability. Briefing Order. On January 6, 2012, *Amici* filed a brief in support of Petitioners regarding severability. On January 17, 2012, *Amici* filed a brief in support of Petitioners regarding the Medicaid Expansion provisions.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D., privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have followed attempts in recent years to enact health care reform legislation. As active members of the medical profession and pursuant to their ethical obligations, *Amici* have monitored the introduction, passage and early implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("HCERA" or "Reconciliation Act"). For the reasons set forth below, the *Amici* believe that the attempted enactment and amendment of 26 U.S.C. §5000A(a) (the "Individual Mandate"), pursuant to Subsection 1501(b) of ACA and Subsection 10106(c) of ACA, involve unconstitutional "ends" accomplished by unconstitutional "means".[3]

---

[3] As explained below, the Individual Mandate is separate and distinct from the penalty set forth in 26 U.S.C. §5000A(b)(1) (the "Penalty"), pursuant to Sections 1501(b) and 10106(b) of ACA.

PRELIMINARY STATEMENT

The "statute before us upsets the federal[- citizen] balance to a degree that renders it an unconstitutional assertion of the commerce power, and [the Court's] intervention is required." *United States v. Lopez*, 514 U.S 549, 580 (1995) (Kennedy, J. concurring). "[N]either the actors nor their conduct has a commercial character, and neither the purposes nor the design of the [statutory provision] has an evident commercial nexus …." *Id*.[4] "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but [the Court has] not yet said the commerce power may reach so far." *Id*.

The Court has an opportunity here to "temper [its] Commerce Clause jurisprudence." *Id*. at 584 (Thomas, J., concurring). Previously, this Court stated: "Congress may regulate not only 'Commerce … among the several States' … but also anything that has a 'substantial effect' on such commerce." *Id*. (internal citations and text omitted). Furthermore, "[t]his test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life." *Id*. This case affords the Court the opportunity to "come to grips with this implication of [the] substantial effects formula." *Id*.

The Court should reject Petitioners' argument for the Individual Mandate, which would "convert congressional authority under the Commerce Clause to a general police power …." *Id*. at 567 (Rehnquist, Ch. J).

---

[4] The Individual Mandate is actually directed towards inaction, *i.e.*, the absence of conduct, by individuals.

SUMMARY OF ARGUMENT

While ACA and particularly the Individual Mandate[5] have divided our Nation prior to enactment, during enactment, and since enactment, this Court's sole focus is to determine the constitutionality of the "Individual Mandate." It need not and should not consider whether the Individual Mandate is desirable or politically wise.

"We start with first principles. The Constitution creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. The Individual Mandate is an inexcusable assault on those principles. If allowed to stand, our Federal Government will be transformed from a government of limited powers into a government of unlimited power.

The appropriate beginning for the Court's analysis are the words of the Individual Mandate. Those words are set forth in Section 1501 of ACA, as amended by Section 10106 of ACA. The Individual Mandate provides: "An applicable individual ['Applicable Individual'] shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."[6]

The Individual Mandate offends the Constitution in several ways.

---

[5] Pursuant to 26 U.S.C. §5000A(a), as added by Sections 1501(b) of ACA and amended by Section 10106(c).

[6] It is actually the "religious conscience exemption," an exception to the term Applicable Individual, which was allegedly modified by Subsection 10106(c) of ACA. *See infra* at pages 8, 15, and 16.

First, it fails to invoke the Commerce Clause which requires "commerce" between a party and a counterparty. The Individual Mandate attempts to regulate inactivity of a single party. Specifically, *Amici* ask the Court to revise its Commerce Clause jurisprudence to first ask the question: Is there "commerce"?

Second, by simultaneously trying to enact and amend the Individual Mandate, pursuant to Sections 1501 and 10106 of ACA, respectively, Congress cross-nullified those sections in violation of the Presentment Clause. These Sections attempt to simultaneously enact and amend 26 U.S.C. §5000A(a). 124 Stat. 244 and 124 Stat. 910, respectively. While the Petitioners have merely set forth the relevant portions of 26 U.S.C. §5000A, as amended by Section 10106,[7] *Amici* ask the Court to examine and compare the countervailing texts of Sections 1501 and 10106[8] to establish the proposition that those sections cross-nullify each other.[9]

---

[7] Petitioners' Appendix ("PetApp") at 476-490; Brief for Petitioners (Minimum Coverage Provision) ("PetBrief") at 1a-15a. *See also* Petition at 4.

[8] The full texts of Sections 1501 and 10106 of ACA may be found at 124 Stat. 242-249 and 124 Stat. 907-911, respectively. *Amici* take the language of these sections directly from Public Law 111-148 as it appears in "124 Stat." and not as it was consolidated into the "United States Code."

[9] In addition to the length of this legislation, the numerous cross-nullifying provisions (possibly more than one hundred) made it difficult, if not impossible, for members of the House and Senate to have fully "considered" the bill (*i.e.*, H.R. 3590), as implicitly required by the Presentment Clause, in the time available. "Our democratic tradition demands that bills be given consideration by the entire membership with adequate opportunity for debate and the proposing of amendments." *How*

Third, Congress did not invoke its revenue-raising power for the several reasons: Because the alleged Penalty (*i.e.*, the alleged "tax liability") specified in 26 U.S.C. §5000A(b) is conditioned upon a failure to comply with §5000A(a), it can never be triggered if the Individual Mandate is declared unconstitutional for either of the above reasons; (2) Congress also tried to simultaneously enact and amend the Penalty in violation of the Presentment Clause; and (3) the words of Subsection 1501(a)(1) and Subsection 1501(a)(2), as amended by Subsection 10106(a), clearly evince an intent to invoke the Commerce Clause and not the "Taxing Clause."[10]

Finally, without the existence of a "tax liability," *i.e.*, the Penalty, to assess or collect, the Anti-Injunction Act does not apply to this case.

Our Laws Are Made 26, Doc. No. 96-352 (Presented by Hon. Peter W. Rodino, Chairman, Committee on the Judiciary of the House of Representatives, pursuant H. Con. Res. 95, 96th Cong., 2d Sess., June 5, 1980).

[10] Although Congress said, "The individual responsibility requirement provided for in this section … is commercial and economic in nature, and substantially affects interstate commerce …," 124 Stat.242, saying something is so ("commercial" or "economic"), does not make it so. *See infra* at 14, 16, 20, 21, 29. The Court should not defer to this finding of Congress because the definitions of "commerce" and "economics" both implicate a party and a counterparty, which is absent from the Individual Mandate. *See* Argument II.A.

ARGUMENT

I. THE PRESENTMENT CLAUSE PREVENTS CONGRESS FROM SIMULTANEOUSLY ENACTING AND AMENDING A SINGLE PROVISION WITHIN THE SAME STATUTE

Congress simultaneously passed Sections 1501 and 10106 of ACA. The former provision creates 26 U.S.C. §5000A, 124 Stat. at 244, while the latter provision contains revisions to some portions of 26 U.S.C. §5000A, 124 Stat. at 909, including the definition of "applicable individual," which is the core component driving the Individual Mandate. Since Sections 1501 and 10106 contain incompatible definitions of Applicable Individual,[11] they cross-nullify each other in violation of the Presentment Clause, *i.e.*, they cannot be presented to the President in the same bill.

A. The Presentment Clause Provides a Single, Finely Wrought and Exhaustively Considered Procedure to Enact, Amend or Repeal Legislation

Congress may not simultaneously enact and revise any provision within the same statute because

---

[11] As discussed in Argument I.C, *infra*, the literal language of the term Applicable Individual is not altered by Section 10106. Rather, it is the "religious conscience exemption," one of the exceptions to the term Applicable Individual, that is altered by Section 10106. Sections 1501 and 10106 also contain incompatible findings regarding personal bankruptcies and incompatible definitions of the terms "Penalty Amount" and "applicable dollar amount." These incompatibilities cross-nullify each other in violation of the Presentment Clause.

that simultaneity violates the Presentment Clause, the "single, finely wrought and exhaustively considered, procedure" which is used to enact Federal legislation. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *Clinton v. City of New York*, 524 U.S. 417, 439-440 (1998). Strict adherence to that procedure is required and is set forth in the Bicameral Clause, U.S. CONST. art. I, § 1, and the Presentment Clause, U.S. CONST. art. I, § 7, cl. 2.

The Bicameral Clause provides "**All legislative Powers** herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1 (emphasis added).

The Presentment Clause provides:

> Every **Bill** which shall have passed the House of Representatives and the Senate, shall, before **it** becomes a Law, be presented to the President of the United States: If he approve he shall sign **it**, but if not he shall return **it**, with his Objections to that House in which **it** shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider **it**. If after such reconsideration two thirds of that House shall agree to pass the **Bill**, it shall be sent, together with the Objections, to the other House, by which **it** shall likewise be reconsidered, and if approved by two thirds of that House, **it** shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the **Bill** shall be entered on the Journal of each House respectively. If any **Bill** shall not be returned by the President within ten

> Days (Sunday excepted) after **it** shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed **it**, unless the Congress by their Adjournment prevent **its** Return, in which Case **it** shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

At the core of the Presentment Clause is the requirement that both the House of Representatives and the Senate pass, in exactly the same final form, every bill that enacts, "adds, amends, or repeals any provision of any federal statute. Each bill so passed must be presented to the President, whose choices are limited to approving it in whole, returning it in whole, or taking no action." Brief of Appellees Snake River Potato Growers, Inc. and Mike Cranney at 2 in *Clinton v. City of New York* (Docket No. 97-1374).[12]

The bicameral system to enact federal legislation that was crafted by the Framers may be viewed as requiring certain legislative concurrences. First, the House of Representatives must agree within itself to the text of a bill.[13] Second, the Senate must also agree within itself to the text of a bill.[14] Third, the text of the House-passed bill must exactly match the text of the Senate-passed bill.[15] Fourth, once the

---

[12] The repeated use of the terms "the Bill," "it", "its" and "reconsider" in the Presentment Clause are consistent with the proposition that a bill that was passed by both Houses of Congress and presented to the President is ***indivisible***. *See* 141 Cong. Rec. S4443-4449 (104th Cong. 1st Sess. 1995) (Sen. Moynihan).

[13] By a majority vote.

[14] By a majority vote.

[15] In explaining the Great Compromise, Madison said: "No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States."

House and Senate agree to the same text of a bill, that bill is presented to the President for his or her agreement or veto.

In *Clinton v. City of New York*, the Court articulated this point as follows:

> Third, our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500-page document that became "Public Law 105-33" after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." Art. I, § 7.

Clinton, 524 U.S. at 448.[16]

"[R]epeal of statutes, no less than enactment, must conform with Art. I." *Clinton*, 524 U.S. at 438 (quoting *Chadha*, 462 U.S. at 954). The same principle applies to revisions and amendments of statutes. Consequently, two versions of a single statutory provision, *e.g.*, 26 U.S.C. §5000A, may not coexist within a single bill or statute. *See* Argument I.C, *infra*.

The Federalist No. 62, at 378 (Madison) (C. Rossiter, ed. 1961). In other words, the House of Representatives represents the people and the Senate represents the States.

[16] A bill may also become a law if the President vetoes a bill but two-thirds of the members of both Houses subsequently override that veto pursuant to the Presentment Clause. U.S. CONST. art. I, § 7, cl. 2.

B. Simultaneously Enacting and Amending a Single Provision Within the Same Statute Cross-Nullifies the Base Provision and the Amendment

Whenever either House of Congress passes a bill with dueling provisions it creates several constitutional paradoxes. How can the other chamber agree simultaneously to both the base provision and its variant regarding precisely the same subject matter? How can the two houses of Congress present both the base provision and its variant to the President? How can the President agree simultaneously to both the base provision and its variant? This is a problem of Congress's own making and easily could have been avoided if both Houses of Congress had taken the time to strike the original language and leave only the replacement language in the bicamerally passed bill that is to be presented to the President.

The problem can be best understood by an example. Consider the following hypothetical bill (the "Hypo-Bill") with two sections: Section (A) provides: "The Washington Monument shall be red." Section (B) provides: "Section (A) is amended to provide 'The Washington Monument shall be white.'"[17] While either House could enact the Hypo-Bill first, as written, it is impossible for the second House to agree with both sections as passed by the first House.

---

[17] As explained below, many of ACA's provisions were revised in this manner. Where one of the amended provisions is amended a second time, a third section could be added to the hypothetical Hypo-Bill to provide: "Section (A), as amended by Section (B), is further amended to provide 'The Washington Monument shall be blue.'"

Assume *arguendo* the House passes the Hypo-Bill first and the Senate passes it (with identical language) subsequently. Under this scenario, Section (A) of the House-passed Hypo-Bill would nullify Section (B) of the Senate-passed Hypo-Bill and Section (B) of the House passed Hypo-Bill would nullify Section (A) of the Senate-passed Hypo-Bill. Similarly, Section (A) of the Senate-passed Hypo-Bill would nullify Section (B) of the House-passed Hypo-Bill and Section (B) of the Senate-passed Hypo-Bill would nullify Section (A) of the House passed Hypo-Bill. Thus, even though the intent of each House of Congress to amend its choice of color for the Washington Monument is quite clear, and the same as the other House, Sections (A) and (B) cannot coexist, even for a scintilla of time. Sections (A) and (B) cross-nullify each other. The House and Senate cannot agree to both provisions at the same time.

Cross-nullification of the Hypo-Bill's incompatible provisions, *i.e.*, Sections (A) and (B), also occurs in connection with the presentment of the Hypo-Bill to the President, even though the Hypo-Bill would have been identically passed by both Houses. The President's agreement to Section (A) would nullify Section (B) of the bicamerally passed Hypo-Bill and the President's agreement to Section (B) would nullify Section (A) of the bicamerally passed Hypo-Bill. Similarly, Section (A) of the bicamerally passed Hypo-Bill would nullify the President's agreement to Section (B) and Section (B) of the bicamerally passed Hypo-Bill would nullify the President's agreement to Section (A). Thus, even though the intents of both Congress and the President to amend the choice of color for the Washington Monument are the same and quite clear, sections (A) and (B) of the Hypo-Bill can-

not coexist, even for a scintilla of time. These sections cross-nullify each other. Congress and the President cannot agree to both provisions simultaneously.

C. Various Provisions within ACA, Including the Individual Mandate, Cross-Nullify Each Other

Although ACA contains scores of provisions that cross-nullify each other, a comparison of four subsections within Sections 1501 and 10106, for example, illustrates this point with great clarity.

First, Congress made contradictory "findings" for the same fact regarding personal bankruptcies in Subsections 1501(a) and 10106(a). In Subsection 1501(a)(2)(E), Congress made the following finding: "***Half of all personal bankruptcies*** are caused in part by medical expenses...." 124 Stat. 243 (emphasis added). In Subsection 10106(a) (which amended Subsection 1501(a)(2), Congress made the following contradictory finding: "***62 percent of all personal bankruptcies*** are caused in part by medical expenses." 124 Stat. 908 (emphasis added). It is impossible for both "findings" to be true. Perhaps, neither is true.[18] In any case, the Presentment Clause requires that they be declared unconstitutional because they cross-nullify each other.

Second, Sections 1501 and 10106 contain different, cross-nullifying versions of "amount of penalty,"

---

[18] Whenever Congress presents "findings", those so-called "findings" are not facts at all, but rather something else - a conclusion based on a vote.

26 U.S.C. §5000A(c)(1&2) (the "Penalty Amount").[19] Subsections 26 U.S.C. §5000A(c)(1&2), as added by Subsection 1501(b) of ACA, are allegedly replaced in their entirety by Subsection 10106(b)(2) of ACA. *Compare* 124 Stat. at 244-45 with 124 Stat. at 909. *See* Office of the Legislative Counsel, United States House of Representatives, 111th Cong.. 2d Sess., *Compilation of Patient Protection and Affordable Care Act [As Amended Through May 1, 2010*] ("*Compilation Report*") at 145-46.[20] *See also* Ernst & Young, LLP, *Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act (May 2010*) ("*E&Y Summary*") at 43.

Third, Sections 1501 and 10106 contain different, cross-nullifying, versions of the "applicable dollar amount," Subsection 26 U.S.C. §5000A(c)(3) (the "Applicable Dollar Amount"). Subsection 26 U.S.C. §5000A(c)(3), as added by Subsection 1501(b) of ACA, is allegedly revised by Subsection 10106(b)(3) of ACA.[21] *Compare* 124 Stat. at 245 with 124 Stat. at 910. *See Compilation Report* at 146-147; *E&Y Summary* at 43.

Fourth, and most importantly, Subsection 10106(c) alters the "religious conscience exemption" (the "RCX") contained in 26 U.S.C. §5000A(d)(2)(A), as added by Subsection 1501(b) of ACA, and thereby

---

[19] This is for the payment of the Penalty required by 26 U.S.C. §5000A(b) for the failure to maintain the coverage required by 26 U.S.C. §5000A(a)(1).

[20] http://docs.house.gov/energycommerce/ppacacon.pdf (viewed 10/23/11).

[21] It is also allegedly revised by Subsection 1002(a)(2) of the Reconciliation Act, a statute which is or may be unconstitutional in its entirety.

alters the definition of Applicable Individual as specified in 26 U.S.C. §5000A(d)(1), as added by Subsection 1501(b) of ACA.[22] Compare 124 Stat. at 246 with 124 Stat. at 910. *See Compilation Report* at 147-148; *E&Y Summary*) at 43.

Under the Presentment Clause, the President may only approve or veto a bill in its entirety. Because Sections 1501 and 10106 contain incompatible definitions of RCX (making the definitions of Applicable Individual incompatible), it is impossible for the President to have approved H.R. 3590 (which became ACA) in its entirety. The President's approval of the RCX definition in Section 1501 nullified the definition presented to him in Section 10106 and the President's approval of the RCX definition in Section 10106 nullified the definition presented to him in Section 1501. The incompatible definitions of RCX (and thus the incompatible definitions of Applicable Individual) contained in Sections 1501 and 10106 prevent the House and Senate from having actually agreed on the definition of each of these terms (*i.e.*, before the two chambers presented the bill to the President).

This reasoning applies to the dueling personal bankruptcy findings, the dueling Penalty Amounts,

---

[22] At first glance, Section 10106 does not appear to alter 26 U.S.C. §5000A(d)(1) which provides: "[t]he term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraphs (2), (3), or (4)." 124 Stat. 246. However, paragraphs (2), (3), and (4) are incorporated by reference into the term Applicable Individual. Because Section 10106 alters the exception specified in paragraph "(2)", the term "Applicable Individual" is cross-nullified and is, therefore, unconstitutional. According to its plain language, the Individual Mandate applies only to Applicable Individuals. Therefore, the Individual Mandate should be declared unconstitutional as well."

and the dueling Applicable Dollar Amounts. Each set of cross-nullifying provisions prevents compliance with the Presentment Clause.

While simultaneously enacting and revising 26 U.S.C. §5000A may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary,[23] the gravamen of the constitutional defect is that both the original and revised versions of Section 5000A were presented to the President within the same bill. Therefore, it could be said that 26 U.S.C. §5000A did not exist when each House passed H.R. 3590 nor did it exist when the bicamerally passed H.R. 3590 was presented to the President. In other words, all three entities, *i.e.*, the Senate, the House of Representatives and the President, were attempting to amend a nullity. For 26 U.S.C. §5000A to have

---

[23] During debate over the ratification of the Constitution, James Madison stated laws should be understandable, not too long, and "not be revised before they are promulgated." *The Federalist*, No. 62, at 381 (Madison). He wrote:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so ***voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated***, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Id. (emphasis added). Congress ignored Madison's warning and passed H.R. 3590, a 2400 page bill, which became ACA upon the President's signature. *See generally Compilation Report and E&Y Summary*. *Amici* believe that the numerous instances of cross-nullification in ACA make it far too difficult for members of the medical and legal professions – let alone the population in general - to fully read and understand.

been revisable, Section 10106 would have to have been enacted after section 1501, not simultaneously with it.

This unconstitutional practice completely infects ACA. Pursuant to Title X, Congress attempted to simultaneously enact and amend scores of ACA's provisions.[24] Indeed, Title X of ACA, which amends the first nine titles of ACA, is a 140-page tome in itself. 124 Stat. 883-1024. *See Compilation Report* and *E&Y Summary*.

II. WITHOUT "COMMERCE" BETWEEN A PARTY AND A COUNTERPARTY, CONGRESS HAS NO POWER "TO REGULATE"

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers."). One of those powers is the Commerce Clause.

Petitioners have argued that Congress may enact the Individual Mandate under the Commerce Clause. PetBrief at 17-52. Because the Individual Mandate does not involve any commerce, this argument fails.

While "commerce" may occur between two people, between two entities, or between a person and an entity, there is no "commerce" when a single person or entity is involved. Since the Individual Mandate involves only a single individual, it does not pertain to

[24] 124 Stat. at 883-1024.

a transaction, agreement, traffic or interrelationship between two parties. Rather, Section 1501 attempts to regulate individuals where no counterparty exists. The individual mandate involves no "commerce". Without "commerce", there is no need to examine the interstate commerce sub-clause.

A. The Text and Structure of Article I, Section 8, Requires "Commerce" Between Two Parties Before Congress May Exercise Its Power "To regulate"

Congress lacks power to enact the Individual Mandate under the Commerce Clause. The language and structure of article I, section 8 make this clear. Under clause 3, the power is "To regulate" and the object of that power is "Commerce". The Constitution does not give Congress power to regulate all commerce. Rather, the Constitution restricts Congress to regulating a set of only three types of commerce: (1) "with" the Indian Tribes; (2) "among" the several States; and (3) "with" foreign nations. All three members of this set necessarily involve at least a dyad or pair of parties. Without two or more parties, the words "with" and "among" are meaningless.

Therefore, in deciding this matter, the Court should undertake a two-step analysis. First, it should determine if Congress attempted "To regulate Commerce." Only if this question is answered affirmatively should the Court undertake step two, an analysis of the "interstate commerce" sub-clause. Petitioners have only addressed step two. Congress has not only ignored step one; Congress simply cannot establish the "Commerce" required by step one. Conse-

quently, there is no "Commerce Clause" power and Petitioners' argument fails.

With regard to step one, the key is to understand that "Commerce" may be viewed as the interrelationship, traffic, agreement or transaction between parties. For example, we may see vendors paired with vendees; sellers paired with buyers; lessors paired with lessees; borrowers paired with lenders; and debtors paired with creditors. Expressed in mathematical terms, "commerce" is Euclid's line between two points or Einstein's interval between two points on an ideal rigid body, where the points represent the two parties and the line or interval represents the commercial transaction, agreement, traffic or interrelationship. *See* Euclid, *Elements of Geometry* 6 (Greek Text of J.L. Heiberg (1883-1885)) (R. Fitzpatrick,ed. & translator) ("And the extremities of a line are points"); Albert Einstein, *The Meaning of Relativity* 4 (5th ed. 1956) (posthumously); George B. Thomas, Jr., *Calculus and Analytic Geometry* 9 (4th ed. 1968) ("Let *L* be the line through points $P_1(x_1,y_1)$ and $P_2(x_2,y_2)$") (emphasis in original).

The "substantial economic effects" test, as argued by the Petitioners, should not be used to establish that the Individual Mandate may be enacted under the Commerce Clause. *Amici* believe the "substantial effects" test leads to false positive results and should be replaced. Furthermore, *Amici* believe that the term "economics", like the term "commerce", involves a party and a counterparty. In fact, similar to the definition of commerce, "economics" has been defined as requiring at least a dyadic relationship. Paul A. Samuelson, *Economics* 3 (10th ed., 1976) ("Economics ... is the study of those activities which, with or with-

out money, involve ***exchange transactions among people***") (emphasis added).[25]

Petitioners have pointed to a litany of congressional "findings" to argue that Congress properly enacted Section 1501 under the Commerce Clause - on the basis that the lack of adequate insurance coverage has a substantial effect upon the economy.[26] PetBrief at 27-30 (References 42 U.S.C. §18091 which is the codification in the "United States Code" of Subsection 1501(a), as amended by Subsection 10106(a)). Applying Petitioners' rationale, courts could easily find the other enumerated powers superfluous including the powers To declare war, U.S. CONST. art. I, § 8, cl. 11, To establish post offices, *id.* at cl. 7, and To provide and maintain a Navy, *id.* at cl. 13. Under Petitioners' theory, these clauses are unnecessary. *Lopez*, 514 U.S. at 589 (Thomas, J., concurring) ("Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce").

First, we begin with the text of the Constitution. "The Congress shall have Power ... **To regulate** Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3 ("Regulation Clause")

---

[25] Professor Samuelson's treatise was the most popular economics textbook of the second half of the twentieth century. He was Economic Advisor to President Kennedy and received the second Nobel Prize in Economics in 1970.

[26] As argued above in Argument I, *supra*, the findings in Subsections 1501(a) and 10106(a) cross-nullify each other and thereby violate the Presentment Clause.

(emphasis added). Whether called the "Commerce Clause" or the "Regulation Clause," the alleged source of congressional authority is the highlighted language above. Its appellation is irrelevant.

Second, each of the powers enumerated in Article I, Section 8 begins with the capitalization of the word "To".[27] That means a capitalized "To" signals the enumerated power. Indeed, nowhere else in the remainder of the Constitution is the word "to" capitalized. The term "Commerce Clause" is technically a misnomer. In this case the power is "To regulate" and the object of that power is "Commerce".

Third, only a semicolon separates the powers enumerated in Article I, Section 8. U.S. CONST. art. I, § 8. *See The Federalist*, No. 41, 263 (Madison).

Fourth, because the powers enumerated in Article I, Section 8, form a single sentence, Congress is limited to those lawmaking powers.[28]

---

[27] Each of the eighteen clauses enumerating the powers of Congress has the same grammatical structure. They begin with the infinitive form of an action verb followed by an object of that action verb. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 9 ("To constitute Tribunals inferior to the [S]upreme Court"). The verb is "To constitute." The object of that verb is "Tribunals inferior to the [S]upreme Court."

[28] Congress has other powers that are non-lawmaking. These include, but are not limited to, the following: (1) the power of the House of Representatives to impeach, U.S. CONST. art. I, § 2, cl. 5; (2) the power of the Senate to try impeachments, *id*. art. I, § 3, cl. 6; (3) the power of each chamber to determine the Rules of its Proceedings, *id*. art. I, § 5, cl. 2; (4) the power of the Senate to ratify treaties, *id*. art. II, § 2, cl. 2; (5) the power of the Senate to confirm ambassadors and members of this Court, *id*. art. II, § 2, cl. 2; and (6) the power to propose amendments to the Constitution, *id*. art. V.

Fifth, the language "**To regulate** Commerce" and the placement of that language before the provision "with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3 (emphasis added), is indicative of a limitation on the allowable purposes for the exercise of congressional power "To regulate." To argue otherwise would mean: (1) that the ends would justify means outside of the enumerated powers; and (2) that the remainder of the enumerated powers are superfluous.

Without "commerce", Congress cannot exercise its power "To regulate."

B. The Legislative and Executive Branches Have Understood that "Commerce" Requires Two Parties

Various federal laws have been enacted which recognize that "commerce" involves a party and a counterparty. *See, e.g.*, 18 U.S.C. §1951(b)(3); and 29 U.S.C. §152. These two references explicitly recognize that "commerce" must occur between two points.

According to 18 U.S.C. §1951(b)(3):

> The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce ***between any point in*** a State, Territory, Possession, or the District of Columbia ***and any point outside*** thereof; all commerce ***between points*** within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id. (emphasis added).

According to 29 U.S.C. §152:

> The term 'commerce' means trade, traffic, commerce, transportation, or communication ***among*** the several States, or ***between*** the District of Columbia or any Territory of the United States and any State or other Territory, or ***between*** any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or ***between points*** in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

29 U.S.C. §152 (emphasis added).

As the above statutes illustrate, at least two points are required for there to be "commerce".

C. This Court Has Recognized That Commerce Requires Two Parties

This Court has long understood and continues to recognize that "commerce", by definition, necessarily involves two or more parties:

> The commerce power "is the power to ***regulate***; that is, to prescribe the rule by which commerce is to be governed ..." The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.
>
> It is not intended to say that these words comprehend that commerce, which is completely internal, which is ***carried on between man and man*** in a State, or ***between different parts*** of the same State, and which does not extend to or affect other States....

Lopez, 514 U.S. at 553 (*quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, Ch. J.) (emphasis added).

D. States, Businesses, and Individuals Understand That "Commerce" Requires Two Parties

The Uniform Commercial Code (the "UCC") has been enacted, with some variations, in all fifty states. According to the UCC, a variety of party/counterparty transactions are contemplated. *See, e.g.*, Neb. (U.C.C.) §1-201(3) ("Agreement", as distinguished from "contract", means the bargain of the ***parties*** in fact, as found in ***their*** language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade…"); *id*. §1-201(35) (The definition of "Security Interest" references buyers and sellers of goods); and *id*. §3-104(a)(1) (this subsection contemplates that a negotiable instrument is payable to someone, *i.e.*, "to order" or "to bearer" and that there is an issuer).

Many who have shipped or received a package via the United Parcel Service ("UPS") have seen the phrase "Synchronizing the World of Commerce®." Not only is this trademarked phrase emblazoned on airplanes and brown trucks used by UPS, but it is also printed on the UPS packaging used to ship overnight mail or packages.

It is well recognized that the word "synchronize" does not apply to a unitary person, entity or thing. As used by the UPS, the word "synchronize" invokes the idea that "commerce" involves the movement of

packages between two or more persons or entities or between two or more places.

III. THE INDIVIDUAL MANDATE WAS NOT AND COULD NOT BE ENACTED UNDER THE TAXING CLAUSE

A. Petitioners Have Mistakenly Conflated the Penalty with the Individual Mandate

Furthermore, Petitioners conflated their use of the terms Individual Mandate and Penalty. *See, e.g.*, Pet. Brief at 52-62. That is an error. They are distinct terms that first appeared in separate subsections of Section 1501.[29] Their language is different. They are directed towards different people. The Individual Mandate applies to an Applicable Individual, while the Penalty Amount applies to a "taxpayer". Most importantly, the Penalty Amount is not triggered unless and until there is a failure to comply with the Individual Mandate. Thus, if the Individual Mandate is unconstitutional, either because it is beyond the power of Congress "To regulate" or because Sections 1501 and 10106 cross-nullify each other, then this Court need not consider the taxing power. The Penalty Amount can never be triggered. In other words, the Penalty Amount - the alleged tax liability- will never exist. To bootstrap the Individual Mandate onto the Penalty Amount would be to ignore the plain meaning of ACA's words in an attempt to justify the Individual Mandate as an exercise of the "Taxing" power of Congress. The Court may not put the proverbial "cart before the horse."

---

[29] Amendments to the Individual Mandate and Penalty Amount are set forth in separate subsections of Section 10106.

B. Congress Did Not Properly Exercise its Revenue-Raising Power

When Congress exercises its power "To lay and collect Taxes, Duties, Imposts, and Excises," U.S. CONST. Art. I, § 8, cl. 1, it must comply with the following five provisions of the Constitution: (1) "All Bills for raising Revenue shall originate in the House of Representatives …," *id*. at art. I, § 7, cl. 1; (2) "all Duties, Imposts and Excises shall be uniform throughout the United States," *id*. at art. I, § 8, cl. 1; (3) "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration …," *id*. at art. I, § 9, cl. 4; (4) "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another …," *id*. at art. I, § 9, cl. 6; and (5) "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," *id*. at amend. XVI.

The Penalty does not involve the purchase or importation of any good or service, and thus it falls outside of the definition of a Duty, Impost or Excise. Even assuming *arguendo* the Penalty is within the definition of a Duty, Impost or Excise, the Penalty should be declared unconstitutional because it is non-uniform throughout the country. Under 26 U.S.C. §5000A(d), as added by Subsection 1501(b), incarcerated individuals are specifically excluded from the definition of Applicable Individual, and under 26 U.S.C. §5000A(e), as added by Subsection 1501(b), members of Indian Tribes would be exempt from the payment of the Penalty even if they were Applicable

Individuals who failed to comply with the Individual Mandate. As a result, residents of prisons and Indian reservations would be able to avoid paying the Penalty. *See* 26 U.S.C. §5000A(d)(4) and 26 U.S.C. §5000A(e)(3), 124 Stat. at 246-47, respectively. This directly contradicts the Constitution's requirement of "uniform[ity] ***throughout*** the United States." U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

Direct Taxes other than Income Taxes must be apportioned in proportion to the census or enumeration as required by art. I, § 9, cl. 4 of the U.S Constitution. Section 1501 makes no such apportionment. Neither does Section 10106.

In contrast, the Sixteenth Amendment permits Congress to impose taxes on income without apportionment and without regard to any census or enumeration. U.S. CONST. amend. XVI. However, the Penalty imposed by 26 U.S.C. §5000A(b) is not a tax on income. It is triggered solely by doing nothing, *i.e.*, an individual's decision to not purchase medical coverage.[30] It is not a tax on income because it excludes entire classes of individuals, including incarcerated individuals, certain religious sects, and illegal aliens, from paying the Penalty because those individuals are excluded from the definition of Applicable Individual.[31] 26 U.S.C. §5000A(d). Furthermore, it is not a tax on income because it excludes members of Indian Tribes from paying the Penalty even if they

---

[30] If the Mandate and the Penalty were allowed to stand, then an individual could theoretically be penalized for: not eating broccoli; not crossing the George Washington Bridge; not climbing Mount Everest; and not sky-diving.

[31] Such exclusions likely deny to others equal protection of the law.

are Applicable Individuals who failed to comply with the Individual Mandate. In other words, one person might have to pay, while another person working by his or her side, would not have to pay, even though both individuals had identical taxable incomes. In an extreme example, an incarcerated billionaire would be exempt from the Penalty, even if he or she were to annually receive hundreds of millions of dollars in portfolio income.

Finally, Congress made no attempt to treat the Penalty for the failure to comply with the Individual Mandate as a revenue provision. The structure of ACA makes this clear. The revenue provisions were lumped together in Title IX of ACA, which is entitled "Revenue Provisions." The Penalty was neither included in Title IX nor in the amendments to Title IX, found at Sections 10901 *et seq*. Furthermore, the language contained in the "findings" of Sections 1501 and 10106 is an attempt to establish "Commerce" power as opposed to an attempt to establish the "Taxing" power of Congress.

C. The Anti-Injunction Act Is Not Applicable Because There Is No Tax Liability to Assess or Collect

Lacking a constitutional Applicable Individual for the Individual Mandate, it is impossible to trigger the Penalty, and thus there is no "tax liability" to "assess or collect." This should render the Anti-Injunction Act, 26 U.S.C. §7421(a), inapplicable here.

CONCLUSION

For the foregoing reasons, the Court should affirm that the Individual Mandate is unconstitutional. Furthermore, the Penalty cannot be justified as a tax to assess and collect, because the Penalty will never be triggered.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608
aschlafly@aol.com

DAVID P. FELSHER
Counsel of Record
488 MADISON AVENUE
NEW YORK, NY 10022
(212) 308-8505
dflaw@earthlink.net

Counsel for Amici

Dated: February 13, 2012