No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

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

BRIEF OF SPEAKER OF THE HOUSE JOHN BOEHNER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

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INTEREST OF *AMICUS*[1]

Amicus Curiae John Boehner is the Speaker of the House of Representatives of the 112th Congress. As such, he is acutely interested in the constitutional issues at stake in this litigation independent of any opposition he voiced, and has continued to voice, to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (hereinafter "PPACA" or "Act") on policy grounds.

Members of Congress must solemnly swear under oath to uphold the Constitution of the United States. Therefore, they bear an independent responsibility to uphold the Constitution of the United States by ensuring that the Legislative Branch stays within its constitutionally enumerated powers. To that end, Speaker Boehner oversaw the adoption of a new rule by the 112th Congress requiring every piece of legislation be accompanied by a statement citing 'the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.' H.R. R. XII, cl. 7, par. (c)(1), 112th Cong. (2011).

Amicus believes his perspective as the House's sole elected leadership officer will assist the Court in understanding how the Individual Mandate falls

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* or his counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

outside the scope of Congressional power under the Necessary and Proper Clause. He is especially attuned to the negative impact that Petitioners' position on this issue would have on the legislative process.

Put simply, Congress acted without constitutional authority in enacting the Individual Mandate of the PPACA. In so doing, Congress has damaged its institutional legitimacy and has triggered severe conflicts between state and federal governments that the Constitution was carefully designed to avert. *Amicus*' interest, therefore, is in preventing the long-term damage to our governmental institutions that will result from the *ultra vires* nature of the PPACA.

SUMMARY OF THE ARGUMENT

The Necessary and Proper Clause serves an important but limited function in our constitutional scheme. Rather than simply giving Congress the means to implement one or more of its enumerated powers, Petitioners' interpretation would give Congress an *all-purpose* power to fill the gaps left by other legislation. Under this interpretation, a law would need only be predicated upon a Congressional finding that it is "necessary" to alleviate the supposed negative effects of other legislation, effectively doing away with the requirement that Congressional action be "legitimately predicated on an enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1963 (2010). That would be a significant departure

from settled law, eliminating one of the key limits on federal power.

The understanding of the Necessary and Proper Clause advanced by Petitioners invites poorly-conceived or poorly-drafted statutes. Congress could routinely enact statutes which, like the health insurance industry reforms of the PPACA, are defective or otherwise insufficient to actually meet Congress' goals. By doing so, Congress could render the use of extra-constitutional fixes "essential." Thus, Congress could use the Necessary and Proper Clause to circumvent the limits on its powers. The more frequently Congress passes defective or contradictory statutes, and the more harmful or insufficient those statutes are, the greater the power that Congress could assume for itself under the Necessary and Proper Clause.

Petitioners' position, if accepted, would also diminish Congress' accountability to the electorate. The more convoluted the legislation passed by Congress, the more likely it will be that Members of Congress will not be able to understand or articulate the full scope of the legislation that has been considered and enacted. Consequently, Members will be less able to explain the impact of the legislation to their constituents, reducing the ability of voters to hold Members accountable for voting for clearly defined policies and making not only the legislative, but also the electoral process effectively dysfunctional.

In short, Petitioners' interpretation of the Necessary and Proper Clause is incorrect, would cause

significant long-term harm to the Constitution, and would encourage future Congresses to pass ill-conceived or poorly-drafted laws.

ARGUMENT

I. The Necessary and Proper Clause Does Not Support the Individual Mandate

By giving Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers, the Necessary and Proper Clause allows Congress to select the means by which to implement those powers. *See* U.S. CONST. art. I, § 8, cl. 18. Nevertheless, Congress must rely on a specified enumerated power; the Necessary and Proper Clause is not an independent grant of authority. *See United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power"); *see also Kinsella* v. *United States*, 361 U.S. 234, 247 (1960) (the Necessary and Proper Clause "is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted foregoing powers of § 8 and all other powers vested by this Constitution) (internal quotation marks and citation omitted; emphasis in original); *Kansas* v. *Colorado*, 206 U.S. 46, 88 (1907) (the Necessary and Proper Clause "is not the delegation of a new and independent power, but

simply provision for making effective the powers theretofore mentioned.").

As Chief Justice Marshall explained in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (Wheat.) 316, 421 (1819), *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 421). This classic statement of the Necessary and Proper Clause sets clear limits on Congressional power which "are not merely hortatory." *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (*citing Printz v. United* States, 521 U.S. 898 (1997) (a law is not '*proper* for carrying into Execution the *Commerce Clause* '[w]hen [it] violates [a constitutional] principle of state sovereignty' ") (emphasis in original); *New York v. United States*, 505 U.S. 144 (1992) (same). Regardless of how "necessary" Congress may deem a provision to be to a particular regulatory scheme, the Necessary and Proper Clause may not be stretched to include illegitimate ends, inappropriate means, or laws inconsistent with the letter or spirit of the Constitution.

Petitioners' reliance on the Necessary and Proper Clause is only required because the Individual Mandate is not authorized by any enumerated power. If the Individual Mandate were an exercise of Congress' authority under the Commerce Clause, no recourse to another clause would be necessary. But, as has been

shown in the other briefs in this case and in the decisions of several lower courts, Congress' commerce power does not allow it to *compel* passive individuals to engage in economic activity. Throughout all of American history, Congress has never even attempted to claim such broad powers until now. *See* Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994) (Congress has "never required people to buy any good or service as a condition of lawful residence in the United States"); *see also Seven-Sky* v. *Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011) (noting that "[t]he Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles."); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 567 (6th Cir. Mich. 2011) ("The mandate is a novel exercise of Commerce Clause power. No prior exercise of that power has required individuals to purchase a good or service.")

Nonetheless, the Necessary and Proper Clause cannot be invoked without reference to an enumerated power. This Court has stated clearly that the Necessary and Proper Clause can only authorize legislation when "the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. This "rational relation" standard is particularly stringent in the Necessary and Proper Clause context, "at least as exacting as it has been in the Commerce Clause cases, if not more so." *Id.* at 1966 (Kennedy, J., concurring). Thus, the standard

requires "a demonstrated link in fact, based on empirical demonstration" beyond "a mere conceivable rational relation" to the enumerated power. *Id.* at 1967 (Kennedy, J., concurring). Furthermore, for the Necessary and Proper Clause to apply, the relationship between the statute and the enumerated power must not be "too attenuated," and the provision must not be "too sweeping in its scope." *Id.* at 1963.

A. The Mandate Does Not Implement PPACA Provisions that are Valid Under the Commerce Clause; Instead it Cancels the Negative Effects of the Legitimate Provisions of the PPACA

Petitioners' major rationale for why the Individual Mandate was a "necessary and proper" means to implement PPACA's legitimate regulations of the health insurance market is that without the Individual Mandate, the other insurance regulations standing alone would create an untenable situation.

The PPACA's insurance market reforms include, *inter alia*, ending lifetime benefit limits and pre-existing condition exclusions (PPACA §§ 1001, 1201); mandating coverage of certain preventive care (PPACA § 1001); extending parental health coverage to unmarried adult children up to age 26 (PPACA § 1001); and various other measures designed to control costs (PPACA § 1001).

These market regulations do fall within the scope Congress' Commerce Clause power to regulate

the interstate health insurance market. *See United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944). However, the Individual Mandate does not regulate the insurance market – instead it compels individuals who are not yet part of that market to enter it. It also neither implements nor enforces the PPACA's other provisions. Moreover, Petitioners have made no claims to suggest that these regulations would become *legally* ineffective without the Mandate. Instead, Petitioners have made a number of remarkable admissions about the *practical* consequences of the PPACA's other reforms and claim the Individual Mandate is necessary *to avert the harmful consequences of the PPACA itself*.

Petitioners' arguments for the Individual Mandate's legitimacy under the Necessary and Proper Clause constitute a string of stunning concessions about the harsh consequences of the PPACA without the Individual Mandate. Petitioners acknowledge that "guaranteed-issue and community-rating enacted in isolation [*i.e.*, without a mandate] create a spiral of higher costs and reduced coverage because individuals can wait to enroll until they are sick." Petrs. Br. at 18. They explain that "Congress found that without a minimum coverage provision, 'many individuals would wait to purchase health insurance until they needed care,' taking advantage of the Act's guaranteed-issue and community-rating provisions' 42 U.S.C.A. 18091(a)(2)(I), thereby driving up costs in the non-group market . . . " Petrs' Br. at 29. Petitioners elaborate that the absence of an individual mandate

threatens the health insurance market's viability, *id.*, and would likely "lead to a death spiral of individual insurance," *id.* at 30 (quoting *Making Health Care Work for American Families: Hearing Before the Subcomm. On Health of the House Comm. On Energy & Commerce*, 111th Cong., 1st Sess. 10 (Mar. 17, 2009). Petitioners' grim predictions are intended to demonstrate that "the minimum coverage provision 'is "necessary" to the end of regulating insurers' underwriting practices without running insurers out of business.'" Petrs' Br. at 30 (quoting Pet. App. 231a)

Yet this line of argument reflects a fundamentally flawed view of both the Necessary and Proper Clause and the limits of Congressional power generally. *Amicus* agrees with Petitioners that these pernicious outcomes will result from the Act; that is one reason he opposed the legislation in Congress. However, the fact that the Act will otherwise have devastating effects does not legitimize the Individual Mandate as an acceptable exercise of Congress' power under the Necessary and Proper Clause.

All parties and *Amicus* agree that the Necessary and Proper Clause grants Congress power to legislate the means to implement a proper exercise of its other, enumerated powers. For instance, in *United States v. Darby* the Supreme Court upheld recordkeeping requirements that eased enforcement of federal fair labor standards. *See* 321 U.S. 100 (1941). The Court explained that the recordkeeping requirements were "incidental to those for the prescribed wages and hours." *Id.* at 125. It reasoned that, "since Congress

may require production for interstate Commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it." *Id.* Similarly, the Court has upheld federal legislation which prevents evasion or obstruction of legitimate federal regulations. *See*, *e.g.*, *Raich*, 545 U.S. 1; *Wickard v. Filburn*, 317 U.S. 111 (1942).

In a very real and important way, the Individual Mandate is different from the laws previously upheld by the Supreme Court as valid exercises of the Necessary and Proper Clause power. The Individual Mandate does not implement the PPACA's other health insurance reforms. It does not facilitate or support the enforcement of these reforms, in contrast to the recordkeeping regulations in *Darby*. Unlike the statutes at issue in *Raich* and *Wickard*, the Individual Mandate does not combat the evasion or obstruction of the valid provisions of the PPACA. Each of the other sections of the PPACA can be independently justified as an exercise of Congress' commerce power, and not one needs the Individual Mandate to be legally effective or enforceable.

This much, then, is clear: the Individual Mandate is not necessary to implement or enforce the PPACA's reforms of the health insurance industry. Petitioners instead argue that the Mandate is "essential" to support their regulatory scheme, Petrs. Br. at 27, because they say the Mandate's policy effects will be to ameliorate the *consequences* of the Act's other reforms: misaligned incentives, higher premiums, and even

the demise of the insurance industry itself. *See* Petrs. Br. 18, 29-31.

Petitioners' argument relies on a fundamentally flawed conception of the Necessary and Proper Clause's purpose and scope. The Clause is not a blanket grant of Congressional power to be invoked by Congress whenever constitutionally-permissible provisions have negative real-world results that can only be mitigated by otherwise unconstitutional provisions. In Petitioners' view, Congress would be free to act without regard to the constitutional limits on its role whenever Congress believes a legitimate statute's policy implications require it. By extension, the more damaging a statute's valid provisions, the more power Congress has to pass "essential" or "necessary" "fixes" that would be otherwise unconstitutional.

Petitioners' argument is specious logically as well as constitutionally. Congress cannot circumvent constitutional limitations on its power by enacting ill-conceived legislation and then invoking the shortcomings of the legislation's policies as the basis for adopting other provisions which exceed Congress' powers under Article I. Such action could hardly be "legitimately predicated on an enumerated power."[2] *Comstock*, 130 S. Ct. 1963.

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[2] The Individual Mandate also is vulnerable under the Supreme Court's dictate that provisions authorized by the Necessary and Proper Clause not be "too sweeping in its scope." *See Comstock*, 130 S. Ct. 1963. The Individual Mandate is the most

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B. Adopting Petitioners' Flawed Reasoning Would Have Negative Long-Term Effects on the Legislative Process

If permitted to stand, Petitioners' distortion of the Necessary and Proper Clause would cause serious, widespread, and long-lasting damage to the Constitution. Moreover, it would provide a tantalizing method by which future Congresses could enact ill-conceived and poorly-drafted laws. Under Petitioners' interpretation, a law would be upheld as constitutional whenever Congress asserted that it was "necessary" to remedy the negative ramifications of other provisions. This would effectively nullify the requirement that federal legislation be "legitimately predicated on an enumerated power." *Comstock*, 130 S. Ct. 1963. Such a departure from settled law would mark the end of a vital limitation on federal power.

Petitioners' interpretation invites poorly-conceived and sloppily-drafted statutes. Congress might easily succumb to the use of extra-constitutional fixes to remedy the negative effects of constitutional provisions merely by labeling such fixes "essential." The worse the consequences of a piece of legislation, the more power Congress could appropriate to fix them.

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sweeping sort of provision imaginable – it touches every single American, regardless of any choices they make, in one of the most personal and intimate areas of life. This Mandate is unlike any other Congressional provision in the past two centuries of American history; it is not merely sweeping, but entirely unprecedented.

Certainly Congress does not need any incentives to create bad legislation.

If adopted by the Court, Petitioners' argument will also inevitably lead to less accountability between Congress and the American people. It would reward legislators for finding complicated workarounds: if there is no constitutional authority to directly take a certain action, legislators could simply use what authority they do have to create a problem, thereby giving themselves a blank check to "fix" the problem. As Congress passes increasingly complex and convoluted legislation, the various working parts of which are only held together by otherwise unconstitutional "fixes," it will become ever harder for Members of Congress to understand and articulate the full effect of the legislation to their constituents. Statutes will become even more impenetrable for concerned citizens, and voters will lose their opportunity to evaluate their representatives based on clearly defined policy choices. The risk recognized by the Founders that legal complexities may undermine the rule of law and the authority of the citizenry remains significant today.[3]

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[3] *See* THE FEDERALIST No. 10 (James Madison):

> 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

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The PPACA itself illustrates this danger. The Act is, quite simply, a monstrosity. It consists of thousands of pages and hundreds of provisions, many in tension with one another. The result is a complex statutory scheme which, stripped of the Individual Mandate, is calculated to *decrease* the number of insured individuals, *increase costs* for those who are insured, and destroy the national health care market. *See* Petrs. Br. at 29-30. Petitioners misread the relevant case law in a way that threatens to undermine our legislative process. This Court should reject an interpretation which undercuts the Constitution's wise limits on congressional power.

> 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?

Justice Breyer makes the parallel argument that the transparency of judicial opinions fosters governmental accountability. *See* Stephen G. Breyer, *Making Our Democracy Work: A Judge's View* 83 (Knopf 2010).

CONCLUSION

The judgment of the Court of Appeals on the constitutionality of the individual mandate should be affirmed.

Respectfully submitted,

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