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

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Brief Of Amici Liberty University, Inc., Michele Waddell And Joanne Merrill In Support Of The Respondents On The Minimum Coverage Provision

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INTEREST OF AMICI CURIAE[1]

Amici Liberty University, Inc., Michele G. Waddell and Joanne V. Merrill are plaintiffs in *Liberty University, Inc. et al v. Timothy Geithner, et. al.,* 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed,* (No. 11-438). Amici filed the first private party lawsuit challenging provisions of the Patient Protection and Affordable Care Act (the "Act") on the day it was enacted. Amici also brought the only lawsuit that challenged both the individual and employer insurance mandates ("minimum coverage provision" or "Insurance Mandate") on the grounds that the provisions violate the First Amendment as well as being *ultra vires* acts exceeding Congress' enumerated powers under Article I §8 of the United States Constitution.

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[1] Counsel for a party did not author this Brief in whole or in part, an no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

Lead counsel with Liberty Counsel representing Amici argued against the constitutionality of the challenged law at the District Court and before the Forth Circuit Court of Appeals. Amici filed a Petition for Writ of Certiorari before this Court and it is being held pending the outcome of the instant case. Amici have extensively researched the issues raised by Congress' broad redefinition of its enumerated powers in the minimum coverage provision and the dangerous consequences of its implementation. Amici have developed information that will greatly assist the Court in addressing the issues that are pivotal to this case and to Amici's challenge. Amici respectfully submit this Brief for the Court's consideration.

SUMMARY OF ARGUMENT

Even Congress' advisors warned that it was treading in unchartered waters when it included the minimum coverage provision in the Affordable Care Act.[2] Never before had Congress attempted to compel people who were

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[2] Jennifer Staman, Cynthia Brougher, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS, CONGRESSIONAL RESEARCH SERVICE 7-5700 (July 24, 2009) www.crs.gov., discussed *infra*.

not engaged in commerce to enter into the marketplace or pay penalties. [3]

The minimum coverage provision not only compels participation in the health insurance market, but also dictates how that participation will look. Only insurance policies that provide what the Department of Health and Human Services determines to be "minimum essential coverage" will satisfy the insurance mandate. That additional layer of regulation further expands Congress' power to include dictating the contents of contracts between citizens and private third party insurance companies. While Congress has long regulated those who voluntarily participate in the insurance market, it has never before compelled involuntary participation in the market in accordance with strict instructions.

Congress is trampling upon fundamental First Amendment rights by dictating that faith-based organizations choose between their religious beliefs and complying with the law.[4] The dangerous consequences of this

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[3] *Id.*

[4] Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, January 20, 2012, http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited February 8, 2012), discussed *infra*.

determination was aptly described by Cardinal-designate Timothy M. Dolan, Archbishop of New York:

> Never before has the federal government forced individuals and organizations to go out into the marketplace and buy a product that violates their conscience. This shouldn't happen in a land where free exercise of religion ranks first in the Bill of Rights.[5]

Congress has over-stepped its bounds by enacting the minimum coverage provision. This Court should reject the attempt to re-define Congress' enumerated powers and find that the minimum coverage provision is unconstitutional.

LEGAL ARGUMENT

I. CONGRESS' POWER UNDER THE COMMERCE CLAUSE DOES NOT EXTEND TO MANDATING THAT VIRTUALLY ALL CITIZENS PURCHASE AND MAINTAIN HEALTH INSURANCE OR PAY A PENALTY.

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[5] http://www.usccb.org/news/2012/12-013.cfm

When it enacted the minimum coverage provision as part of the Affordable Care Act, Congress journeyed far beyond the outer limits this Court has placed on the Commerce Clause by seeking to regulate non-economic inactivity. The Insurance Mandate forces inactive by-standers into the stream of commerce by compelling virtually all American citizens to purchase and maintain government-defined health insurance or pay penalties enforceable by the Internal Revenue Service. 26 U.S.C. §5000A. As district court Judge Vinson explained, the breadth of the Commerce Clause power envisioned by Congress is virtually limitless:

> For example, everyone must participate in the food market. Instead of attempting to control wheat supply by regulating the acreage and amount of wheat a farmer could grow as in *Wickard* [*v. Filburn,* 317 U.S. 111 (1942)] under this logic, Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, non-consumers of wheat bread

adversely affect prices in the wheat market. Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile–now partially government-owned–because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

I pause here to emphasize that the foregoing is not an irrelevant and fanciful "parade of horribles." Rather, these are some of the serious concerns implicated by the individual mandate that are being discussed and debated by legal

scholars. For example, in the course of defending the Constitutionality of the individual mandate, and responding to the same concerns identified above, often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that although "what people choose to eat well might be regarded as a personal liberty" (and thus unregulable), "Congress could use its commerce power to require people to buy cars." *See ReasonTV, Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful*, August 25, 2010, available at: http://reason.tv/video/show/wheat-weed-and-obamacare-how-t. When I mentioned this to the defendants' attorney at oral argument, he allowed for the possibility that "maybe Dean Chemerinsky is right." See Tr. at 69. Therefore, the potential for this assertion of power has received at least some theoretical consideration and has not been ruled out as Constitutionally implausible.

Florida ex. rel. Bondi v. Dep't Health and Human Servs., 780 F.Supp.2d 1256, 1289 (N.D. Fla. 2011). Even Congress' advisors at the Congressional Research Service agreed that using the Commerce Clause to justify an insurance mandate is unprecedented:

> Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.[6]

While merely being novel does not, *per se* make a law unconstitutional, in this case, the novelty coupled with the expansive over-reaching of the

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[6] Staman and Brougher, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS, CONGRESSIONAL RESEARCH SERVICE 7-5700 (July 24, 2009) www.crs.gov.

Insurance Mandate creates an unprecedented and unsustainable re-definition of Congress' enumerated powers. Congress has attempted to plow new ground that is not authorized by the text of Article I, §8 of the Constitution or this Court's precedents and goes far beyond anything envisioned by the Founders.

A. *Raich* Does Not Support The Administration's Expansive Re-Definition Of Congress' Commerce Clause Authority.

The Administration and others who argue that the Insurance Mandate is constitutional point to this Court's most recent Commerce Clause decision, *Gonzales v. Raich*, 545 U.S. 1 (2005) as supporting Congress' broad re-definition of the Commerce Clause to include mandate that individuals purchase a particular product. However, *Raich,* an as-applied challenge to an admittedly proper exercise of the Commerce Clause, is factually inapposite to the facial challenge at issue in this case. Furthermore, the statute at issue in *Raich* involved voluntary activity, while the Insurance Mandate here transforms inactivity into involuntary economic activity. The Administration has downplayed the

activity/inactivity differentiation, but this Court has consistently recognized that the Commerce Clause encompasses the regulation of *activity, not inactivity*. *Raich*, 545 U.S. at 22-23; *United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995); *Wickard v. Filburn*, 317 U.S. 111, 128-129, (1942).

In *Raich,* the plaintiffs challenged the inclusion of their *activity* of cultivating marijuana for medicinal use, which is legal is California, as a violation of the Controlled Substances Act ("CSA"). *Raich*, 545 U.S. at 15 (emphasis added). Unlike here, where Respondents and Amici are challenging Congress' authority to enact the Insurance Mandate, the plaintiffs in *Raich* did not challenge Congress' authority to regulate interstate commerce in illegal drugs. *Id.* Instead, they asked this court to carve out an exception for their activity of growing marijuana for medical uses. *Id.* This Court rejected plaintiffs' request, stating, "we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class'" *Id.* at 23 (citing *Perez v. United States*, 402 U.S. 146, 154 (1971)). Trying to excise the plaintiffs' cultivation activities from the CSA would leave a gaping hole that would

undermine the concededly valid statutory scheme enacted by Congress, a step this Court was unwilling to take. *Id.* at 22.

As Justice Scalia noted, since *Perez*, "our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce." *Raich*, 545 U.S. at 33-34 (Scalia, J., concurring). Regulation of activities that "substantially affect" interstate commerce in turn, includes the power to regulate economic *activities* that substantially affect interstate commerce, non-economic *activities* that substantially affect interstate commerce, and non-economic *activities* "which in a substantial way interfere with or obstruct the exercise of the granted power." *Id.* at 36-37. The *Raich* plaintiffs' *activity* of cultivating marijuana for medicinal purposes fell within the third category. *Id.* "Congress may regulate noneconomic intrastate *activities* only where the failure to do so 'could ... undercut' its regulation of interstate commerce." *Id.* at 38 (citing *Lopez*, 514 U.S. at 561) (emphasis added). Notably, in every sub-category the underlying requirement was *activity*, either economic or non-economic.

By contrast, in this case, Congress is seeking to regulate *inactivity*. The mere status of being an American citizen without health insurance is not an activity, either economic or noneconomic, that can be said to fall within the category of activities having a substantial effect on interstate commerce. Through the Insurance Mandate, Congress is trying to force those who are not engaging in any activity or participating in any market to become active participants in the market. Furthermore, Congress is attempting to then regulate the involuntary participants to the point of dictating the contents of the product they are compelled to purchase, all under the threat of IRS-enforced penalties.

Of particular importance to this case, the plaintiffs in *Raich* could avoid Congress' oversight entirely by discontinuing their activity of growing marijuana. By contrast, here, citizens cannot escape Congress' grasp because the Insurance Mandate requires that all citizens who do not qualify under narrow exemptions must purchase and maintain health insurance or pay the penalty. 26 U.S.C. §5000A. There is no underlying activity that citizens can discontinue to avoid having to comply with the law. Instead, so long as a citizen is living legally in the United States he must meet the insurance requirement or face IRS-enforced penalties.

Even in its most expansive definition of Congress' Commerce Clause power this Court did not abandon the underlying requirement that an individual must be engaged in an activity before he can be subject to congressional oversight. In this case, there is no underlying activity, either economic or non-economic that can be subject to Congress' control.

B. *Wickard* Also Does Not Support The Expansive Re-definition of Congress' Commerce Clause Power.

As was true in *Raich*, in *Wickard*, Mr. Filburn could discontinue cultivating wheat and avoid the Congressional regulation that he challenged, setting that case apart from this case. *Wickard*, 317 U.S. at 128-129. As was true in *Raich*, in *Wickard* this Court found that Mr. Filburn's activity of growing and harvesting wheat fell within the category of activities that "substantially affect" interstate commerce. *Id.* As was true with the *Raich* plaintiffs' cultivation of marijuana, Mr. Filburn's cultivation of wheat for personal use would affect the supply of the commodity overall and undercut Congress' regulation of an interstate market. *Id.*

Consequently, as was true in *Raich*, the *Wickard* Court concluded that Congress had a

rational basis for believing that, when viewed in the aggregate, Mr. Filburn's *activity* of growing wheat for home consumption would have a substantial influence on price and market conditions and therefore was within its Commerce Clause power. "*Wickard* thus establishes 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." *Raich*, 545 U.S. at 18 (emphasis added). Like *Raich*, therefore, *Wickard* addressed the question of whether an entirely intrastate, non-commercial economic *activity* could be regulated by Congress. In both cases, this Court confirmed that these economic *activities* fell within the third category of Commerce Clause authority, *i.e., activities* that "substantially affect" interstate commerce.

That is not the case with the Insurance Mandate. Rather than regulating voluntary activity such as Mr. Filburn's cultivation of wheat, the Insurance Mandate seeks to compel those who are not participating in the market to involuntarily enter into activity. If the law at issue in *Wickard* were comparable, then it would have required that Mr. Filburn purchase land and plant a wheat crop to then be subject to the regulations regarding the amount of

wheat that can be grown. Unlike Mr. Filburn, the citizens here have not voluntarily entered the market for health insurance. Since there is no activity, there is nothing that citizens can discontinue to avoid the regulation. Mr. Filburn could stop growing wheat and no longer be subject to congressional oversight. However, in this case, citizens cannot avoid paying a penalty or purchasing health insurance. Congress is attempting to exercise plenary police power in the guise of a Commerce Clause regulation.

For the same reason, the Insurance Mandate is also unlike the anti-discrimination laws upheld in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *Heart of Atlanta* and *Katzenbach*, the proprietors could discontinue operating a motel or restaurant, respectively, and no longer be subject to the challenged law. Congress did not try to compel the parties to go into the motel and restaurant business in order to increase the pool of available rooms or dining places, but merely said that if a party wants to operate such a business, then it must comply with the anti-discrimination law. *Heart of Atlanta*, 379 U.S. at 261; *Katzenbach*, 379 U.S. at 304. In both cases, unlike here, Congress was seeking to regulate economic *activities*, not merely the status of living in the United States.

C. *Lopez* And *Morrison* Illustrate How The Mandates Contradict The Supreme Court's Restrained Approach To Congress' Commerce Clause Authority.

Contrary to the active market participation in *Raich* and Wickard, merely possessing a firearm near a school or committing a violent crime against a woman is not an activity that "substantially affects" interstate commerce so as to be a permissible exercise of Congress' Commerce Clause power. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. As is true in this case, and was untrue in *Raich*, in both *Lopez* and *Morrison* the parties asserted that the challenged statute fell outside of Congress' commerce power. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. Therefore, as was true in *Lopez* and *Morrison,* in this case, the parties are not asking "'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S., at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)) (emphasis added). Instead, as occurred in *Lopez* and *Morrison*, Respondents and Amici are asserting that the statutory scheme is itself invalid and should be struck down as outside the scope of Congress' Commerce Clause powers.

In *Lopez*, this Court found that the statute at issue was a criminal statute that "by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Neither was the statute "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* Therefore, the statute could not be sustained under the Court's jurisprudence "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.* "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. This Court emphasized the importance of limiting Congress' enumerated powers to protect fundamental liberties. *Id.* at 552. The government defendants in *Lopez* presented a chain of events that they claimed brought possession of a firearm in a school zone under the Commerce Clause. *Id.* at 563. The government argued that possessing a firearm in a school zone might result in violence which might affect the national economy by spreading costs throughout the population, reducing travel and threatening productivity by threatening the learning environment. *Id.* This

Court responded, "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.

Relying upon *Lopez*, the *Morrison* court struck down a portion of the Violence Against Women Act that Congress argued was a valid exercise of its Commerce Clause power. 529 U.S. at 614. As in Lopez, the *Morrison* Court rejected the argument that a remote chain of inferences can justify the regulation of non-economic activity. *Id.* at 607. "*Lopez* emphasized . . . that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *Id.* at 608. "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate *activity* only where that *activity* is economic in nature." *Id.* at 613 (emphasis added). "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-616. "We accordingly

reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce." *Id*. at 617. As in *Lopez*, in *Morrison*, this Court compared Congress' claim that the VAWA fell under the Commerce Clause to the enactment of a prohibited federal police power. *Id.* at 618. The fact that Congress might have stated that there was a sufficient connection did not establish the concept. *Id.* at 616. "Under our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace." *Id*.

The same is true of Congress' claim that the Insurance Mandate is a valid exercise of its Commerce Clause power in this case. The mandates are more troubling than were the provisions struck down in Lopez and Morrison since those statutes were at least aimed at actions taken by individuals, i.e., obtaining a firearm and possessing it near a school and engaging in criminal conduct against a woman, while the mandate is aimed at people who have not taken any action. If the statutes in *Lopez* and *Morrison* were outside of Congress' authority, then the mandate is even more so.

D. The Mandate Provisions Are Not Merely Further Examples Of Congress' Regulation Of The Business Of Health Insurance.

Congress also cannot justify the Insurance Mandate by pointing to its power to regulate the business of health insurance. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). Neither is the Insurance Mandate simply another example of Congress' regulation of health insurance through Medicare, the Employee Retirement and Income Security Act of 1974 ("ERISA"), Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), and Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as the Administration contends. (Petitioners' Brief on the Minimum Coverage Provision, p. 5).

In *South-Eastern Underwriters*, this Court confirmed that the insurance industry is subject to regulation under the Commerce Clause. 322 U.S. at 553. The plaintiffs in *South-Eastern Underwriters* challenged indictments charging violation of the Sherman Anti-Trust Act, claiming that insurance was not subject to the Sherman Act or Congress' power over interstate commerce. *Id.* at 536. The Supreme Court rejected both contentions. *Id*. at

552-553. "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance." *Id.* at 553. Congress' "power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible nation; its continued existence is equally essential to the welfare of that nation." *Id.* at 552. But, the authority to regulate aspects of the insurance industry does not grant Congress the power to dictate that all citizens participate by either purchasing government-defined policy or paying a penalty. Regulating an interstate industry to protect against anti-competitive or other injurious conduct can be said to fall within Congress' authority "to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants." *Raich*, 545 U.S. at 35 (Scalia, J. concurring). However, compelling non-participants to participate against their will cannot fit into that definition.

That is all the more true in light of this Court's determination that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, does not supersede state taxation and regulation of

insurance. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 421 (1946). This Court clarified that *South-Eastern Underwriters* did not require the invalidation of states' taxation and regulation of insurance within their borders. *Id.* at 432. "The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment" across the country. *Id.* at 431. Consequently, Congress cannot assert that the Commerce Clause grants it plenary power over all aspects of the business of insurance, and particularly over individuals' decisions regarding whether they will obtain insurance and what it will contain.

Congress' enactment of ERISA, COBRA, HIPAA and similar laws are examples of Congress exercising its authority to facilitate interstate commerce by regulating those who have voluntarily entered into the stream of commerce. By contrast, the Insurance Mandate is an attempt to compel those who have deliberately not entered into commerce to become unwilling participants who can then be regulated. Forcing people into commerce cannot be compared to regulating those who voluntarily participate.

Under the current statutory scheme, insurance companies and employers are only regulated if they choose to enter into the

insurance market by either insuring or offering insurance. Neither insurance companies nor employers are forced to insure or offer insurance. Now, however, the Act forces employers to offer a government-defined insurance program at the level and cost set by the government. Moreover, none of the current insurance regulations regulate individuals per se, or most importantly, force individuals to buy insurance. Here, the Act forces unwilling individuals to purchase a government-defined health insurance package.

Of critical importance to the Commerce Clause analysis is the fact that in enacting ERISA, HIPAA, COBRA and Medicare, Congress made clear that it was not interfering with individual freedom. Congress emphasized the continuing importance of individual liberties when it enacted what became known as Medicare in 1965:

> Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to

> exercise any supervision or control over the administration or operation of any such institution, agency, or person.

42 U.S.C. §1395. Congress was explicit about its concern regarding individual freedom in what became 42 U.S.C. §1395a, stating:

> Basic freedom of choice–Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services.

In the Health Insurance for the Aged and Disabled Act (Medicare), Congress did not attempt to override the will of individuals or employers and compel participation under penalty. The Insurance Mandate here is not merely a natural extension of Medicare. Individuals may choose to not take Medicare and doctors may choose not to accept Medicare patients. By contrast, the Act forces individuals to obtain and maintain insurance and employers to provide it.

Similarly, when it enacted ERISA, 29 U.S.C. §§ 1001 *et. seq*., Congress was cognizant of the voluntary nature of employee pension

plan benefits. H.R. Rep. 93-533 on Public Law 93-406 1974 USCCAN 4639. Congress enacted ERISA to protect the interests of participants in existing employee benefit plans. *Yates v. Hendon*, 541 U.S. 1, 6 (2004). ERISA established reporting requirements, vesting and funding standards and fiduciary obligations to protect employees' investments in pension plans, and, in particular, to protect employees from losses when pension plans are under funded. *Id.* at 6-7. Congress was clear that it wanted to encourage employers to offer these plans to employees, but that employers and employees retained their freedom to make decisions regarding the plans. 1974 USCCAN at 4647. Unlike the mandate here, ERISA does not compel employers to offer such plans, nor employees to participate in them. Instead, as is true with other Commerce Clause legislation, ERISA regulates those who have voluntarily engaged in an activity or entered into an agreement. Employers do not have to create and offer pension plans, but if they decide to, then they will have to comply with ERISA. ERISA is unlike the Insurance Mandate under the Act and does not support a finding that the Act is a valid exercise of Congress' enumerated powers.

In Title X of COBRA Congress instituted standards to protect employees who voluntarily agreed to participate in group health plans that

their employers voluntarily agreed to offer. Public L. No. 99-272, §§ 10001-10003 (1986), 100 Stat. 82, The relevant provisions in COBRA provide that an employee must be permitted to continue participating in the group health insurance program for a period of time after the employment ends. *Id.* at § 10001(c). COBRA provides that if an employer decides to no longer offer group health plans to its employees, then the continuation provisions in COBRA no longer apply. *Id.* In other words, employers retain their freedom to not offer or discontinue offering employee health insurance benefits. *Id*. As is true with ERISA, COBRA contains provisions that regulate employers who have voluntarily agreed to provide group health plan benefits and benefit employees who have voluntarily agreed to participate in the plans. *Id.* If either party decides to no longer participate in the program, then no one is compelled to do so. *Id*. COBRA does not support the proposition that Congress can use its authority under the Commerce Clause to compel employers to offer group health plans and employees to participate in them.

HIPAA also does not support the conclusion that the mandate provisions are a natural extension of Congress' regulation of the health insurance industry. Pub. L. No. 104-191, 110 Stat. 1936 (codified in various sections beginning with 42 U.S.C. §300gg). As is true

with ERISA and COBRA, HIPAA does not mandate that companies or individuals participate in the health insurance industry, but regulates companies which have voluntarily agreed to offer health insurance to individuals and groups. *See id.,* Title I, 110 Stat. at 1939-1991. No individual or organization is compelled to offer or purchase health insurance against his/its will. *Id.* Instead, organizations that want to provide health insurance coverage to others must agree, as a part of engaging in that business, to abide by certain rules and regulations sent forth in HIPAA. *Id.* Unlike the Act here, HIPAA does not demand that companies either partake in the health insurance industry or pay punitive sanctions.

Far from merely being a logical extension of Congress' authority to regulate the insurance industry, the mandate provisions are a giant leap into uncharted territory. Congress is attempting to move from regulating voluntary conduct that affects the national economy to managing private decisions and even inactivity. Congress is attempting to extend its reach from economic activities to non-economic non-activities and to regulate personal decision making. The intrusive and expansive power exemplified in the mandates is without precedent.

II. MANDATING THE CONTENT OF HEALTH INSURANCE POLICIES THAT MUST BE PURCHASED BY VIRTUALLY ALL CITIZENS IS NOT REASONABLY RELATED TO CONGRESS' STATED OBJECTIVES FOR THE AFFORDABLE CARE ACT AND THEREFORE CANNOT BE FOUND TO BE NECESSARY AND PROPER TO CONGRESS' EXERCISE OF ITS ENUMERATED POWERS.

When determining whether a law falls within the Necessary and Proper Clause, "we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010). However, the rational relationship analysis under the Necessary and Proper Clause is not the same as the analysis under due process, *i.e.,* "it might be thought that the particular legislative measure was a rational way to correct" an evil. *Id.* at 1966 (Kennedy, J. concurring). There must be "a tangible link to commerce, not a mere conceivable rational relation." *Id.* "The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration." *Id.*

When viewed under the lens of this rational relationship test using the purposes

articulated by the Administration, the Insurance Mandate cannot be substantiated under the Necessary and Proper Clause. That is particularly true when the Court looks beyond the provision that virtually all citizens must purchase and maintain health insurance to the further directive that only insurance policies which contain what the Administration defines as "minimum essential coverage" will fulfill the Mandate. 26 U.S.C. §5000A, 42 U.S.C. §18022(b). Mandating not only that virtually all Americans purchase health insurance, but also what that insurance must contain transcends rationality to become an unprecedented assertion of government control over the private affairs of American citizens.

A. Directing What Insurance Policies Must Cover Does Not Further The Objectives Of Congress As Described By The Administration.

Focusing on the über-intrusive provision that only insurance policies containing those products and services that the government defines as "minimum coverage," it is apparent that the Insurance Mandate cannot be reconciled with Congress' limited enumerated powers under Article I §8.

The Administration has described the "minimum coverage provision" as "integral to

the ACA's insurance reforms which are part of the Act's broad framework of economic regulation and incentives designed to address the terms on which health insurance is offered, rationalize the timing and method of payment for health care services expand access to health care, and reduce shifting of risks and costs. (Petitioners' Brief p. 24). The Administration further argues that "the minimum coverage provision is necessary to make effective the Act's core reforms of the insurance market, *i.e.,* the guaranteed-issue and community-rating provisions." (*Id.*). "And the minimum coverage provision itself regulates economic conduct with substantial effects on interstate commerce—the manner in which individuals finance and pay for services in the health care market." (*Id.* at 24-25). Even if requiring that all Americans purchase health insurance or pay a penalty could be said to be rationally related to these goals (which it cannot), dictating the provisions within that policy certainly is not.

As Justice Alito stated in *Comstock*, the "Necessary and Proper Clause does not give Congress carte blanche." *Comstock*, 130 S.Ct. at 1970 (Alito, J. concurring). "Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress." *Id.* (citing *McCulloch v. Maryland*, 4

Wheat. 316, 415, (1819)). "And it is an obligation of this Court to enforce compliance with that limitation." *Id.* As Justice Kennedy said, that link is not merely conceivable rational relationship, but a tangible, demonstrable link. *Id.* at at 1966 (Kennedy, J. concurring).

There is no such link between the Administration's avowed purposes, *i.e.,* increasing the pool of insured individuals and rationalizing the timing and payment of health care services and directing what services must be included in an individual's insurance policy. Ordering that all individuals purchase health insurance (if constitutionally permissible) could increase the number of people who have health insurance. However, directing that all insurance policies must include, at a minimum, "ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services, including behavioral health treatment, prescription drug coverage, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services, chronic disease management and pediatric services, including oral and vision care," (42 U.S.C. §18022(b)), does nothing to increase the number of people who have health insurance or when or how they pay for health care.

Instead, adding compulsory types of coverage to compulsory insurance coverage creates the kind of impermissible exercise of authority that Justice Marshall described in *McCulloch*, 4 Wheat. at 423:

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

While Congress might have been entrusted with regulating those who have voluntarily entered into the stream of commerce, it has not been entrusted with dictating the contents of private contracts between citizens and third party insurance providers. Therefore, this Court should exercise its obligation to determine that the Insurance Mandate exceeds Congress' power under the Necessary and Proper Clause.

B. The Deference Accorded To Congressional Findings Cannot Be Used To Justify Congress' Coercive Intrusion Into Private Financial Matters.

Even if the mandated contents of a "minimum coverage" policy are set aside and the language requiring that the purchase and maintenance of health insurance is examined in isolation, it is evident that the provision does not have the necessary relational link to the purposes set forth by Congress. In fact, the Insurance Mandate, as worded, does not do anything to address the problems that Congress says the Act is designed to address.

This Court has stated that "[i]n assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one." *Raich*, 545 U.S. at 22. "We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* This Court might defer to Congress' findings, but only after determining that the means are rationally related to the ends they are supposed to address. As this Court said in *Morrison*, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of

Commerce Clause legislation." 529 U.S. at 614. "As we stated in *Lopez*, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " *Id.* "Rather, '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.' " *Id.* (citing *Lopez*, 514 U.S. at 557).

The Administration argues that the Insurance Mandate is a reasonable means to attain Congress' goal of addressing "a crisis in the national health care market." (Petitioners' Brief p. 2). In fact, however, the provision does nothing to address the problems Congress claimed to address.

The Administration claims that "the minimum coverage provision" will prevent health care consumers from waiting to buy insurance until the last minute, *i.e.,* when they are sick or injured. (Petitioners' Brief p. 29). However, there is nothing in the language of the statute to prevent such last-minute purchases. Individuals can pay the penalty, not purchase health insurance and be in compliance with the law. There is nothing to prevent individuals from later purchasing health insurance when they become sick or

injured, dropping coverage when they recover and return to paying the penalty. The problem of last minute purchases is not resolved by the "minimum coverage provision."

The Administration also argues that the "minimum coverage provision" is a reasonable means to diminish uncompensated health care. (Petitioners' Brief p. 19). This assertion is based upon the faulty premise that every person who is not presently insured will become insured when the provision goes into effect in 2014. However, the provision only requires that individuals choose between purchasing and maintaining insurance *or* paying a penalty. 26 U.S.C. §5000A. If an individual decides to pay the penalty, which is not designated to be applied to purchasing insurance, then the person could still remain uninsured and perhaps fail to pay for health care services. This argument is built not only upon the false premise that all uninsured persons will become insured when Section 5000A takes effect, but also upon the fallacy that everyone who does not purchase health insurance does not pay for his health care costs through other means. The Administration does not offer any evidence to support the proposition that those who do not have health insurance do not pay their medical bills while those with insurance pay every penny.

Neither the words of the statute nor any of the scholarly opinions and reports cited by Petitioners support the conclusion that the Mandates will solve economic problems associated with health care costs, increase demand for health insurance, or decrease the number of uninsured Americans. The Administration's logically unsupportable arguments are wholly inadequate to justify Congress' unprecedented expansion of the Commerce Clause to reach into the private financial affairs of virtually all American citizens. This Court should not defer to Congress' findings, which do not hold up under scrutiny. Congress has not established the necessary rational relationship between the means chosen and the desired ends. Therefore, the "minimum coverage provision" cannot be validated as necessary and proper to Congress' exercise of its enumerated powers.

III. CONGRESS CANNOT EXERCISE ITS ENUMERATED POWERS IN A WAY THAT VIOLATES THE FIRST AMENDMENT BY DEMANDING THAT CITIZENS PURCHASE HEALTH INSURANCE POLICIES WITH PROVISIONS THAT VIOLATE CITIZENS' FREE EXERCISE RIGHTS.

The Administration has brought the deleterious effects of Congress' unprecedented intrusion into the private lives of American citizens into sharp focus with its determination that faith-based organizations will be required to provide health insurance that fully compensates for the cost of contraceptives, sterilization and medical abortifacents, regardless of an organizations' sincerely held religious beliefs that forbid such practices.[7] On January 20, 2012, the Department of Health and Human Services announced that it would not permit faith-based organizations (other than those that such as churches which only employ adherents to their faith) to be exempt from the regulation that defines "preventative

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[7] Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, January 20, 2012, http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited February 8, 2012).

care" under the "minimum essential coverage" provision to include fully compensated contraception and sterilization services.[8] Instead of being exempt from the provision that violates their religious beliefs, faith-based organizations will merely be given an additional year, from August 1, 2012 to August 1, 2013, to comply with the law.[9]

The devastating consequences of this unprecedented expansion of congressional power to violate fundamental First Amendment freedoms were cogently described by Archbishop Dolan, president of the United States Conference of Catholic Bishops:

> Religious freedom is the lifeblood of the American people, the cornerstone of American government. When the Founding Fathers determined that the innate rights of men and women should be enshrined in our Constitution, they so esteemed religious liberty that they made it the first freedom in the Bill of Rights.
>
> In particular, the Founding Fathers fiercely defended the right of

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[8] *Id.*

[9] *Id.*

conscience. George Washington himself declared: "The conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be extensively accommodated to them." James Madison, a key defender of religious freedom and author of the First Amendment, said: "Conscience is the most sacred of all property."

Scarcely two weeks ago, in its *Hosanna-Tabor* decision upholding the right of churches to make ministerial hiring decisions, the Supreme Court unanimously and enthusiastically reaffirmed these longstanding and foundational principles of religious freedom. The court made clear that they include the right of religious institutions to control their internal affairs.

Yet the Obama administration has veered in the opposite direction. It has refused to exempt religious institutions that serve the common good—including Catholic schools, charities and hospitals—from its

sweeping new health-care mandate that requires employers to purchase contraception, including abortion-producing drugs, and sterilization coverage for their employees.

Last August, when the administration first proposed this nationwide mandate for contraception and sterilization coverage, it also proposed a "religious employer" exemption. But this was so narrow that it would apply only to religious organizations engaged primarily in serving people of the same religion. As Catholic Charities USA's president, the Rev. Larry Snyder, notes, *even Jesus and His disciples would not qualify for the exemption in that case, because they were committed to serve those of other faiths.*

Since then, hundreds of religious institutions, and hundreds of thousands of individual citizens, have raised their voices in principled opposition to this requirement that religious institutions and individuals violate

their own basic moral teaching in their health plans. Certainly many of these good people and groups were Catholic, but many were Americans of other faiths, or no faith at all, who recognize that their beliefs could be next on the block. They also recognize that the cleverest way for the government to erode the broader principle of religious freedom is to target unpopular beliefs first.

Now we have learned that those loud and strong appeals were ignored. On Friday, the administration reaffirmed the mandate, and offered only a one-year delay in enforcement in some cases—as if we might suddenly be more willing to violate our consciences 12 months from now. As a result, all but a few employers will be forced to purchase coverage for contraception, abortion drugs and sterilization services even when they seriously object to them. All who share the cost of health plans that include such services will be forced to pay for them as well. Surely it violates freedom of religion to force religious ministries

and citizens to buy health coverage to which they object as a matter of conscience and religious principle.

The rule forces insurance companies to provide these services without a co-pay, suggesting they are "free"—but it is naïve to believe that. There is no free lunch, and you can be sure there's no free abortion, sterilization or contraception. There will be a source of funding: you.

Coercing religious ministries and citizens to pay directly for actions that violate their teaching is an unprecedented incursion into freedom of conscience. Organizations fear that this unjust rule will force them to take one horn or the other of an unacceptable dilemma: Stop serving people of all faiths in their ministries—so that they will fall under the narrow exemption—or stop providing health-care coverage to their own employees.

The Catholic Church defends religious liberty, including freedom of conscience, for everyone. The

> Amish do not carry health insurance. The government respects their principles. Christian Scientists want to heal by prayer alone, and the new health-care reform law respects that. Quakers and others object to killing even in wartime, and the government respects that principle for conscientious objectors. By its decision, the Obama administration has failed to show the same respect for the consciences of Catholics and others who object to treating pregnancy as a disease.
>
> This latest erosion of our first freedom should make all Americans pause. When the government tampers with a freedom so fundamental to the life of our nation, one shudders to think what lies ahead.[10]

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[10] Timothy M. Dolan, Op-Ed., *Obamacare and Religious Freedom,* WALL STREET JOURNAL, January 25, 2012, http://online.wsj.com/article/SB10001424052970203718504577178833194483196.html?KEYWORDS=Timothy+M+Dolan (last visited February 8, 2012) (emphasis added).

As Archbishop Dolan stated, the Administration's announcement came only days after this Court unanimously re-affirmed the primacy of the First Amendment's protection of religious freedom and denounced governmental interference with the internal affairs of religious organizations. *Hosanna-Tabor Evangelical Lutheran Church and School*, 132 S.Ct. 694 (2012). In *Hosanna Tabor*, this Court upheld the ministerial exception to employment actions against faith-based organizations, and firmly re-established the pre-eminence of the First Amendment. *Id.* at 707. This Court's precedents radiate "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 704 (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116, (1952)). This Court found that the ministerial exception proceeded from the same spirit of freedom and protected faith-based employers from unreasonable government interference. *Id.* at 706. By contrast, permitting the EEOC to challenge the organization's employment decision would be akin to the New York law struck down in *Kedroff,* which intruded the "power of the state into the forbidden area of religious freedom contrary to

the principles of the First Amendment." *Id.*, at 119. (citing *Kedroff*, 344 U.S. at 119).

In *Hosanna-Tabor* this Court affirmed that "the Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious *beliefs* as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (emphasis added). The fact that the employment action in *Hosanna-Tabor* involved the inner workings of the church based upon its core beliefs set that case apart from *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877-78, (1990), which involved government regulation of only physical acts, not internal beliefs. *Hosanna-Tabor,* 132 S.Ct. at 707.

As this Court explained in *Smith*, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." 494 U.S. at 877-78.

> Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such"….The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false,

> impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (citations omitted). *Accord*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (a law targeting religious beliefs as such is never permissible).

Through the Insurance Mandate, Congress and the Administration are imposing special disabilities on those whose religious views proscribe contraception and medically induced abortions by requiring those individuals and organizations to choose between obeying the law and practicing their faith. Congress and the Administration are punishing individuals and organizations through the imposition of penalties because the government believes that their religious views against contraception are false. The government is seeking to regulate religious belief by dictating what constitutes "preventative medical care." The Administration insists that this intrusion into the private lives of American citizens is an "eminently reasonable" exercise of Congress' Commerce Clause authority. (Petitioners' Brief, p. 19). According to the Administration, the "minimum coverage provision" is a "reasonable

and humane way" of motivating uninsured individuals to obtain health insurance. (Petitioners' Brief, p. 38). The Administration does not and cannot explain how forcing individuals to choose between their religion beliefs and complying with the law, *i.e.,* violating the First Amendment is either reasonable or humane.

The Insurance Mandate places the Administration's expansive view of Congress' Commerce Clause authority on a collision course with the First Amendment, and particularly with this Court's precedent firmly establishing the pre-eminence of free exercise rights. *Hosanna-Tabor*, 132 S.Ct. at 707. The clash with the First Amendment illustrates why this Court should not condone Congress' attempt to expand its Commerce Clause authority to include the mandated purchase of government-defined health insurance that violates free exercise rights or payment of a penalty. Upholding the Insurance Mandate as a proper exercise of Congress' Commerce Clause authority would threaten the "spirit of freedom for religious organizations" and "independence from secular control or manipulation" upon which the country was founded. *See*, *Kedroff*, 344 U.S. at 116. This Court should not permit such an erosion of the core foundations of the country.

CONCLUSION

The Insurance Mandate creates a dangerous, unprecedented expansion of congressional power that threatens fundamental First Amendment rights. Amici respectfully request that this Court reject the attempted re-definition of Congress' power by finding that the mandate provision is unconstitutional.

February 2012.

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