No. 11-398

In The
Supreme Court of the 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 THE STATE OF OKLAHOMA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS (Addressing Minimum-Coverage Provision)

E. SCOTT PRUITT
Attorney General of Oklahoma

PATRICK R. WYRICK
Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, Oklahoma 73105
patrick.wyrick@oag.ok.gov
405.521.3921
405.522.0669 FAX
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Blank Page

BRIEF OF THE STATE OF OKLAHOMA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS (Addressing Minimum-Coverage Provision)

STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS* TO FILE

The State of Oklahoma as *amicus* has an interest in the decisions in *U.S. Dept. of Health and Human Services v. Fla.*, No. 11-398 because Oklahomans have a state constitutional right to be free from any law or rule that would compel them to participate in any health care system. *See* Okla. Const. Art. 2, § 37. The Affordable Care Act's individual mandate directly conflicts with Oklahoma's Constitution, and if found to be valid, would preempt Oklahoma's law.[1]

SUMMARY OF THE ARGUMENT

The Court should affirm the decision below. The Affordable Care Act's ("ACA") individual mandate exceeds Congress's commerce power by curtailing individual liberty in a way that cannot be reconciled with the commerce power's purpose and textual limitations.

---

[1] Pursuant to Rule 37.4 of the Rules of this Court, the State of Oklahoma, as a sovereign State, does not require leave nor the consent of the parties to file this *amicus curiae* brief submitted by its Attorney General. This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation and submission of this brief.

The primary purpose of the commerce power is to prevent state laws that discriminate against interstate commerce – not to allow Congress the virtually unfettered ability to regulate the lives of Americans. That would be a federal police power, and this Court has always insisted that the commerce power is no such thing.

If that is true, and there is no such federal police power, then there must be some limiting principle placed on the commerce power that prevents it from being abused. This case proves that the existing limits are inadequate. The Court should articulate clear limits that prevent improper curtailments of individual liberty – limits that take into account the following four factors:

1. Commerce regulations that apply to all citizens, regardless of whether they have voluntarily placed themselves in any interstate market, are inherently more restrictive of individual liberty than are more traditional commerce regulations, which place conditions only on those who wittingly engage in interstate commerce.

2. Commerce regulations that mandate conduct reduce individual liberty more so than regulations that prohibit conduct.

3. Because the commerce power does not have the political check that limits the use of the taxing power, it has a greater

potential to be used in a way that excessively infringes on individual liberty.

4. Infringements on individual liberty are best left to the States, as the state-level political process is more responsive and sensitive to the will of the people.

If these four factors are considered, the Court will arrive at a limiting principle that protects individual liberty, and the individual mandate will be found to be outside those limits.

ARGUMENTS AND AUTHORITIES

> Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011) (internal citation omitted).

The ACA, with its mandate that as a condition of residence all citizens buy a product that many do not want, has infringed upon the individual liberty of Oklahoma's citizens.

In effect, Congress has deemed a 20-year-old woman in Norman, Oklahoma engaged in no commerce at all, to be the regulatory equivalent of an eighteen-wheel truck transporting goods on interstate highways. That is, both are equally subject to regulation by Congress under the Commerce Clause.

The commerce power was never intended to create such odd parallels. It was conceived as the Founder's "response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation . . . the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). The Founders thought the commerce power, with its seemingly clear textual limits, hardly susceptible to abuse. *Cf.* The Federalist No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce . . . seems to be an addition which few oppose, and from which no apprehensions are entertained."). Little thought was given to additional protections in the Bill of Rights to protect against abuse of the power, and additional words of limitation in the text of the clause were deemed unnecessary.

With the individual mandate, Congress has proven the Founders wrong. Congress incorrectly assumed that the commerce power gives the federal government virtually "complete jurisdiction over all concerns of public life." Oklahoma submits that in a federal system of limited, enumerated powers, the

individual mandate *must* be found to exceed Congress's commerce power because it infringes on individual liberty in a way that was never contemplated by the Founders.

I.

Using the commerce power to regulate those who are not actively engaged in interstate commerce reduces an individual's liberty more so than using it to regulate those who wittingly engage in interstate commerce.

Whatever limiting principle the Court decides to place on the commerce power – and there must be one lest the power be transformed into a federal police power – must take into account the power's effect on individual liberty. That is, the commerce power cannot be allowed to excessively infringe upon individual liberties protected by the federal constitution.[2]

Here is why: it is one thing to regulate those who voluntarily choose to engage in interstate commerce. But it is quite another to characterize "engagement in

---

[2] The federal constitution not only protects individual liberty through explicit guarantees, but also through the system of federalism it establishes. *Bond*, 131 S.Ct. at 2364 ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."). This redundancy of safety measures illustrates just how much value the Founders placed on protecting individual liberty, and underscores the importance of structural federalism.

interstate commerce" in such a way that *every* citizen is subject to regulation – even the unwitting. Indeed, Americans are quite accepting of the notion that conditions might be imposed upon them when they choose to engage in interstate commerce – that is the most basic of American bargains. But Americans are much less accepting of the notion that a remote central government can place conditions on them when they choose to do nothing but *live*. That notion is antithetical to fundamental American views on individual autonomy.

The Court should thus at the outset acknowledge that commerce regulations that reach *every* citizen, regardless of their status, are inherently more coercive, and inherently more restrictive of individual liberty than those that reach only citizens who have wittingly injected themselves into an interstate market.

II.

Commerce regulations that *mandate* conduct reduce an individual's liberty more so than regulations that *prohibit* conduct.

The individual mandate represents Congress's single-most coercive exercise of the commerce power – that much seems clear. Some suggest that the novelty of the mandate indicates that past Congresses believed they lacked the commerce power to enact such a law. But it might also be the case that Congress never passed such a mandate because such a law is

vastly more restrictive than more common regulations that prohibit certain conduct.

Think about it this way: an individual with $1 to spend has a virtually infinite number of ways to spend that dollar. If Congress exercises its commerce power like it usually does, and passes rules prohibiting the individual from spending that dollar on certain things, like illegal drugs or weapons, the ways the individual can choose to spend his $1 decrease from infinite, to infinite minus only the prohibited expenditures. Conversely, when Congress passes a regulation mandating the way the individual spends their $1, the ways the individual can choose to spend their $1 are decreased from infinite to only one. A mandate thus tramples on individual choice and freedom much more so than a more typical regulatory prohibition. *That* is likely a better answer to the questions of why mandates are rare, and that is why in close cases involving mandates, the Court should view the exercise of the commerce power with extreme skepticism.

The Court should thus also acknowledge that, regardless of who or what is being regulated, a mandate reduces individual freedom more than does a prohibition. And in a case where the question of whether the conduct is subject to commerce regulation is a very close one, this acknowledgment should tip the scales in favor of striking down the mandate.

III.

If Congress wishes to reduce an individual's liberty by enacting laws like the ACA's individual mandate, it should be required to do so through its taxing power – rather than the commerce power – as the taxing power is more checked by the political process and thus less susceptible to uses that infringe upon individual liberty.

Congress could have elected to utilize the taxing power to accomplish the ends of the individual mandate. But it did not because it could not, at least not in the political climate that existed at the time.

And therein lies the rub of the taxing power. When then-presidential candidate George H.W. Bush declared, "Read my lips: no new taxes," he described an American hostility towards taxes that has festered since the Boston Tea Party. That hostility towards exercises of the taxing power makes it a power that Congress uses at its own risk. Ronald J. Krotoszynski, Jr., *Reconsidering the Non-Delegation Doctrine: Universal Service, The Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 240 (2005) ("[F]ew things inspire greater dread in most politicians than the prospect of raising taxes.").

The Founders recognized as much. As a result, they did not feel the need to place textual limits on the power, nor did they place protections against its use in the Bill of Rights. *United States v. Kahriger*, 345 U.S. 22, 28 (1953) ("It is axiomatic that the power

of Congress to tax is extensive and sometimes falls with crushing effect. . . . As is well known, the constitutional restraints on taxing are few."). With the Boston Tea Party still in their recent memory, the Founders knew that political pressures exerted by the will of the people were more than enough of a check:

> One cannot study American history for long before noticing the conspicuous role of tax revolts. Time and again Americans have turned mutinous against taxes – the Boston Tea Party, the Whiskey Rebellion, the Depression-era tax strikes. "Tax revolts," as one commentator put it, "are as American as 1776." Kirk J. Stark, *The Right to Vote on Taxes*, 96 Nw. U. L. Rev. 191, 191 (2001) (quoting Joseph D. Reid, Jr., *Tax Revolts in Historical Perspective*, 32 Nat'l Tax J. 67, 69 (1979)) (footnotes omitted).

So when proponents of the individual mandate argue that because Congress *could have* enacted it with its taxing power, "what's the harm in letting them enact it with the commerce power?," they miss the constitutional point. The Federalist No. 33, at 203-04 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded."). The taxing power and commerce power cannot be coextensive precisely because Congress wields the commerce power without the stigma that accompanies the taxing power. If the commerce power is expanded so that it is coextensive

with the taxing power, it will be far too susceptible to abuse.

IV.

Infringements on individual liberty are best left to the states, as the state-level political process is more responsive and sensitive to the will of the people.

Were it not for its constitutional amendment, the State of Oklahoma, through its general police power, *could* require its citizens to purchase health insurance. This is so because the Founders intended that most infringements of individual liberty be left to the States, because the individuals affected by such laws could more easily use their political will to affect legal change at the local, rather than national, level.

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. *Bond,* 131 S.Ct. at 2364; *see also* The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.").

This core principle of federalism cannot be ignored nor eroded, but it will be if the commerce power is transformed into a federal police power. Indeed, the fact that 28 of the 50 States have sued seeking to invalidate the individual mandate proves the disconnect that too often exists between the federal government and the States it was formed to serve. That disconnect will be exacerbated so long as the commerce power is the functional equivalent of a federal police power. The commerce power must therefore be limited in a way that acknowledges the federal government's proper place in our republican form of government.

CONCLUSION

For these reasons, the decision below should be affirmed, and the individual mandate should be declared unconstitutional and its enforcement should be permanently enjoined.

Respectfully submitted,

E. SCOTT PRUITT
Attorney General of Oklahoma

PATRICK R. WYRICK
Counsel of Record
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, Oklahoma 73105
patrick.wyrick@oag.ok.gov
405.521.3921
405.522.0669 FAX
Attorneys for Respondent

February 9, 2012