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 *AMICUS CURIAE* PARTNERSHIP FOR AMERICA IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

BRIAN S. KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 Fax
ccooper@cooperkirk.com

Attorneys for Amicus Curiae Partnership for America

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INTEREST OF *AMICUS CURIAE*[1]

The Partnership for America is an advocacy organization dedicated to advancing common sense public policies rooted in America's traditions of individual freedom and free markets. http://partnership4america.org. Partnership for America opposes stripping Americans of the freedom to make their own individual decisions about medical care by forcing people to purchase health insurance or to incur a government penalty but is developing economically and politically viable legislation which would address the problems of adverse selection and preexisting conditions without mandating the purchase of health insurance. Partnership for America, through a closely related predecessor organization, Revere America Foundation, collected over one million petitions to repeal and replace the Patient Protection and Affordable Care Act and filed briefs *amicus curiae* in several cases challenging Section 1501 of the Patient Protection and Affordable Care Act. *See Liberty Univ. v. Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Nov. 8, 2011); *Florida v. Department of HHS*, 648 F.3d 1235 (11th Cir. 2011); *Kinder v. Geithner*, No. 11-1973

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation and submission of this brief. *See* S. Ct. Rule 37.6.

(8th Cir. argued Oct. 20, 2011), and *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

STATEMENT OF THE ISSUE

Whether Congress' authority to regulate interstate commerce includes the power to compel individuals to engage in commerce by purchasing a product they do not want.

SUMMARY OF ARGUMENT

This case presents the Court with a pivotal moment in its history – one in which it must face its "responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). At issue is the validity of a law without precedent in American history, a law compelling individual Americans to purchase a consumer product that they do not want. Section 1501 of the Patient Protection and Affordable Care Act contains an individual mandate ("Individual Mandate") that requires most people to purchase health insurance policies. *See* Pub. L. No. 111-148, §§ 1501(b), 10106, 124 Stat. 119, 244, 907 (2010).

Although modern jurisprudence has gradually eliminated the distinction between interstate and

intrastate commerce, this Court has never doubted its "duty to recognize meaningful limits on the commerce power of Congress," *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring), lest the limited powers enumerated in Article I become the general federal police power that the Framers deliberately withheld. As the Court of Appeals correctly recognized, the Individual Mandate represents "a sharp departure from all prior exercises of federal power." *Florida ex rel. Attorney Gen. v. Department of HHS*, 648 F.3d 1235, 1290 (11th Cir. 2011). The mandate is triggered not by any sort of commercial, economic, or even noneconomic activity, but rather by an individual's *decision not to engage in economic activity*. It regulates *in*activity, conscripting unwilling individuals into the market to buy an unwanted product. The Individual Mandate thus introduces *compulsory commerce* into the American economy – commerce that Congress not only regulates, but *creates*. If Congress has power to regulate an individual's *inactivity* in this fashion, then one is "hard pressed to posit any *activity* by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564 (emphasis added). Such sweeping federal regulatory power offends "the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Because the Individual Mandate ousts the States of their reserved sovereign powers, it violates the Tenth Amendment, as the 26 States now before this Court have amply demonstrated. Brief for State Respondents on the Minimum Coverage Provision, No. 11-398 (U.S. filed Feb. 6, 2012).

But the Individual Mandate commits a constitutional offense that is graver still, for "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond*, 131 S. Ct. at 2364. Federalism has an even higher, antecedent purpose: it "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*." *Id.* (emphasis added). Because the Individual Mandate exceeds Congress' enumerated powers to regulate individual conduct, it infringes the retained rights of the People, rights expressly protected by the Ninth Amendment.

Although it is difficult to posit what Congress could *not* do with the power it claims here, it is not hard to envision what it *could* do. Indeed, Congress' own budget office, concerned that federally mandated private expenditures ought to be included in the federal budget, understood that implementation of such a power could lead to, "[i]n the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services." CONGRESSIONAL BUDGET OFFICE MEMORANDUM: *Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 9 (1994) ("CBO MEMORANDUM"). A nation that takes the first step along that path will find the second less difficult. And that path leads ultimately to a place where the "central authority," as Tocqueville warned, "monopolizes all activity and life," where "there are

subjects still, but no citizens." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 93-94 (Perennial Classics ed. 2000) (1835).

If Congress' claimed power to force citizens to buy products they do not want is countenanced by this Court, then little if anything will be left of the doctrine of enumerated and thus limited powers of the national government, of the retained rights of the People guaranteed by the Ninth Amendment, and of the distinction between a free People and a servile one.

ARGUMENT

The Individual Mandate does not regulate the "channels of interstate commerce," the "instrumentalities of interstate commerce," or "persons or things in interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Nor does the Government contend otherwise. Therefore the mandate may be sustained, if at all, only as an exercise of power under the Necessary and Proper Clause to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.

The Government, accordingly, defends the Individual Mandate as necessary to ensure the effectiveness of Congress' *other* reforms of the health insurance market: extending coverage to those with preexisting medical conditions and preventing

premiums based on individual medical history. According to the Government, unless everyone is required by law to purchase health insurance (or to pay a penalty), the revenue base will be insufficient to underwrite the costs of insuring individuals presently deemed high risk or uninsurable. Therefore, the Government reasons, insofar as Congress has power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, power to make that regulation effective by *coercing commerce* – that is, by forcing unwilling individuals to enter the health-insurance market to buy a product they do not want.

The Individual Mandate, however, "represents a wholly novel and potentially unbounded assertion of congressional authority." *Florida*, 648 F.3d at 1328. Unlike other regulations sustained by this Court as necessary and proper to implement Congress' power under the Commerce Clause, the Individual Mandate does not regulate economic activity. Rather, it attempts to regulate individual decisions *to refrain from activity*, to remain *outside* the stream of commerce by choosing *not* to purchase health insurance. As demonstrated below, the Individual Mandate exceeds Congress' enumerated powers and thus infringes the powers of the States and the rights of the People preserved under the Tenth and Ninth Amendments.

I. The Individual Mandate Is Wholly Unprecedented.

To uphold the Individual Mandate under the Commerce and Necessary and Proper Clauses, this Court "would have to uphold a law that is unprecedented on the federal level in American history." *Seven-Sky v. Holder*, 661 F.3d 1, 51 (D.C. Cir. 2011) (Kavanaugh, J., dissenting with respect to jurisdiction). "Never before has Congress sought to *regulate* commerce by compelling non-market participants to *enter into* commerce so that Congress may regulate them." *Florida*, 648 F.3d at 1311. Even judges upholding the Individual Mandate have acknowledged that in asserting power to "compel individuals to buy products they do not want," Congress "crossed [a] line" it had never before crossed. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 558 (6th Cir. 2011) (Sutton, J., concurring). Likewise, the Government, which in the litigation below offered various singularly unpersuasive examples in support of its claim that the Individual Mandate was not unprecedented,[2] has subsequently been forced to "conced[e] the novelty of the mandate." *Seven-Sky*, 661 F.3d at 14.

To be sure, Congress has repeatedly "sought to *encourage* commercial activity it favors." *Florida*, 648

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[2] *See Florida v. Department of HHS*, 780 F. Supp. 2d 1256, 1285 (N.D. Fla. 2011) (noting that Government's strained attempt to find historical precedents for the mandate "only underscores and highlights its unprecedented nature"); *see also Florida*, 648 F.3d at 1290-91.

F.3d at 1289 (emphasis added). But it has never before sought to *compel* such activity. *Id.* Indeed, when legislation that would have imposed an Individual Mandate was first considered by Congress in 1994, the Congressional Budget Office concluded that "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States." CBO MEMORANDUM at 1. "The fact that Congress has never before exercised this supposed authority is telling." *Florida*, 648 F.3d at 1289. As the Court of Appeals explained,

> Few powers, if any, could be more attractive to Congress than compelling the purchase of certain products. Yet even if we focus on the modern era, when congressional power under the Commerce Clause has been at its height, Congress still has not asserted this authority. Even in the face of a Great Depression, a World War, a Cold War, recessions, oil shocks, inflation, and unemployment, Congress never sought to require the purchase of wheat or war bonds, force a higher savings rate or greater consumption of American goods, or require every American to purchase a more fuel efficient vehicle.

Id. Given the stunning versatility and infinite applicability of a power to correct perceived market distortions by mandating that consumers buy this or that product, "the utter lack of statutes imposing

obligations" anything like the Individual Mandate "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997). The fact that "earlier Congresses avoided use of this highly attractive power" surely provides "reason to believe that the power was thought not to exist." *Id.* at 905.

II. None of This Court's Commerce Clause Decisions Authorizes Congress To Compel Unwilling Individuals To Purchase Unwanted Products.

This Court has never "interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." *Florida*, 648 F.3d at 1288. Again, even judges upholding the Individual Mandate agree. *See Thomas More Law Ctr.*, 651 F.3d at 558 (Sutton, J., concurring). Yet the Government insists that the Individual Mandate is supported by *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005). Those cases, however, involved federal regulation of individuals who voluntarily engaged in economic activity that was subject to Congress' power to regulate. They do "not show that Congress may compel individuals to buy products they do not want." *Thomas More Law Ctr.*, 651 F.3d at 558 (Sutton, J., concurring).

Wickard upheld a federal price-support program that penalized a participating farmer for growing more than his statutory allotment of wheat, even

though he used it solely for his own family and livestock. The Court reasoned that Congress could rationally conclude that a decision by many farmers to grow their own wheat, rather than entering the marketplace to buy it, could in the aggregate affect prices and undermine the federal price-support program. According to the Government, a person's "preference" for paying for healthcare needs out of pocket rather than purchasing insurance is much like the preference of farmer Filburn for fulfilling his need for wheat by growing his own rather than by purchasing it. But the law in *Wickard* imposed a penalty not on farmer Filburn's merely philosophical and passive "preference," but on his affirmative *activity of actually producing grain*. *See* 317 U.S. at 127-29. Obviously, a farmer's production and consumption of a commodity falls within the Court's definition of "activities" that "are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.' " *Raich*, 545 U.S. at 25.

Moreover, farmer Filburn *chose* to participate in the federal price-support program and, in return for abiding by its production limits, he was guaranteed a price for his wheat that was nearly three times what the market price would otherwise have been. *Wickard*, 317 U.S. at 126, 130, 133. Even then, the regulation at issue in *Wickard*, unlike the Individual Mandate, did not force Filburn to grow wheat, nor did it compel him, or anyone else, to buy it. "Instead, Filburn had any number of other options open to him. He could have decided to make do with the amount of

wheat he was allowed to grow. He could have redirected his efforts to agricultural endeavors that required less wheat. He could have even ceased part of his farming operations." *Florida*, 648 F.3d at 1291. "The wheat-acreage regulation" thus "was a limitation – not a mandate – and left Filburn with a choice." *Id.* Thus, "*Wickard* is striking not for its similarity to [the] present case, but in how different it is." *Florida*, 648 F.3d at 1291.

Gonzales v. Raich is equally inapposite. The statute upheld there did not mandate that individuals engage in economic activity nor did it otherwise regulate their *inactivity*. Rather, it "regulate[d] the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26. "Like the farmer in *Wickard*," the plaintiffs in *Raich* were themselves "cultivating, for home consumption, a fungible commodity for which there is an established . . . interstate market." *Id.* at 18. Thus, "the activities engaged in by the plaintiffs themselves fit the Court's definition of economic, since they involved the production, distribution, and consumption of marijuana." *Florida*, 648 F.3d at 1278. By contrast, "in choosing not to purchase health insurance, the individuals regulated by the individual mandate are hardly involved in the 'production, distribution, and consumption of commodities.'" *Id.* at 1286 (quoting *Raich*, 545 U.S. at 25). To the contrary, they exhibit "the *absence* of such behavior, at least with respect to health insurance." *Id.* at 1287 (emphasis added).

III. There Is a Constitutionally Significant Distinction between Regulating Voluntary Activity and Coercing Activity.

The Government strives to avoid the obvious and intuitive distinction between laws regulating voluntary economic activity and laws compelling individuals to engage in such activity by purchasing a product they do not want. *See* Brief for Petitioners (Minimum Coverage Provision) at 48-52, No. 11-398 (U.S. filed Jan. 6, 2012) ("Gov't Br."). All its efforts fail.

First, focusing on the definition of "regulate," the Government argues that there is "no textual support in the Commerce Clause" for this distinction. *Id.* at 48. But however broad the definition of "regulate" may be, the Constitution nowhere grants Congress blanket power to "regulate," let alone to "regulate inactivity." Rather, it grants Congress specific power "to regulate *Commerce . . . among the several States*." U.S. CONST. art. I, § 8 (emphasis added). Plainly, a decision to *refrain* from purchasing health insurance is not that.[3]

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[3] The Government argues that at the time of the Founding "the term 'commerce' " was not "limited to only *existing* commerce." Gov't Br. 48 (quoting *Seven-Sky*, 661 F.3d at 16). But "[t]he power to regulate commerce, of course, presupposes that something exists to regulate." *Florida*, 648 F.3d at 1285. As Chief Justice Marshall explained in *Gibbons v. Ogden*, "If Congress has the power to regulate it, that power must be exercised whenever the subject *exists*." 22 U.S. (9 Wheat.) 1, 195 (1824) (emphasis added).

Further, although the Court has not restricted congressional power to regulations of interstate commerce *per se*, it "has always described the commerce power as operating on *already existing or ongoing activity*." *Florida*, 648 F.3d at 1286 (emphasis added). *See, e.g.*, *Lopez*, 514 U.S. at 558 (identifying the "categories of *activity* that Congress may regulate") (emphasis added); *United States v. Morrison*, 529 U.S. 598, 611 (2000) ("[W]here we have sustained federal regulation of intrastate *activity* . . . , the *activity* in question has been *some sort of economic endeavor*.") (emphases added); *Raich*, 545 U.S. at 17 ("Our case law firmly establishes Congress' power to regulate purely local *activities* that are part of an *economic 'class of activities*.'") (emphases added). While this Court's "Commerce Clause cases run the gamut of possible regulation[,] [they] share at least one commonality: they all involved attempts by Congress to regulate preexisting, freely chosen classes of activities." *Florida*, 648 F.3d at 1286.

Second, the Government argues that any distinction between regulating voluntary activity and forcing individuals to engage in involuntary activity is mere semantics. Gov't Br. 48-50. But there is a real and obvious distinction between regulating commerce and other voluntary activity and forcing unwilling consumers into the market to purchase a product they do not want. Indeed, even Congress' own staff recognized that it may "be questioned whether a

requirement to purchase health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, but for this regulation, a part of the health insurance market." CONGRESSIONAL RESEARCH SERVICE, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 6 (2009). The fact that clever lawyers can identify real or supposed hard cases in applying such a distinction does not distinguish it from the line this Court has drawn between economic and noneconomic activity or, for that matter, from any other legal rule. As this Court explained in *Lopez*:

> Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender legal uncertainty.

514 U.S. at 566. "Any possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers." *Id.*

Third, the Government argues that the Individual Mandate does not regulate inactivity because "the uninsured as a class are active in the market for

health care," are "always at risk" of needing medical services that they may be unable to pay for, and may have purchased insurance in the past or may do so in the future. Gov't Br. 50-51. But the mandate is not conditioned on the purchase of insurance, the receipt of healthcare services, or the failure to pay for such services. *See Florida*, 648 F.3d at 1295. And the fact that an individual has purchased a product or service before and may purchase it again at some indefinite point in the future surely does not change the character of a Government mandate that he purchase even that product – let alone a *different* product – now. More important still, the Government's focus on the details of the healthcare market is at bottom "a convenient sleight of hand to deflect attention" from the sweeping and unprecedented power it asserts, *Florida*, 648 F.3d at 1297, for the Government has proved unable to "identify *any* mandate to purchase a product or service in interstate commerce that would be unconstitutional" under the Commerce Clause, *Seven-Sky*, 661 F.3d at 14-15 (emphasis added); *see also infra* Part IV.

Fourth, the Government argues that the distinction between regulating activity and regulating inaction "'seems more redolent of Due Process Clause arguments' than any principled enumerated powers analysis." Gov't Br. 51-52 (quoting *Seven-Sky*, 661 F.3d at 19). It is unclear what, exactly, the Government means by this. But if it means to suggest that federalism, unlike due process, is not intended to protect individual autonomy from government

overreaching, it is simply wrong. As this Court recently reaffirmed, "federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364; *see also infra* Part V.

IV. The Government Proffers No Limiting Principle To Contain a Commerce Clause Power To Compel Involuntary Activity.

In *Lopez*, the Court struck down a federal gun-possession statute because the Government's "hip bone connected to the thigh bone" theory of how gun possession near schools affects interstate commerce had no stopping point: the Government could not identify a single activity that did not, under its theory, affect interstate commerce. Nor could the Court: "[I]f 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." 514 U.S. at 564. Upholding this claim of congressional power would thus negate the central premise of federalism: that the Constitution's enumeration of congressional powers "'presupposes something not enumerated.'" *Id.* at 566.

The interpretation of the Commerce Clause urged by the Government here is likewise "breathtaking in its expansive scope" and similarly "affords no limiting principles in which to confine Congress' enumerated power." *Florida*, 648 F.3d at 1295; *see also Seven-Sky*, 661 F.3d at 51 (Kavanaugh, J., dissenting as to jurisdiction) (noting "the extraordinary

ramifications of [the D.C. Circuit's] decision expanding Congress' authority to impose mandatory-purchase requirements"). Although the Government places great emphasis on the specific characteristics of the markets for health care and health insurance, as a matter of legal principle Congress' power under the Commerce and Necessary and Proper Clauses is not, and cannot be, conditioned on the "uniqueness" of the market at issue. Although the supposedly "distinctive characteristics" of the healthcare market, even if true, might provide *policy* reasons why Congress *should choose not* to enact individual mandates in other areas, they certainly are not *constitutional* reasons why Congress *could not* do so. Only the latter can provide a judicially enforceable principle to cabin Congress' exercise of its commerce power. After all, "[u]nder our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616.

The Government's implicit assurance that a decision expanding the commerce power far enough to uphold the Individual Mandate will be "a restricted railroad ticket, 'good for this day and train only,'" *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting), is cold comfort. Indeed, this Court in *Lopez* rejected the dissent's similar argument – that congressional regulation of gun possession near schools should be upheld as a "rare case," due to the "particularly acute threat" to commerce posed by firearms and the "special way in which guns and education are incompatible." 514 U.S.

at 624 (Breyer, J., dissenting). The *Lopez* Court rightly dismissed this supposed limiting principle as "devoid of substance." *Id.* at 564-65.

Furthermore, the specific characteristics of the markets for health care and health insurance highlighted by the Government – such as general need, uncertainty, and cost-shifting – are in no way unique to these markets. *See, e.g.*, *Florida*, 648 F.3d at 1296 ("virtually all forms of insurance entail decisions about timing and planning for unpredictable events with high associated costs"). Thus, as Judge Kavanaugh aptly explained, "despite the Government's effort to cabin its Commerce Clause argument to mandatory purchases of health insurance, there seems no good reason its theory would not ultimately extend as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example." *Seven-Sky*, 661 F.3d at 51-52.

Nor could the Government's claimed regulatory power be confined to insurance and other private financial products. For, "[g]iven the economic reality of our national marketplace, any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce in that good." *Florida*, 648 F.3d at 1292. That is why the Government cannot "identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional" under the Commerce Clause. *Seven-Sky*, 661 F.3d at 14-15. It is simply impossible "to

conceive of *any* product whose purchase Congress could not mandate under this line of argument." *Florida*, 648 F.3d at 1292; *see also Seven-Sky*, 661 F.3d at 18 (upholding Individual Mandate despite court's inability to identify "any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce"). This chilling fact is all one needs to know about the size of the stakes in this case.

In short, under the Government's theory, Congress is empowered to regulate grain prices not only by penalizing wheat production in excess of a quota, as it did in *Wickard*, but by mandating that individuals enter the market to purchase bread and other grain products. Likewise, the need to prop up the domestic auto industry, recently owned in large part by the federal government, might lead Congress to impose a tax penalty on those who do not buy American cars – even if they do not purchase any car at all.[4]

The Government's argument thus admits of no judicially enforceable principle that would restrain Congress from addressing real or perceived problems in other markets by compelling individuals to enter the stream of commerce to buy products that they do

[4] During the Senate hearings, Professor Charles Fried testified – while *defending* the constitutionality of the Mandate – that "Congress could, indeed, mandate that everyone buy broccoli." *See Florida v. Department of HHS*, 780 F. Supp. 2d 1307, 1311 n.2 (N.D. Fla. 2011) (citing both the Senate transcript and Professor Fried's written testimony).

not want. Congress' own nonpartisan Congressional Budget Office reviewed the first bill contemplating an individual mandate 17 years ago and cautioned that "the essence of private choice is the ability *not* to act. Decisions about resource allocation are not private unless individuals can choose not to spend their money in response to market forces." CBO MEMORANDUM at 7 (emphasis in original). Given the degree of control that the federal government would exert over mandated purchases of health insurance by individuals who had been conscripted into commerce by congressional decree, the CBO was concerned that the cost to individuals of complying with the mandate should be counted as part of the federal budget. *Id.* at 6-7. The CBO then offered this warning:

> Failure to record the cost of this compulsory activity in the budget would open the door to a mandate-issuing government taking control of virtually any resource allocation decision that would otherwise be left to the private sector, without the federal budget recording any increase in the size of government. In the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services, could be instituted without any change in total federal receipts or outlays.

CBO MEMORANDUM at 9.[5] Embracing the unlimited regulatory authority asserted by the Government here would open the constitutional door to the same result.

V. A Statute Is Not "Proper" Under the Necessary and Proper Clause if it Would Negate the Purpose, Embodied in Article I and the Ninth and Tenth Amendments, of Enumerating, and Thereby Limiting, Federal Power.

The Government's argument that the Individual Mandate is essential to its larger regulatory scheme for the interstate healthcare market, even if credited, goes only to the "Necessary" element of the Necessary and Proper Clause.[6] Even a "necessary" exercise

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[5] As this report makes clear, Congress' use of mandates such as the one at issue here, rather than its Article I powers to tax and spend, would allow it to increase the size and control of the federal government while masking the true cost of that growth. It would thus undermine a key component of our constitutional system – the accountability of representatives to voters and taxpayers. *Cf. New York v. United States*, 505 U.S. 144, 168-69 (1992).

[6] Both the numerous exceptions to the Individual Mandate and the anemic measures specified for enforcing it plainly cast doubt on the Government's claim that it is "necessary" to its other healthcare reforms. *See, e.g.*, *Florida*, 648 F.3d at 1310-11 (discussing the "broad exemptions and exceptions to the individual mandate (and its penalty)" and the "toothless enforcement mechanisms"); *id*. at 1299 (explaining that those responsible for incurring healthcare costs without paying will be "largely persons who either (1) are exempted from the mandate,

(Continued on following page)

of Commerce Clause authority must also be "a 'Law . . . *proper* for carrying into Execution the Commerce Clause.'" *Printz*, 521 U.S. at 923-24 (quoting Art. I, § 8, cl. 18) (alteration omitted; emphasis added by the Court). In Chief Justice Marshall's words, for a law to be "proper," it must "consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). A law that does not do so is, in Alexander Hamilton's phrase, "merely [an] act[ ] of usurpation" which "deserve[s] to be treated as such." THE FEDERALIST NO. 33, at 204 (Hamilton) (Clinton Rossiter ed., 1961), *quoted in Printz*, 521 U.S. at 924. The Individual Mandate fails to comport with "the letter and spirit of the Constitution" because it is inconsistent with – indeed, it negates – the "first principle[ ]" that Article I "creates a Federal Government of enumerated powers" that are "'few and defined.'" *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292-93 (Madison) (Clinton

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(2) are excepted from the mandate penalty, or (3) are now covered by the Act's Medicaid expansion").

In all events, the "necessity" identified by the Government, at bottom, is the need for additional monetary resources. *See id.* at 1310 ("At best, the individual mandate is designed *not* to enable the execution of the Act's regulations, but to counteract the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed reforms."). But the Internal Revenue Code is a testament to the innumerable ways in which revenues can be raised in accord with the Constitution, and thus a justification based on a need for additional resources is one of the least compelling showings of "necessity" imaginable.

Rossiter ed., 1961)). As discussed above, under the Government's theory of compulsory commerce, Congress can impress unwilling individuals into commerce and compel them to buy unwanted products whenever doing so is deemed by Congress to be a desirable part of its regulatory plans.

That makes this case *easier* than *Lopez*, where the Court balked at the extreme attenuation between the regulated "actors" and the ultimate effect of "their conduct" on commerce. 514 U.S. at 580 (Kennedy, J., concurring); *see also id.* at 559-61, 565-67 (opinion of the Court). Although the Court admitted that "some of our prior cases have taken long steps down [the] road" toward granting Congress a general police power by "giving great deference to congressional" programs regulating activities with remote effects on commerce, *id.* at 567, the Court drew the line at "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." *Id.* at 561.

The Individual Mandate strains the concept of commerce even more than the gun-possession statute in *Lopez*, for it reflects not a difference *in degree* from prior exercises of Commerce Clause power, but a difference *in kind*. Again, the Individual Mandate reaches beyond even noneconomic "actors" to command those who have decided *not* to act. Far from what Chief Justice Marshall described as "the natural, direct, and *appropriate* means, or the *known and usual means*, for the execution of a given power,"

JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 186 (Gerald Gunther ed., 1969) (emphasis added), the Individual Mandate is the ultimate form of congressional bootstrapping: unwilling individuals are first coerced into the health insurance market and then their involuntary participation in that market is used to justify the mandate as an exercise of the commerce power. Upholding the Individual Mandate "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," and leave no apparent "activity that the States may regulate but Congress may not." *Lopez*, 514 U.S. at 564, 567. The Individual Mandate thus encroaches on the reserved sovereign powers of the States in violation of the Tenth Amendment.

But that is not all. "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992); *see also, e.g.*, *Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 552; *Gregory v. Ashcroft*, 501 U.S. 456, 458-59 (1991). Indeed, "our constitutional structure" plays a "vital . . . role in securing freedom for us." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

To uphold the claim of congressional power underlying the Individual Mandate would fundamentally alter the nature of the relationship between the federal government and the governed. That relationship is defined, in large part, by the boundaries on federal regulation inherent in the Constitution's enumeration of congressional powers. Adherence to these boundaries "preserves an area of individual freedom by limiting the reach of federal law." *Morrison*, 529 U.S. at 622 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). As this Court recently emphasized in *Bond v. United States*, "Federalism" – and the enumeration of powers, in particular – thus "protects the liberty of all persons . . . by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." 131 S. Ct. at 2364. And it is precisely this liberty – the liberty of individuals to direct and control their own actions, free of federal regulatory interference, in areas lying beyond the "few and defined" regulatory powers "delegated by the . . . Constitution to the federal government," THE FEDERALIST NO. 45, *supra*, at 292-93 – that the Ninth Amendment was specifically designed to protect.

Central to the Framers' concept of republican government was the belief that the enumerated *powers* of the federal government are reciprocally related to the retained *rights* of the People. By delegating certain legislative powers to the national government, the People consented to abide by the laws enacted by the federal government pursuant to

those powers. But as to those matters over which the national government had no enumerated power, the People had a retained right to do as they pleased, free of federal regulation. *See, e.g.*, Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J. L. & POL. 63, 64 (1987). As George Washington, President of the Constitutional Convention explained in a letter to his friend Lafayette, "The people evidently retained everything which they did not in express terms give up." THE WRITINGS OF GEORGE WASHINGTON 478 (Fitzpatrick ed., 1939); *cf.* Samuel Adams, *The Rights of the Colonists* (Nov. 20, 1772), in 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) ("Every natural Right not expressly given up or from the nature of a Social Compact necessarily ceded remains.").

Indeed, many of the Framers opposed the incorporation of a Bill of Rights in the Constitution for fear that an attempt to "enumerate" the rights of the People would carry the risk that any omission from the list would be construed to grant Congress an implied, *unenumerated* power to legislate on the subject at issue. *See* THE FEDERALIST NO. 84, at 513-14 (Hamilton) (Clinton Rossiter ed., 1961); Cooper, *Limited Government and Individual Liberty*, *supra*, at 69-70.[7]

[7] This concern was succinctly expressed by James Wilson in the Pennsylvania ratifying convention: "If we attempt an enumeration [of rights], every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect

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As James Madison explained in introducing his proposal for a bill of rights in the First Congress:

> It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

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enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (reprint 1966) (Jonathan Elliot ed., 2d ed. 1836) (statement of J. Wilson at Pennsylvania Ratifying Convention, Oct. 28, 1787). The Framers believed that the limited nature of Congress' enumerated powers created a body of reciprocal rights that was virtually limitless. No one could hope to catalogue all of these rights, and Wilson was indignant at the suggestion that such a task should have been undertaken in the Constitutional Convention: "Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing." *Id.* at 54 (statement of J. Wilson at the Pennsylvania Ratifying Convention, Dec. 4, 1787).

James Madison, 1 ANNALS OF CONGRESS 439 (Joseph Gales & William Seaton eds., 1834).[8] The provision to which Madison was referring was framed as follows:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id. at 435.

Since the Framers understood that delegated powers and retained rights were two sides of the same coin, the clause in Madison's proposal negating any implied purpose "to diminish the just importance of other rights retained by the people" was entirely redundant to the clause negating any intent "to enlarge the powers delegated by the Constitution." Neither clause added anything of substance to the other. Accordingly, the meaning of the Ninth Amendment was not changed when Madison's original proposal was amended by the House to delete reference to delegated powers and to provide simply that

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[8] Several months earlier, Madison wrote to Thomas Jefferson that he had come to favor a Bill of Rights "provided it be so formed as not to imply powers not to be included in the enumeration." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 271 (Gaillard Hunt ed., 1904).

"[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Indeed, the congruence of meaning between Madison's original proposal and what ultimately became the Ninth Amendment was confirmed by Madison himself, in a letter to George Washington. Madison was advising President Washington of Edmund Randolph's opposition to Virginia's ratification of the Ninth Amendment. Governor Randolph had argued against the enlargement of delegated powers rather than a preservation of retained rights. Madison found Randolph's point "altogether fanciful." Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 THE WRITINGS OF JAMES MADISON 432 (Gaillard Hunt ed., 1904). As he put it,

> If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.

Id.

Thus, the wording of Madison's original proposal and the Ninth Amendment are merely two complementary ways of saying the same thing – namely, that with respect to any area over which the national government lacked delegated power, the American people retained the right, vis-à-vis the national

government, to do as they pleased.[9] Or, as this Court put it in *Bond*, "laws enacted in excess of delegated governmental power cannot direct or control their actions." 131 S. Ct. at 2364.

The Framers conceived of the People's reserved rights as ranging from the fundamental to the mundane, from the rights of free speech and assembly to an individual's "right to wear his hat if he pleased."[10]

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[9] Any suggestion that the Ninth Amendment authorizes judges to recognize and enforce specific positive rights against Congress *when it is acting within the scope of its enumerated powers* thus turns the Ninth Amendment on its head. Although this view has been suggested by some Justices, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting), this Court has properly held that the Ninth Amendment "does not withdraw the rights *which are expressly granted* to the Federal Government." *Ashwander v. TVA*, 297 U.S. 288, 330-31 (1936) (emphasis added); *see also Griswold*, 381 U.S. at 520 (Black, J., dissenting) (Ninth Amendment was adopted "to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication"); *id*. at 529-30 (Stewart, J., dissenting) (Amendment was adopted "to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers").

[10] During the debates on the Bill of Rights, Congressman Sedgwick of Massachusetts objected that no amendment protecting free assembly was needed, for "it is a self-evident, unalienable right which the people possess . . . [and] that never would be called in question." He argued that, if Congress were going to "descend to such minutiae," it may as well "have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought

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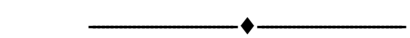
There is little doubt that, somewhere along that continuum, the Framers would have placed the right of individuals to refuse to buy products and services that they do not want. Indeed, the right not to buy an unwanted product has an honored American pedigree. The colonists in Boston boycotted tea and other products bearing the imprimatur of the Crown, and not even King George III claimed a sovereign power to compel his American subjects to buy English products. "It is difficult to imagine that a nation which began . . . as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place." *Florida v. Department of HHS*, 780 F. Supp. 2d at 1286.



proper; but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed." 1 ANNALS OF CONGRESS, *supra*, at 759-60.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that this Court should hold that the Individual Mandate exceeds Congress' enumerated powers under the Interstate Commerce and Necessary and Proper Clauses.

Respectfully submitted,

BRIAN S. KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 Fax
ccooper@cooperkirk.com

Attorneys for Amicus Curiae Partnership for America