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 *AMICUS CURIAE* OF SENATOR RAND PAUL ADDRESSING THE MINIMUM COVERAGE PROVISION ISSUE IN SUPPORT OF RESPONDENTS, URGING AFFIRMANCE

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QUESTION PRESENTED

Whether the Court should overrule *Wickard v. Filburn*, 317 U.S. 111 (1942), as part of holding that under Article I of the U.S. Constitution, Congress may not compel all individuals in the United States to acquire and maintain health insurance or pay a penalty, as set forth in the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

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INTRODUCTION

The purpose of this brief *amicus curiae* is to ask this Court to restore some limiting principle to Commerce Clause jurisprudence by overruling *Wickard v. Filburn*, 317 U.S. 111 (1942), consistent with the original meaning of Congressional power under the Commerce Clause, as the Court addresses the constitutionality of healthcare reform legislation.

INTEREST OF *AMICUS CURIAE*[1]

United States Senator Rand Paul respectfully submits this brief *amicus curiae* in support of Respondents. Senator Paul represents the Commonwealth of Kentucky and is also a founding member of the U.S. Senate Tea Party Caucus. Senator Paul is a physician of ophthalmology and one of only three physicians in the Senate.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* discloses that no counsel for any party authored any portion of this brief and no person or entity other than *amicus* made any monetary contributions to the preparation or submission of this brief. All parties have consented to the filing of this brief in that counsel for petitioners and respondents have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

[2] The proportion of physician-legislators has changed little since the founding of this nation. Three of the Constitutional Convention's fifty-five delegates – Maryland's James McHenry, North Carolina's Hugh Williamson and Virginia's James McClurg – were practicing physicians. DAVID O. STEWART, THE MEN WHO INVENTED THE CONSTITUTION: THE SUMMER OF 1787 ix, x (2007).

Senator Paul has a vital interest in protecting the Constitutional rights of the American people, including his constituents, as well as ensuring that Congress does not exceed its authority. Pursuant to his oath of office, Senator Paul has sworn to "support and defend the Constitution." As a Senator, physician, and member of the Tea Party, Senator Paul has a special interest in the implications of the minimum coverage provision for individual liberty and our system of federalism.

STATEMENT

The breathtaking scope of the Patient Protection and Affordable Care Act ("PPACA") extends to more than one sixth of the economy of the United States.[3] PPACA was passed by the U.S. Senate on Christmas Eve, December 24, 2009. At that time, the national debt was nearly $12.135 trillion, exceeding the statutory debt limit.[4] Upon passage of the statute in March 2010, private sector job growth halted and dropped sharply in the following months.

PPACA contains nine titles and hundreds of new laws scattered throughout the U.S. Code. The approximately 2000-page bill in its entirety was

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[3] CONG. BUDGET OFFICE, THE LONG-TERM OUTLOOK FOR HEALTH CARE SPENDING (2007), available at http://www.cbo.gov/ftpdocs/87xx/doc8758/11-13-LT-Health.pdf.

[4] Mark Knoller, *U.S. National Debt Tops Debt Limit*, CBS NEWS ONLINE, December 16, 2009, http://www.cbsnews.com/8301-503544_162-5987341-503544.html.

admittedly read by few members of Congress before their vote. As then-Speaker of the U.S. House of Representatives, Nancy Pelosi, said shortly after the Congressional vote, "We have to pass the bill so you find out what's in it."[5]

The nature of the minimum coverage provision compelling all individuals in the United States to acquire and maintain health insurance is an unprecedented assertion of Federal Government authority at the expense of the States as well as an assault on individual liberty. For the first time in history, Congress has required private citizens to buy an expensive product from a private company every month for the rest of their lives, just by virtue of being U.S. citizens. In addition, PPACA mandates a significant expansion of the States' Medicaid schemes. Under PPACA, States must spend an enormous sum of additional dollars. They are required to broaden their Medicaid eligibility standards to accommodate as much as fifty percent more individuals, many of whom are compelled to enroll by the mandate, or else face a tax penalty.

Public response to the passage of PPACA was extraordinary. Thousands of Americans publicly protested in opposition to passage of the legislation, in particular the individual mandate. Ordinary Americans – not legal scholars – became keenly interested in the Constitution and the history of its framing and ratification. The Tea Party movement

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[5] Yuval Levin, *Pass It To Find Out What's In It*, NATIONAL REVIEW ONLINE, March 9, 2010, http://www.nationalreview.com/corner/195976/pass-it-find-out-whats-it/yuval-levin.

was born and the U.S. House of Representatives changed hands, with Democrats losing more seats in a single election than any party in more than seventy years. Court challenges to the constitutionality of PPACA soon followed.

The U.S. Court of Appeals for the Eleventh Circuit concluded that Congressional enactment of the minimum coverage provision was an unconstitutional exercise of authority, falling outside Congress's enumerated power under the Commerce Clause. *See Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1298 (11th Cir. 2011), *cert. granted*, 132 S.Ct. 603, 604 (U.S. Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

The Eleventh Circuit's decision directly conflicts with those of the United States Courts of Appeal for the District of Columbia and Sixth Circuits, both of which upheld the minimum coverage provision based on *Wickard v. Filburn*. *See Seven-Sky* v. *Holder,* 661 F.3d 1, 20 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679); *Thomas More Law Ctr.* v. *Obama,* 651 F.3d 529, 564 (6th Cir. 2011), *petition for cert. filed* (U.S. July 29, 2011) (No. 11-117).

As explained below, this Court should affirm the Eleventh Circuit's decision striking down the minimum coverage provision and in so doing overrule *Wickard,* which extended application of the Commerce Clause, through the Necessary and Proper Clause, far beyond the historical meaning of "commerce" as used in the text of the Commerce Clause.

ARGUMENT

I. THIS COURT SHOULD STRIKE DOWN PPACA AS EXCEEDING THE ENUMERATED POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

A. The Court Should Reconsider The Constitutional Validity Of Its Reasoning In *Wickard v. Filburn*

Other parties and *amici* will attempt to assure the Court that it need not alter existing doctrine to hold that PPACA is unconstitutional. It is true that PPACA's individual mandate is – literally – unprecedented in the violence that it does to the notion of a Congress constrained by enumerated powers. Nonetheless, the rationale for Congress's assertion of power over individuals and against the several States through PPACA has been decades in the making. The seeds for this case were sown in *Wickard v. Filburn,* 317 U.S. 111 (1942).

Wickard stands for the sad proposition that Congress can prevent a man from feeding his family in his own home with food he grew himself. *See id.* at 125.[6] Rather than engaging in a tortured exercise

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[6] So infamous is the case, it has been set to music, to the 1970s tune of "Convoy":

> "His name was farmer Filburn, we looked in on his wheat sales. We caught him exceeding his quota. A criminal hard as nails. He said, "I don't sell none interstate." I said, "That don't mean cow flop." We think you're affecting commerce. And I set fire to his crop,

to distinguish *Wickard*, the more intellectually honest course would be to use this opportunity to overrule *Wickard* as a case that was wrongly decided and that has caused manifold mischief and confusion. *Wickard,* like PPACA, cannot be squared with the plain text of the Commerce Clause as understood by those who drafted it

Chief Justice Rehnquist characterized *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *United States v. Lopez*, 514 U.S. 549, 560 (1995). Indeed, concurring in *Lopez,* Justice Thomas called for reconsideration in a future case of the "substantial effects" test with a view to better reflect the text and history of the Commerce Clause. 514 U.S. at 584 (Thomas, J., concurring). This is such a case, and examination of the "substantial effects" test must necessarily include *Wickard,* wherein the test was extended beyond all limits by allowing aggregation of personal consumption of a commodity in a purely local setting.

The issue of whether PPACA is constitutional presents the Court with the proper opportunity to show that the Commerce Clause power is not limitless, and reject the aggregation theory as applied in *Wickard.* Judge Sutton said it best in his

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> HOT DAMN! Cause we got interstate commerce. Ain't no where to run! We gone regulate you. That's how we have fun."

Jim Chen, *Filburn's Legacy,* 52 EMORY L.J. 1719, 1721 (2003) (quoting Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674 (1995) (emphasis in original)).

concurrence in *Thomas More Law Center*: "At one level, past is precedent, and one tilts at hopeless causes in proposing new categorical limits on the commerce power. But there is another way to look at these precedents – that the Court either should stop saying that there is a meaningful limit on Congress's commerce power or prove that it is so." 651 F.3d at 555 (Sutton, J., concurring in part).

The D.C. Circuit upheld PPACA with explicit reliance on *Wickard* and *Gonzales v. Raich*, 545 U.S. 1 (2005). Judge Silberman wrote, "We think the closest Supreme Court precedent to our case is *Wickard v. Filburn*." *Seven-Sky,* 661 F.3d at 17 (citation omitted). Judge Silberman recognized that the aggregation of individual conduct was the means by which the activity was deemed substantially to affect interstate commerce:

> The logic of the *[Wickard]* opinion would apply to force any farmer, no matter how small, into buying wheat in the open market. *See Raich,* 545 U.S. at 20. *Wickard,* therefore, comes very close to authorizing a mandate similar to ours, at least indirectly, and the farmer's 'activity' could be as incidental to the regulation as simply owning a farm.

See id. (parallel citation omitted).

The Sixth Circuit also relied on *Wickard* and *Raich* to uphold PPACA. *See Thomas More Law Center,* 651 F.3d at 542. That court reasoned:

> Similar to the causal relationship in *Wickard*, self-insuring individuals are attempting to fulfill their own demand for a commodity rather than resort to the market and are thereby thwarting Congress's efforts to stabilize prices. Therefore, the minimum coverage provision is a valid exercise of the Commerce Power because Congress had a rational basis for concluding that, *in the aggregate*, the practice of self-insuring for the cost of health care substantially affects interstate commerce.

Id. at 545 (emphasis added).

The lower appellate courts' explicit reliance on *Wickard* underscores its doctrinal importance to the issues presented in this case. It is therefore appropriate for the Court to reexamine the Constitutional validity of this shaky foundation on which the edifice of the government's argument in support of PPACA is built.

B. *Wickard* Is At Odds With The Framers' Understanding Of The Commerce Clause

Wickard (followed in *Raich*) is far removed from the appropriate starting point, which is the plain text of the Constitution. "The Congress shall have power to . . . regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

This authority to regulate commerce is one of Congress's enumerated powers. Such "powers delegated . . . to the federal government" were "few and defined," while the powers "to remain in the State governments" were "numerous and indefinite," as James Madison wrote. *See* THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Federal authority was to "be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected." *Id.* "The powers reserved to the several States," in contrast, were to "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people," *id.* – a category one would expect to include the purely intrastate growing of wheat or individual purchase of health insurance.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the first significant Commerce Clause case decided by this Court, Chief Justice Marshall observed that "[t]he enumeration" of commerce as a Congressional power "presupposes something not enumerated; and that something, if we regard the language or subject of the sentence, must be the exclusively internal commerce of a state." *Id.* "Marshall emphasized that federal power extended only to commerce 'with foreign Nations, and among the several States, and with the Indian Tribes.'" DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 170 (1985). This "enumeration of the particular classes of commerce to which the [federal] power was to be extended, would not have been made, had the intention been

to extend the power to every description." *Gibbons*, 22 U.S. (9 Wheat.) at 194-95. "Commerce 'among' the states thus was limited to that 'commerce which concerns more states than one. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself.'" Currie, *supra*, at 170 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194-95).

In the time since *Wickard* was decided in 1942, there has been considerable legal scholarship to advance our understanding of the specific words that the Framers of the Constitution chose to use when drafting the Commerce Clause. *See, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause,* 55 ARK. L. REV. 847 (2003). The point is not to try to "channel" the Framers, but rather to understand the meaning of the words they so carefully chose at the time they chose them. It is a search for an objective, contemporaneous meaning regarding what the Framers actually wrote, not a speculative foray into what they might or might not have intended to write.

The word "commerce" was used repeatedly during the Constitutional Convention, during the state ratification debates and in *The Federalist* papers. In each of those contexts, "commerce" was used in a narrow sense that is synonymous with trade, or exchange, or transportation to effect the trade or exchange of something. *See Raich*, 545 U.S. at 56 (Thomas, J., dissenting) ("The [Commerce] Clause's text, structure and history all indicate that at the time of the founding, the term 'commerce'

consisted of selling, buying and bartering, as well as transporting for those purposes."). The Framers used "commerce" in its ordinary sense. Dictionaries at the time of the drafting of the Constitution defined "commerce" as "Exchange of one thing for another; trade." *See, e.g.,* SAMUEL A. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1785); *see also Lopez,* 514 U.S. at 585 (Thomas, J., concurring) (citing founding era dictionaries). The word commerce derives from the Latin. Its etymology is *com* (with) *merci* (merchandise). *See, e.g.*, 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989).

Professor Barnett reviewed James Madison's notes from the Constitutional Convention and concluded that of the thirty-four uses of commerce, all but eight were equivalent to "trade or exchange"; those eight other uses referred to trade with foreign nations. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114 (2001) (citing JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (W.W. Norton 1987)). Likewise, in the sixty-three times in which the term "commerce" appears in *The Federalist* papers, its meaning is uniformly synonymous with trade. *See id.*

Even Alexander Hamilton, who of all *The Federalist* authors (and perhaps of any Framer) desired a strong central government, used "commerce" in a narrow sense for which trade or exchange could have been substituted. Take, for example, *The Federalist* No. 12, wherein Hamilton discussed the "rivalship" "between agriculture and commerce." Plainly, Hamilton viewed commerce

and agriculture as different things. THE FEDERALIST NO. 12, at 86 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He reiterated the point in *The Federalist* No. 17, where he noted that the authority to regulate interstate commerce, a national matter, should be distinguished from "the supervision of agriculture and other concerns of a similar nature, all those things, in short, which are proper to be provided by local legislation." *See id.* at 114; *see also* THE FEDERALIST NO. 36, at 214 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing "agriculture, commerce and manufactures"). Congress's authority under the Commerce Clause, therefore, was limited to regulation of interstate or foreign transactions such as the trade or exchange of goods between States or with foreign nations, not purely intrastate activities such as a person's growing of crops for his own family's use or the purchase of health insurance for an individual.

C. *Wickard* and *Raich* Did Not Disclose Any Commerce Properly Subject To Congressional Regulation As Understood By The Framers

The concept of commerce the Court used in *Wickard* and later in *Raich* bears no resemblance whatsoever to the word as the Framers understood it. The facts in *Wickard* have become a symbol of an overreaching Federal Government and a Congress that disrespects the limits of a written Constitution of enumerated powers.

In *Wickard*, Roscoe Filburn sought to enjoin the enforcement of a penalty against him under the Agricultural Adjustment Act of 1938 that limited the amount of wheat he could grow. Filburn, a fifth-generation Ohio farmer, "operated a small farm." 317 U.S. at 114. It was hardly an operation that possessed an economy of scale to cause a swing fluctuation in the interstate price of wheat. Pursuant to the Agricultural Adjustment Act, the government notified Filburn that his "wheat acreage allotment" was 11.1 acres. Filburn, however, defied the government: he had the temerity to sow 23 acres, and was fined as a result. And when Filburn refused to pay the fine, he was denied a "marketing card" and a lien was placed against his crop. *Id.* at 115.

Filburn's practice, according to the Court's opinion, was to "raise a small acreage of winter wheat. . . ; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding." *Id.* Only the portion of wheat that he did not sell was at issue. *Id.* Filburn argued that the Commerce Clause could not apply to his production and consumption of wheat, activities which are "local in character" and with "effects upon interstate commerce that are at most 'indirect.'" *Id.* at 119.

The Court held that:

> even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

Id. at 125.

Where *Wickard* broke new ground was the concept of aggregating the personal, local, non-commercial conduct. It was undisputed (and inconceivable) that a small-time farmer like Filburn by himself could exert any effect on interstate commerce whatsoever, certainly not a "substantial effect." Filburn's excess wheat production cannot be characterized as having even a *de minimus* effect on interstate commerce: it never left the farm, let alone the State. That is, even if growing wheat is commerce – which the Framers made clear it is not – the so-called "commerce" cannot be called interstate in any sense. Nonetheless, the Court reasoned that by growing wheat to make his own flour and then his own bread, Filburn affected interstate commerce by not buying the bread at the store: his failure to engage in commerce was the rationale for asserting that Congress could regulate him. *See id.* at 129.

Filburn's conduct was not commerce. It was not interstate. And because the amount of wheat at issue was so miniscule, the Court extended the Commerce Clause power beyond all limits by aggregating Filburn's personal consumption of a

home-grown plant: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 128. Aggregation was the doctrinal tool used to assault self-sufficiency.[7]

So convoluted was the reasoning in *Wickard,* and so outrageous the result, that the Court attempted to bolster the opinion with a nod to international law. *See id.* at 125-26 (discussing wheat regulations of Argentina, Australia, and Canada).

Wickard's reasoning recurred more recently in *Gonzales v. Raich*, 545 U.S. at 17-18. Change the wheat in *Wickard* to medical marijuana, and that is *Raich:* personal use of a home-grown, legal plant in miniscule quantities, which was never bought or sold, and never crossed state lines. *See id.* at 57-58 (Thomas, J., dissenting). To find a "substantial effect" on interstate commerce, the Court had to aggregate the six plants. It was a doctrinal trick that proved too much. Justice Thomas pointed out that the aggregated substantial effects holding has no limiting principle: "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything and the Federal Government is no longer one of limited and enumerated powers." *Id.*

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[7] The Filburn Family History notes of Roscoe C. Filburn: "I never worked for another man in my life." Chen, *supra,* at 115.

Justice Thomas called the majority's decision "further proof that the 'substantial effects' test is a 'rootless and malleable standard' at odds with the constitutional design." 545 U.S. at 67 (Thomas, J., dissenting) (quoting his concurrence in *United States v. Morrison,* 529 U.S. 598, 627 (2000)). "The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause." *Id.* at 67.

> The majority's treatment of the substantial effects test is malleable because the majority expands the relevant conduct. By defining the class at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market.

Id. at 68.

As with *Wickard,* the analytical device in *Raich* used to justify a Commerce Clause power inconceivable to the Framers was not just the "substantial effects" test but rather the aggregation of individual conduct that was personal and local to demonstrate the supposed "substantial effect." Therefore, in overruling *Wickard*, this Court need not invalidate all "substantial effects" cases – only those in which it was necessary to aggregate

individual local conduct in order to portray a "substantial effect on interstate commerce."[8]

D. PPACA Presents The Opportunity To Better Define The Parameters Of The Commerce Power Consistent With The Framers' Original Understanding

Perhaps recognizing that the aggregation principles risked turning the Commerce Clause into a Congressional police power, the Court has attempted to limit aggregation to "economic activities," noting that "in every case where we have sustained federal regulation under the aggregation principles in *[Wickard],* the regulated activity was of an apparent commercial character." *Morrison*, 529

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[8] Nor would interstate Commerce Clause precedents be diminished in which the activity or substance regulated was an instrumentality or a channel of interstate commerce. Thus, Congress could enact environmental regulations because pollution, by its nature, crosses state lines. Likewise, Congress can enact civil rights laws regarding restaurants and hotels, because those businesses by their nature are open to and designed to attract people in interstate commerce. In any event, the civil rights cases have other Constitutional text that supplies the authority to legislate: namely, the Thirteenth, Fourteenth, and Fifteenth Amendments. That is, some cases decided under the aggregated substantial effects doctrine might be right for other reasons. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 279 (Douglas, J., concurring); *see also* Randy E. Barnett*, Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 8 (2012); *see also* Donald H. Regan, *How To Think About The Federal Commerce Power And Incidentally Rewrite United States v. Lopez,* 94 MICH. L. REV. 554, 595, 609 (1995).

U.S. at 611 n.4; *see also Lopez*, 514 U.S. at 559-60, 580. Though *Lopez* and *Morrison* were correctly decided – and gave hope that Congress's power is still enumerated and hence limited – the supposed distinction between economic and non-economic activity as a threshold for aggregation is simply unworkable, because any activity can be quantified and described in economic terms. Courts routinely quantify even the most personal and non-commercial activity in order to award damages, for example the loss of consortium.

To uphold PPACA, this Court would need to extend *Wickard* and *Raich* even further. The government's justification of PPACA forces it to conflate two markets: (1) the present market for health insurance, and (2) the future and hypothetical purchase of health care. *See Florida v. United States*, 648 F.3d at 1286 (quoting 42 U.S.C. § 18091(a)(2)(A) (2011) to note that Congress described "the activity" it chose to regulate as "economic and financial *decisions* about how and when health care is paid for and when health insurance is purchased") (emphasis added). That is, the government asks this Court not only to aggregate individual conduct but to *aggregate two distinctly different markets, as well.* Justice Thomas warned of defining interstate commerce at such a level of generality to justify Congressional regulation. *Raich*, 545 U.S. at 72 (Thomas, J., dissenting).

Moreover, unlike the wheat in *Wickard* or the marijuana in *Raich,* neither of the government's suggested markets concerns a fungible product. *See Raich*, 545 U.S. at 18. To the contrary, the delivery

of health care is highly personal. Healthcare, because it is the opposite of a fungible product, is therefore especially unsuited for aggregation. Health insurance is similarly personal, non-fungible and inappropriate for aggregation.

Even assuming, for sake of argument, that aggregation were proper in this case, it still does not justify Congress acting under the Commerce Clause. As the parties and other *amici* will explain, the individual mandate punishes inactivity: the failure or refusal to enter the market for health insurance. The present effect on interstate commerce of the failure to purchase health insurance is zero. No matter how many people are subject to the regulation by aggregation, that number multiplied times zero will always equal zero. That is why the government conflated the present market for health insurance with that of the future market for the potential purchase of health care. But collapsing those two markets would require the Court to "pile inference upon inference in a manner that would bid fair to convert Congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

The government's characterization of the market as national also fails because it ignores the local nature of purchases of health care and health insurance: areas that fall within the traditional police power of the States. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006); *Hill v. Colorado*, 530 U.S. 703, 715 (2000). Congress attempts to justify PPACA with the reasoning that uninsured people eventually show up sick at the emergency room, which then is forced to treat them and shifts

the cost on to insured patients. Even so, sick people rarely cross state lines to go to the emergency room. The nature of an emergency forces the sick or injured to go to the closest emergency room to save time. The delivery of emergency care, therefore, is done, as a general matter, locally rather than interstate. *Cf. NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937) (noting that court should use a "practical conception" of interstate commerce that "does not ignore actual experience"). Likewise, consumers cannot purchase health insurance from out of state.

The regulatory scheme that PPACA purports to establish is far larger and more complicated than the federal narcotics regulations in *Raich*. However, the breadth and complexity of PPACA is no justification for deference to Congress. If anything, the fact that Congress passed a bill too big for most members even to read suggests that the Court should heighten the standard of review. The breadth of the substantial effects doctrine cries out for a judicial review that is more searching than a cursory review for a rational basis for Congress to justify its usurpation of the States' police power. *Cf. United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) (Commerce Clause cases may require a different test than the rational-basis test to demonstrate a tangible link to commerce).

II. THE NECESSARY AND PROPER CLAUSE CANNOT SAVE PPACA BECAUSE, BY VIOLATING THE TENTH AMENDMENT, PPACA IS INHERENTLY IMPROPER

A. The Necessary And Proper Clause Cannot Replace The Absence Of Commerce Clause Jurisdiction Or Spending Powers

As is often the case when Congress asserts jurisdiction under the Commerce Clause to regulate conduct that is neither interstate nor commerce, the government invokes the Necessary and Proper Clause to shore up the attenuated nature of the so-called "substantial effect" on interstate commerce. *See New York v. United States,* 505 U.S. 144, 158 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting). Indeed, the government's brief in *Wickard* relied on the Necessary and Proper Clause. *See* Appellants' Br. on Reargument at 49; *Wickard*, 317 U.S. at 119; So, too, with PPACA, the statute's proponents lean on the Commerce Clause, the Necessary and Proper Clause and the spending power to form a three-legged stool to support the Act. None of these legs can support the Act's constitutionality either in isolation or cobbled together in the regulatory morass that is PPACA.

In *Raich*, the Court found a "necessary and proper" application of the Commerce Clause because the regulation at issue was "an essential part of a larger regulation of economic activity, in which the

regulatory scheme could be undercut unless the intrastate activities were regulated." *Raich*, 545 U.S. at 24 (quoting *Lopez*, 514 U.S. at 561). Justice O'Connor warned that such a justification actually encourages Congress to legislate imprecisely: "[T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause – nestling questionable assertions of its authority into comprehensive regulatory schemes – rather than with precision." *Raich*, 514 U.S. at 43 (O'Connor, J., dissenting). And that is exactly what occurred with PPACA. Congress passed an approximately 2,000 page bill – which few members of Congress had even read before voting upon – before recessing for the holidays. The statute's complexity, however, does not justify and cannot mask just how far Congress has strayed from the enumerations of Article I.

B. The Government's Arguments Conflict With Framers' Understanding Of The Necessary And Proper Clause

Writings contemporaneous with the framing of the Constitution make clear that the Necessary and Proper Clause does not confer any additional enumerated power upon Congress. Rather, it clarifies what is implicit in the structure of the Constitution – that Congress has the authority to effectuate its enumerated powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Edmund Pendleton, president of the Virginia Constitutional Ratification Convention, flatly denied that the Necessary and Proper Clause went "a

single step beyond the delegated powers" of Congress. "If [Congress were] about to pass a law in consequence of this clause, they must pursue some of the delegated powers, but can by no means depart from them, or arrogate any new powers; for the plain language of the clause is, to give them power to pass laws in order to give effect to the delegated powers." THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 313 (Jonathan Elliot ed., 1888). James Madison agreed, noting that "whatever meaning [the Necessary and Proper] [C]lause may have, none can be admitted, that would give an unlimited discretion to Congress." James Madison, The Bank Bill, House of Representatives (Feb. 2, 1791), in 13 THE PAPERS OF JAMES MADISON 376-78 (William T. Hutchinson ed., 1977).

Even when the Necessary and Proper Clause is used to carry out enumerated powers such as the commerce and spending powers, the Clause does not give Congress *carte blanche* to use whatever means it fancies to carry out its enumerated powers. To the contrary, as Alexander Hamilton explained, the means that may be necessary for carrying out Congress's enumerated powers were nonetheless improper if those means violated an independent provision of the Constitution: "[P]ower vested in a Government is in its nature sovereign, and includes by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions and exceptions specified in the

constitution . . . ." Alexander Hamilton, Opinion on the Constitutionality of the Bank (23 Feb. 1791) in 8 THE PAPERS OF ALEXANDER HAMILTON 2 (Harold C. Syrett ed., 1961).

In *McCulloch v. Maryland*, Chief Justice Marshall reasoned: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." 17 U.S. at 421.

More recently, Justice Thomas, joined by Justice Scalia, addressed the *McCulloch* standard for assessing the propriety of Congressional action: "The means Congress selects will be deemed . . . 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" *United States v. Comstock*, 130 S.Ct. 1949, 1972 (2010) (Thomas, J., dissenting). In the same opinion, Justice Thomas noted that the Court's expansive construction has "come[ ] perilously close to transforming the necessary and proper clause into a basis for the federal police power that 'we have always rejected.'" *Id.* at 1983 (quoting concurrence of Thomas, J., in *Lopez*) (citations omitted).

The Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). "When a law . . . violates the principle of state sovereignty reflected in the Tenth Amendment and other constitutional provisions, it is not a law proper . . . and is thus merely an act of

usurpation which deserves to be treated as such." *Id.*

Judged under the standard as understood by the Framers, PPACA cannot be justified under the Necessary and Proper Clause, regardless of the enumerated power under which Congress purports to act. By commanding that States accept a staggering expansion of Medicaid eligibility or lose all Medicaid funding, while at the same time mandating that all individuals obtain insurance even if they would not have taken advantage of their Medicaid eligibility before, Congress has far exceeded both its commerce and spending powers and has violated the Tenth Amendment by encroaching on State sovereignty.

The spending power is not a roundabout to evade the Constitution's federalist plan of limited and enumerated powers. *See* Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law,* 89 CORNELL L. REV. 1, 24 (2003). Indeed, there is no "Spending Clause" per se, and there is considerable scholarly debate about what constitutional provision empowers Congress to spend. *See, e.g.*, ORIGINALISM: A QUARTER-CENTURY OF DEBATE 253-85 (Steven Calabresi ed., 2007). For most of the first seventy years after the Constitution's ratification, the spending power was understood to be limited to the enumerated powers, rather than a free-standing power. *See* John C. Eastman, *The Spending Power*, in THE HERITAGE GUIDE TO THE CONSTITUTION 95 (Edwin Meese III ed., 2005) (discussing narrow view of spending power leading to vetoes by Presidents Thomas Jefferson, James Madison and James Monroe).

PPACA cannot be squared with this original understanding.

C. PPACA Fails The Test Of *South Dakota v. Dole*

Nor can PPACA be justified under *South Dakota v.* Dole, 483 U.S. 203 (1987).[9] Congress does not have unconstrained authority to use conditional grants of federal funds to achieve regulation outside of the limited areas allowed under Article I. *Id.* at 207-08. Only two prongs of the *Dole* test are at issue here. The Medicaid provisions of PPACA fail the *Dole* test because (1) States did not make the choice to enter into the Medicaid partnership with the federal government knowing that they would eventually be forced to drastically expand the program or forfeit the funds they relied on, and (2) the Medicaid provisions' conditioning of all federal Medicaid dollars on a State's acceptance of the unprecedented Medicaid expansion is as a practical matter compulsory and thereby violates the final *Dole* prong and the Tenth Amendment. *See id.*

In the past, when Congress sought to expand Medicaid coverage, it offered additional funding to States that agreed to additional obligations, without threatening existing funding of States that did not elect to participate in the new provisions. However, under PPACA, Congress did not tie the new

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[9] Other *amici* and parties are addressing the Tenth Amendment issue. This brief simply notes that the Tenth Amendment violation precludes upholding the individual mandate under the Necessary and Proper Clause.

conditions only to those additional federal funds made newly available under PPACA. It instead made the new terms a condition of continued participation in Medicaid, thereby threatening each State with the loss of *all* federal Medicaid funds unless it adopts the Act's substantial expansions of state obligations.

Even worse is PPACA's manifest contempt for the principles of federalism. PPACA Medicaid provisions leave the States no choice but to accept, violating the anti-compulsion prong of *Dole* and amounting to direct regulation of the States in contravention of the Tenth Amendment. *See id.* at 211 (noting that "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion"). Moreover, the Medicaid provisions of PPACA go so far beyond the previous conditional allotments of federal Medicaid dollars that any prior jurisprudence in this area is inapplicable.

PPACA drastically expands the eligibility and coverage thresholds that States must adopt to remain eligible to participate in Medicaid. Whereas States previously retained significant flexibility to determine who would be covered by Medicaid, PPACA requires States, with few exceptions, to cover all legal citizens under age 65 with incomes up to 133 percent of the poverty level. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2011). Although the Federal Government will initially fund 100 percent of that expansion, by 2017, States will be responsible for 5 percent of those costs, with that number increasing to 10 percent by 2020. 42 U.S.C §

1396d(y)(1) (2011). Compounding the burden on the States, Congress offered no increased funding to cover the millions of individuals who were previously eligible for Medicaid and opted not to enroll, but now must enroll to comply with the individual mandate provision of PPACA. 26 U.S.C. § 5000A(a) (2011). Despite the massive burden these new provisions impose on the States, PPACA requires States to either implement and fund this expansion of benefits or forfeit *all* federal Medicaid funds.

In recent years, most States have received at least $1 billion in federal Medicaid funding, which covers at least half of each State's total Medicaid costs. NATIONAL ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009-2011 STATE SPENDING 47 (2011); 42 U.S.C. § 1396d(b) (2010). "Once adopted, a cooperative federalism program such as Medicaid has a political 'lock-in' effect." James F. Blumstein & Frank A. Sloan, *Health Care Reform Through Medicaid Managed Care: Tennessee as a Case Study and a Paradigm,* 53 VAND. L. REV. 125, 133 (2000).

If a State refused to accept the expanded Medicaid eligibility requirements of PPACA, then that State would have to fund 100 percent of healthcare costs for lower income citizens. At the same time, the citizens of that State still would be subject to significant taxation to fund Medicaid in the other States–without receiving any of the benefits.

If the loss of all of a State's federal Medicaid funding whatsoever does not rise to the level of coercion envisioned by the *Dole* Court to reflect unconstitutional compulsion, then it is difficult to imagine what would.

The Court has noted that, in regards to the line where coercion becomes compulsion, "definition more precise must abide the wisdom of the future." *Steward Machine Co. v. Davis*, 301 U.S. 548, 591 (1937). The future is here. More is at issue than the constitutionality of PPACA. The Court here is faced with the continued validity of the principles of enumerated and limited powers in a federalist system. If Congress is allowed to entice the States to create massive programs based on the promise of federal funding but then later threaten to remove that funding unless the States do as Congress wills, then the States are no longer sovereign in any real sense. To uphold that kind of compulsion of the States is to allow Congress to regulate the States in any area it deems fit, thereby rendering federalism an historical curiosity. By coercing the States to surrender their sovereignty, Congress diminishes the freedom of individual citizens.

D. PPACA Contravenes Our System Of Federalism As Envisioned By The Framers

In *Bond v. United States* 131 S. Ct. 2355, 2364 (2011), Justice Kennedy, writing for a unanimous Court, emphasized that "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own

integrity. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" It is this system of federalism, and our very Constitution, that PPACA imperils.

PPACA Medicaid provisions violate the "clear notice" requirement of *Dole,* are impermissibly compulsive, and contravene the Tenth Amendment. In light of the violation of an independent constitutional provision, the Tenth Amendment, PPACA is not a "proper" exercise of Congress's enumerated powers under the Commerce Clause, the spending powers or any other constitutional provision. The Court should strike down PPACA as an unconstitutional attempt to evade the plain meaning of the words our Framers used to draft our Constitution. It is those written words that constrain judicial authority and thereby secure our liberty. It is to those written words that We the People have consented to be governed.

As Thomas Jefferson wrote, "[o]ur peculiar security is in the possession of a written Constitution." Letter from Thomas Jefferson to Wilson Cary Nicholas, (September 7, 1803) in 10 THE WRITINGS OF THOMAS JEFFERSON 419 (Andrew A. Lipscomb ed., 1904). This Court should heed Jefferson's warning: "Let us not make it a blank paper by construction." *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals on the minimum coverage provision should be affirmed.

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Respectfully submitted,

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