No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

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

BRIEF OF MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

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INTEREST OF *AMICI*[1]

Amici Curiae United States Senate Republican Leader Mitch McConnell, and Senators Orrin Hatch, Lamar Alexander, Kelly Ayotte, John Barrasso, Roy Blunt, John Boozman, Richard Burr, Saxby Chambliss, Daniel Coats, Tom Coburn, Thad Cochran, Susan Collins, Bob Corker, John Cornyn, Mike Crapo, Jim DeMint, Michael Enzi, Chuck Grassley, Dean Heller, John Hoeven, Kay Bailey Hutchison, James Inhofe, Johnny Isakson, Mike Johanns, Ron Johnson, Jon Kyl, Mike Lee, Richard Lugar, John McCain, Jerry Moran, Lisa Murkowski, Rand Paul, Rob Portman, James Risch, Pat Roberts, Marco Rubio, Richard Shelby, Olympia Snowe, John Thune, Patrick Toomey, David Vitter, and Roger Wicker are United States Senators serving in the One Hundred Twelfth Congress.

As United States Senators, *Amici* are acutely interested in the constitutional issues at stake in this litigation, independent of any opposition they may have voiced to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (hereinafter "PPACA" or "Act") on policy grounds. Members of Congress are required to swear an oath to uphold the Constitution of the United States. Therefore, they are

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

under an independent responsibility to uphold the Constitution of the United States by ensuring that the Legislative Branch does not exceed its constitutionally enumerated powers. *See United States* v. *Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring)

> ([I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.).

Mindful of their duty to uphold the Constitution, Senators raised two constitutional points of order during the Senate's consideration of the PPACA. On December 23, 2009, Senator Ensign raised a point of order stating that the bill would violate the Constitution because the powers delegated to Congress by Article I, § 8, do not include the authority to require individuals to engage in a particular activity – in this case, buying qualifying medical insurance – on pain of a penalty.

Senator Hutchison raised another constitutional point of order on the same day, asserting that the bill would violate the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Amici have a particular interest in preserving the proper balance of power between the federal and state governments in order to safeguard our constitutional system of dual sovereignty, the Senate being the branch of Congress whose very structure was designed to ensure the representation of the States themselves within the federal legislature. To the extent that the Commerce Clause is expanded beyond its proper boundaries, Congress will undoubtedly introduce more legislation that is tangential to or outside of its actual constitutional mission, distracting from its central function as envisioned by the founders and intruding on the general police power reserved to the states.

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

SUMMARY OF ARGUMENT

Our nation was distinguished in its founding by a government of dual sovereignty, which provided for states to retain their sovereignty subject to a federal government that exercises only enumerated powers.

The Framers of the Constitution judged this arrangement to be especially protective of individual liberty because it prevented any one government from amassing too much power. Petitioners' arguments in this case will undermine this carefully-balanced system of government by placing an effectively unlimited power in the hands of Congress.

The Commerce Clause allows the federal government to "regulate Commerce . . . among the several States,"[2] and has been interpreted broadly by this Court to allow regulation of things actually in interstate commerce, the channels of interstate commerce, and even intrastate activities that have a "substantial relation" to interstate commerce.[3] But the Individual Mandate in the PPACA goes even farther than this already-expansive understanding of the Commerce Clause to allow the federal government, for the first time in history, to compel its citizens to purchase a government-prescribed product and thereby force inactive individuals into the market for health insurance.

The step from regulating market participation to mandating participation in a market is novel and unprecedented. This has been acknowledged by the non-partisan Congressional Budget Office and Congressional Research Service as well as every court that has addressed the issue. The fact that Congress

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[2] U.S. CONST. art. I, § 8, cl. 3.

[3] *See United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995).

in 200 years has not attempted to regulate inactivity to force market participation also strongly suggests it never has had such authority.

Petitioners downplay the novelty of the Individual Mandate by attempting to blur the distinction between regulating activities voluntarily undertaken and mandating that individuals engage in activity in the first place. But historical usage of the term "regulate" has always presupposed an existing activity to be regulated. This Court's decision in *Wickard* v. *Filburn*, 317 U.S. 111 (1942) is no exception. The agricultural regulations at issue in that case did not apply to all Americans, but only to those who chose to grow wheat and who thereby engaged in activity that affected the wheat market. But if the decision *not* to engage in commerce is itself regulable – and all inaction naturally affects markets at some level – then the Commerce Clause contains no limit at all on governmental power, and the government has been unable to identify any limits on the power it proposes for itself. Such an expansion of federal power is foreclosed by the structure and purposes of our Constitution as well as this Court's precedents.

The Individual Mandate is a classic exercise of a general police power, which is constitutionally reserved to the States, not the federal government. States may compel activity; the only other example of a health insurance mandate to be upheld by a court was premised on the exercise of a *state's* general police power. This Court has repeatedly held that there is no federal police power, and warned that

creating one would result in a centralized government, undermining the fundamental American institution of dual sovereignty and in the process, individual liberty.

ARGUMENT

I. The Individual Mandate Exceeds the Commerce Clause Power

At the founding of our nation's system of dual sovereignty, while federal law became the supreme law of the land, the States nevertheless entered the Union "with their sovereignty intact." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U.S. 743, 751 (2002). The Framers of the Constitution achieved these seemingly contradictory goals by clarifying that the States would retain the general police power while the federal government would be limited to exercising *only* those enumerated powers granted to it by the Constitution. *See generally* THE FEDERALIST No. 45 (Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined" while "[t]hose which are to remain in the State Governments are numerous and indefinite.").

This balance of power was conceived by the Framers to "ensure protection of our fundamental liberties" by "prevent[ing] the accumulation of excessive power," thus "reduc[ing] the risk of tyranny and abuse from either" state or federal government.

Gregory v. *Ashcroft*, 501 U.S. 452, 458 (1991). As Chief Justice Marshall observed:

> Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

McCulloch v. *Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819) (*quoted in United States* v. *Lopez*, 514 U.S. 549, 566 (1995)). In modern times, debate has arisen particularly over the scope of the power granted to the federal government "[t]o regulate Commerce . . . among the several States. . . ." U.S. CONST. art. I, § 8, cl. 3.

While the past century has seen a general expansion of the subject matter committed to the federal government under the Commerce Clause, in recent years this Court has not tolerated attempts to stretch the Commerce Clause beyond all bounds for fear of eliminating the remaining meaningful limits on the federal government's power. *See United States* v. *Lopez*, 514 U.S. 549, 556-57 (1995); *United States* v. *Morrison*, 529 U.S. 598, 607-08 (2000). If accepted, Petitioners' arguments in this case will overwhelm the remaining limits on Commerce Clause power, thereby upsetting the Constitution's delicate balance by untethering the federal government from its

enumerated powers and invading the legitimate province of the States.

A. The Commerce Clause Does Not Authorize Congress to Mandate the Purchase of a Particular Product, but Only Permits Regulation of Existing Activity That Substantially Affects Interstate Commerce

The Individual Mandate requires that "an . . . individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual . . . is covered under minimum essential coverage for such month," subject only to a few very narrow exceptions. *See* PPACA § 1501(b). The federal government penalizes with a fine those who decline to purchase its prescribed type of health insurance. *See* PPACA § 1501(b)(1). This mandate and penalty are designed to compel inactive individuals to engage in a particular economic activity by requiring them to purchase health insurance even if they do not wish to do so. This law greatly exceeds the authority given to the federal government in the Commerce Clause, which has always been understood to allow regulation, not compulsion, of economic activity.

This Court noted in *United States* v. *Lopez* that Congress' power to "regulate Commerce . . . among the several States" has three permissible applications:

> First, Congress may regulate the use of the channels of interstate commerce. Second,

> Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate commerce. Finally, Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce.

Lopez, 514 U.S. at 558-59 (emphasis added, internal citations omitted). Although the Commerce Clause specifically addresses interstate activity, this Court has allowed regulation of even local and intrastate activity if that "activity," in the aggregate, exerts a "substantial economic effect" on the interstate economy. *See Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942). But this "power to regulate commerce, though broad indeed, has limits" that the Court must enforce. *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968). The existence of an "activity" first and foremost always has been a basic requirement for the assertion of federal power under the Commerce Clause and a precursor to determining whether the activity "substantially" affects interstate commerce.

In its findings accompanying the PPACA, Congress exclusively and explicitly invoked its power under the Commerce Clause as the purported constitutional authority for the Individual Mandate, making clear that it was relying on the third prong of *Lopez* in particular. *See* PPACA § 1501(a). These findings, however, misstate the *Lopez* test, and strongly suggest that Congress misunderstood the nature of

its authority when enacting the PPACA. *Compare* PPACA § 1501(a) (finding that "*[t]he individual responsibility requirement* provided for in this section . . . is commercial and economic in nature, and *substantially affects* interstate commerce") (emphasis added) *with Lopez* 514 U.S. at 558-59 ("Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce") (emphasis added). Its confusion is evident in that Congress did not actually find that the failure to purchase health insurance was an activity, let alone one that substantially affects interstate commerce. Rather, it found that the PPACA *itself* would affect interstate commerce.

Although the scope of the Commerce Clause has been debated for over two centuries, this Court has never embraced such blatant bootstrapping. On the contrary, the landmark Commerce Clause cases have always addressed first whether a particular type of activity was commercial, only afterwards turning to the impact of the regulation on interstate commerce (where relevant). *See*, *e.g.*, *Gibbons* v. *Ogden*, 9 Wheat 1 (1824) (considering whether interstate navigation was "commerce"); *Kidd* v. *Pearson*, 128 U.S. 1 (1888) (whether manufacturing was "commerce"); *NLRB* v. *Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937) (whether labor relations could be regulated as "commerce"); *Wickard*, 317 U.S. 111 (whether economic activity was too "local" to be regulated under the Commerce Power); *Lopez*, 514 U.S. 549 (whether carrying a weapon in a "school zone" could be regulated on the

basis of its asserted effects on commerce); *Morrison*, 529 U.S. 598 (whether gender-motivated violence could be regulated under the Commerce Clause).

These cases represent a wide spectrum of Commerce Clause decisions with diverse fact patterns. But none even suggests that, under the Commerce Clause, Congress has the power to affirmatively obligate otherwise passive individuals to engage in a particular economic activity – to purchase a particular good or service – and to punish them if they choose not to do so. What the Petitioners urge, therefore, is frankly an unprecedented interpretation of the Commerce Clause – an interpretation that, if adopted, would result in a dramatic expansion of Congressional power without any realistic limitation on its reach. Because the Individual Mandate regulates a simple decision or choice not to purchase a particular product, it exceeds the proper scope of the Commerce Clause.

Indeed, Congress' own analyses have repeatedly recognized the complete lack of precedent for using the Commerce Clause to compel the purchase of a product. For example, Congress has charged the Congressional Budget Office (CBO) with providing it with objective and nonpartisan analyses of federal programs. *See* http://www.cbo.gov/aboutcbo/factsheet.cfm. The CBO has noted that Congress has "never required people to buy any good or service as a condition of lawful residence in the United States." *See* Congressional Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf.

Another non-partisan office within Congress, the Congressional Research Service (CRS) has reached much the same conclusion. Among its responsibilities, the CRS provides Congress with analyses of the constitutionality of proposed federal laws and has been called Congress' "think tank." It has questioned whether the Commerce Clause "would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, at 3 (Jul. 24, 2009), *available at* http://www.gwumc.edu/sphhs/departments/healthpolicy/healthreform/CRS%20Report_Constitutionality.pdf. In fact, the CRS has acknowledged that the idea that Congress may use the Commerce Clause to require an individual to purchase a good or service is "a novel issue." *Id.*; *see also* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, at 9 (Nov. 15, 2011), *available at* http://src.senate.gov/files/R40725.pdf.

Since the enactment of the PPACA, the CRS has reiterated its uncertainty about the constitutionality of the Individual Mandate. The CRS has repeatedly noted the unprecedented nature of the Individual Mandate. *See most recently* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* November 15, 2011, at 8-9. It has observed that, in "general, Congress has used its authority under the Commerce

Clause to regulate individuals, employers, and others who *voluntarily* take part in some type of *economic activity*." *Id.* at 11 (emphasis added). And it questioned whether, like in the PPACA, "regulating a *choice* to purchase health insurance is" such an activity at all. *Id.* (emphasis added). The CRS observed that the Individual Mandate in the PPACA is different in kind, not just in degree, from the type of power that Congress in the past has relied upon the Commerce Clause to exert.

> While in *Wickard* and *Raich*, the individuals were participating in their own home activities. . . . , they were acting on their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, [under the Individual Mandate] a requirement could be imposed on some individuals *who do not engage in any economic activity* relating to the health insurance market. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of *required participation* can be considered economic activity.

Id. (emphasis added). The CRS went on to say that "it may seem like too much of a bootstrap to force individuals into the health insurance market and then use their participation in that market to say they are engaging in commerce." *Id.* at 11-12.

In accord with the analyses just discussed, the court below noted the novel character of the Individual Mandate.

> Economic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality. Nor does our independent review reveal such a precedent.

Florida v. *United States HHS*, 648 F.3d 1235, 1288 (11th Cir. 2011). Every court of appeals to consider the issue has agreed that the Mandate is without precedent. *See Seven-Sky* v. *Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011) ("The Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles"); *Thomas More Law Center* v. *Obama*, 651 F.3d 529, 567 (6th Cir. 2011) ("The mandate is a novel exercise of Commerce Clause power. No prior exercise of that power has required individuals to purchase a good or service."). *See also Virginia* v. *Sebelius*, 728 F. Supp. 2d 768, 775 (E.D. Va. 2010) ("[T]he Minimum Essential Coverage Provision appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark."); *Thomas More Law Center* v. *Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010) (noting that this is a case of first impression because "[t]he [Supreme] Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity").

As this Court has stated repeatedly, where there is an "utter lack" of statutes purporting to exercise the Commerce Power in a particular expansive manner for over 200 years, there is a strong presumption of the "*absence* of such power." *Printz* v. *United States*, 521 U.S. 898, 908 (1997) (emphasis in original); *id.* at 905 (if "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist"); *id.* at 907-08 ("the utter lack of statutes imposing obligations [like the one in *Printz*] (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power") (emphasis in original); *id.* at 918 ("almost two centuries of apparent congressional avoidance of the practice [at issue in *Printz*] tends to negate the existence of the congressional power asserted here").

B. Lacking Precedent for the Constitutional Authority They Claim Justifies the Individual Mandate, Petitioners Attempt to Elide the Distinction Between Regulating Voluntary Activities and Mandating that Inactive Individuals Engage in Activity in the First Place

Petitioners argue that "[t]here is no textual support in the Commerce Clause for respondents' 'inactivity' limitation . . . [because] to regulate can mean to require action." *Petitioners' Br.*, p. 48 (internal citations omitted). From its earliest Commerce Clause jurisprudence, however, this Court has "acknowledged

that limitations on the commerce power are inherent in the very language of the Commerce Clause." *Lopez,* 514 U.S. at 553 (citing *Gibbons,* 9 Wheat at 194-95). For example, "'[c]omprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.'" *Id.* (*quoting Gibbons,* 9 Wheat at 194). And "'enumeration presupposes something not enumerated.'" *Id.* (*quoting Gibbons,* 9 Wheat at 195).

Contrary to what the Petitioners assert, this Court has always understood the term "regulate" to presuppose the basic requirement of an *existing* commercial action or activity. In *Gibbons,* Chief Justice Marshall, writing for the Court, observed that "commerce" is something more than simply "traffic": "it is intercourse. . . . and is regulated by prescribing rules for carrying on that intercourse." 9 Wheat at 189-90; *accord Lopez,* 514 U.S. at 559 (emphasis added) ("Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce"); *Wickard,* 317 U.S. at 120 (emphasis added) (the proper focus is on "the actual effects of the *activity* in question upon interstate commerce"). If Petitioners' view were to prevail, and there were no "'inactivity' limitation," then the "first principles" of the Constitution – enumerated and

defined federal power – would be eviscerated. *Lopez,* 514 U.S. at 552.[4]

Petitioners also argue that "the Court has recognized that it is not appropriate to 'draw content-based or subject-matter distinctions, thus defining by semantic categories those *activities* that [are] commerce and those that [are] not." *Petitioners' Br.,* p. 49 (citing *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring) (emphasis added)). The issue here, however, is not one of semantics. It is whether the most basic limit on the scope of power afforded to the federal government under the Commerce Clause is going to remain. In their effort to remove that limit, Petitioners attempt to read Justice Kennedy's concurrence in *Lopez* to contradict the majority opinion itself, which Justice

[4] Indeed, as Judge Vinson explained below, at the time of the drafting of the Constitution, the contemporaneous understanding of "regulate" only allowed for the regulation, not compulsion, of economic activity. *See State of Florida* v. *U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1256, 1286 n.17 (N.D. Fla. 2011). Eighteenth-century dictionaries, like those of today, define "to regulate" in terms that presuppose the existence of a previous activity. A regulator comes to an existing phenomenon and organizes, limits, or encourages it; he or she does not trigger the underlying phenomenon itself. *See* 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "regulate" as "(1) to adjust by rule or method. (2) to direct."). *See also Merriam Webster's Collegiate Dictionary* 985 (10th ed. 1996) (defining "regulate" variously as "to govern or direct according to rule," "to bring under the control of law or constituted authority," "to make regulations for or concerning," "to bring order, method, or uniformity to," "to fix or adjust the time, amount, degree, or rate of").

Kennedy himself joined. In particular, *Lopez* still affirms the enumerated nature of the federal government's powers, 514 U.S. at 552, and the need to preserve the distinctions between state and federal governments, *id*. at 557. Indeed, the concurrence itself is devoted to reinforcing the Court's "duty to recognize meaningful limits on the commerce power of Congress," particularly in the context of the Commerce Clause. 514 U.S. at 580 (Kennedy, J., concurring). Insofar as Petitioners' arguments would undermine those limits, they are in conflict with the Kennedy concurrence as well as *Lopez* itself.[5]

Finally, petitioners misread *Wickard* v. *Filburn* in their effort to equate inactivity and activity. Petitioners allege that, just as Congress could use the Commerce Clause to "*forestall resort to the market,*" *Wickard*, 317 U.S. at 127 (emphasis added), the Individual Mandate "regulates the way in which the uninsured finance what they will consume in the

[5] Petitioners state that "[u]nder the Court's practical approach, it 'ha[s] applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion.'" *Petitioners' Br.*, p. 49 (*quoting Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 222 (1938)). They fail to note that, two sentences later, the *Consolidated* Court clarifies that "whether or not particular *action* in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion *as to be subject to federal control*, is left to be determined as individual cases arise." *Id*. (emphasis added, citations omitted). Thus the *Consolidated Edison* Court itself implicitly acknowledged the basic and still-important requirement of an activity.

market for health care services (in which they participate), requiring that they 'resort to the market' for insurance rather than attempt to 'meet [their] own needs' through attempted self-insurance." *Petitioners' Br.*, p. 50 (*quoting Wickard*, 317 U.S. at 127). What we are talking about here, however, is not "forestalling resort" to the health insurance "market," but rather the government mandating that its citizens *enter* the health insurance market by purchasing a government-prescribed insurance product when those citizens have decided not to do so. This is not just a different way of affecting the market; it is the polar opposite of what the Court endorsed in *Wickard*.

Petitioners ignore that market forestalling is premised upon there being activity to regulate. Because *Wickard* involved wheat quotas, the case was premised on the *activity* of growing wheat. *Wickard*, 317 U.S. at 113. In *Wickard*, Congress did not require all Americans, or even all farmers, to grow a prescribed amount (a quota) of wheat, instead only requiring that farmers who were growing wheat follow the quota.

A regulation more analogous to the Individual Mandate would be a "Wheat Mandate" that forced every American to buy a government-prescribed amount of wheat or pay a penalty. This would be a more effective means of raising wheat prices than the regulation at issue in *Wickard*. It also would share the features Petitioners rely upon to justify the health insurance mandate: the vast majority of Americans participate in the wheat market in some form,

and the gains to farmers from raised prices could allow them to more easily absorb the cost of fulfilling a moral obligation to provide food for the hungry. While that goal would be a salutary one, this Court has never approved of such intrusive and seemingly unlimited power for the federal government. Yet that is the import of the scope of power that the federal government proposes for itself in this case. In sum, rather than explain how their proposed construct of the Commerce Clause would leave any meaningful limits on the power of the federal government, Petitioners instead label the Respondents' arguments "formalistic" and "semantic." Yet try as they might, Petitioners cannot escape the Court's consistent focus on "the actual effects of the *activity* in question upon interstate commerce." *Wickard*, 317 U.S. at 120 (emphasis added). And petitioners do not point to a single Supreme Court case suggesting that the effects of such *inactivity* should be analyzed under the Commerce Clause because there simply are none.[6]

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[6] *See Seven-Sky* v. *Holder,* 661 F.3d 1, 14-15 (D.C. Cir. 2011) ("The Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles; indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause."); *United States HHS*, 648 F.3d at 1288 (Economic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality. Nor does our independent review reveal such a precedent.); *see also Gonzales* v. *Raich*, 545

(Continued on following page)

More fundamentally, without some "formalistic" – or in other words, *basic* – limitations upon the scope of the Commerce Clause, there would be no way to restrain the exercise of federal power. As this Court has explained in *New York* v. *United States*, formal limitations on federal power are essential to maintaining our Constitutional system of checks and balances and enumerated federal powers:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case

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U.S. 1, 37 (2005) (Congress "may regulate even noneconomic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce.") (emphasis added, citation omitted); *United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995) (Congress may regulate "channels of interstate commerce . . . instrumentalities of interstate commerce, or persons or things in interstate commerce . . . [and] *those activities* having a substantial relation to interstate commerce.") (emphasis added, internal citations omitted); *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981) ("The pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated *activity* affects interstate commerce.") (emphasis added, citations omitted); *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) (Allowing regulation of local and intrastate activity if that "activity," in the aggregate, exerts a "substantial economic effect" on the interstate economy); *United States* v. *Darby*, 312 U.S. 100, 119-20 (1941) (" . . . the power of Congress to regulate interstate commerce extends to the regulation through legislative action of *activities* intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.") (emphasis added).

> to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day
>
> . . . [A] judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse [than the crisis itself].

New York v. *United States*, 505 U.S. 144, 187-88 (1992).

In passing the PPACA, Congress fell prey to this temptation to concentrate power in the federal government – assuming the power to require the purchase of a particular product in a given market under the guise of regulating that market As will be shown, if this concentration of power is allowed to stand, there is no discernible area the federal government could not regulate.

C. Petitioners' Recharacterization of the Decision Not To Purchase Insurance as a Regulable "Activity" Fails Because It Would Destroy All Limits on the Commerce Power

Current Commerce Clause jurisprudence clearly states that a proper understanding of that power

must not vitiate the limited, enumerated powers granted the legislature by the Constitution or disregard the distinction between federal and state power. The *Lopez* Court indicated the lack of a limiting principle as a chief reason to reject the expansion of governmental power in that case:

> Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

514 U.S. at 564; *accord* 514 U.S. at 580 (Kennedy, J., concurring) (noting the Court's "duty to recognize meaningful limits on the commerce power of Congress"); *Morrison,* 529 U.S. at 613 (to allow regulation of non-economic activity at issue would enable the federal government to regulate almost any activity, including "family law and other areas of traditional state regulation."). But Petitioners' logic admits of no sustainable limits on the federal legislative power.

Petitioners' argument rests on blurring the lines between those who do and do not participate in the health insurance market. They argue not that the Individual Mandate affects only individuals who are active in the health insurance market – individuals who already are purchasing health insurance products – but that *most* affected individuals are somehow

"active" in the much broader, and undefined, market for health care. Petitioners make three points: (1) uninsured Americans *as a class* participate in the health care market, thus acknowledging that certain individuals within the class do not participate in the market; (2) individual Americans are *at risk of* needing health care, thus understanding that many individuals will not need health care; and (3) the *majority* of uninsured Americans are "not permanently out of the health care market," thus recognizing that many uninsured Americans are in fact permanently out of the health care market. *Petitioners' Br.*, 50-51. Throughout, Petitioners implicitly acknowledge that the Individual Mandate will inevitably regulate inactivity – the decision not to purchase an insurance product – even if it also regulates activity.

This analysis can easily be extended to almost any market, as (1) every market can be said to include in some sense those who do not formally "participate" in it, in that their inactivity in deciding not to purchase goods and services affects that market; (2) every individual can be said to be *at risk* of needing to purchase a particular product or service in a market; and (3) all markets could be said to include individuals who have not *permanently* left the market but have simply chosen at a given time not to purchase a product or service.

The *Lopez* Court clearly indicated that it would not extend Congress' considerable power under the Commerce Clause beyond its current reach, and that the distinction between general state police power

and enumerated federal power must be preserved. 514 U.S. at 567. Petitioners are nevertheless arguing for the most dramatic expansion of the Commerce Clause in history. If Congress may punish a decision to refrain from engaging in a private activity (namely, the purchase of health insurance) because the consequences of not engaging in it, in the aggregate, could substantially affect interstate commerce, then the Congress can require the purchase of virtually *anything*. For example, this same rationale would allow Congress to punish individuals for not purchasing a host of health-related products, such as vitamin supplements, the use of which could lower aggregate health costs. Indeed, it is hard to imagine any private decision not to purchase a particular good or service that does not have some economic impact when aggregated among millions of people. Under that rationale, the government could mandate any commercial activity.

The Court has warned of the risks that such an expanded Commerce Clause would pose to our system of dual sovereignty:

> the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is

> local and create a completely centralized government.'

Jones & Laughlin Steel, 301 U.S. 1 at 37 (*quoted in Lopez*, 514 U.S. at 557). Such an expansion would also produce a Commerce Clause jurisprudence unrecognizable to the Founders, and incompatible with their vision of a federal government of limited and enumerated powers. *See generally* THE FEDERALIST No. 45 (Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined" while "[t]hose which are to remain in the State Governments are numerous and indefinite.").

II. Petitioners' Arguments Would Impermissibly Convert the Commerce Power into a Federal Police Power, Eliminating the Distinction Between State and Federal Authority

A. This Court's Precedent has Foreclosed Conversion of the Commerce Power into a General Federal Police Power

As the *Lopez* Court repeatedly emphasized, the Commerce Clause must not be commandeered to create a federal police power. Indeed, creating a rampart against such an intrusion of federal power into the historic realm of state power was a major rationale of *Lopez*. *See*, *e.g.*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation"), *id*. at 567 ("To uphold the Government's

contentions here, we would have 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."), *id.* at 580 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.").

The boundary between the federal Commerce Clause power and the states' police powers, in fact, has been described as crucial to our constitutional structure. *See Morrison,* 529 U.S. at 616, n.7 ("As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); *id.* at n.8 (The contrary "argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."); *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985) ("The 'constitutionality mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'") (cited in *Morrison,* 529

U.S. 616, n.7). On "[t]he theory that two governments accord more liberty than one," the Constitution preserves "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States". *See Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). For that reason, the *Lopez* Court warned of extending the Commerce Clause so far as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *See id.* at 557. *See also Morrison*, 529 U.S. at 617-19 (explaining that "[t]he Constitution . . . withholds from Congress a plenary police power") (internal citations omitted).

This distinction between federal and state authority is crucial to protect the rights of individuals. The Court has explained that: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2010).

B. The Individual Mandate is a Classic Exercise of a General Police Power

Affirmative legal obligations on citizens characteristically arise under the state police power. For example, compulsory vaccination, *Jacobson* v. *Massachusetts*, 197 U.S. 11, 12, 24-25 (1905); drug

rehabilitation, *Robinson* v. *California*, 370 U.S. 660, 665 (1962); and the education of children, *cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972), have all been upheld on the basis of state police powers.

Besides the PPACA, the only other statutory mandate to purchase health insurance in America is also premised on state police power. Under Massachusetts law, most adult residents must obtain "creditable" health insurance coverage and are penalized for not doing so. *See* Mass. Gen. Laws ch. 111M, § 2 (2008). In designing the PPACA, Congress noted the "similar requirement" in Massachusetts and explicitly cited that measure as a model for PPACA's Individual Mandate. *See* PPACA § 1501(a)(2)(D) (finding that "[i]n Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.").

But the federal government does not possess the state police power upon which Massachusetts claimed to base its requirement to purchase health insurance. *See Fountas* v. *Comm'r of Dep't of Revenue*, 2009 WL 3792468 (Mass. Super. Ct. Feb. 6, 2009) (dismissing suit), *aff'd*, 922 N.E.2d 862 (Mass. App. Ct. 2009), *review denied*, 925 N.E.2d 865 (Mass. 2010)). Congress, by contrast, may only impose affirmative obligations on passive individuals when it does so based on an enumerated power. For example, the draft is authorized by Congress' power "to raise and support Armies." *See* U.S. CONST. art. I, § 8, cl. 12; *Selective*

Draft Law Cases, 245 U.S. 366, 383, 390 (1918). The Individual Mandate represents the first time Congress has ever tried to use the Commerce Clause to impose an affirmative obligation to purchase a product or service, or to participate in any kind of activity.

If Petitioners' view of the Commerce Clause is adopted here, not only will any meaningful limit on Congress' power under the Commerce Clause disappear, but so will any meaningful separation between federal and state power. As this Court warned in *Lopez*, such a ruling would "obliterate the distinction between what is national and what is local." 514 U.S. at 557. Indeed, a new federal police power would not merely mirror state police power – because of the Supremacy Clause, it would actually take it over piece by piece. But since our constitutional system is premised on a federal, not a unitary, structure as the arrangement most conducive to liberty, the arguments advanced by the Petitioners, and their inevitable consequences if adopted, should be rejected.

CONCLUSION

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

Respectfully submitted,

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February 13, 2012