No. 10-2388

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS MORE LAW CENTER, et al.,

Plaintiffs-Appellants,

V.

BARACK HUSSEIN OBAMA,
in his official capacity as President of the United States, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
Hon. George Caram Steeh
Civil Case No. 10-11156

BRIEF *AMICI CURIAE* OF THE CATO INSTITUTE AND PROF. RANDY E. BARNETT IN SUPPORT OF APPELLANTS

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CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Sixth Circuit Local Rule 26.1(a), the Cato Institute declares that it is nonprofit public policy research foundation dedicated in part to enforcing the constitutional limits on government and protecting the rights and liberties secured thereby. Cato states that it has no parent corporation. Cato has issued only a handful of shares that are privately held by its directors.

Prof. Randy E. Barnett is an individual to whom the corporate disclosure requirement is not applicable.

No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato or Prof. Barnett.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*. It also files amicus briefs with the courts, including in cases focusing on the Commerce Clause and the Necessary and Proper Clause such as *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Comstock*, 130 S. Ct. 1949 (2010). The present case centrally concerns Cato because it represents the federal government's most egregious attempt to exceed its constitutional powers.

Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center. Prof. Barnett has taught constitutional law, contracts, and criminal law, among other subjects, and has published more than 90 articles and reviews, as well as eight books. His book, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004), and other scholarship concerns the original meaning of the Commerce and Necessary and Proper Clauses

[1] Pursuant to Rule Fed. R. App. P. 29, both the Plaintiffs and the Defendants, through their respective counsel, have consented to the filing of this brief.

and their relationship to the powers enumerated in the Constitution. His constitutional law casebook, *Constitutional Law: Cases in Context* (Aspen 2008), is widely used in law schools throughout the country. In 2004 he argued *Gonzales v. Raich* in the Supreme Court. In 2008, he was awarded a Guggenheim Fellowship in Constitutional Studies.

SUMMARY OF ARGUMENT

The individual mandate goes beyond Congress's power to regulate interstate commerce under existing doctrine. The outermost bounds of the Supreme Court's Commerce Clause jurisprudence—the "substantial effects doctrine"—prevent Congress from reaching intrastate *non-economic* activity regardless of whether it substantially affects interstate commerce. Nor under existing law can Congress reach *inactivity* even if it purports to act pursuant to a broader regulatory scheme.

That is, as the court below recognized, "in every Commerce Clause case presented thus far, there has been some sort of activity. In this regard, the Health Care Reform Act arguably presents an issue of first impression." *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882, 893 (E.D. Mich. 2010). What Congress is attempting to do here is quite literally unprecedented.

"The government has never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The*

Budgetary Treatment of an Individual Mandate to Buy Health Insurance 1 (1994). Nor has it ever said that every man and woman faces a civil penalty for declining to participate in the marketplace. And never before have courts had to consider such a breathtaking assertion of raw power under the Commerce Clause. Even in *Wickard v. Filburn*, 317 U.S. 11 (1942), the federal government claimed "merely" the power to regulate what farmers grew, not to *mandate* that people become farmers, much less to force people to purchase farm products. Even if not purchasing health insurance is considered an "economic activity"—which of course would mean that every aspect of human life is economic activity—there is no legal basis for Congress to require individuals to enter the marketplace to buy a particular good or service.

Amici fully endorse the arguments offered in the appellants' brief. We offer this brief to highlight the limits on federal power under the Commerce Clause and Necessary and Proper Clause and to underscore the necessity of preserving those limits in the light of constitutional text, structure, and history.

ARGUMENT

I. The Mandate is Unconstitutional Under the "Substantial Effects" Doctrine That Defines the Scope of the Necessary and Proper Clause in the Context of the Commerce Power

Since the New Deal, the Supreme Court has asked whether a particular "economic activity substantially affects interstate commerce" when considering whether it falls under Congress's Commerce Clause power. *Gonzalez v. Raich*, 545 U.S. 1, 25 (2005) (quoting *United States v. Morrison*, 529 U.S. 598, 610 (2000) (in turn quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995)). The significant New Deal cases, however, found the authority for the "substantial effects doctrine" not in the inherent power of the Commerce Clause, but in its execution via the Necessary and Proper Clause. Although prevailing legal convention describes the New Deal cases as expanding the definition of "commerce," a closer examination of these decisions shows that the definition of "commerce" remained unchanged. The Court instead asked whether federal regulation of the activity in question is a necessary and proper means for exercising the power to regulate interstate commerce because the activity substantially affects that commerce. Beyond that point Congress has never been able go.

In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court considered the power of Congress to "prohibit the employment of workmen in the production of goods 'for interstate commerce' at other than prescribed wages and

hours." *Id.* at 105. Rather than stretching the definition of "commerce," the Court focused on how congressional power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.* The authority cited for this proposition did not come from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)—the Commerce Clause case which the Court had already cited throughout its opinion—but instead from the foundational Necessary and Proper Clause case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

The Court in *Darby* makes it apparent that the substantial effects doctrine has always rested on the Necessary and Proper Clause. The "appropriate means to the attainment of a legitimate end" language explicitly references Chief Justice Marshall's seminal explanation of the Necessary and Proper Clause: "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." *Id.* at 421 (emphasis added). Moreover, the phrase in *Darby*, "the exercise of the granted power," 312 U.S. at 105, evokes the language of the Clause itself: "carries into execution the foregoing powers." U.S. Const. art I, § 8, cl. 18.

A year after *Darby*, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court continued this reasoning—that "commerce" was not being redefined but rather the challenged measures were a necessary and proper means for regulating commerce as historically understood. Like *Darby*, *Wickard* is explicit in its reliance on the Necessary and Proper Clause, citing *McCulloch*, *id.* at 130, n.29, as authority for congressional power—even if Roscoe Filburn's personal production of wheat "may not be regarded as commerce." *Id.* at 125. Thus, contrary to the conventional academic view, *Wickard* did not expand the Commerce Clause to include the power to regulate intrastate activity that, when aggregated, substantially affects interstate commerce. "Instead, *Wickard* actually stands for the proposition that this intrastate activity can be regulated because the failure to do so would impede the government's ability to regulate the interstate price of wheat by restricting supply." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, N.Y.U. J.L.L. (forthcoming), *available at* http://ssrn.com/abstract=1680392.

Fast forward 50 years, when the Court clarified the substantial effects doctrine by confining congressional power under the Commerce and Necessary and Proper Clause to the regulation of intrastate *economic* activity. Again, as in *Wickard* and *Darby*, the Court did not redefine "commerce" but only refined its

analysis of whether the means adopted by Congress were necessary and proper to the end of regulating commerce.

In *United States v. Lopez*, the Court found that "[e]ven *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not." 514 U.S. at 560. Five years later, in *United States v. Morrison*, the Court held that the gender-motivated violence regulated by the Violence Against Women Act was not itself economic activity and thus had only an "indirect and remote" or "attenuated" effect on interstate commerce. 529 U.S. at 608 (quoting *Lopez*, 514 U.S. at 556-57 (in turn quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))), 615.

Chief Justice Rehnquist described the limits of Congress's power as follows: "Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560 (emphasis added). Conversely, non-economic activity cannot be regulated merely because it has "substantial effects on employment, production, transit, or consumption," or indirectly affects interstate commerce through a "but-for causal chain." *Morrison*, 529 U.S. at 615. That is because the subject of regulation must have a "close" qualitative "relation to interstate commerce," not merely a substantial "quantitative" impact on the national economy. *NLRB*, 301 U.S. at 37.

The distinction between economic and non-economic activity allowed the Court to determine when it was truly necessary to regulate intrastate commerce without engaging in protracted, and arguably impossible, attempts to evaluate the "more or less necessity or utility" of a measure. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), in Legislative and Documentary History of the Bank of the United States 98 (H. St. Clair & D.A. Hall eds., reprinted Augustus M. Kelley 1967) (1832). This Necessary and Proper doctrine limits congressional power to regulating intrastate economic activity because this category of activity is closely connected to interstate commerce, without recognizing an implied federal power that would amount to a federal police power that the Supreme Court has always denied existed. *See*, *e.g.*, *Lopez*, 514 U.S. at 567. Moreover, a power to regulate intrastate economic activity that has a substantial affect on interstate commerce is not so broad as to obstruct or supplant the states' police powers.

In other words, to preserve the constitutional scheme of limited and enumerated powers, the Court drew a judicially administrable line beyond which Congress could not go in enacting "necessary and proper" means to execute its power to regulate interstate commerce. The "substantial effects" doctrine, as limited in *Lopez* and *Morrison*, thus established the outer doctrinal bounds of "necessity" under the Necessary and Proper Clause.

Authority for this view can be found in Chief Justice Marshall's subsequent defense of his *McCulloch* opinion. Writing as "A Friend of the Constitution," Marshall explained that the constitutionality of congressional acts depend "on their being the natural direct and appropriate means, or the known and usual means, for the execution of a given power." *John Marshall's Defense of McCulloch v. Maryland* 186 (Gerald Gunter ed., Stanford University Press 1969) (from essay of July 5, 1819). *Lopez* and *Morrison* employ that same logic: Only the regulation of intrastate *economic* activity qualifies as "natural direct and appropriate means, or the known and usual means" of executing the commerce power.

Most recently, in *Gonzales v. Raich*, the Court found the cultivation of marijuana to be an economic activity that Congress could prohibit as a necessary and proper exercise of its commerce power. 545 U.S. at 22. *Raich* explicitly adhered to the economic/non-economic distinction set out in *Lopez* and *Morrison*. As Justice Stevens wrote for the majority, "Our case law firmly establishes Congress's power to regulate purely local activities that are part of an *economic* 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added). The majority in *Raich*, therefore, reaffirmed that the scope of Congress's power under the Necessary and Proper Clause to execute its commerce power is limited to reaching economic activity.

Raich also rejected the government's contention that it was Angel Raich's or Roscoe Filburn's non-purchase of a commodity traded interstate that brought their personal cultivation under congressional power. *See* Barnett, *supra*, at 18-19. Instead, Justice Stevens invoked the Webster's Dictionary definition of "economics"—"the production, distribution, and consumption of commodities," *Raich*, 545 U.S. at 25—and thus refused to adopt the government's sweeping theory here that non-participation in the marketplace was itself economic activity.

As Professor Randy Beck has explained, "Given the close relationship between intrastate and interstate economic activity, a statute regulating local economic conduct will usually be calculated to accomplish an end legitimately encompassed within the plenary congressional authority over interstate commerce." J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 625. In short, regulating intrastate *economic* activity can be a "necessary" means of regulating interstate commerce as that term is understood under the Necessary and Proper Clause. The obvious corollary is that regulating non-economic activity cannot be "necessary," regardless of its effect on interstate commerce. And a power to regulate inactivity is even more remote from Congress's power over interstate commerce.

In *Raich*, the Court identified the doctrinal distinction between economic and non-economic activity by looking back at all the substantial effects cases it had

previously decided and found that "the pattern is clear." *Lopez*, 514 U.S. at 560. Similarly, the leading Commerce Clause and Necessary and Proper Clause precedents establish a doctrinal line between activity and inactivity, even if that line has heretofore escaped articulation because no precedent has presented the distinction as sharply as this case. Just as Chief Justice Rehnquist did in *Lopez* regarding the economic/non-economic line, therefore, we can examine existing case law and find that the individual mandate is unsustainable under existing interpretations of congressional power.

In *Wickard*, Roscoe Filburn had grown wheat and thus with his own actions inserted himself into the realm of economic activity. *Wickard*, 317 U.S. at 114-15. In *NLRB*, the Jones & Laughlin Steel Corporation was subject to regulatory schemes because it engaged in the business of steelmaking. *NLRB*, 301 U.S. at 26. The Civil Rights Cases concerned parties that operated a restaurant and a hotel, respectively. *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). And finally, in *Raich*, Diane Monson and Angel Raich grew, processed, and consumed medicinal marijuana. *Raich*, 545 U.S. at 7.

All these cases fall into two general categories. *Raich*, 545 U.S. at 35-38 (Scalia, J., concurring) (discussing the "two general circumstances" in which "the regulation of intrastate activities may be necessary to and proper for the regulation

of interstate commerce"—and limits thereto). First, if someone affirmatively places himself into the economic realm by starting a business or participating in agriculture, manufacturing, or another commercial endeavor, Congress can regulate those activities as a necessary and proper exercise of its power to regulate interstate commerce. This regulation may mandate certain activities—for example, recordkeeping, posting workplace regulations, and providing fire extinguishers—but it never requires someone to start the business or buy a product in the first place. The second category, articulated in *Raich*, concerns Congress's regulatory attempts to narrow a particular type of commerce, such as that involving drugs. This regulation can require individuals to stop engaging in certain activities as a necessary and proper means of regulating (or, in this case, limiting) interstate commerce. In other words, Congress can *regulate* or perhaps even *prohibit* economic acts that substantially affect interstate commerce, but it cannot *force* people to undertake such acts—not even ones that, if voluntarily undertaken, would have been subject to regulation.

With the individual mandate, Congress addressed the requirement that it confine itself to regulating economic activity by redefining the word "activity" to include "decisions" or even "non-actions." Yet the vital limiting principles on federal power cannot be brushed away by recourse to the admitted importance of reforming health care or the cost-shifting aspects of that market. There is no

"health care is different" constitutional exemption—and indeed Congress could have reformed the health care system in any number of ways that may have been better or worse as a matter of policy but would have been legally unassailable. The reason for this lawsuit and dozens of others around the country, however, is that the health insurance mandate is supported by no Supreme Court precedent. As one district court recently said while striking down the individual mandate, "Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some sort of action, transaction, or deed placed in motion by an individual or legal entity." *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH, 2010 U.S. Dist. LEXIS 130814, at *37-38 (E.D. Va. Dec. 13, 2010).

If allowed to stand, the individual mandate would collapse the traditional distinction between acts and omissions by characterizing a failure to act as a "decision" not to act—thereby transforming inactivity into activity by linguistic alchemy. It would also then collapse the distinction between economic and non-economic activity by characterizing an activity as "economic" not based on the type of activity it is but on whether it has any economic effect. Since any activity, in the aggregate, can be said to have an economic effect, the line the Court drew between activity that Congress can reach and that which is outside its powers would be destroyed. The government's novel theory would end our scheme of limited and enumerated powers, as well as erase the long-held constitutional

distinction "between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68 (citing *NLRB*, 301 U.S. at 30). All of this transgresses the current state of Commerce and Necessary and Proper Clause doctrine.

II. The Individual Mandate Cannot be Justified as an "Essential Part of a Broader Regulatory Scheme" because Congress Cannot Regulate Inactivity

Unable to directly justify the individual mandate under existing Commerce Clause and Necessary and Proper Clause doctrine (let alone the fallback taxing power theories that we do not confront here), the government has resorted to a new theory: that the Necessary and Proper Clause authorizes Congress to mandate economic activity when doing so is an essential part of a broader regulatory scheme. That is, while not itself a regulation of interstate commerce, nor a regulation of intrastate economic activity, nor even a regulation of intrastate noneconomic activity, an economic mandate is a necessary and proper means of exercising the lawful ends of regulating the interstate health insurance industry.

The government's proposed theory that Congress may mandate economic activity rests on a sentence of *dictum* from *Lopez* and a concurring opinion by Justice Scalia in *Raich* that identify circumstances when Congress may reach wholly *intrastate noneconomic activity*. Even if such a doctrine is someday accepted by a majority of the Supreme Court, these two sources speak only of the regulation of *activity* not inactivity. Indeed, in his opinion in *Raich*, Justice Scalia

uses the word "activity" or "activities" 42 times. *See* Jason Mazzone, *Can Congress Force You to Be Healthy*? N.Y. Times, Dec. 16, 2010, at A39.

In *Lopez*, the Court referred to reaching intrastate noneconomic activity when doing so is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." 514 U.S. at 561 (emphasis added). In *Raich*, Justice Scalia proposed that "Congress may regulate even noneconomic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce." 545 U.S. at 37 (emphasis added). Neither formulation extends to the regulation of inactivity and there is good reason to doubt that he would ever extend his proposed doctrine so far. For Scalia is the Justice who referred to the Necessary and Proper Clause as "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997) (Scalia, J.).

If and when a majority of the Court does accept Justice Scalia's "essential to a broader regulatory scheme" rationale for reaching intrastate noneconomic activity, some doctrine limiting "necessity" under this theory will be required. The distinction between economic and noneconomic activity would obviously provide no limit to this doctrine. The whole purpose for his concurring opinion was to question the usefulness of that distinction in dealing with the problems posed by *Raich*. Without some judicially administrable limiting doctrine, however, the fear

expressed in *Lopez* and *Morrison* that Congress would then possess a general police power would be realized.

The distinction between activity and inactivity provides the same type of judicially administrable limiting doctrine for what is "necessary" to execute the commerce power under an "essential to a broader regulatory scheme" theory as the economic/non-economic distinction provides for the substantial effects doctrine. Now that Congress has, for the first time, sought to reach inactivity, all the Supreme Court need do is look back at its previous substantial effects doctrine cases, as it did in *Lopez*, to see that every case decided until now involved the regulation of activity, not inactivity.

Limiting Congress to regulating or prohibiting activity under both the "substantial effects" and the "essential to a broader regulatory scheme" doctrines would serve the same purpose as the economic/non-economic distinction. Such a formal limitation would help assure that exercises of the Necessary and Proper Clause to execute the commerce power would be truly incidental to that power and not remote. Doing nothing at all involves not entering into a literally infinite set of economic transactions. Giving a discretionary power over this set to Congress when it deems it essential to a regulation of interstate commerce would give Congress a plenary and unlimited police power over inaction that is typically far remote from interstate commerce. However imperfect, some such line must be

drawn to preserve Article I's scheme of limited and enumerated powers. Because accepting the government's theory in this case would effectively demolish that scheme, the government's theory is unconstitutional.

And the government implicitly acknowledged that problem in its previous briefs, in attempting to distinguish the health insurance business as "unique" in a variety of respects and thereby appear to be providing a limiting principle. Defs.' Response to Pls'. Mot. Prelim. Inj. and Br. Supp. at 24 n.10, *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010) (No. 10-11156); Defs.' Surreply to Pls.' Mot. Prelim. Inj. and Br. Supp. at 11-12, *Thomas More Law Center v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010) (No. 10-11156). But examining the substance of the law in question is precisely the sort of inquiry into the "more or less necessity" of a measure that has been rejected by the Supreme Court since *McCulloch*. Once the power to mandate economic activity is recognized here, the Court will refuse to examine future mandates on a case-by-case basis to see if they are factually similar to the health insurance mandate. Therefore, if this mandate is allowed to stand, Congress will henceforth have the discretionary power to impose mandates at its discretion regardless of the "uniqueness" of the market in question. The government's attempt to limit the doctrine by its factual assertions is chimerical.

III. The Individual Mandate Constitutes a "Commandeering of the People" That Is Not "Proper" Under the Necessary and Proper Clause

The Supreme Court, in two novel cases presenting theretofore unprecedented assertions of power under the Commerce Clause, has stated that Congress cannot use this power to mandate or "commandeer" state legislatures and executive officers. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). As Justice Scalia explained, doing so would be "fundamentally incompatible with our constitutional system of dual sovereignty," and therefore improper under our federalist system. *Printz*, 521 U.S. at 935. In *Printz*, Justice Scalia pointed to the Tenth Amendment as the source of "residual state sovereignty" in a constitutional system that confers upon Congress "not all governmental powers, but only discrete, enumerated ones." *Id.* at 919 (citing U.S. Const. amend. X). He then elaborated that the mandate at issue, even if necessary, could not be justified under the Necessary and Proper Clause: "When a 'la[w]…for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in" the Tenth Amendment and other constitutional provisions, "it is not a 'La[w] . . . *proper* for carrying into execution the Commerce Clause.'" *Id.* at 923-24 (quoting U.S. Const. art. I, § 8, cl. 18) (emphasis added).

Just as mandating that states take action is improper commandeering, so too is mandating that individual citizens enter into transactions with private companies

an improper commandeering of the people. *See generally*, Barnett, *supra*, at 27-42. The Tenth Amendment reads: "The powers not delegated by the Constitution to the United States, nor prohibited by it to the states, are reserved to the states respectively, *or to the people.*" U.S. Const. amend. X (emphasis added). In this way, the text of the Tenth Amendment protects not just state sovereignty, but also popular sovereignty.

Chief Justice John Jay affirmed the priority of popular sovereignty in the first great constitutional case before the Supreme Court, *Chisholm v. Georgia*, noting that the "sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each state," as the people were "truly the sovereigns of the country." 2 U.S. (Dall.) 419, 471-72 (1793). Fellow Founder James Wilson agreed, recognizing that sovereignty starts with the individual citizen: "If one free man, *an original sovereign*, may do all this; why may not an aggregate of free men, *a collection of original sovereigns*, do this likewise?" *Id.* at 456 (emphasis added). Although the Eleventh Amendment reversed the outcome of *Chisholm* and the Supreme Court has interpreted that Amendment as establishing state sovereignty, the Court has never repudiated the priority of popular sovereignty. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("in our system, while sovereign powers are delegated to the agencies of

government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.").

Just as the Constitution disallows the "commandeering" of states as a means of regulating interstate commerce, thus so too does it bar a commandeering of the people for this purpose. Various express provisions of the Constitution reflect this anti-commandeering principle. For example, persons may not be mandated to quarter soldiers in their homes in time of peace, U.S. Const. amend. III, to testify against themselves, *id*., amend. V, or to labor for another, *id*., amend. XIII.

What very few mandates are imposed on the people by the federal government all rest on the fundamental pre-existing duties that citizens owe that government. Such are the duties to register for the draft and serve in the armed forces if called, to sit on a federal jury, and to file a tax return. *See*, *e.g.*, *Selective Draft Law Cases*, 245 U.S. 366, 378 (1918) (relying on the "supreme and noble duty of contributing to the defense of the rights and honor of the nation" to reject a claim founded on the Thirteenth Amendment). In the United States, there is not even a duty to vote. So there is certainly no comparable pre-existing "supreme and noble duty" to engage in economic activity when doing so is convenient to the regulation of interstate commerce.

There are also pragmatic reasons to believe that the individual mandate is not "proper." In *New York v. United States*, Justice O'Connor explained that mandates on states are improper because, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. 144, 169 (1992). That proposition applies to the commandeering of individuals as well: the individual mandate has allowed Congress and the president to escape political accountability for increasing taxes on persons making less than $250,000 per year by compelling them to make payments directly to private companies. It is the evasion of that accountability that explains why the mandate was formulated as a regulatory "requirement" enforced by a monetary "penalty."

The individual mandate crosses a fundamental line between limited constitutional government and limitless power cabined only by the vagaries of political will—which is to say, not cabined at all. If the word "proper" is to be more than dead letter, it at least means that acts which destroy the very purpose of Article I—to enumerate and therefore limit the powers of Congress—are improper. If the federal power to enact "economic mandates" were upheld here, Congress would be free to require *anything* of the citizenry so long as it was in the name of a comprehensive regulatory plan. Unsupported by any fundamental, preexisting, or

traditional duty of citizenship, imposing "economic mandates" on the people is improper, both in the lay and constitutional senses of that word. Allowing Congress to exercise such power would turn "citizens" into "subjects."

IV. The Inactivity/Activity Distinction, Like the Economic/Non-Economic Distinction, Provides a Judicially Administrable Line By Which Some Laws Are Deemed Too Remote From the Commerce Power—and Thus Resists Making Congress's Enumerated Powers into a Plenary Police Power

The analysis offered above demonstrates both the extensions and limits that the Necessary and Proper Clause creates when applied to the Commerce Clause. The limits to the Necessary and Proper Clause, most recently expressed in *Lopez* and *Morrison*, are part of a long tradition in which judicially administrable limits are given to the Clause in order to maintain limited and enumerated powers of Congress within a federal system.

A. The Supreme Court Has Always Resisted Any Ruling that Would Give Congress Plenary Power

Although the history of Commerce Clause and Necessary and Proper Clause jurisprudence does not provide a consistent interpretation of the clauses, there is one rule that has remained constant throughout: "we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quire clear that there are real limits to federal power." *Lopez*, 514 U.S. at 584 (Thomas, J., concurring). These

limits to federal power do not solely derive from the political process. From *McCulloch* onward, the Commerce and Necessary and Proper Clauses have never been held non-justiciable and left completely to congressional discretion. The inquiry begins with the determination that an activity "fits somewhere along a causal chain of federal powers," but does not end there. *United States v. Comstock*, 130 S. Ct. 1949, 1966 (2010) (Kennedy, J., concurring) (quoting *Lopez*, 514 U.S. at 566). "The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another ad infinitum in a veritable game of ''this is the house that Jack built.''" *Id.* (quoting Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 The Papers of Thomas Jefferson 547 (B. Oberg ed. 2004)).[2]

It is worth asking, therefore, whether some test can be devised to distinguish a constitutionally permissible form of mandated activity from a constitutionally impermissible form. In other words, would the health insurance mandate, if allowed to stand, permit any future limitation on congressional power?

The government argues, essentially, that not purchasing health care is a particularly pernicious type of inactivity upon which the entire fee-shifting edifice

[2] Kennedy also here advocated enhanced scrutiny, beyond a mere rational-basis test, of the connection between means and ends when considering claims of power under the Commerce Clause. *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). This clarification strongly signals that his joining the majority in *Raich* did not represent an abandonment of his prior stance in *Lopez*. *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring).

of providing health care is built. Thus, in the aggregate, the effects of allowing individuals to opt out of the system are particularly dire.

Such logic may be sound given the complex legislation that Congress chose to pass, but if so then it is undoubtedly true of many if not all markets. There are an infinite number of things that everyone is not doing right now, many of which might have an effect on health. Making everyone do those things—from purchasing orthopedic shoes to joining a gym—would undoubtedly have substantial effects on interstate commerce. Indeed, diet and exercise have a greater effect on health care outcomes than ownership of a health insurance policy. *See, e.g.*, Barak D. Richman, *Behavioral Economics and Health Policy: Understanding Medicaid's Failure*, 90 Cornell L. Rev. 705, 718 (citing Victor R. Fuchs, Who Shall Live? Health, Economics, and Social Choice at 54-55 (1998)), 725 (2005).

If upheld, therefore, the individual mandate would usher in a new era of constitutional jurisprudence in which either (a) courts review every congressional action to determine whether a particular law is more or less necessary and proper, an inquiry which it has traditionally rejected because it would encroach upon Congress's authority to make policy decisions for the areas over which its power duly extends; or, (b) there are no longer any checks on congressional power outside the political process and claims under the Necessary and Proper Clause become non-justiciable "political questions."

Either choice would fly in the face of constitutional precedent, history, and philosophy—the letter and spirit of our founding document. *McCulloch*, 17 U.S. (4 Wheat.) at 421. In order to maintain meaningful and justiciable limits on federal power, the Supreme Court has always articulated limiting principles. With the individual mandate, Congress has not only bootstrapped its own power—by creating a scheme that requires an unprecedented economic mandate—it has used that same strap to pull every American from passive inactivity into some form of action. As the Court has expressed time and again, the Constitution "does not tolerate reasoning that would 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Raich*, 545 U.S. at 45 (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 567).

B. A Judicially Administrable Limiting Principle on Congressional Power Has Always Been An Essential Part of Commerce Clause and Necessary and Proper Clause Jurisprudence

The demand for an articulable limit to federal power is not a mere linguistic contrivance or a plaintive recourse to the nullification and "states rights" theories obviated by the Civil War. Rather, such limiting principles are essential to the very concept of federalism. In an integrated national system in which goods, ideas, and people flow freely across state borders, *anything* can be realistically construed to have an effect on interstate commerce. And, in the aggregate, those effects

could certainly be substantial. Arguments based on these effects, such as the government's here, have salience precisely because such effects *do exist*.

Given the obviousness of such effects to both the Framers and modern interpreters, and given the concept of an enumerated and limited federal government, the mere substantial effects of an intrastate economic activity cannot be, and is not, the only test for constitutionality. The need to be able to articulate a limiting principle is as much an aspect of Necessary and Proper Clause jurisprudence as those principles that have enlarged the scope of congressional power. If we only ask how a particular provision augments congressional power and not how it limits that same power, then we are examining only half of one of the foundational tenets in constitutional jurisprudence. Cf. The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

Nobody disputes that the market for health care is an important one and that people's decisions on whether to buy health insurance (and if so in what form) affects the economy. Instead the issue is how the document that is the font of all of Congress's legitimate authority limits federal power. The Constitution does so, among other structural mechanisms, by granting Congress a finite set of

enumerated powers. As Chief Justice Marshall wrote in the foundational Commerce Clause case of *Gibbons v. Ogden*, "The enumeration presupposes something not enumerated." 22 U.S. (9 Wheat.) at 195.

During oral arguments in *Gibbons*, Daniel Webster conceded that "the words used in the constitution, 'to regulate commerce,' are so very general and extensive, that they might be construed to cover a vast field of legislation," and thus the words "must have a reasonable construction, and the power should be considered as exclusively vested in Congress so far, and so far only, as the nature of the power requires." *Gibbons*, 22 U.S. (9 Wheat.) at 14.

In the context of the Commerce Clause, the Framers adopted the limiting principle that Congress' regulatory authority reached only physical items that crossed state lines and did not reach local agriculture and manufacture. *See Lopez*, 514 U.S. at 585-87 (Thomas, J., concurring); Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003). They did so "despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce." *Lopez*, 514 U.S. at 591 (Thomas, J., concurring).

In the context of the Necessary and Proper Clause executing that same commerce power, *McCulloch v. Maryland* provided a limiting principle distinct

from the "more or less utility" standard disfavored by the Framers for unduly interfering with congressional discretion over policy matters. During oral arguments in *McCulloch*, the attorney for Maryland offered a fascinating argument that thematically mirrors the one now offered by the government. Needing to overcome the clear problem that the challenged bank of the United States was the second such bank—with the first having been presumptively constitutional—Joseph Hopkinson argued that a national bank, once a necessity, was no longer needed: "a power growing out of a necessity which may not be permanent, may also not be permanent. It has relation to circumstances which change; in a state of things which may exist at one period, and not at another . . . [W]hatever might have been the truth and force of the bank argument in 1791, they were wholly wanting in 1816." *McCulloch*, 17 U.S. (4 Wheat.) at 333. In contrast, Chief Justice Marshall in both *McCulloch* and his defense of that case as "A Friend to the Constitution" proposed a means/end test that did not require judges to evaluate a given law's relative necessity or utility.

By claiming that "health care is special" and that the unique features of the health care market justify the individual mandate, however, the government asks courts to weigh the "more or less necessity or utility" of the new health care law. In doing so, it ignores the unprecedented nature of the individual mandate and, instead, offers a long-discarded method of constitutional interpretation.

Striking down the individual mandate requires no such tortuous calculations, and it would affect no other law ever enacted by Congress. The Court in *McCulloch* rightly rejected Maryland's arguments and chose, instead, to fashion a test that respected congressional prerogative while drawing a judicially administrable line beyond which congressional power did not reach. Then, as now, "the task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis)." *Raich*, 545 U.S at 47-48 (O'Connor, J., dissenting).

CONCLUSION

For the first time in American history, the federal government has attempted to "commandeer the people" by imposing on them an "economic mandate." Such economic mandates cannot be justified by existing Supreme Court doctrines defining and limiting the powers of Congress. Upholding the power to impose economic mandates "would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution limits federal power." Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded In Law—And Pose Serious Challenges*, 29 Health Affairs 1229, 1232 (June 2010). It would turn citizens into subjects.

As the first court considering a constitutional challenge to the individual mandate recognized last summer, "[n]ever before has the Commerce Clause and the associated Necessary and Proper Clause been extended this far." *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 612 (E.D. Va. 2010). Only the Supreme Court is empowered to reconsider the outer bounds of federal power under the Commerce and Necessary and Proper Clauses, and the district court erred in going beyond existing doctrinal limits in this area. Accordingly, *amici* respectfully request this Court to reverse the district court and remand the case for further proceedings.

Respectfully submitted this 22nd day of December, 2010,

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/s/

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Dated: December 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2010, I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing (NEF) to the appropriate counsel.

/s/

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