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April 11, 2011

The Honorable Robert N. Mayer
Senate President Pro Tem
Missouri State Capitol, Room 326
Jefferson City, MO 65101

The Honorable Steven D. Tilley
Speaker of the House of Representatives
Missouri State Capitol, Room 308A
Jefferson City, MO 65101

Dear President Pro Tem Mayer & Speaker Tilley:

Attached is a copy of the state of Missouri's amicus brief filed this morning, Monday, April 11, in the United States Court of Appeals for the 11th Circuit in the matter *State of Florida, et al., v. United States Department of Health and Human Services, et al*.

On March 23, 2010, the Patient Protection and Affordable Care Act ("ACA") was signed into law. Among its numerous provisions, the ACA mandates that an applicable individual shall maintain "minimum essential [healthcare] coverage" or pay a penalty. 26 U.S.C. § 5000A.

On August 3, 2010, the people of the state of Missouri overwhelmingly passed, by referendum, "Proposition C." Mo.Rev.Stat. § 1.330. Proposition C was passed in response to the ACA and prohibits compelling "any person, employer, or health care provider to participate in any health care system." Id. § 1.330.1.

The ACA and Missouri state law are, therefore, in conflict.

On January 11, 2011, the Missouri House of Representatives adopted by a vote of 115 to 46 House Resolution No. 39, calling on the Office of the Missouri Attorney General to "[challenge] the constitutionality and validity of the Patient Protection and Affordable Care Act…and to aggressively defend the validity of Proposition C…" On January 19, 2011, the Missouri Senate adopted by voice vote Senate Resolution No. 27, the language of which is nearly identical to House Resolution No. 39.

This office is sworn to uphold the Constitution and the laws of the state of Missouri, of which Proposition C is unquestionably a part. The resolutions passed by the General Assembly

are non-binding on this office, but they are impactful, as they give voice to the political will of Missourians.

This office has analyzed the constitutional questions posed by the ACA, and has submitted an amicus brief in the 11th Circuit that focuses on two issues:

1. Whether forcing individuals, who are not actors in interstate commerce and who have not chosen to enter the stream of commerce, to obtain health insurance is within the enumerated authority of Congress under the Commerce Clause.
2. Whether the provisions of the ACA which are capable of operating independently in a manner consistent with the intent of Congress should be severed.

Although these are complex questions on which many scholars, judges, and interested parties sincerely disagree, it is the opinion of this office that the Congress reached beyond current Commerce Clause precedent when it regulated that individuals maintain "minimum essential [healthcare] coverage" or pay a penalty. Therefore, it follows that the federal courts, in reviewing this aspect of the law, must either expand Congress' Commerce Clause authority, justify the provision on alternate constitutional grounds, or strike down the individual mandate.

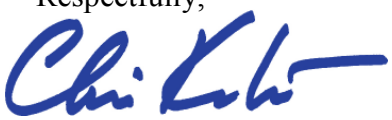
It is also the legal view of this office that the individual mandate is severable from the ACA and that those provisions of the bill not clearly dependant upon the mandate may stand.

Our argument against the expansion of Congress' Commerce Clause authority is emphatically not based on any opposition to the expansion of health coverage for uninsured Americans. To the contrary, I favor the expansion of health coverage.

Nonetheless, the Attorney General's highest duty is to the Constitution and to the law, and not to a political outcome. In preparing this brief, we have tried our best to serve that duty.

I hope you will take the time to read it.

Respectfully,



CHRIS KOSTER
Attorney General

No. 11-11021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, ET AL.,

***Plaintiffs-Appellees*,**

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, ET AL.,

***Defendants-Appellants*.**

Appeal from the United States District Court for the Northern District of Florida, the Honorable Roger Vinson

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BRIEF OF THE MISSOURI ATTORNEY GENERAL AS *AMICUS CURIAE*

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CERTIFICATE OF INTERESTED PERSONS

Defendants-Appellants' amended certificate of interested persons appears to be complete with the following additions: State of Missouri, by and through Chris Koster, Attorney General; Office of the Missouri Attorney General; Jeremiah J. Morgan; and J. Andrew Hirth.

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INTEREST OF AMICUS CURIAE

The Patient Protection and Affordable Care Act ("ACA") was signed into law on March 23, 2010. Among its numerous provisions, the ACA mandates that an applicable individual shall maintain "minimum essential [healthcare] coverage" or they must pay a penalty. 26 U.S.C. § 5000A.

On August 3, 2010, the people of the state of Missouri overwhelmingly passed, by referendum, "Proposition C." Mo. Rev. Stat. § 1.330. Proposition C was passed in response to the ACA, and prohibits compelling "any person, employer, or health care provider to participate in any health care system." *Id.* § 1.330.1.

The ACA and Proposition C are in conflict. Thus, the state of Missouri has an interest in the application of the ACA and in this Court's determination of the validity of its provisions under the United States Constitution. Because of the Supremacy Clause, the validity and impact of Proposition C depends on the constitutionality of the ACA provisions with which Proposition C conflicts.

STATEMENT OF THE ISSUES

1. Whether forcing individuals, who are not actors in interstate commerce and who have not chosen to enter the stream of commerce, to obtain health insurance is within the enumerated authority of Congress under the Commerce Clause.

2. Whether the provisions of the ACA that are capable of operating independently in a manner consistent with the intent of Congress should be severed.

SUMMARY OF THE ARGUMENT

When Henry Thoreau set about to idly chronicle the summer of 1845 alongside Walden Pond, could Congress assert that Thoreau's season of reflection was, in fact, an active decision not to fish Walden's waters, regulate his negative decision under the Commerce Clause, and thereafter penalize his failure to fish under the theory that everyone has to eat?

* * *

Could Congress assert, under a newly expanded *Wickard v. Filburn*, not only the authority to limit the acres of wheat a farmer in Northwest Missouri may plant, but also the power to penalize his decision to leave his land fallow, or not to plant, based on the federal theory that resting his acreage negatively impacts the price of food?

* * *

Can the United States Congress employ an enhanced Commerce Clause authority to mandate expectant mothers undergo amniocentesis testing in order to identify and treat individuals, yet unborn, whose extraordinary medical expenses may someday be cost-shifted onto the society-at-large?

* * *

To each of these questions, the state of Missouri answers "No." Such federal authority would require a generalized police power or a separately enumerated power, but is not cognizable under the Commerce Clause.

Upholding the Patient Protection and Affordable Care Act's ("ACA") individual mandate (26 U.S.C. § 5000A) as a legitimate exercise of congressional power under the Commerce Clause would imbue Congress with police powers rejected by the Founding Fathers and never before permitted by the Supreme Court. Within the healthcare arena, the power to penalize one's decision not to purchase health insurance is indistinguishable from granting Congress the power to penalize individuals for not obtaining an annual check-up or prostate exam, for not vaccinating one's children, or for not maintaining a specific body-mass. Outside the healthcare arena, granting Congress such new power would stand *Wickard v. Filburn* on its head, for it would allow Congress not only the authority to penalize a farmer's planting of wheat, but also grant Congress the power to penalize a farmer's decision *not* to plant wheat. 317 U.S. 111 (1942).

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." *United States v. Lopez*, 514 U.S. 549, 567 (1995). A decision to uphold the individual mandate as a permissible exercise of the Commerce Clause would grant Congress the power to penalize inactivity in a manner that can only rationally be described as the establishment of a federal police power.

ARGUMENT

I. The Founding Fathers and the Supreme Court Have Uniformly Rejected a Generalized Federal Police Power.

The Founding Fathers envisioned – and the people adopted – a federal government with limited, enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Alexander Hamilton wrote that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." THE FEDERALIST NO. 32 (emphasis in original). James Madison also declared that federal authority extends "to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST NO. 39; *see also* THE FEDERALIST NO. 45 (James Madison) (reserving to the states power over "the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity").

The Supreme Court has long held that the federal government does not have a generalized police power. In 1827, Justice John Marshall declared that the police power "unquestionably remains, and ought to remain, with the States." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827). A few years later, in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 561 (1842), the Court again declared that "police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

By contrast, in *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905), the Supreme Court endorsed the states' use of police power to compel action to protect public health. The Court considered a Massachusetts law permitting a city to "require and enforce the vaccination and revaccination of all the inhabitants." *Id.* at 12. The law penalized individuals $5 for refusing or neglecting to comply with the requirement. *Id.* Speaking for the Court, Justice Harlan invoked "[t]he authority of the state to enact this statute [under] the police power,–a power which the state did not surrender when becoming a member of the Union under the Constitution." *Id.* at 24-25. The Court also "distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description.' " *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

The modern Court has continued to reject a generalized federal police power. In *United States v. Morrison*, 529 U.S. 598, 618-19 (2000), the Court made clear that the Constitution " 'withhold[s] from Congress a plenary police power' " and reserves "a generalized police power to the States." *Id.* (quoting *Lopez*, 514 U.S. at 566). Indeed, Justice O'Connor warned against further expanding the Commerce Clause authority beyond existing precedent, stating that the Court had "already rejected the result that would follow–a federal police power." *Gonzales v. Raich*, 545 U.S. 1, 50 (2005) (O'Connor, J., dissenting).

II. The Commerce Clause is Not a Federal Police Power Permitting Congress to Force Individual Citizens to Act.

A generalized police power is "the sovereign right of a government to protect lives, promote public safety, health, morals, and the general welfare of society." 16A C.J.S. *Constitutional Law* § 609 (2011). This includes the power to "impose obligations and responsibilities otherwise nonexistent." *Id.* § 616.

The Commerce Clause is not a general, but a limited, enumerated authority to "regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has been interpreted by the Supreme Court to empower Congress in three ways: (1) "Congress may regulate the use of the channels of interstate commerce"; (2) "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 activities"; and (3) "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

The first two categories of Commerce Clause authority are not at issue here. Indeed, the second category provides authority for many of the ACA's provisions – including the requirement that certain employers provide health insurance to their employees. *See, e.g.,* 26 U.S.C. § 4980H. Thus, a company such as Walmart could not claim that the "employer mandate" violates the Commerce Clause, because

Walmart is covered under the second category above – "persons or things in interstate commerce." The same is likely true of a local flower shop, or even a seller at the farmers' market. To the extent the ACA regulates "[2] . . . the instrumentalities of interstate commerce, or persons or things in interstate commerce," the regulation, even if it compels the action it then regulates, is within existing Commerce Clause authority and precedent. *Lopez*, 514 U.S. at 558.

The question here is whether the individual mandate – the mandate that reaches those who have not entered the stream of commerce – regulates "[3] … activities that substantially affect interstate commerce." *Id.* at 558-59.[1/] That question cannot be answered "yes" without erasing the line between Commerce Clause authority and "a plenary police power." *Morrison*, 529 U.S. at 617-19.

A. Although the Commerce Clause Broadly Reaches "Activities" That Substantially Affect Interstate Commerce, an Individual's Neglect or Refusal to Act is Not an Activity.

Florida and many other states challenge the ACA to the extent it reaches those who have not chosen to enter the stream of commerce. The question, then, is whether such individuals, when they neglect or refuse to purchase health insurance, are

[1/] Congress invoked the third category of Commerce Clause authority in the ACA by finding the individual mandate "substantially affects interstate commerce." 42 U.S.C. § 18091(a)(1). A Congressional finding, however, does not mean the act is within Congress' authority. After all, the Violence Against Women Act, declared unconstitutional in part in *United States v. Morrison*, 529 U.S. 598 (2000), contained a similar provision. 42 U.S.C. § 13981(a).

engaging in "activities having a substantial relation to interstate commerce" so as to bring them within the scope of congressional regulation. *Lopez*, 514 U.S. at 558-59.

Put another way, when Henry Thoreau set about to idly chronicle the summer of 1845 alongside Walden Pond, could Congress assert that Thoreau's season of reflection was, in fact, an active decision not to fish Walden's waters, regulate his negative decision under the Commerce Clause, and thereafter penalize his failure to fish under the theory that everybody has to eat? No. While the state of Massachusetts could have compelled Thoreau to either fish or pay a fine under the state's authority to regulate the health, safety, and welfare of its citizens (*i.e.* police power), *see Jacobson*, 197 U.S. at 24-25, the United States Congress, relying solely on the Commerce Clause, could not.

1. The "most far reaching example of Commerce Clause authority," *Wickard v. Filburn*, involved only activities, not inactivity or doing nothing.

The modern view of the Commerce Clause has its origins in *Wickard v. Filburn* – "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. We accept the basic premise of *Wickard v. Filburn* as controlling law. That is, if activities, though apparently intrastate in nature, aggregate to "substantially affect" interstate commerce, then Congress has authority under the Commerce Clause to regulate those intrastate activities. *Wickard*, 317 U.S. at 129.

The practical consequences of this landmark expansion of congressional authority are that the garden in your back yard, the tomato plants on your porch, and the herbs on your window sill are all potentially subject to federal regulation under the Commerce Clause, even if the production is purely for one's own consumption. What is missing from *Wickard v. Filburn*, however, is any hint that Congress could penalize a farmer or a family for *failing or refusing* to raise wheat, a tomato plant, or herbs. Even after this most expansive of Commerce Clause decisions, farmers could still decide to leave their land fallow without incurring a penalty imposed by the federal government.

2. The law at issue in *Gonzales v. Raich* also penalized only activities, not inactivity or doing nothing.

More than a half-century after *Wickard v. Filburn*, the Court took up a similar case. In *Gonzales v. Raich*, the activity was growing marijuana solely for personal consumption. Utilizing the same aggregating analysis it used to extend the Commerce Clause to production for personal use on the farm, the Court held that "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales*, 545 U.S. at 19.

Again, we do not quarrel with the decision in *Gonzales v. Raich*, nor that Congress may, by virtue of the Commerce Clause, reach the small-scale cultivation of plants in the home. *See id.* at 50 (O'Connor, J., dissenting). As with *Wickard v. Filburn*, we accept the basic premise of *Gonzales v. Raich*. That is, no matter how

small (or illegal) the activity may be, it can be aggregated to show a "substantial affect" on interstate commerce. Yet, the Court in *Gonzales v. Raich* still made no mention of regulating *a failure or refusal to plant*. Thus, a family remained free to decide whether to plant a garden, a tomato plant, or herbs, and their decision to do nothing was beyond the reach of Congress to compel.

B. If Doing Nothing Constitutes "Activities" Subject to Regulation Under the Commerce Clause, the Commerce Clause Becomes a Generalized Police Power.

In *United States v. Morrison* and *United States v. Lopez*, the Court recognized a limit on Congress' Commerce Clause authority: it does not reach non-economic activities, *e.g.* violence against women and carrying guns in school zones. That limitation does not apply here; if the non-purchase of insurance (whether by decision or indecision) were an "activity," it would certainly be an economic one. But the third category of Commerce Clause authority reaches only "*activities* having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-59. No prior articulation of this Commerce Clause category has dared to reach the regulation of "thought" or "inactivity" or "doing nothing." Such a line bars Congress from compelling citizens to step into the stream of commerce when they have either neglected or chosen not to do so. And absent such a restriction on Commerce Clause authority, the Clause would become exactly what Justice O'Connor warned against – "a federal police power." *Gonzales*, 545 U.S. at 50 (O'Connor, J., dissenting).

1. The definitions of "commerce" and "activity" do not include the decision to do nothing.

The very notion that doing nothing is "interstate commerce" is contrary both to a common sense definition, and to the original meaning of "commerce" in the Constitution. The dictionary defines "commerce" as:

> **1a:** social intercourse : dealings between individuals or groups in society : interchange of ideas, opinions, or sentiments . . . **b:** dealings of any kind . . . : interrelationship, connection, or communication . . . **2a:** the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place . . . .

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 456 ("WEBSTER'S") (1993). "Commerce" thus contemplates what the Supreme Court has always found to be regulated by Commerce Clause legislation: an "activity." The definition of "activity" is consistent with this concept:

> **1:** the quality or state of being active . . . **2:** physical motion or exercise of force: as **a:** vigorous or energetic action . . . **b:** adroit or skillful physical action . . . **4a:** an actuating force . . . .

WEBSTER'S 22 (1993). Neither definition contemplates doing nothing or inactivity as a potential definition.

Yet, some courts considering the ACA have concluded that an activity substantially affecting interstate commerce includes doing nothing or deciding to do nothing. For example, the United States District Court for the District of Columbia recently held that "decisions, whether positive or negative, are clearly economic ones" and therefore "this case involves an economic activity: deciding whether or not

to purchase health insurance." *Mead v. Holder*, No. 10-950, 2011 WL 611139, at *15 (D.D.C. Feb. 22, 2011).

There is no support for the leap of logic that equates decisions with actions. Even a decision to buy insurance is not an action, just a prelude to action. And an inchoate decision by an individual who is not a person in the stream of commerce has never been subject to regulation under the Commerce Clause. Every case in which congressional authority has been upheld under the Commerce Clause involves not commercial decisions but commercial actions. *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (noting that "like the earlier cases to come before the Court here neither the *actors* nor their *conduct* has a commercial character") (emphasis added). Indeed, the D.C. district court acknowledged that "previous Commerce Clause cases have all involved physical activity, as opposed to mental activity, i.e. decision-making." *Mead*, 2011 WL 611139, at *18. To include mental decision making – or perhaps even more important, failure to engage in mental decision making – within the scope of "activities" Congress can regulate under the Commerce Clause is beyond the pale of linguistic analysis and current precedents.

Nor is it supported by the original meaning of "commerce." The Commerce Clause's "text, structure, and history all indicate that, at the time of the founding, the term 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (citing *Lopez*,

514 U.S. at 585 (Thomas, J., concurring)). "Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term 'commerce' is consistently used to mean trade or exchange-not all economic or gainful activity that has some attenuated connection to trade or exchange." *Id.* (citing Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112-125 (2001)).

And if the original meaning of "commerce" was limited to actual trade or exchange, then simply doing nothing is in no way consistent with the meaning of "commerce" – historical or modern.

2. Allowing Congress to penalize, under the Commerce Clause, a decision to do nothing is a dramatic and unsupported expansion of its authority.

To put these principles and definitions in perspective, it is worth looking again at *Wickard v. Filburn* and *Gonzales v. Raich*, but from a new perspective: the inverse.

Suppose that Congress decided to regulate not how many acres of wheat Mr. Filburn could plant, but how many acres of wheat he must plant. Although he may not wish to farm his land, Congress could – if inactivity or refusal to act were covered

under the Commerce Clause – force Mr. Filburn to grow wheat on pain of civil *or even criminal* penalties.[2/]

Now consider the inverse of *Gonzales v. Raich*. If Congress' authority under the Commerce Clause extended as far as the Justice Department suggests, then individuals or families could be required to grow tomatoes, herbs, or marijuana whether they wanted to or not. Family gardens and simple home production may be beneficial, and indeed it may be possible to mandate "victory gardens" under the war power. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (noting that the war power "permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation"). But it is another matter to suggest that Congress has the power under the Commerce Clause to force such activity. Such an interpretation would mean that Congress has the power to create commerce in order to regulate it.

The consequences are more intrusive in the healthcare arena than in agriculture. If Congress can force activity under the Commerce Clause, then it could force individuals to receive vaccinations or annual check-ups, undergo mammogram or prostate exams, or maintain a specific body-mass. In the aggregate, the failure to

[2/] The manner in which regulation is imposed under the Commerce Clause belongs exclusively to Congress, and includes both civil and criminal penalties. A newly expanded *Wickard v. Filburn* (or an upholding of the ACA) would authorize Congress to criminally penalize individuals for their decision not to enter the stream of commerce. Such a result is entirely unprecedented, if not disturbing.

obtain such medical care unquestionably has an impact on interstate commerce. But nothing in existing precedents presages, much less justifies, congressional compulsion of an unbounded range of human activity. [3/]

C. The Power to Require Individual Citizens to Act to Protect Health is Quintessentially State Police Power.

What Congress seeks to regulate, or rather force, with the individual mandate provision of the ACA – the health and welfare of individual citizens – is a traditional area of state police power. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens.' ") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)); *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872)).

[3/] To erase any effective limit on Commerce Clause authority at what may yet prove to be a politically transitory moment seems particularly ill-advised; after all, the effective date of the individual mandate is delayed until 2014, and various proposals are now circulating that may change or eliminate the individual mandate altogether. *See, e.g., FACT SHEET: The Affordable Care Act: Supporting Innovation, Empowering States*, WHITEHOUSE.GOV (FEB. 28, 2011), http://www.whitehouse.gov/the-press-office/2011/02/28/fact-sheet-affordable-care-act-supporting-innovation-empowering-states (last visited Apr. 7, 2011) (President Obama "announced his support for accelerating State Innovation Waivers."); *Health Insurance Waiver: Bipartisan Proposal Attempts to Move Up Date*, CSMONITOR.COM (FEB. 19, 2011), http://www/csmonitor.com/USA/Lastest-News-Wires/2011/0219/Health-insurance-waiver-bipartisan-proposal-attempts-to-move-up-date (last visited Apr. 7, 2011) (noting "states could apply for an exemption from some requirements of the reform law – including the [individual] mandate").

Whether Congress is stepping into traditional areas of state police power has been an important factor in the Supreme Court's Commerce Clause analysis. *See, e.g.*, *Morrison*, 529 U.S. at 615-16 (noting, with disapproval, that if Commerce Clause reached violent crime it could be applied equally to "other areas of traditional state regulation"). Indeed, the Supreme Court noted with dismay in *United States v. Lopez* that the government's efforts to regulate violent crime under the Commerce Clause would allow Congress to regulate "any activity that it found was related to economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." 514 U.S. at 564. As a result, Congress would be permitted virtually unlimited power, including in "areas such as criminal law enforcement or education where States historically have been sovereign." *Id.*

Here, Congress chose to use a classic form of state police power – the same form considered in *Jacobson v. Massachusetts*. Just like those who refused vaccinations in *Jacobson v. Massachusetts*, the people who refuse healthcare insurance under the ACA may eventually get sick, need care, and have an impact on the economy in the aggregate, if not individually. While forcing citizens to obtain healthcare insurance may be perfectly within a state's police power, it is not within the enumerated authority of Congress under the Commerce Clause. That is why Justice Harlan stated that the police power necessary to force individual citizens to be

vaccinated is "a power which the state did not surrender when becoming a member of the Union under the Constitution." *Jacobson*, 197 U.S. at 25.

Permitting Congress the power to force individual citizens to act under the Commerce Clause would allow a host of heretofore unauthorized incursions into areas of traditional state authority. In addition to immunizations or vaccinations, Congress could force compulsory education or require individual citizens to obtain long-term care insurance. As to each, there is an undeniable aggregate effect on interstate commerce, even if, for example, an individual may never need long-term care. But an aggregate effect on interstate commerce is not enough to permit Congress a generalized police power to force individual citizens to act.

D. Alternatives to Uphold the Individual Mandate.

As discussed above, Congress lacks the authority under current Supreme Court Commerce Clause precedent to compel economic activity by those who are not actors in interstate commerce and who have not chosen to enter the stream of commerce. Should this Court, nonetheless, choose to uphold the ACA's individual mandate, it must do so in a manner that preserves both state sovereignty and the continuity of case law from *Wickard v. Filburn* to *Gonzales v. Raich*. Although challenging, this might be accomplished in the following ways:

First, the Spending Clause may provide an appropriate alternative. Missouri and the several states are the actual sovereigns in possession of the plenary police

powers necessary to effectuate Congress' goal. *See Jacobson*, 197 U.S. at 24-25. To the extent Congress, through its Commerce Clause authority, seeks to penalize an individual's neglect or refusal to purchase health insurance, it has illegitimately co-opted Missouri's sovereign police power over its citizens. The people of Missouri, by a vote of over 70%, affirmed their desire to be free of congressional regulation in this area. However, this Court could rule that, in order for Missouri's sovereign authority to be exercised under the ACA, Missouri's elected representatives must have an opportunity to opt out of (or into) Congress' regulatory plan. Such an opportunity would place the ACA under Congress' Spending Clause authority, where it may legitimately rest.[4/] Indeed, the concept of allowing states such an option is similar to proposals recently advanced by the Administration and various members of Congress. *See supra* n.3.

Second, this Court could adopt the Justice Department's argument that the individual mandate is "independently authorized by Congress's power to 'lay and collect Taxes.' " Appellants' Br. p. 50 (quoting U.S. Const. art. I, § 8, cl. 1). No court to date has concluded that the individual mandate was passed under the taxing power, and Congress unquestionably was at pains to avoid calling the individual mandate a

[4/] Assuming a final judgment regarding the individual mandate is issued by June 2012, Congress should have adequate time to pass the appropriate legislation regarding state options. Conversely, a states' acceptance of federal funding under the ACA could conceivably be construed as acquiescence to Spending Clause authority.

tax. *See* 42 U.S.C. § 18091(a)(1); 26 U.S.C. § 5000A(b)(1). Nonetheless, inclusion of the individual mandate within the IRS Code may be construed by this Court as evidence enough of taxing power intent. "[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). While inconsistent with the language of the ACA, such a decision would preserve the limited, but important, boundaries on Commerce Clause authority that now exist.

Third, and despite undermining the historical continuity of Commerce Clause precedent, a bright-line exception could be constructed to aggressively limit this Court's decision solely to the healthcare arena. Such an exception might include the following limiting considerations: (a) the congressional regulation is in the area of healthcare in which nearly all individuals are certain to enter interstate commerce because of the need for medical treatment at some point in their life; (b) the regulation of healthcare is necessary because individuals are highly likely to "cost-shift," where the uninsured impose on others the burden of paying for their choices; and (c) the economic impact of the regulated choices affect a significant portion of the national gross domestic product and are beyond dispute.

We do not suggest, by these alternatives, that the individual mandate can be sustained under current Commerce Clause precedent. It cannot. And the above suggestions are, at the very least, problematic. The Constitution still "withholds from

Congress a plenary police power," *Morrison*, 529 U.S. at 617-19; *see Lopez*, 514 U.S. at 567-68, and without an expansion of congressional authority under the Commerce Clause, or some alternative means of analysis such as suggested immediately above, the individual mandate must fail.

III. Severance of the Individual Mandate From the ACA is Appropriate to Preserve the Valid Remaining Provisions.

Should this court find the individual mandate unconstitutional, that finding does not require the entirety of the ACA be struck down. From providing coverage for well child visits and preventative services to establishing reasonable break times for nursing mothers, the ACA today provides benefits to Americans that are not dependent on a mandate that remains three years away.

Severance is a fundamental doctrine of judicial restraint. It derives from the notion that "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006). Otherwise, courts would frustrate "the intent of the elected representatives of the people" by striking an entire statute when only a portion is unconstitutional. *Id.* at 329. The question in this case is whether "the balance of the legislation is incapable of functioning independently" or whether the remaining "statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987) (emphasis in original).

Furthermore, although the ACA has no severability clause, "Congress' silence is just that – silence – and does not raise a presumption against severability." *Id.* at 686.

Yes, the individual mandate was important to Congress in passing the ACA, and certain pieces of the ACA will not operate as Congress intended without it, particularly insurance industry reforms.[5/] *See* 42 U.S.C. §§ 300gg *et seq.* (guaranteed-issue and community-rating reforms). But if the test to strike down an entire statute were whether some part will not operate the same without the unconstitutional provision, then there would be no doctrine of severability. Thus, only the invalid provision and those provisions that do not operate the same without the invalid provision should be struck down.

The ACA contains over 450 provisions that address a wide variety of topics, including Medicaid eligibility, student loan reforms, and Medicaid coverage for delivery of babies. Some of the provisions are already effective and are successfully operating independently of the individual mandate. The following are a few examples of provisions that appear to operate independently of the individual mandate:

[5/] This would not be the first time the Supreme Court has struck down an important provision of a statute under the Commerce Clause and left the remainder of the statute intact. Indeed, in *United States v. Morrison*, the Court struck down only one provision – the civil remedies provision – leaving the rest of the Violence Against Women Act in force. 529 U.S. 598 (2000).

Description	Statutory Section
Expands Medicaid eligibility up to 133% of the poverty line.	ACA § 2001
Provides funding for maternal, infant, and early childhood visitation in order to reduce infant and maternal mortality.	ACA § 2951
Provides funding for school-based health centers.	ACA § 4101
Requires Medicaid coverage for therapy for cessation of tobacco use by pregnant women.	ACA § 4107
Establishes nutrition labeling of standard menu items at chain restaurants.	ACA § 4205
Establishes a reasonable break time for nursing mothers and a place, other than a bathroom, which may be used.	ACA § 4207

With the exercise of judicial restraint as the fundamental doctrine of severability, this Court should restrict its ruling to the individual mandate and dependent provisions. Beyond such a limited decision, this court should allow any further, and perhaps necessary, alterations of the ACA to be rendered by Congress as part of that branch's legislative and political prerogative.

CONCLUSION

The decision before the Court is about much more than bending a cost curve; it is about the nature of federalism and Congress' control over the lives of our citizens.

Congress' taxation power, while largely unlimited, is inherently contained by both economic and political realities. Congress' spending power is inherently respectful of federalism in its very application, for it invites rather than compels state

action. Yet, to now unleash the Commerce Clause, so as to grant Congress unlimited power over every aspect of our economic lives, from activities to inactivities, would be a substantial blow to federalism and personal freedom, leaving citizens no more protection from congressional dominion than a rational basis test.

For the foregoing reasons, this Court should affirm the trial court's decision in part, and reverse in part.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that the foregoing brief of *amicus curiae* complies in all material respects with the requirements set forth in Federal Rule of Appellate Procedure 28.1(e) and Federal Rule of Appellate Procedure 32(a). It is prepared with Word 2003 in Times New Roman typeface, size 14 (text and footnotes). The brief contains 5,027 words, including the signature block but exclusive of cover, tables, and certificates. A virus check was perfored on the E-brief, using Symantec Endpoint Protection, and no virus was detected.

/s/ *J. Andrew Hirth*
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CERTIFICATE OF SERVICE

I hereby certify that I have caused twenty-six paper copies (including one original) of this brief to be filed with the Clerk of this Court and two copies of this brief were served upon all parties listed on this Court's ECF system and by Federal Express Overnight mail, on April 8, 2011.

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