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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA (NO. 3:10-91 (RV))

BRIEF OF SPEAKER OF THE HOUSE OF REPRESENTATIVES JOHN BOEHNER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *amicus curiae* or his counsel contributed money that was intended to fund preparing or submitting the Brief.

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INTEREST OF *AMICUS*

Amicus Speaker of the House of Representatives John Boehner, as the elected leader of the United States House of Representatives, is acutely interested in the constitutional issues at the center of this case, as well as the long-term effects that this court's ruling may have on the legislative process, notwithstanding any position *amicus* may have held on the Patient Protection and Affordable Care Act (hereinafter "PPACA" or "Act"), Pub. L. No. 111-148 (2010), on policy grounds.

Amicus has taken an oath as an individual member of Congress to uphold the Constitution of the United States. Moreover, as the Speaker of the House, he has a particular responsibility to ensure that the Legislative Branch observes its proper constitutional role. To that end, *Amicus* oversaw the adoption of a new rule by the 112th Congress requiring every piece of legislation to be accompanied by a statement citing 'the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.' H.R. R. XII, cl. 7, par. (c)(1), 112th Cong. (2011).

Amicus believes his perspective as the House's sole elected officer will assist the Court in determining whether or not the Individual Mandate falls within the scope of Congressional power under the Necessary and

Proper Clause. Additionally, *amicus* is especially attuned to the negative impact that Appellants' position would have on the legislative process.

Appellants have argued that the PPACA's reforms of the insurance market – which fall within Congress's power to regulate interstate commerce – "would not work without a minimum coverage provision to prevent health care consumers from waiting to buy insurance." Appellants' Brief at 30-31. Based on this assertion, Appellants argue that the Individual Mandate is "essential" to the Act's other regulations of the insurance market that are supported by the Commerce Clause, *id*. at 28, and that Congress may employ "any means" reasonably designed to "achieving [the] key reforms" of the Act that are unquestionably within its power. Defendants' Memorandum in Support of Motion for Summary Judgment, at 23-24 [hereinafter "Defs. MSJ"]; *see also* Appellants' Brief at 33 ("Governing precedent does not permit a court to override Congress's judgment about the appropriate means to achieve objectives within the scope of the commerce power").

If adopted by the court, this interpretation of the Necessary and Proper Clause would create incentives for Congress to pass ill-conceived or unrealistic statutes. As Speaker of the House, *amicus* is uniquely positioned

to make this argument and to explain why the Court should reject Appellants' position.

ARGUMENT

I. The Necessary and Proper Clause Does Not Support the Individual Mandate

The Necessary and Proper Clause serves an important but limited function in our constitutional scheme. By giving Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers, it allows Congress to select the means by which it implements those powers. *See* U.S. CONST. art. I, § 8, cl. 18. But Congress must rely on a specified enumerated power; the Necessary and Proper Clause is not an independent grant of authority. *See United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power").

As Chief Justice Marshall explained in *McCulloch v. Maryland*: "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 consist with the letter and spirit of the constitution,

are constitutional." 17 U.S. (Wheat.) 316, 421 (1819); *see also Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 421). This classic statement of the Necessary and Proper Clause sets clear limits on Congressional power which "are not merely hortatory." *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J. concurring). The Clause must not be stretched to include illegitimate ends, inappropriate means, or laws inconsistent with the letter or spirit of the Constitution, however "necessary" to a regulatory scheme Congress may deem such a provision to be.

Appellants' reliance on the Necessary and Proper Clause is only required because the Individual Mandate is not authorized by any enumerated power. If it were an exercise of Congress' authority under the Commerce Clause, no recourse to another clause would be necessary. But, as has been shown in the other briefs in this case and in the decisions of several trial courts, Congress's commerce power does not allow it to *compel* passive individuals to engage in economic activity. Throughout all of American history, Congress has only now even attempted to claim such broad powers. *See* Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994) (Congress has "never required people to buy any good or service as a condition of

lawful residence in the United States"); *see also Virginia v. Sebelius*, 728 F. Supp. 2d 768, 775 (E.D. Va. 2010) (the Individual Mandate goes "beyond" the "current high water mark" of Commerce Clause power); *id.* at 771 ("No reported case from any federal appellate court has extended the Commerce Clause ... to include the regulation of a person's decision not to purchase a product ...."); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010) ("The [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").

Nonetheless, the Necessary and Proper Clause cannot be invoked without reference to an enumerated power. The Supreme Court has stated clearly that the Necessary and Proper Clause can only authorize legislation when "the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. A statute that is "necessary and proper" must be "legitimately predicated on an enumerated power," the relationship between the statute and the power must not be "too attenuated," and the provision must not be "too sweeping in its scope." *Id.* at 1963.

A. The Mandate Does Not Implement PPACA Provisions that are Valid Under the Commerce Clause; it Cancels the Negative Effects of the Legitimate Provisions of the PPACA

Appellants' appeal to the Necessary and Proper Clause is an implicit acknowledgement, at least in the alternative, that the Commerce Clause alone cannot justify the Individual Mandate. Instead, they argue that other legitimate exercises of the Commerce Power create a situation that would be untenable without an Individual Mandate. For example, Appellants cite the Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, as creating the problem of cost-shifting from individuals who receive uncompensated emergency care onto hospitals and, ultimately, patients who do pay their medical bills directly or through insurance. They assert that the Individual Mandate lessens the problematic consequences of EMTALA by forcing individuals who can afford insurance to buy it and therefore not to receive uncompensated care.[1] However, Appellants cannot claim that the Individual Mandate actually *implements* the EMTALA in any way.

[1] As Private Appellees note, this argument still fails to account for the fact that the vast majority of individuals receiving uncompensated care would not be covered by the Individual Mandate. *See* Brief for Private Plaintiff-Appellees at 5-6.

Appellants have also argued that the Individual Mandate is necessary – indeed, "essential" – to the PPACA's reforms of the insurance market. As Appellants have noted in this case, "the minimum coverage provision is key to the Act's provisions that bar insurers from denying coverage because of a pre-existing medical condition … and from charging higher premiums because of a person's medical history" Appellants' Brief at 3-4. The PPACA's insurance market reforms include, *inter alia*, ending lifetime benefit limits and pre-existing condition exclusions (PPACA §§ 1001, 1201); mandating coverage of certain preventive care (PPACA § 1001); extending parental health coverage to unmarried adult children up to age 26 (PPACA § 1001); and various other measures designed to control costs (PPACA § 1001).

These market regulations do fall within the scope Congress' Commerce Clause power to regulate the interstate health insurance market. *See United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944). However, the Individual Mandate itself does not regulate that market – it compels individuals who are not yet part of the insurance market to enter it. It also neither implements nor enforces the PPACA's provisions. And Appellants do not suggest that these sections would become *legally*

ineffective without the Mandate. Instead, Appellants have made a number of remarkable admissions about the *practical* consequences of the PPACA's other reforms and claim the Individual Mandate is necessary *to avert the harmful consequences of the PPACA itself*.

Appellants' arguments for the Mandate's legitimacy under the Necessary and Proper Clause constitute a string of stunning insights into the harsh consequences of the PPACA without the Individual Mandate. First, the guaranteed-issue and community-rating provisions would incentivize consumers to "dela[y] their purchase of insurance until their medical costs outstrip their premiums." *See* Appellants' Brief at 17. This then "would increase the costs of uncompensated care and the premiums for the insurance pool," Defendants' Memorandum in Support of Motion to Dismiss, at 45-46 [hereinafter "Defs. MTD"], and could also "decrease coverage … for those who remained in the insured pool," Defs. MSJ at 21. These trends would be "unsustainable," leading to a "death spiral of individual insurance." *See* Appellants' Brief at 28, 31. Appellants' grim predictions are intended to demonstrate that "[PPACA's] reforms of the insurance market ... could not function" without the Individual Mandate, Defs. MTD at 44-45, rendering

the Mandate "essential to the Act's regulation of underwriting insurance practices in the insurance industry." Appellants' Brief at 46.

Yet this line of argument reflects a fundamentally flawed view of both the Necessary and Proper Clause and the limits of Congressional power generally. *Amicus* agrees with Appellants that these pernicious effects will follow from the Act's provisions; that is part of why he opposed the legislation in Congress. Yet the fact that the Act will otherwise have devastating effects does not therefore make the Individual Mandate an acceptable exercise of Congress' power under the Necessary and Proper Clause.

All parties and *amicus* agree that the Necessary and Proper Clause grants Congress power to legislate the means to implement a proper exercise of its other, enumerated powers. For instance, in *United States v. Darby* the Supreme Court upheld recordkeeping requirements that eased enforcement of federal fair labor standards. *See* 321 U.S. 100 (1941). The Court explained that the recordkeeping requirements were "incidental to those for the prescribed wages and hours." *Id.* at 125. It reasoned that, "since Congress may require production for interstate Commerce to conform to those conditions, it may require the employer, as a means of enforcing the

valid law, to keep a record showing whether he has in fact complied with it." *Id.* Similarly, the Court has upheld federal legislation which prevents evasion or obstruction of legitimate federal regulations. *See, e.g.*, *Raich*, 545 U.S. 1; *Wickard v. Filburn*, 317 U.S. 111 (1942).

In a very real and important way, the Individual Mandate is different from the laws previously upheld by the Supreme Court as valid exercises of the Necessary and Proper Clause power. The Mandate does not implement the PPACA's other health insurance reforms. It does not facilitate or support the enforcement of these reforms as did the recordkeeping regulations in *Darby*. Unlike the statutes at issue in *Raich* and *Wickard*, the Mandate does not combat the evasion or obstruction of the valid provisions of the PPACA. Each of the other sections of the PPACA can be independently justified as an exercise of Congress's commerce power, and not one needs the Mandate to be legally effective or enforceable.

This much, then, is clear: the Individual Mandate is not necessary to implement or enforce the PPACA's reforms of the health insurance industry. Appellants instead argue that the Mandate is "essential" to support their regulatory scheme, Appellant's Brief at 30-31, because they say its policy effects will be to ameliorate the *consequences* of the Act's other reforms:

misaligned incentives, higher premiums, and even the demise of the insurance industry itself. *See* Appellants' Brief at 31. Appellants' argument is a fundamentally flawed conception of the Necessary and Proper Clause's purpose and scope. The Clause is not a blanket grant of Congressional power to be invoked by Congress whenever its constitutionally-permissible provisions have bad real-world results that can only be mitigated by otherwise unconstitutional provisions. In Appellants' view, Congress may act without regard to constitutional limits on its role whenever Congress believes a legitimate statute's policy results require it. The more a statute's valid provisions cause problems, the more power Congress has to pass "essential" or "necessary" "fixes" that would be otherwise unconstitutional.

Appellants' argument is specious logically as well as constitutionally. Congress cannot avoid constitutional limitations on its power by enacting ill-conceived legislation and then using the shortcomings of its policies as the basis for adopting other provisions which exceed its powers under Article I. Such action could hardly be "legitimately predicated on an enumerated power."[2] *Comstock*, 130 S. Ct. 1963.

[2] The Individual Mandate also is vulnerable under the Supreme Court's dictate that provisions authorized by the Necessary and Proper Clause not be "too sweeping in its scope." *See Comstock*, 130 S.Ct. 1963. The Individual Mandate is the most sweeping sort of provision imaginable – it touches every single American, regardless of any choices they make, in one of the most personal

B. Adopting Appellants' Flawed Reasoning Would Have Negative Long-Term Effects on the Legislative Process.

If permitted to stand, Appellants' distortion of the Necessary and Proper Clause would cause serious, widespread, and long-lasting damage to the Constitution. Moreover, it would provide a tantalizing method by which future Congresses could enact ill-conceived and poorly-drafted laws. Under Appellants' interpretation, a law would be upheld as constitutional any time that Congress asserted that it were "necessary" to remedy the negative ramifications of other provisions. This would effectively nullify the requirement that federal legislation be "legitimately predicated on an enumerated power." *Comstock*, 130 S. Ct. 1963. Such a departure from settled law would mark the end of a vital limitation on federal power.

Appellants' interpretation invites poorly-conceived and sloppily-drafted statutes. Congress could easily fall into the bad habit of using extra-constitutional fixes to remedy the bad effects of constitutional provisions merely by labeling such fixes "essential." The worse the consequences of a piece of legislation, the more power Congress could appropriate to fix them. But Congress needs no incentives to create bad legislation.

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and intimate areas of life. This Mandate is unlike any other Congressional provision in the past two centuries of American history; it is not merely sweeping, but entirely unprecedented.

If adopted by the court, Appellants' argument will also inevitably lead to less accountability between Congress and its employers, the American people. It would reward legislators for finding complicated work-arounds: if there is no constitutional authority to directly take a certain action, they could simply use what authority they do have to create a problem, giving themselves a blank check to "fix" the problem. As Congress passes increasingly complex and convoluted legislation, the various working parts of which are only held together by otherwise unconstitutional "fixes," it will become ever harder for Members of Congress to understand and articulate the full effect of legislation to their constituents. Statutes will become even more impenetrable for concerned citizens, and voters will lose their opportunity to evaluate their representatives based on clearly defined policy choices. The risk that legal complexities may undermine the rule of law and the authority of the citizenry was recognized by the Founders and remains significant today.[3]

[3] *See* THE FEDERALIST No. 10 (James Madison):

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

The PPACA itself illustrates this danger. The Act is, quite simply, a monstrosity, with thousands of pages and hundreds of provisions, many in tension with one another. The result is a complex statutory scheme which, stripped of the Mandate, is calculated to *decrease* the number of insured individuals, *increase costs* for those who are insured, and destroy the national health care market. *See* Brief for Appellants at 31. Appellants misread the relevant case law in a way that threatens to undermine our legislative process; this court should reject an interpretation which so undercuts the Constitution's wise limits on congressional power.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Speaker of the House of Representatives John Boehner respectfully requests that the Court uphold the judgment of the district court.

Dated May 11, 2011.

Justice Breyer makes the parallel argument that the transparency of judicial opinions fosters governmental accountability. *See* Stephen G. Breyer, *Making Our Democracy Work: A Judge's View* 83 (Knopf 2010).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 2,876 words.

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2011, I filed the above brief by causing a copy to be electronically uploaded and by causing paper copies to be delivered to the Court by First Class Mail. I also hereby certify that, by agreement with counsel for the parties, I caused the brief to be served by electronic mail upon the following counsel:

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