**No. 11-11021**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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STATE OF FLORIDA, ET AL.,

*Plaintiffs-Appellees*,

*v*.

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

*Defendants-Appellants*.

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

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# BRIEF OF MEMBERS OF THE UNITED STATES SENATE AS *AMICI 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 *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the Brief.

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## INTEREST OF *AMICI*

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

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

the United States by ensuring that the Legislative Branch stays within its constitutionally enumerated powers.

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

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

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

our governmental institutions that will result from the *ultra vires* nature of the PPACA.

## ARGUMENT

### I. The Individual Mandate Exceeds the Commerce Power.

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

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

either" state or federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). As Chief Justice Marshall observed:

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

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

While the past century has seen a general expansion of subject matter committed to the federal government under the Commerce Clause, in recent years the Supreme Court has not tolerated attempts to stretch the Commerce Clause beyond all bounds for fear of enveloping the remaining meaningful limits on the federal government's power. *See United States v. Lopez*, 514 U.S. 549, 556-57 (1995); *United States* v. *Morrison*, 29 U.S. 598, 607-08 (2000). If accepted, Appellants' arguments in this case will overwhelm the remaining limits on Commerce Clause power, thereby upsetting the

Constitution's delicate balance by untethering the federal government from its enumerated powers and invading the legitimate province of the States.

### A. The Commerce Clause Does Not Authorize Congress to Mandate the Purchase of a Particular Product, but Only Permits Regulation of Commercial Activity in Which People Are Engaged.

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

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[1] As the district court recognized, the contemporaneous understanding of the constitutional term "regulate" bears this understanding out. Eighteenth-century dictionaries, like those of today, define "to regulate" in terms that

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

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

*Lopez*, 514 U.S. at 558-59 (emphasis added, internal citations omitted). Although the Commerce Clause specifically addresses interstate activity, the Supreme Court has allowed regulation of even local and intrastate activity if that "activity," in the aggregate, exerts a "substantial economic effect" on the interstate economy. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

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presuppose the existence a previous activity. A regulator comes to an existing phenomenon and organizes, limits, or encourages it, he or she does not trigger the underlying phenomenon itself. *See* 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "regulate" as "(1) to adjust by rule or method. (2) to direct."). *See also Merriam Webster's Collegiate Dictionary* 985 (10th ed. 1996) (defining "regulate" variously as "to govern or direct according to rule," to bring under the control of law or constituted authority," "to make regulations for or concerning," "to bring order, method, or uniformity to," to fix or adjust the time, amount, degree, or rate of"). *See State of Florida* v. *U.S. Dept. of Health and Human Services*, 2011 U.S. Dist. LEXIS 8822, at *43 (N.D. Fl., January 31, 2011) (citing brief of *amici* United States Senators).

However, the Supreme Court's holding that the Commerce Clause requires first and foremost that there be an "activity" is a precursor to determining whether the activity "substantially" affect interstate commerce.

In its findings accompanying the PPACA, Congress exclusively and explicitly invoked its power under the Commerce Clause as the purported constitutional authority for the Individual Mandate, making clear that it was relying on the third prong of *Lopez* in particular. *See* PPACA §1501(a). These findings, however misstate the *Lopez* test, and strongly suggest that Congress misunderstood the nature of its authority when enacting the PPACA. *Compare* PPACA §1501(a) (finding that "*The individual responsibility requirement* provided for in this section . . . is commercial and economic in nature, and *substantially affects* interstate commerce") (emphasis added) *with Lopez* 514 U.S. at 558-59 ("Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce") (emphasis added). The confusion is evident in that Congress did not actually find that the failure to purchase health insurance was an activity, let alone one that substantially affects commerce. Rather, it found that the PPACA *itself* would affect commerce.

Although the scope of the Commerce Clause has been debated for over two centuries, the Supreme Court has never embraced such blatant bootstrapping. On the contrary, the landmark Commerce Clause cases have always addressed whether Congress was authorized to regulate a particular type of activity first, only afterwards turning to the impact of the regulation on commerce (where relevant). *See*, *e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824) (considering whether interstate navigation was "commerce"); *Kidd v. Pearson*, 128 U.S. 1 (1888) (whether manufacturing was "commerce"); *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), 301 U.S. 1 (whether labor relations could be regulated as "commerce"); *Wickard*, 317 U.S. 111 (whether economic activity was too "local" to be regulated under the Commerce Power); *Lopez*, 514 U.S. 549 (whether carrying a weapon in a "school zone" could be regulated on the basis of its asserted effects on commerce); *Morrison*, 29 U.S. 598 (whether gender-motivated violence could be regulated under the Commerce Clause). These cases represent a wide spectrum of Commerce Clause decisions with diverse fact patterns. But none of these decisions even suggests that, under the Commerce Clause, Congress has the power to affirmatively obligate otherwise passive individuals to engage in a particular economic activity—to purchase a

particular good or service—and to punish them if they choose not to do so. What the Appellants urge, therefore, is frankly an unprecedented interpretation of the Commerce Clause—an interpretation that, if adopted, would result in a dramatic expansion of Congressional power without any realistic limitation on its reach. Because the Individual Mandate regulates a simple decision or choice not to engage in activity, it exceeds the proper scope of the Commerce Clause.

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

More recently, and as the lower court noted, another non-partisan office within Congress, the Congressional Research Service (CRS) has reached much the same conclusion. Among its responsibilities, the CRS

provides Congress with analyses of the constitutionality of proposed federal laws and has been called Congress' "think tank." It has questioned whether the Commerce Clause "would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009 at 3. In fact, the CRS has called the constitutionality of the individual mandate "the most challenging question" and has acknowledged that the idea that Congress may use the Commerce Clause to require an individual to purchase a good or service is "a novel issue". *Id*, *see also* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, April 28, 2011, at 8-9.

Since the enactment of PPACA, the CRS has reiterated its uncertainty about the constitutionality of the Individual Mandate. The CRS has repeatedly noted the novelty of the individual mandate, restating this proposition even within the last two weeks. *See* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* April 28, 2011, at 8-9. It then noted that, in "general, Congress has used its authority under the Commerce Clause to regulate individuals,

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

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

*Id. (emphasis added).* But it did not stop there. Indeed, the CRS went on to say that "it may seem like too much of a bootstrap to force individuals into the health insurance market and then use their participation in that market to say they are engaging in commerce." *Id.* at 11-12.

In accord with the analyses just discussed, the court below held that the power claimed by the federal government is "without logical limitation and far exceeds the existing legal boundaries established by Supreme Court

precedent." *State of Florida v. Dept. of Health and Human Services*, 2011 U.S. Dist. LEXIS 8822, at *104. Other federal courts have also agreed that the Individual Mandate "extends the Commerce Clause powers beyond its current high water mark." *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 775 (E.D. Va. 2010); *see also Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010) (noting that this is a case of first impression because "[t]he [Supreme] Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity").

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

assumed *absence* of such power") (emphasis in original); *id.* at 918 ("almost two centuries of apparent congressional avoidance of the practice [at issue in *Printz*] tends to negate the existence of the congressional power asserted here").

**B. Appellants' Recharacterization of the Failure to Purchase Insurance as a Regulable "Activity" Fails Because It Would Destroy All Limits on the Commerce Power.**

Lacking precedent for the constitutional authority claimed to justify the Individual Mandate, Appellants have attempted to elide the distinction between regulating voluntary activities and mandating that inactive individuals participate in activity in the first place. Appellants disparage the distinction between activity and inactivity by characterizing it as formalistic, appealing instead to the "practical economic consequences" of "failing" to purchase insurance. See Appellants' Brief at 43. Yet, try as they might, Appellants cannot escape the Supreme Court's consistent focus on "the actual effects of the *activity* in question upon interstate commerce." *Wickard*, 317 U.S. at 120 (emphasis added). Similarly, Appellants do not point to a single Supreme Court case suggesting that the effects of *inactivity* should be analyzed under the Commerce Clause because there simply are none.

It is telling that, rather than quoting the majority opinion in *U.S.* v. *Lopez*, Appellants have instead focused heavily on Justice Kennedy's concurrence. *See* Brief for Appellants at 38, 43. That concurrence cannot be read to contradict the majority opinion that Justice Kennedy also joined. Nevertheless, this is essentially what Appellants attempt to do. In particular, *Lopez* still affirms the enumerated nature of the federal government's powers, 514 U.S. at 552, and the need to preserve the distinctions between state and federal governments, *id*. at 557. Insofar as Appellants' arguments would undermine this distinction, they are in conflict with *Lopez* itself and the Kennedy concurrence.

Although the *Lopez* Court clearly indicated that it would not extend Congress' power under the Commerce Clause any further, 514 U.S. at 567, Appellants' are nevertheless arguing for the most dramatic expansion of the Commerce Clause in history. If Congress may punish a decision to refrain from engaging in a private activity (namely, the purchase of health insurance) because the consequences of not engaging in it, in the aggregate, could substantially affect interstate commerce, then the Congress can require the purchase of virtually *anything*. For example, this same rationale would allow Congress to punish individuals for not purchasing a host of health-

related products, such as vitamin supplements, so people would ameliorate or prevent their own health conditions and diseases, which, in turn, could lower aggregate health costs. Indeed, it is hard to imagine any private decision not to purchase a particular good or service that does not have some economic impact when aggregated among millions of people. Under that rationale, the government could mandate any commercial activity.

Appellants' arguments conflict with *Lopez* in yet another way when they state that "[f]ederal statutes [that] address practical economic consequences, ... need not be triggered by specific market transactions," to be authorized under the Commerce Clause. Appellants' Brief at 43. By contrast, the *Lopez* court pointed to the absence of a specific market transaction as a reason for striking down a statute as exceeding the scope of the Commerce Clause. *See Lopez*, 514 U.S. at 567 (noting that under the statute "there is no requirement that his possession of the firearm have any *concrete tie* to interstate commerce") (emphasis added); *id.* 514 U.S. at 562 (distinguishing the statute at issue with gun restrictions that have "an explicit connection with or effect on interstate commerce"). Further, *Lopez* held that the Commerce Clause cannot be expanded to apply to non-economic *activity*, regardless of its causative connection to economic consequences,

practical or otherwise. Nevertheless, Appellants have boldly attempted to bend *Lopez* further by arguing that it allows the Commerce Clause to apply even to non-economic, *non-activity*. For example, they state that "Congress may regulate the conduct of participants in the health care market even if those individuals are, at a particular point in time, 'inactive' in the insurance market." Brief for Appellants at 38. But their analysis turns on assuming that individuals admittedly "inactive" in the market are nonetheless market "participants," a significant logical leap.

This is precisely the type of reasoning the Supreme Court criticized in *Lopez,* where it warned that, under the Government's theories,

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

514 U.S. at 564; *accord Morrison,* 529 U.S. at 613 (to allow regulation of non-economic activity at issue would enable the federal government to regulate almost any activity, including "family law and other areas of traditional state regulation.").

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

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

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

## II. Appellants' Arguments Would Impermissibly Convert the Commerce Power into a Federal Police Power.

### A. The Supreme Court has Foreclosed Conversion of the Commerce Power into a Federal Police Power.

As the *Lopez* Court repeatedly emphasized, the Commerce Clause must not be commandeered to create a federal police power. Indeed, creating a rampart against such an intrusion of federal power into the historic realm of state power was a major rationale of *Lopez*. See, e.g., 514 U.S. at 566

("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation"), *id*. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.")

The boundary between the federal Commerce Clause power and the states' police powers, in fact, has been described as crucial to our constitutional structure. *See Morrison,* 29 U.S. at 616, n. 7 ("As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); *id.* at n. 8 (The contrary "argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."); *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985) ("The 'constitutionality mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental

liberties'") (cited in *Morrison,* 29 U.S. 616, n. 7). As Justice Kennedy put it, on "[t]he theory that two governments accord more liberty than one," the Constitution preserves "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States". *See Lopez*, 514 U.S. at 576 (Kennedy, J. and O'Connor, J. concurring). For that reason, the *Lopez* Court warned of extending the Commerce Clause so far as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *See id.* at 557. *See also Morrison*, 529 U.S. at 617-19 (explaining that "[t]he Constitution . . . withholds from Congress a plenary police power") (internal citations omitted).

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

Affirmative legal obligations on citizens characteristically arise under the state police power. For example, compulsory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11, 12, 24-25 (1905); drug rehabilitation, *Robinson v. California*, 370 U.S. 660, 665 (1962); and the education of children, *cf.*

*Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), have all been upheld on the basis of state police powers.

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

But the federal government does not possess the state police power on which Massachusetts claimed to base its requirement to purchase health insurance. *See Fountas v. Comm'r of Dep't of Revenue*, 2009 WL 3792468 (Mass. Super. Ct. Feb. 6, 2009) (dismissing suit), *aff'd*, 922 N.E.2d 862 (Mass App. Ct. 2009), *review denied*, 925 N.E.2d 865 (Mass. 2010)). Congress, by contrast, may only impose affirmative obligations on passive individuals when it does so based on an enumerated power. For example, the

draft is authorized by Congress' power "to raise and support Armies." *See* U.S. CONST. art. I, § 8, cl. 12; *Selective Service Cases*, 245 U.S. 366, 383, 390 (1918). The Individual Mandate represents the first time Congress has ever tried to use the Commerce Clause to impose an affirmative obligation to purchase a product or service, or to participate in any kind of activity.

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

## CONCLUSION

For the foregoing reasons, *amici* Members of the United States Senate respectfully request that the Court uphold the judgment of the district court.

May 11, 2011

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 4,381 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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