No. 11-398

In the Supreme Court of the United States

U.S. DEPT. OF HEALTH & HUMAN SVCS., ET AL.
Petitioners.
v.
STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* TEXAS PUBLIC POLICY FOUNDATION SUPPORTING RESPONDENTS ON THE INDIVIDUAL MANDATE

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QUESTION PRESENTED

Whether Congress has the power under Article I of the U.S. Constitution to require individuals to purchase health insurance.

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INTEREST OF *AMICUS CURIAE*[1]

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "ACA")[2] contains minimum insurance coverage provisions (the "individual mandate") that, if upheld, would constitute an unprecedented expansion of federal power. Such a concentration of government power at the national level would be incompatible with federalism, with the Constitution, and with our basic liberties. It would be another step towards the complete centralization of government power.

The mission of the Texas Public Policy Foundation (TPPF) is to defend liberty, personal responsibility, free enterprise, and limited government in Texas and in the nation as a whole. Because these goals would be substantially undermined by the individual mandate of the ACA, TPPF has an interest in this Court's determination of the mandate's validity, and urges this Court to invalidate the mandate under the United States Constitution.

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* states that all parties have lodged blanket consents. Pursuant to Rule 37.6, *amicus* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amicus* funded its preparation or submission.

[2] Citations herein are to the "consolidated print" of the ACA, P.L. 111-148 as amended by P.L. 111-149.

SUMMARY OF THE ARGUMENT

Sec. 1501 of the ACA contains a mandate that all individuals must obtain health insurance or pay a tax penalty, subject to a variety of exceptions and exemptions. That "individual mandate" finds no home under the Commerce Clause of the United States, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The current interpretation of that clause, which allows Congress to regulate any local activity that has a "substantial effect" on interstate commerce, is fatally flawed for reasons of text, structure, history and economic rationality.

Perhaps the precedents of the last 70 years cannot be undone. But by the same token, they are not a legitimate basis for the further extension of Congress's power into the wholly unprecedented arena of forcing individuals to engage in certain activities in order to conscript them into the service of some ambitious federal scheme. Decisions such as *NLRB v. Jones & Laughlin,* 301 U.S. 1 (1937); *United States v. Wrightwood Dairy,* 315 U.S. 100 (1942); and *Wickard v. Filburn*, 317 U.S. 111 (1942) went far beyond the scope of the original constitutional plan. But even those cases do not come close to suggesting that the Commerce Clause gives Congress the power to force individuals to enter into intrastate transactions in order to

regulate their aggregate effect on interstate commerce.

Writing in *Gibbons v. Ogden,* 22 U.S. 1 (1824), Chief Justice Marshall was careful to limit the power of Congress so that it did not cover agriculture, manufacture or mining, which took place before goods entered into commerce, or their use and consumption once they left commerce. Indeed, even the "purely internal" commerce within a given State was beyond the federal power to regulate.

In *Gibbons*, Chief Justice Marshall set the stage for a uniform interpretation of the commerce power that survived through 1937. These cases uniformly rejected the proposition that Congress could regulate agriculture, mining or manufacture because a change in the quantity or prices of the goods produced through these activities could "indirectly" influence the quantity of goods that moved in interstate commerce. *See*, *United States* v. *E.C. Knight* 156 U.S. 1 (1895); *Kidd v. Pearson,* 128 U.S. 1 (1888). That tripartite division, which looked at the phases before, during and after interstate commerce as distinct, held firm through *A.L.A. Schechter Poultry Corp. v. United States*, 259 U.S. 495 (1935), notwithstanding major transformation in the national economy.

Given this ironclad constraint, Congress also sought to regulate the activities of the States by

imposing restrictions on the types of goods that could move in interstate commerce. In *Champion v. Ames,* 188 U.S. 321 (1903), this Court allowed the federal government to prohibit the movement of lottery tickets through interstate commerce even when they were legal in the States at both ends of the transaction. *Champion* implied that Congress could leverage its control of interstate commerce in order to shape internal State policies. But in 1918 this Court brought that process to a halt by refusing to allow Congress to ban the shipment of goods in interstate commerce by any firm that had used child-labor under the age of 14 anywhere in its plant. *Hammer v. Dagenhart* 247 U.S. 251 (1918).

These limitations on the use of the commerce power were well understood in Congress. The Pure Food and Drug Act of 1906, 21 U.S.C. §§ 1-15, forbade the shipment of certain drugs in interstate commerce, and allowed Congress to regulate their manufacture in the territories, but *not* in the States. The repeal of prohibition in the 21st Amendment also made it clear that, as in the pre-prohibition era, Congress had no power to regulate either the production or consumption of intoxicating liquors in the several States.

This entire system was undone in the key New Deal decisions of *Jones & Laughlin, Wrightwood,* and *Wickard,* which in combination resurrected the theory of substantial indirect effects that had been explicitly rejected in the earlier precedents. This

Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) did puncture the common perception after *Wickard* that Congress could enact whatever legislation it wanted. But *Lopez* placed its unfortunate imprimatur on *Wickard*, and thus did little to restore the pre-New Deal balance.

The modern Commerce Clause cases are not only flawed textually, they have wrecked the sound economic arrangements created under the original system. The earlier rules had two signal virtues. First, they allowed the federal government to organize interstate commerce that could otherwise be vulnerable to disruption by individual States. Second, by blocking the federal government from regulating local activities, they fostered a healthy competition among States, which served as an effective curb against government abuse and reinforced the essentially free society contemplated under the Constitution.

Far from solving any "national problem," the modern, expansive view of the Commerce Clause has become a breeding ground for all sorts of monopoly and cartel activities, most notably in labor and agriculture, that the States acting on their own could have never implemented. This unworthy tradition may be so entrenched that it cannot be uprooted. But this Court should indicate its determination to limit the dangerous aggrandizement of federal power by striking down the unprecedented individual mandate in the ACA.

The cause of individual liberty requires reaffirming the need for reliable limits on the federal commerce power.

ARGUMENT

I. This Court Should Decline to Extend the Deeply Flawed Rule of *Wickard v. Filburn* to the Individual Mandate.

A. The Text, Origins, and Traditional Understanding of the Commerce Clause.

The Commerce Clause of the U.S. Constitution provides that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As this Court has long recognized, the words "among the several States" were words of limitation, meant to be read in parallel with the words "with foreign Nations" and "with the Indian tribes." See *Gibbons,* 22 U.S. at 193-94. There are two implicit limitations in the carefully crafted words. The first is that those economic activities that were not commerce were not subject to any regulation by Congress at all. That includes all the routine manufacture, mining and agriculture that precede commerce, and all the uses of various products after they leave commerce. Second, even within the class of commercial activities—understood as a combination of transportation, communication, sales and similar mercantile transactions, Congress could only deal

with cross-border transactions. It could not deal with the purely internal commercial transactions within States, such as that which is provided by a local carriage or taxi service.

Congress was not granted the power to regulate the national economy generally, because it is abundantly clear that the Constitution would not have been ratified if it *had* granted the Congress such a sweeping power. The Constitution before the Civil War contains many repugnant provisions that protect slavery within the States. If commerce covered agriculture, manufacture and mining, Congress could have done what no one in the ante-bellum period ever thought possible: abolish by national legislation slavery in the States. Article I, § 9, cl. 1 of the Constitution makes it clear that Congress could not control the "Migration and Importation of such persons as any of the States now existing shall think proper to admit"—e.g. slaves—before 1808, but had the power to regulate those activities after that date. If the Commerce Clause had the scope routinely contended for it now, it would have meant that Congress in 1787 was free to abolish slavery within the States, even though it was powerless to prevent the admission of slaves into the States, which is manifestly absurd.

The main public opposition to the proposed constitution came from those who thought that its limits, even under the restricted reading that best conforms to ordinary usage, still left the federal

government with too much power. During Virginia's ratification debates, Patrick Henry railed against the proposed constitution: "To all common purposes of Legislation it is a great consolidation of Government." Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making Of the Constitution* 162 (1996). Federalists such as James Madison agreed that such a consolidation of power might lead to tyranny or civil strife. They counted on strictly delineated enumeration of powers for the federal government, and on the diffusion of power among different levels of government, to protect against those possibilities. In *The Federalist* No. 10, James Madison wrote, "The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." *The Federalist* No. 10 (Madison). Ratification of the Constitution in the State conventions was predicated on the acceptance of this limited vision of federal power—enough power to overcome the limitations of the Articles of Confederation, but limited enough to secure the States' highly evolved democratic institutions, indispensable to both liberty and self-government, from federal control.

On the need to protect the constraints on Congress's enumerated powers there was unanimity of opinion on all sides of the ratification debates. Neither the federalists nor anti-federalists ever imagined that the federal government would be

other than one of limited powers. As James Madison wrote, "the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty," chiefly through the strict delineation of the federal government's powers, and the preservation of the remainder to the States or the people:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 (Madison).

Safeguarding the "lives, liberties, and properties" of the people was, that to that generation, the most fundamental function of government, and reflects the contemporaneous understanding that the State governments, each of which already had a long history, would remain the principle "government" in society. John Locke's *Second Treatise of Government*, one of the canonical texts of the Enlightenment,

which influenced both the Declaration of Independence and the Constitution, explained that people unite "for the mutual preservation of their lives, liberties and estates, which I call by the general name, property." Locke, *Second Treatise of Government*, Ch. 9, ¶ 123 (C.B. Machperson ed., 1980) (1698). Madison chose his words wisely when he suggested that the States' authority would *continue to cover* all the legitimate ends of government along Lockean lines. That reading decisively bars the federal government from any role in the provision of health care.

Throughout the 19th century and well into the 20th, the commerce power was read in a limited fashion consistent with both the basic text and the philosophical tradition of limited government that underlay its adoption. To be sure no case read the clause so narrowly that Congress was helpless to deal with interstate commerce. At the same time, both Congress and the Court were constantly mindful that there were many activities where the federal government could not enter because they were reserved for the exclusive operation of the States. *See*, *Kidd v. Pearson,* 122 U.S. 1 (1888). The idea was that States were "preempted" from regulating within areas of exclusive federal regulatory power, such as interstate commerce, but the federal government was blocked from dealing with matters of primary concern to the States. Areas

of overlap did exist, but they were narrowly confined.

This Court's initial foray into the Commerce clause took place in 1824, in the seminal case of *Gibbons v. Ogden*, 22 U.S. 1 (1824). At issue was whether the Gibbons, operator of two steamboats from New Jersey to New York had to respect the exclusive franchise to operate steamboats in New York State waters now claimed by Ogden. Chief Justice Marshall held that these voyages were within interstate commerce, and that federal law therefore trumped the local police regulation under which Robert Fulton and Robert Livingston had received a state franchise for the operation of a steam vessel. In upholding the supremacy of the federal government in this conflict, Marshall made clear the limits of the federal power. State inspections laws, he wrote,

> act upon the subject before it becomes an article of foreign commerce, or of commerce among the States . . . . Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.
>
> No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Id. at 203.

New York's monopoly, therefore, was not disturbed with respect to boats that started and ended their journeys in New York's waters.

Gibbons stands for the principle that "the sovereignty of Congress, though limited to specific objects, is plenary as to those objects." *Id.* at 197. But the word "plenary" presupposed the Madisonian vision of a limited federal power:

> The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect the States generally; but not to those which are completely within a particular state, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

Id. at 195.

It was only because he was so certain of the "restricted" nature of the federal commerce power, that Marshall felt so confident asserting the supremacy of federal law within its domain. Marshall could not have been clearer:

> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase

> is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.

Id. at 194-95.

No trace of Marshall's careful description of the strict limits on the commerce power appears in the judgments upholding the individual mandate as a valid exercise of that power. In *Seven-Sky v. Holder*, 661 F.3d 1 (2011), for example, Judge Silberman sees virtually no limit to the commerce power, framing the constitutional question in terms of whether individuals are "engaging in an *activity* involving, or substantially affecting, interstate commerce." *Id.* at 16. He notes, "[T]he Framers, in using the term 'commerce among the states,' *obviously* intended to make a distinction between interstate and local commerce, but Supreme Court jurisprudence over the last century has largely eroded that distinction." *Id.* (emphasis added)

B. The Nineteenth and Early Twentieth Century Cases Respected These Well-Established Limits on the Commerce Power.

Perhaps the most prominent of the 19th century's post-*Gibbons* decisions is *United States v. E.C. Knight*, 156 U.S. 1 (1895). That case rightly read *Gibbons* to hold that manufacture preceded commerce and was not part of it. The decision strikingly treated the enforcement of the Sherman Antitrust Act against nationwide cartels as though it were a local matter—a stance that did not last long. *See*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). The key point is that even with this antitrust qualification it was universally understood before the New Deal period that local manufacturing, agriculture, mining, and the provision of any kind of service from retail to health care were subject to the exclusive regulation of the States.

To hammer that point home *E.C. Knight* relied, 156 U.S. at 14, on the Court's then-recent decision in *Kidd v. Pearson*, 128 U.S. 1 (1888), which held that there was no difference between a State's prohibition of a particular manufacture for export (which had been long sustained) and its prohibition of transactions in the same item after importation into the State. Neither prohibition had a "direct" effect on interstate commerce, because one preceded and the other followed it, and was therefore not in conflict

with the plenary grant of interstate commerce authority to Congress. *Kidd* tells a consistent tale:

> As has been often said, legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution, unless, under the guise of police regulations, it imposes a direct burden upon interstate commerce, or interferes directly with its freedom."

Kidd, 128 U.S. at 21-23 (quotations and citations omitted).

The distinction between "direct" and "indirect" effects depended upon a clear distinction between economic activity that was "interstate commerce" properly so-called, and all other economic activity, which was the province of the States. Although by controlling, e.g., manufactures, the State police power might "result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it." *E.C. Knight*, 156 U.S. at 12. The Court in *E.C. Knight* went on to note:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be

> recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government . . . ."

Id. at 13. Anticipating serious problems to come, the Court quoted *Kidd*:

> If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?

Id. at 14 (quoting *Kidd*, 128 U.S. at 21) (quotations omitted). The decision in *E.C. Knight* faithfully built on both *Gibbons* and *Kidd* to forge a vision of federalism which was faithful to the original plan.

The pre-New Deal cases thus stood consistently and clearly for a principle that is the utter antithesis of *Wickard*. No one ever thought that local

manufacturing, agriculture, mining, or the provision of any kind of service from retail to health care was not subject to the exclusive regulation of the States. One significant deviation from that vision of federalism occurred in the *Shreveport Rate Cases*, 243 U.S. 342 (1914), which explicitly acknowledged the continuing authority of *E.C. Knight*. Thus the Court held that Congress could regulate intrastate carriers along with interstate carriers. Congress could control the operations of intrastate carriers "in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate" to federal regulation of that traffic. *Id*. at 351. But, the Court cautioned, "this is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such." *Id*. at 353. The Hughes opinion restricts its "substantial relation" test to interstate *traffic* and the "instrumentalities" of interstate commerce. The decision departs from prior law because it allows some regulation of internal commerce within the State. But it did so only in connection with transportation by rail, leaving agriculture, mining and manufacture totally untouched.

Another development in Commerce Clause cases focused not on those limited activities that "affected" the instrumentalities of interstate commerce, but rather on the direct regulation of interstate commerce in order to shape State regulation of intrastate activity then though to lie

within their exclusive domain. The key case in this progression is *Champion v. Ames*, 188 U.S. 321 (1903), which by a narrow five-to-four vote held that the federal government could prohibit the shipment of lottery tickets in interstate commerce, even when their sale was legal in the States at both ends of the journey. In effect, federal officials used their monopoly power over interstate commerce as leverage to control local activities. Thus, in a classic case of monopoly extension, Congress could achieve indirectly what it admittedly could not achieve directly—namely the elimination of intrastate lotteries that were, in Madison's original vision, exclusively subject to State regulation.

Champion was clearly wrong as a matter of principle because, left unchecked, it spells the end of federalism. Under that case, the federal chokehold on interstate commerce would allow Congress to put the following hard choice to all merchants: either bend to the federal will or abandon the national market. One can only imagine the astonishment it would have caused if, in 1840, Congress had passed a statute forbidding the shipment of cotton from slave plantations into either the national or the foreign market.

Champion created the opening for the passage of Theodore Roosevelt's Pure Food and Drug Act of 1906, 21 U.S.C. §§ 1-15, to put some teeth into drug regulation without running afoul of the clear

limitations of *E.C. Knight*. The act made it "unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded." It outlawed the "introduction" or "shipment" of misbranded foods and drugs into the States—but, conspicuously and self-consciously—it refrained from regulating the manufacture of drugs within the States. The reason was clear enough. Everyone realized that *Champion* had not overruled *E.C. Knight* or any other case on the proposition that manufacture preceded commerce and was not part of it.

The expansionist effort to use the federal commerce power to gain control over purely intrastate commerce came to a temporary halt in *Hammer v. Dagenhart*, 243 U.S. 342 (1918), where the Court, again by a five-to-four vote refused to extend *Champion*. *Hammer* barred Congress from enacting a child labor law that prohibited the shipment in interstate commerce of any goods made in factories that did not conform to the 14-year-old federal minimum age standard for child labor. Once again, it was clear that Congress could not use its power over interstate commerce to control activities that were reserved to the States under the original constitutional scheme. Moreover, as direct regulation was off-limits to the federal government, so too was taxation. Four years later, the *Child Labor Tax Cases*, 259 U.S. 20 (1922), held that

Congress could not seek to pressure the States by taxing interstate trade in goods made in factories that employed child labor. The basic constitutional structure held firm.

The continued dominance of *E.C. Knight* well into the 20th century is also evident in the text of the 18th and 21st Amendments. The 18th Amendment (1920) prohibited the manufacture, sale, or transportation of intoxicating liquor, and thus covered the full gamut of activities at the federal and State level. U.S. Const. amend. XVIII. But when the 21st Amendment repealed prohibition (1933), its text made it clear that Congress, consistent with *E.C. Knight*, had no power to regulate the manufacture of intoxicating liquors within the States. U.S. Const. amend. XXI. Instead, section 2 provides, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

This amendment explicitly does not apply to all activities, but only to the transportation or importation of intoxicating liquors, and only with respect to those States that chose to remain dry. The way the provision was drafted presupposed that, without the just-repealed constitutional amendment, the federal government could neither prohibit nor authorize the manufacture or sale of intoxicating

liquor, both of which remained matters of exclusively local jurisdiction. But once those options were exercised to keep a State dry, then Congress was duty-bound to prohibit transportation or importation, which were of course the only powers that it had under the Commerce Clause to begin with. Indeed, the power given here is narrower than that which Congress asserted in *Champion*, because it only let the Congress regulate the flow of intoxicating liquor between States that had banned its use.

Finally, as late 1935, *A.L.A. Schechter Poultry Corp. v. United States*, 259 U.S. 495 (1935), struck down parts of a federal fair competition law on the ground that sick chickens were no longer in interstate commerce when they were off-loaded from interstate railroads onto local trucks. In extending federal power over "intrastate transactions on the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects." *Id.* at 546. The *Shreveport Rate Cases*, explained the Court, was an example of intrastate activity with a "direct effect" on interstate commerce, because controlling the intrastate activity was essential to promoting the efficiency of interstate rail service and protecting it from unjust discrimination. *Id.* at 544-46. But if the effect on interstate commerce was merely indirect, intrastate transactions could not be reached by the federal commerce power. *Id.* at 546. In line with the

use of this term in *Kidd*, the condition of chickens which had come to rest within a State had at most an indirect effect on interstate commerce, because they were no longer in interstate commerce. If the Commerce Clause were construed to reach transactions with merely an "indirect effect on interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." *Id.*

Despite the creeping expansion of *Shreveport*'s "substantial relation" test from interstate *traffic* to interstate *commerce*, the decision shows the continued effectiveness of hard boundaries in demarcating the division of federal and State power on all matters of State economic activity that did not concern the instrumentalities of interstate commerce. The structure involved in those cases is far superior to that which replaced it after *Wickard.* Clear boundaries are essential to preserving the States' "independen[ce] and autonom[y] within their proper sphere[s] of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997), otherwise that independence and autonomy "would exist only by sufferance of the federal government." *Schechter Poultry*, 259 U.S. at 546.

Dichotomous decisions such as jurisdiction and determinations of liability require clear yes/no tests.

The occasional borderline case is not an argument for abandoning for the local/national line in favor of an approach that answers any and all questions by expanding federal power. Quite the opposite, the Tenth Amendment clearly contemplates that residual powers are reserved to the State. Why put it into the Constitution if in effect the extent of federal power depends entirely on the will of Congress? *Wickard* stands in practical effect for the proposition that *Garcia v. San Antonio*, 469 U.S. 528 (1985), later tried to enshrine, namely that the all powers not specifically delegated to the States are reserved for the federal government, to use at its discretion.

C. The New Deal Expansion of the Commerce Clause Was Both Inconsistent With the Original Structure and Ill-Adapted to a Dynamic Economy

The constitutional structure of 1789 was not rejected because it somehow became inappropriate or ineffective in a changing economy. The principles that applied wisely to interstate stagecoaches and steamships apply just as well to telegraphs, railroads, automobiles, and airplanes. Indeed, the Framers could see easily enough that the great economic expansion during their own lifetimes carried with it the prospect of vast territorial expansion and technological change. They formulated a Constitution that would stand the test

of the time for a growing nation of bustling towns and busy commerce. Well into the 20th century, through world war, depression, and recovery, their framework served the nation well.

When the Constitution was ratified, there was already plenty of commerce "with foreign Nations, and among the several States, and with the Indian tribes," to which the text of the Constitution refers. Manufactures and agricultural products were indeed local, but they routinely crossed State lines in a country marked by increasingly frenetic commercial activity. It was their movement across State lines that Congress was meant to regulate under the Commerce Power, not the manufacture and agricultural production itself.

That result gets the economics just right. Allow these localized activities to be regulated by the States, and a form of interjurisdictional competition will go a long way to restrain State abuses, by the ability to purchase goods and services elsewhere. But network industries like railroads and communication can, in the absence of federal oversight, easily be cut by any State that may want to extract some payment from its neighbors. Putting those activities under centralized control helps avoid that risk, as does the dormant commerce clause which this Court has strongly embraced in the name of the same competitive federalism that New Deal

decisions like *Wickard* fatally undermined. *See*, *e.g.* *Dean Milk v. Madison*, 340 U.S. 349 (1951).

Nonetheless the dam broke in the economic uncertainty of the 1930s. In *National Labor Relations Board v. Jones & Laughlin Steel*, 301 U.S. 1 (1937), a closely divided Supreme Court expanded the scope of the commerce power to allow the federal government to impose a system of collective bargaining in factories and shops across the nation. In a stunning reversal from *Schechter*, this Court held that Congress can regulate those intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Id.* at 37. Still, the Court counseled,

> [T]he scope of this 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.

Id.

Those cautionary words proved idle. Four years later, in *U.S. v. Darby*, 312 U.S. 100 (1941), the

Court struck down *Hammer*'s limitations on the power of Congress to regulate manufacturing within the States, sustaining the Fair Labor Standards Act of 1938, which prohibited the interstate transport of goods produced in contravention of certain labor standards. *Darby* held that Congress's power "extends to those activities intrastate which so affect interstate commerce . . . 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. at 118. In just a few decisions, the Court had transformed *Shreveport*'s extension of federal power over operations of *intrastate carriers* in matters with a "substantial relation" to *interstate traffic*, into a general federal power over all *activities* with a "substantial relation" to *interstate commerce*, demonstrating the slippery slope of the "substantial relation" test. *Kidd* had made it clear that local efforts that altered the quantity and price of goods that were shipped in interstate commerce were not subject to federal power. It drew no distinction between substantial indirect effects and trivial or remote ones. It did not care whether transactions were looked at in isolation or in the aggregate. *Darby* turned *Kidd* upside-down by holding that substantial indirect effects were always caught by the Commerce clause. The set of insubstantial indirect effects was vanishingly small. But by this wave of the semantic wand, this Court in *Darby* transformed the constitutional order without

offering a single substantive explanation as to why the earlier system had failed. The ability of the federal government to regulate employment contracts nationwide creates the risk of massive capture of the federal government. In contrast, leaving this issue to the States imposes an effective check on the abuse of government power.

From *Darby*, the next wrong step was taken in *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942), where the Court applied the logic of the *Shreveport Rate Cases* to local agricultural sales that were made in competition with interstate sales. Chief Justice Stone stated that "'the reach of that [commerce] power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *Id.* at 119. This oft quoted redaction of *Gibbons* reverses its meaning, for Chief Justice Marshall had said "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." *Gibbons*, 22 U.S. at 194. It takes a novel theory of language to treat "extend" and "restricted" as synonyms.

But once that novel move was made, it was but a short step to *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Court held that a farmer was subject to federal regulation when he harvested wheat for feeding his family and farm animals. The effect of his activity on aggregate demand, "taken

together with that of many others similarly situated, is far more trivial." *Id.* at 128. This was true, said the Court, "whatever [the] nature" of the activity, even if it did not constitute commerce. *Id.* at 125. Hence the Court's answer to the critical question of how far Congress could go to reach activities with a "substantial relation" to interstate commerce was both simple and absolute: Congress could regulate virtually every class of activity, no matter how local, if that kind of activity might affect the supply or demand for something in interstate commerce.

These cases have been justified on the basis that the increasingly interstate nature of commerce has blurred the distinction between local and national economic activities. But the level of commercial interpenetration solemnly noted in *Wickard* had been extensive since the beginning of the Republic. *Wickard* legitimatized a system of agricultural cartelization that only the federal government could enforce. The sound and long-held conviction that agriculture cartels were socially undesirable was thrown under the bus in the service of an unwise extension of federal power.

Despite its revolutionary consequences, *Wickard* characterized its decision as "a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*." *Id.* at 122. In fact, *Wickard* was a complete and conscious repudiation of *Gibbons*. In *Gibbons*, Chief Justice Marshall had

insisted that "No direct general power … is granted to Congress" over an article "before it becomes an article … of commerce among the States." *Gibbons*, 22 U.S. at 203. "[T]he exclusively internal commerce of a State" was categorically outside the commerce power. *Id.* at 195. But under *Wickard*, the exclusively internal commerce of a State disappeared into a void, because every transaction, no matter how internal to one State, affects, by definition, supply and demand in the aggregate across the country, and indeed across the whole economy. After all, the family farms that feed their own grain to their own cows no longer have to purchase grain in interstate commerce. Nothing more is needed to subject them to regulation (for socially destructive purposes) even though these activities are completely internal to their *farms*. This tortured result is no trivial matter for human welfare, for much evidence suggest the price controls reduce social welfare. *See*, *e.g.*, Dale Heien & Cathy Roheim Wessells, *The Nutritional Impact of the Dairy Price Support Program*, 22 J. Consumer Aff. 201 (1988) (price controls reduce the level of calcium available to families on welfare below the recommended daily allowances).

D. The Difficulties in the Modern Caw Law Reaffirm the Vital Importance of Imposing Strict Limits on the Commerce Power.

Wickard seemed to give Congress a carte blanche under the Commerce Clause, and for decades the federal government grew dramatically in its scope and intrusiveness. Chief Justice Hughes's prescient warning in *Schechter Poultry* that, if the distinction between direct and indirect effects were abandoned, "the federal authority would embrace practically all the activities of the people," 295 U.S. at 546, materialized with vertiginous speed and no end in sight.

Eventually this Court became more wary of sanctioning new expansions of dubious constitutionality. That wariness finally produced a check for federal power, however nominal, in *United States v. Lopez*, 514 U.S. 549 (1995).

Lopez struck down the Federal Gun-Free School Zones Act, which forbade carrying a gun within 1,000 feet of a school. Chief Justice Rehnquist, writing for a narrow five-to-four majority, tried to find *some* limitation on congressional power even though the Court's doctrine that aggregates small transactions for their substantial effects, *see*, *e.g.* *Perez v. United States*, 402 U.S. 146 (1971), is virtually impossible to square with any meaningful distinction between commercial and non-commercial activity, or between national and local activity.

The majority's conclusion is telling: Although it was not willing to overturn *Wickard*, it could not avoid the implication of the New Deal cases: "The

broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further." 514 U.S. at 567. Without ever confronting the inconsistencies in the past case law, and without explaining how *Wickard*'s expansive "substantial effect" test fit into the original scheme of enumerated powers, the Court simply refused to proceed further.

Justice Thomas was right to reject this ingenious effort to salvage *Wickard*: "In an appropriate case [this Court] must further reconsider [its] "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting [its] more recent Commerce Clause jurisprudence." *Id.* at 585 (Thomas, J., concurring). He then notes, "[O]ur cases are quite clear that there are real limits to federal power" and "[t]he Federal government has nothing approaching a police power." *Id.* at 585-86. And yet, what does *Wickard* stands for if not for a general federal police power?

In his concurrence, Justice Anthony Kennedy rejected the Court's old "content-based or subject-matter distinctions, [which had defined] by semantic or formalistic categories those activities that were commerce and those that were not." *Id.* at 569 (Kennedy, J., concurring). But the expansion of the commerce power in the New Deal was not the function of any supposed "imprecision of content-

based boundaries." *Id.* at 574. It was a conscious effort to abandon the Framers' vision of federalism for the newly minted New Deal substitute. Both formulations are clear. The difference is that *Wickard* is indefensible on textual and structural grounds.

Justice Kennedy is on far firmer ground, however, when he attempts to save *Wickard* on the ground that it is too difficult to overturn it, that courts should leave well enough alone:

> [T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the essential power to regulate transactions of a commercial nature.

Id. at 574.

E. *Stare Decisis* Does Not Require an Extension of *Wickard v. Filburn* in this Case.

In dealing with this case, *stare decisis* highlights the risk of great institutional instability in overruling *Wickard* and its progeny, no matter how flawed its constitutional pedigree. But *stare decisis* does not require that an unsound decision like *Wickard* be extended to unprecedented and

constitutionally troubling expansions of federal power. Indeed one reason why courts have been so determined to reconcile *Wickard* and *Gibbons* is that the indefensible nature of the ruling in *Wickard* may one day be acknowledged, and without the distorting filter of *Wickard*, *Gibbons* would leave would leave legislation like the ACA and much else besides on constitutionally fatal ground.

Just that issue comes up with the ACA now that the issue is framed as whether the Congress may "regulate" forms of economic *inactivity* under its commerce power. In making its claim the government argues that individuals without health insurance will one day consume health care, and this justifies the federal government forcing them to buy insurance now. In one sense the claim is overwrought for in the next breath the government insists that these same individuals must be forced to buy insurance (albeit at low rates) in order to subsidize other individuals with higher expected costs. The first of these goals does not require dragooning everyone in to the ACA. It is met by asking them to buy insurance to cover their own future losses, and which point the government's undue paternalism becomes apparent. Yet by the same token, the correct way to run any subsidy scheme is to raise the needed revenues through a general tax, which the Congress refused to do.

The unsatisfactory case for both these rationales evades the prior question of constitutional authority,

which asks this unprecedented question: May the government force persons to enter into commercial transactions under its commerce power?

In *Seven-Sky*, Judge Silberman concluded cautiously that Congress can regulate inactivity under such circumstances. 661 F.3d at 1. He dutifully treated *Wickard* as the lodestar against which the issue should be decided. But he candidly noted that this case lies in *terra incognita* where *Wickard* gives no particular guidance on the novel question of whether individual inaction can be regulated, given that Congress has never attempted to follow this course. He concludes therefore that the question is open and that as a lower court judge, he is entitled to kick the case upstairs, because the Court has never grappled with the issue.

For all its ambition, *Wickard* does not touch the question, for it only decided that if someone wanted to engage in farming, the government could limit the level of his activity. *Wickard* did not decide that the government could force a farmer to produce a minimum amount of grain or lose his farm, as that would presumably have been barred by the Thirteenth Amendment. Judge Silberman was wrong to conclude that the present case is governed by *Wickard*. But so long as this question is open, this Court has no obligation to *extend Wickard*, given its illegitimate constitutional pedigree, in ways that make it a genuine threat to the liberty of the person.

This Court must give a candid answer to this question: "If the government can force us to buy health insurance, what can't it force us to do?" To that question it is not an acceptable answer to say that in the name of protecting and advancing health, the commerce power allows the federal government to prescribe what individuals may eat, how they must exercise, and what medicines they may take. Without judicially enforceable limits on the power of Congress, only the self-restraint of transient congressional majorities can limit the reach of the federal government. History teaches, and Madison knew all too well, that in any constitutional republic, the transition to unrestrained majority rule is often an irrevocable step on the road to tyranny.

Both the majority in *Lopez* and the concurrence of Justice Anthony Kennedy (in which Justice Sandra Day O'Connor joined) recognized that risk and understood in the abstract the imperative of preserving the boundary between federal and State authority as a limitation on the federal commerce power. The majority noted that under the government's theories, "it is difficult to perceive any limitation on federal power, even in areas … where the States historically have been sovereign." *Id.* at 564. Invoking both *Gibbons*, with a nod toward *Jones & Laughlin Steel*, it refused to admit that "the Constitution's enumeration of powers does not presuppose something not enumerated, and that

there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-68.

In his *Lopez* concurrence, Justice Kennedy went further, asserting the need for careful judicial scrutiny of federal power where it might impact the separation of federal and State authority. "This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution." *Id.* at 575. "The theory that two governments accord more liberty than one requires for its realization two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second, between the citizens and the States." *Id.* at 576. That is the reason why political accountability matters: "Were the Federal Government to take over the regulation of entire areas of traditional State concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

The time has now come to turn these principles into reality. It is wholly wrong to assert uncritically, as does Judge Silberman, that "Congress be free to forge national solutions to national problems, no matter how local–or seemingly passive–their individual origins." 661 F.3d at 20. That argument

does nothing to deal with the situation when the "national problem" is Congress itself, who by its vice-like control over the economy stifles innovation by the imposition of national cartels driven by special interest politics. The Framers on this issue were far wiser for they understood that while it was important to energize Congress in some cases, it was vital to chain that Leviathan to the mast in others. The dangers of excessive Congressional action are manifest not only in the individual mandate, but in the full complex of the ACA's misguided regulation of every detail of standard health insurance contracts from guaranteed issue and renewal, to the medical loss ratio, to its weird systems of indirect price controls, none of which are before the Court in this challenge. It is equally apparent in the growing tendency of Congress to condition its spending in Medicaid on the willingness of the States to surrender their internal budgetary priorities to the federal government. One does not have to worship at the altar of "States' rights" to see massive imbalances in constitutional structure that are ingrained by deferring thoughtlessly to Congress on matters where State competition is both possible and desirable. Why trust Congress to "forge" national solutions, when its enactments bring a wrecking ball to State governments and local economic structures?

Put in its simplest form the system of competitive federalism, wherein the States vie with each other

for the loyalty and affections of its citizens cannot survive when subjected to the all-powerful hand of the federal government. In 1932, before the 1937 constitutional revolution, Justice Louis Brandeis could say with a straight face that one of the virtues of the American federalist system was that a single courageous State can serve as a "laboratory" for "novel social and economic experiments." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Those days may be over, but the constitutional clause that gives Congress the power to regulate commerce "among the several States" should not be twisted to give Congress the power to destroy all forms of business within the several States. Chief Justice Marshall recognized in *McCulloch v. Maryland*, that "[T]he power to tax involves the power to destroy." 17 US. 159, 210 (1819). The time has now come to recognize that the power to regulate is also the power to destroy.

II. This Court Has A Vital Role As Guardian Of The Constitutional Constraints On Government Power

For the Founders, the Constitution's framework of dual sovereignty was important not only as a means of protecting State prerogatives, but also as a means of preserving individual liberty. *The Federalist* No. 51 (Madison) ("In the compound republic of America, the power surrendered by the

people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.")

As Justice Kennedy noted in his concurrence in *Lopez*, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the federal courts] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. 578 (Kennedy, J., concurring).

This Court has not been called on frequently to restore the balance between State and federal power set forth in the Constitution, but when it has it has often played a pivotal role. In *Schechter Poultry*, 295 U.S. at 495, this Court defended the limited nature of federal power even though it meant invalidating the centerpiece of a progressive president's legislative agenda. After the decision, Justice Louis Brandeis is reputed to have told aides to President Roosevelt, "I want you to go back and tell the president that we're not going to let this government centralize everything." Jeff Shesol, *Supreme Power: Franklin Roosevelt v. The Supreme Court* 137 (2010). *Schechter* drew transient political fire, but is now considered an example of proper judicial review.

Grave consequences could follow this Court abdication of its role as guardian of the Constitution's federal system. Without judicially enforceable limits on the power of Congress, the extent of those limits will depend only on the self-restraint of the majority, which is an insufficient safeguard for individual liberty. As Tocqueville famously noted, an unconstrained majoritarian democracy can turn into a tyranny of the majority. Tocqueville, 1 *Democracy in America* 241 (Harvey C. Mansfield & Delba Winthrop eds. & trans. 2000) (1835) ("I am not so much alarmed at the excessive liberty which reigns in that country as at the inadequate securities which one finds there against tyranny. An individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority and implicitly obeys it; if to the executive power, it is appointed by the majority and serves as a passive tool in its hands.") As Madison rightly noted at the Virginia Ratifying Convention, "there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." James Madison, *General Defense of the Constitution*, Speech at the Virginia Convention (June 6, 1788). Subsequent events have only continued to vindicate Madison's insight.

Amicus Curiae urges this Court to consider how much is at stake. This Court will surely hear a question posed in stark terms: "If the government can force us to buy health insurance, what can't it force us to do?" As an incremental expansion in government regulation, however, Judge Silberman's conclusion is easy enough to accept. The roof of enumerated powers constraints has been leaking since the 1930s and nobody can say whether it will provide any protection from a flood of new government regulation in the future. Compared with the overall condition of the roof, what's the point of arguing over one new leak?

But there is more at stake than meets the eye. It is not merely that the prospect of a federal government regulating every single aspect of our lives is wholly incompatible with our constitutional notions of liberty and limited government. More worrisome, this Court, and the Constitution which it is sworn to uphold, are the only things that can ultimately protect our constitutional Republic from the tyrannical caprices of some future transient.

The ACA poses a serious threat to the dual purposes of individual liberty and limited government that our Constitution was created to preserve. This Court should reaffirm its commitment to that text, and the values it embodies.

CONCLUSION

This Court should rule that the individual mandate of the ACA exceeds the power of Congress to regulate commerce among the several States.

Respectfully submitted,

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