APPEAL NO. 10-2347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G. WADDELL; JOANNE V. MERRILL,

PLAINTIFFS-APPELLANTS

v.

TIMOTHY GEITNER, Secretary of the Treasury of the United States, in his official capacity; KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; HILDA L. SOLIS, Secretary of the United States Department of Labor in her official capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his official capacity,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG

REPLY BRIEF OF APPELLANTS LIBERTY UNIVERSITY, MICHELE G. WADDELL AND JOANNE V. MERRILL

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INTRODUCTION

Defendants paint a picture of the Patient Protection and Affordable Care Act (the "Act") as a common-sense constitutionally sound system which will "stem a crisis in the health care market that has threatened the vitality of the U.S. economy." (Appellees' Brief at 16). However, when the layers of glossy paint are peeled away what remains below the rhetoric is a rotten law, which, if allowed to stand, would undermine the very notion of limited government and enumerated powers of Congress. The Administration insists that *Gonzales v. Raich*, 545 U.S. 1 (2005) supplanted *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) as controlling precedent for the scope of the Commerce Clause, ignoring the fact that the *Raich* plaintiffs conceded that Congress had authority under the Commerce Clause to enact the underlying statute. *Raich*, 545 U.S. at 15. Defendants also fail to address the fact that the Individual and Employer Mandates will not provide a guaranteed reduction in the number of uninsured Americans or that the penalty for failing to purchase insurance will not create revenue that will help reduce the number of uninsured Americans. The Administration presumes that everyone who does not have health insurance does not pay his medical bills and that everyone who has health insurance pays every cent of his health care expenses and will never face financial problems related to medical expenses. (Appellees' Brief, at 51, "The Act will

protect people like plaintiffs from the risk of being left destitute by catastrophic medical expenses"). None of these premises is factually or legally supportable, leaving Defendants with no foundation for their claims that the Mandates are constitutionally valid exercises of Congress' enumerated powers. Defendants offer no analysis of the problems posed by the Mandates' infringement upon Plaintiffs' fundamental rights, choosing instead to simply dismiss those claims out of hand. Defendants' cavalier attitude toward Plaintiffs' First Amendment and Religious Freedom Restoration Act ("RFRA") claims does not erase the very significant infringement upon fundamental rights embodied within the Mandate provisions.

LEGAL ARGUMENT

I. THIS COURT SHOULD REJECT DEFENDANTS' ATTEMPT TO JUSTIFY CONGRESS' UNPRECEDENTED EXPANSION OF THE COMMERCE CLAUSE.

A. Defendants Cannot Shoehorn The Individual Mandate Within The Supreme Court's Commerce Clause Decisions.

Faced with the unprecedented expansion of Congress' Commerce Clause authority posed by the Mandates, Defendants use linguistic sleight of hand to try to convince this Court that the Mandates' unsupportable intrusion into the private financial affairs of Americans is nothing more than an extension of Congress' long-standing oversight of the interstate insurance and health care markets. Defendants use feats of logical sleight of hand to try to convince this Court that the Mandates will, *inter alia*, cure the ailing health care system, make health insurance

more available and affordable and save Americans from economic devastation brought on by catastrophic medical bills. (Appellees' Brief at 28, 51). In reality, however, the Mandates will not work the miracles promised by Defendants. When the curtain is pulled back from Defendants' presentation and the faulty premises upon which these conclusions are based are revealed, it is apparent that the Mandates are not cure-alls, but unprecedented power grabs that fall far outside of the boundaries the Supreme Court has placed upon Congress' Commerce Clause power.

1. Defendants Cannot Use Raich To Bypass Lopez And Morrison And Rely Upon Wickard.

Defendants continue to rely upon *Gonzales v. Raich*, 545 U.S. 1 (2005) as controlling precedent for their conclusion that the Mandates are valid under the Commerce Clause. By clinging to *Raich,* Defendants can attempt to return to the expansive definition of the Commerce Clause under *Wickard v. Filburn*, 317 U.S. 111 (1942) and by-pass the intervening narrowing of Congress' power under *Lopez* and *Morrison.* Defendants' reliance upon *Raich* and *Wickard* is misplaced because regulating the *Raich* plaintiffs' active growing and cultivating of medical marijuana or Mr. Filburn's active growing and cultivating of wheat is not analogous to Plaintiffs' inaction in failing to purchase health insurance. *See Id.* at 127-128; *Raich,* 525 U.S. at 22. More importantly, *Raich* is inapposite because it did not involve a facial Commerce Clause challenge. *Id.* at 23. In *Raich* the

plaintiffs did not, as Plaintiffs do here, challenge Congress' authority to enact the underlying statute. *Id.* at 15. "Respondents in this case do not dispute that passage of the CSA [Controlled Substances Act], as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power." *Id.* "Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority." *Id.* Consequently, *Raich* did not, as Defendants claim, effectively overrule *Lopez* and *Morrison* and re-establish the broadened definition of the Commerce Clause announced in *Wickard*. *Raich*'s conclusion that "when Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class" must be understood as referring to the *Raich* plaintiffs' request to excise their economic activity from a *concededly valid exercise of the Commerce Clause*, not, as Defendants claim, an expansion of Commerce Clause authority. Defendants' failure to recognize that distinction renders their conclusion that the Mandates are valid under *Raich* untenable. The distinctions between *Raich*, this case and the most recent Supreme Court cases analyzing facial Commerce Clause challenges, *i.e.*, *Lopez* and *Morrison*, mean that Defendants' attempt to resurrect the pre-*Lopez* expansive definition of the Commerce Clause under *Wickard* is unavailing, leaving Defendants with *Lopez* and *Morrison* as controlling precedent. But even *Wickard* and *Raich* cannot save the Act, because both these cases involved active growing

and consumption; whereas here Plaintiffs are doing absolutely nothing. The *Wickard* and *Raich* plaintiffs were reached by regulation because of their voluntary activity, but the Act here seeks to reach Plaintiffs merely because they lawfully exist.

When viewed under the more limiting standards of *Lopez* and *Morrison*, the individual Mandates fall far outside the permissible limits of Congress' power to regulate interstate commerce. *See Lopez*, 514 U.S. at 567 (accepting the defendants' arguments would convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states). Defendants try to escape that conclusion by engaging in semantic gymnastics aimed at recasting the non-economic inactivity of not purchasing health insurance as an economic activity suitable for congressional regulation under the Commerce Clause. Defendants portray the Mandates as regulating "the means of payment for services in the interstate health care market," preventing "the consumption of health care services without payment," restricting "the shifting of costs to other market participants" and comporting with "broad principles of economic practicality" under which this Court is urged to overlook the fact that through the Mandates Congress is, for the first time, seeking to regulate non-economic inactivity. (Appellees' Brief at 24, 40, 41). No matter how Defendants portray the Mandates, the truth is that Congress is compelling Americans who have chosen not to engage

in commerce to become active market participants by purchasing a government-defined health insurance policy or paying a penalty. There is no legal precedent for such an intrusion into the private financial affairs of American citizens.

Even *Wickard*, which upheld the regulation of the private economic activity of growing wheat, and *Raich*, which upheld the regulation of the private economic activity of growing medical marijuana, did not reach as far as Congress is seeking to reach here. *See Wickard*, 317 U.S. at 128, *Raich*, 545 U.S. at 22. In each of those cases, the Court found that the *economic activities* engaged in by the plaintiffs were sufficiently connected to interstate commerce to warrant congressional regulation.[1] *Wickard*, 317 U.S. at 128, *Raich*, 545 U.S. at 22. By contrast, possessing a gun near a school and committing a violent crime against a female are not subject to congressional regulation under the Commerce Clause because their relationship to *economic* activity is too attenuated. *Lopez*, 514 U.S. at 566-568 (possession of a gun near a school); *Morrison*, 529 U.S. at 608 (violent crime against women). Similarly, Plaintiffs' inaction regarding health insurance is dissimilar to the taking of red wolves on private land that this Court held is

[1] Again, it should be emphasized that in *Raich* the plaintiffs conceded that Congress had the power under the Commerce Clause to enact the Controlled Substances Act, but were seeking a special "carve out" exception for medical marijuana grown in California. *Raich*, 545 U.S. at 23. Plaintiffs do not concede that Congress has the power under the Commerce Clause to enact the Mandates, making *Raich* wholly inapposite. However, if *Raich* were applicable, the economic activity of planting, raising and cultivating medical marijuana would distinguish it from this case.

"regulable economic and commercial activity as understood by current Commerce Clause jurisprudence." *Gibbs v. Babbitt* 214 F.3d 483, 492-493 (4th Cir. 2000). Unlike Plaintiffs' inaction here, the conduct regulated in *Gibbs* involved voluntary actions, *i.e.*, the taking of wolves, for commercial and economic benefit, *i.e.*, protection of valuable livestock and crops, in a way that affected interstate commerce, *i.e.* tourism, trade and research. *Id.*

Neither Defendants' newly minted characterizations of the Mandates nor their recitation of statistics, opinions and conclusions from scholarly articles and congressional reports (none of which is in evidence and most of which is inadmissible) alters the conclusion that the Mandates far exceed the boundaries that the Supreme Court has placed on Congress' Commerce Clause authority.

2. Defendants' Contention That The "Uniqueness" Of The Health Care Market Warrants Congress' Expansion of the Commerce Clause Is Unsupportable.

Defendants build their defense of the Mandates upon a claim that the health care market is somehow "unique" so that Congress is justified in extending its Commerce Clause power to, for the first time, compel people to purchase a product or be penalized. Judge Vinson of the Northern District of Florida cogently revealed the fallacy of that argument in his opinion that declared the Individual Mandate unconstitutional and determined that it was not severable from the Act so that the

entire Act is unconstitutional.[2] *State of Florida v. Dep't of Health and Human Servs.*, 2011 WL 285683 (N.D. Fla. 2011). Judge Vinson persuasively refuted the same issues Defendants have raised in this case, including that Plaintiffs cannot "opt out" of health care, that hospitals are legally required to provide emergency care and that unpaid medical costs are shifted to third parties. *Id.* at *18-*25.

> The defendants contend that there are three unique elements of the health care market which, when viewed cumulatively and in combination, belie the claim that the uninsured are inactive. First, as living and breathing human beings who are always susceptible to sudden and unpredictable illness and injury, no one can "opt out" of the health care market. Second, if and when health services are sought, hospitals are required by law to provide care, regardless of inability to pay. And third, if the costs incurred cannot be paid (which they frequently cannot, given the high cost of medical care), they are passed along (cost-shifted) to third parties, which has economic implications for everyone. Congress found that the uninsured received approximately $43 billion in "uncompensated care" in 2008 alone. These three things, according to the defendants and various health care industry experts and scholars on whom they rely, are "replicated in no other market" and defeat the argument that uninsured individuals are inactive.
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> First, it is not at all clear whether or why the three allegedly unique factors of the health care market are Constitutionally significant. What if only one of the three factors identified by the defendants is present? After all, there are lots of markets–especially if defined broadly enough–that people cannot "opt out" of. For example, everyone must participate in the food market. Instead of attempting to control wheat supply by regulating the acreage and amount of wheat a

[2] Plaintiffs realize that Judge Vinson's opinion is not binding on this Court, but offers his reasoned analysis as a response to Defendants' recurring reference to the purported uniqueness of the health care market as a justification for the Mandates. The Florida case addresses only the Individual Mandate, but Judge Vinson's analysis is equally apropos for the Employer Mandate.

farmer could grow as in *Wickard*, under this logic, Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, non-consumers of wheat bread adversely affect prices in the wheat market. Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile–now partially government-owned–because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

I pause here to emphasize that the foregoing is not an irrelevant and fanciful "parade of horribles." Rather, these are some of the serious concerns implicated by the individual mandate that are being discussed and debated by legal scholars. For example, in the course of defending the Constitutionality of the individual mandate, and responding to the same concerns identified above, often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that although "what people choose to eat well might be regarded as a personal liberty" (and thus unregulable), "Congress could use its commerce power to require people to buy cars." *See ReasonTV, Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful, August 25, 2010, available at: http:// reason.tv/video/show/wheat-weed-and-obamacare-how-t*. When I mentioned this to the defendants' attorney at oral argument, he allowed for the possibility that "maybe Dean Chemerinsky is right." See Tr. at 69. Therefore, the potential for this assertion of power has received at least some theoretical consideration and has not been ruled out as Constitutionally implausible.[3]

[3] This directly counters Defendants' contention that Plaintiffs' similar illustrations regarding the consequences of adopting Defendants expansive view of

Id. at *23-*24.

> In alluding to these same general concerns, another court has observed that requiring advance purchase of health insurance based on a future contingency that will substantially affect commerce could also "apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence." *See Virginia[v Sebelius], supra*, 728 F.Supp.2d [768] at 781 [(E.D. Va. 2010)].

Id. at *25. Judge Vinson added:

> [T]he contention that Commerce Clause power should be upheld merely because the government and its experts or scholars claim that it is being exercised to address a 'particularly acute' problem that is 'singular [ ],' 'special,' and 'rare'–that is to say 'unique'–will not by itself win the day. Uniqueness is not an adequate limiting principle as every market problem is, at some level and in some respects, unique. If Congress asserts power that exceeds its enumerated powers, then it is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.
>
> Second, and perhaps more significantly, under *Lopez* the causal link between what is being regulated and its effect on interstate commerce cannot be attenuated and require a court "to pile inference upon inference," which is, in my view, exactly what would be required to uphold the individual mandate. For example, in contrast to individuals who grow and consume marijuana or wheat (even in extremely small amounts), the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce (not "slight," "trivial," or "indirect," but *no impact whatsoever)*–at least not any more so than the status of being without any particular good or service. If impact on interstate commerce were to be expressed and calculated mathematically, the status of being uninsured would necessarily be represented by zero. Of course, any other figure multiplied by zero is also zero. Consequently, the impact must be zero, and of no effect on interstate commerce. The uninsured

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Congress' Commerce Clause authority are mere "rhetoric" which should be dismissed as meaningless. (Appellees' Brief at 49-51)

> can only be said to have a substantial effect on interstate commerce in the manner as described by the defendants: (i) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment arrangements directly with the health care provider, or with assistance of family, friends, and charitable groups, and the costs are thereafter shifted to others. In my view, this is the sort of piling "inference upon inference" rejected in *Lopez*, *supra*, 514 U.S. at 567, and subsequently described in *Morrison* as "unworkable if we are to maintain the Constitution's enumeration of powers." *Supra*, 529 U.S. at 615.

Id. at *25-*26. "In short, the defendants' argument that people without health insurance are actively engaged in interstate commerce based on the purported "unique" features of the much broader health care market is neither factually convincing nor legally supportable." *Id.* at *27. Defendants cannot make an unconstitutional law constitutional merely because they allege a crisis is looming or conjure up a parade of horribles. Nor can the purported good intention of making healthcare available and affordable make a bad law good. When all the rhetoric and mathematical magic fades, we are left with the basic question of whether Congress has the authority to force inactive citizens to purchase a government-defined product or pay a penalty. The answer is a simple "No!"

3. Defendants Cannot Use The Deference Accorded To Congressional Findings To Justify Congress' Coercive Intrusion Into Private Financial Matters.

Defendants also attempt to justify Congress' unprecedented reach into the private financial lives of lawful citizens by alluding to the usual deference

accorded Congress' choice of the means used to attain the end of regulating interstate commerce. (Appellees' Brief, at 32-33). "Governing precedent leaves no room for plaintiffs' invitation to override Congress' judgment about the appropriate means to achieve its legitimate objectives." *Id.* at 32. Defendants argue this Court should merely look at "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power' or under other powers that the Constitution grants Congress the authority to implement." *Id.* at 32 (citing *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010)). Not surprisingly, Defendants conclude that the Mandates are reasonable means to attain Congress' goal of ameliorating "a crisis in the health care market that has threatened the vitality of the U.S. economy." (Appellees' Brief at 16). In fact, however, the Mandates do nothing to address the problems Congress sought to address. Even if the ends Congress sought in enacting the Act were legitimate objectives under the Commerce Clause (which they are not), the means enacted to address them cannot meet even Defendants' ultra-deferential rational relationship test.[4]

[4] Plaintiffs do not agree with Defendants' characterization of the appropriate standard for review of congressional enactments. Defendants overstate the deference accorded to legislative findings in support of legislation. Following Defendants' position would make this Court little more than a rubber stamp for anything members of Congress might come up with to attempt to justify legislation. The Supreme Court has specifically rejected such a standard. *Morrison*, 529 U.S. at 614. "Whether particular operations affect interstate commerce

Defendants have imbued the Mandates with attributes that are not present in the Act. The Mandates cannot deliver the results promised by Defendants and are not reasonable means to meet the ends described in the Act, even if those ends were legitimate. Defendants claim that "the minimum coverage provisions" will "prevent health care consumers from waiting to buy insurance until they are sick or injured." (Appellees' Brief at 30). In fact, there is nothing in the Mandates to prevent such last-minute purchases. Section 1501 of the Act provides that individuals must demonstrate that they have health insurance which meets the government's definition of "minimum essential coverage" or pay a penalty. 26 U.S.C. §5000A. Section 1513 of the Act dictates that, with limited exceptions, employers must offer employees health insurance coverage that meets what the government determines to be "minimum essential coverage" at what the government determines is affordable or pay significant penalties. 26 U.S.C. §4980H. Under either provision, individuals or employers could pay the penalty and decide to not purchase health insurance at all, or purchase health insurance only when they get sick or injured and be in compliance with the law. Defendants claim that the Mandates will prevent uninsured people from "externalizing" their

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sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Id.* None of the cases cited by Defendants gives Congress *carte blanche* to enact laws (including means and ends) which exceed their enumerated powers. *See Comstock*, 130 S.Ct. at 1970 (Alito, J., concurring).

costs. (Appellees' Brief at 34). Again, this is based upon the faulty premise that the Mandates will result in every individual being covered by health insurance when the Mandates merely provide that individuals purchase insurance or pay a penalty. According to Defendants, the Mandates will ensure that those who use health care services "will not add to the staggering burden of uncompensated health care costs." (Appellees' Brief at 50). This assertion is based upon the faulty premise that every person who is not presently insured will become insured under the Mandates, when in fact the provisions only require a choice between an insurance policy and paying a penalty. If an individual decides to pay the penalty, which is not designated to be applied to purchasing insurance, then he could still remain uninsured and perhaps fail to pay for health care services. Defendants' statement is built upon the further fallacy that everyone who does not purchase health insurance does not pay for his health care costs through other means and thereby shifts the burden of his health care unto those who have insurance. Defendants offer no evidence to support the proposition that those who do not have health insurance do not pay their medical bills while those with insurance pay every penny. Finally, Defendants claim that the Mandates guarantee that people like plaintiffs will be protected from the risk of being "left destitute by catastrophic medical expenses." (Appellees' Brief at 51, citing statistic that 62 percent of all personal bankruptcies are caused in part by medical expenses). This conclusion builds upon the fallacies

that every uninsured person will have health insurance and that everyone who does not purchase health insurance does not pay his medical bills, and adds another fallacy that those who have health insurance will have 100 percent of all medical costs paid for so that they will never face significant medical costs that could create financial hardship.

Neither the words of the Mandates nor any of the scholarly opinions and reports cited by Defendants support their conclusion that the Mandates will solve economic problems associated with health care costs, increase supply and demand for health insurance, and decrease the number of uninsured Americans. Defendants' logically unsupportable arguments are wholly inadequate to justify Congress' unprecedented expansion of the Commerce Clause.

4. Other Governmental Regulatory Schemes Are Not Analogous To Congress' Unprecedented Attempt To Compel Participation in Commerce.

Defendants attempt to defend the unprecedented expansion of Commerce Clause authority by pointing to examples of what they believe are analogous regulations of passive conduct and claiming that the Mandates are merely logical extensions of those regulations.[5] The cited statutory schemes are not analogous, however, and only serve to emphasize the unprecedented nature of Congress'

[5] This argument seems to contradict Defendants' argument that the health care market is "unique." If it is unique, then these comparisons to other industries should be irrelevant.

attempt to compel citizens to purchase a product and penalize those who refuse. Defendants cite two statutory provisions, The Second Militia Act of 1792, ch. 38, 1 Stat. 264, and federal laws regulating child pornography, 18 U.S.C. §2252(c), as examples of Congress regulating inactivity. However, neither statute supports the proposition that Congress can force a person who has purposely not purchased a product to purchase a government-defined product under threat of sanction. The Second Militia Act was an early form of the draft, establishing that every male between 18 and 45 was enrolled in the militia. 1 Stat. 264 at Section I. As part of their responsibilities each man had to "provide himself" with the weapons and supplies needed if he should be called into service. *Id.* The colonial-era law did not require that all males purchase certain government-approved firearms from a third party or pay a penalty, as the Mandates do here with regard to health insurance. Moreover, this law had nothing to do with the Commerce Clause.

The child pornography statute penalizes "knowing possession, transmission, or receipt" of child pornography. 18 U.S.C. §2252(c). Knowing possession, transmission or receipt connotes an affirmative, deliberate action to acquire or transmit something, wholly unlike Plaintiffs' failure to act to purchase health insurance.

In *Nortz v. United States*, 294 U.S. 317, 328 (1935), the Supreme Court found that Congress' power to control the currency included the ability to compel

all of those who had gold bullion, coins and certificates to exchange them for paper currency. As was true in *Raich*, the plaintiff in *Nortz* conceded that Congress had the power to enact the underlying legislation, but wanted a specific ruling regarding the amount of compensation to which he was entitled. *Nortz*, 294 U.S. at 328. While the statute in *Nortz* referred to compelling citizens to do something, it did not, as the Mandates do here, compel those who had taken no action to take action or pay a penalty. *Id.* The affected citizens in *Nortz* had voluntary engaged in an economic transaction–acquiring gold bullion, coins, or certificates–and, as a consequence, were subject to congressional regulation. *Id.* The Court did not say that Congress could force those who did not own gold to purchase gold and then trade it in for currency. *Id.* Neither can Congress here force Plaintiffs and others to purchase a health insurance policy in order to become part of the insurance industry regulated by Congress.

This Court's cases upholding the Freedom of Access to Clinic Entrances (FACE) Act also do not support Defendants' argument that Congress can regulate non-economic inactivity, but further illustrate that Congress' Commerce Clause authority extends to *activities* which affect interstate commerce. *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995); *Hoffman v. Hunt*, 126 F.3d 575, 587-588 (4th Cir. 1997). In *American Life League*, this Court found that the *activities* of violence, threats of force, and physical obstructions aimed at persons

seeking or providing reproductive health services, while not themselves economic, substantially affected the interstate commercial activities of abortion clinics to warrant regulation under the Commerce Clause. *American Life League*, 47 F.3d at 647. In *Hoffman*, this Court re-examined the FACE Act in light of the Supreme Court's decision in *Lopez*, and found that it did not attempt to regulate non-economic inactivity as did the Gun-Free School Zones Act in *Lopez*. *Hoffman*, 126 F.3d at 587.

> FACE does not regulate the provision of reproductive health care. Rather, it regulates the *use* of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with persons because they are or have been obtaining or providing reproductive health care services. Although this regulated *activity* is not itself commercial or economic in nature, it is closely connected with, and has a direct and profound effect on, the interstate commercial market in reproductive health care services. As the congressional reports accompanying FACE make clear, several aspects of interstate commerce are directly and substantially affected by the regulated *conduct*.

Id. (emphasis added). The emphasized words are critical to the distinction drawn by this Court, as they exemplify the essential differentiation between what can be regulated under the Commerce Clause, *i.e.*, voluntary and deliberate actions encompassed in the words *use*, *activity* and *conduct*, and what cannot, *i.e.*, inaction such as being in possession of something (Lopez) or not purchasing a product (the Mandates here). *American Life League* and *Hoffman* are further examples of the long-standing proposition that the Commerce Clause can be used to regulate

activities that affect interstate commerce. *See Morrison*, 529 U.S. at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only where that activity is economic in nature.*" (emphasis added)).

This Court's validation of prior property owner liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) also does not support Defendants' argument that the Mandates are a logical extension of existing congressional regulation. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992). *Nurad* did not involve the Commerce Clause, but analyzed the question of the extent of strict liability for the disposal of hazardous materials on property. *Id.* This Court found that CERCLA "plainly imposes liability on a party who owns a facility at the time hazardous waste leaks from an underground storage tank on the premises." *Id.* at 840. This Court rejected the former owner's attempt to avoid liability by differentiating between prior passive ownership of contaminated property and active present ownership. *Id.* at 845. Under the view proffered by the prior owner, "an owner could avoid liability simply by standing idle while an environmental hazard festers on his property. Such an owner could insulate himself from liability by virtue of his passivity, so long as he transfers the property before any response costs are incurred." *Id.* Such a result would be anomalous to Congress' purpose in enacting

CERCLA. *Id.* at 845-846. While this Court rejected the concept of "passive" versus "active" ownership, it did not, as Defendants imply, embrace the idea that Congress can regulate non-economic inactivity. Property owners subject to CERCLA are not inactive non-participants as are Plaintiffs here. Instead, purchasing property and operating a business from which hazardous materials leaked involves voluntary conduct that produces an economic benefit to the person or industry. The prior property owner in *Nurad* voluntarily purchased a piece of property, *i.e.*, participated in an economic transaction, and held or used it in a way that created economic benefit. Regardless of whether he actively deposited hazardous materials on the land, he owned the land and realized profit from the sale, and so was engaged in economic activity. By contrast, Plaintiffs here have not voluntarily agreed to purchase health insurance from which they realize economic benefit. Congress could not compel the parties in *Nurad* to purchase real property in order to have them liable for contamination and it cannot compel Plaintiffs here to purchase health insurance in order to regulate their personal spending choices.

Similarly, when the Supreme Court found that the Commerce Clause permitted Congress to require local motels and restaurants to serve black customers, it did not say that Congress could require that individuals purchase motels and restaurants in order to increase the supply of facilities available to blacks. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964);

Katzenbach v. McClung, 379 U.S. 294 (1964). Consequently, these precedents do not, as Defendants imply, support the position that Congress can require that individuals purchase health insurance policies in order to increase the number of insured Americans who can be regulated.

None of the statutory schemes Defendants offer as examples of Congress' power to regulate Plaintiffs' private financial affairs do what the Mandates do here – compel citizens to engage in a government-defined financial transaction or be penalized for failing to do so. Despite Defendants' best efforts to prove otherwise, there simply is no precedent for the limitless expansion of the Commerce Clause that is reflected in the Mandates.

5. Defendants' Blurring Of The Lines Between Regulating Participants And Compelling Participation Does Not Validate Congress' Invalid Assertion Of Authority In The Mandates.

In a further effort to blur the distinction between permissible and impermissible Commerce Clause regulations, Defendants point to numerous instances in which courts have upheld regulations of economic transactions in the health care, health insurance and similar national industries. Defendants fail to recognize the difference between regulating those who voluntarily engage in economic transactions and compelling people who have not engaged in any transactions to purchase a product so that they can be regulated.

Defendants point to the fact that health insurance is sold by national or regional companies that operate interstate and cover costs for supplies, drugs and equipment shipped in interstate commerce, presumably implying that those attributes justify compelling all individuals to participate in the industry. (Appellees' Brief at 44). Of course, the mere existence of a national industry and the mere existence of an individual who might someday partake in the industry does not justify compelling the individual to participate at the risk of financial penalty. Defendants state that Congress can regulate health care under the Commerce Clause because diseases can spread rapidly so that people can suddenly need health care services far from home, and consumers travel out of state to receive health care services. (Appellees' Brief at 45). However, these hypothetical possibilities do not give Congress authority to compel people to purchase a government-defined health insurance policy or pay a penalty.

Defendants cite *Hoffman* and *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002) as evidence that this Court has held that Congress can regulate "the cross-border challenges associated with health care and other markets." (Appellees' Brief at 47). In *Freilich*, this Court recognized that since hospitals are regularly engaged in interstate commerce, performing services for out-of-state patients and generating revenues from out-of-state sources, Congress has the power under the Commerce Clause to enact statutes governing physician

peer review. *Freilich*, 313 F.3d at 213. However, the fact that abortion clinics or hospitals, which voluntarily engage in economic transactions, can be subject to regulation does not support Defendants' conclusion that Congress can force someone to engage in similar transactions so that they can be regulated. The mere fact that individuals might someday use health care facilities regulated by federal law does not provide Congress with the power to cast a regulatory net over those individuals' private financial affairs.

Similarly, the fact that the Supreme Court has upheld national reforms for interstate concerns in other industries does not create in Congress the power to compel those who do not participate in the health insurance industry to participate or be penalized. (Appellees' Brief at 47, citing *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.* 452 U.S. 264, 276 (1981) (upholding the Surface Mining Control and Reclamation Act under the Commerce Clause); *United States v. Darby*, 312 U.S. 100, 122-23 (1941) (upholding the Fair Labor Standards Act); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the Social Security system as a national reform for problems associated with state-regulated insurance)). It is undisputed that Congress can enact federal laws to provide consistency and national reforms for interstate industries, including health insurance, but that undisputed fact does not grant Congress the right to compel citizens to become part of those industries against their will.

B. Congress' Long-standing Regulation Of Employers Who Voluntarily Provide Insurance Benefits To Employers Does Not Grant Congress The Right To Compel Employers To Offer Government-Defined Benefits That The Government Defines As Affordable.

Defendants cavalierly dismiss Plaintiffs' challenges to the Employer Mandate by referring to the various statutes under which Congress has regulated the content and availability of group health insurance plans offered by large employers. (Appellees' Brief at 53). However, as Plaintiffs explained in their Opening Brief, the fact that Congress can regulate employers who voluntarily agree to offer health insurance and other benefits to their employees does not mean that Congress can take the further step of requiring that employers offer health insurance to their employees or pay a penalty, nor the further steps of defining what coverage must be offered and whether the coverage is "affordable." (Appellants' Brief at 32-37).

Defendants entirely miss the point of the argument that regulation of wages and hours under *Darby* and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) does not confer upon Congress the right to dictate what benefits will be offered. Plaintiffs' argument is not that the Employer Mandate is unconstitutional because it involves a contract with a third party, but because it seeks to assert the authority to dictate that employers will offer certain benefits defined by the government to their employees or be penalized. (Appellants' Brief, at 25-26).

Defendants cannot cite a single case to support that unprecedented assertion of authority.

II. DEFENDANTS FAIL TO EFFECTIVELY REFUTE THE VALIDITY OF PLAINTIFFS' FIRST AMENDMENT CLAIMS.

Defendants summarily dismiss Plaintiffs' First Amendment claims as "insubstantial," claiming that the Mandates "easily withstand rational basis review." (Appellees' Brief at 62). They base that conclusion upon their unsubstantiated arguments that the Mandates regulate economic activity ("means of payment for services obtained in the health care market") and that Plaintiffs are active participants in the health care market subject to congressional authority. (Appellees' Brief at 62).

Defendants also offer the conclusory statement that the Mandates are neutral laws of general applicability under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) with no analysis of what those terms mean and how the Mandates comport with the definition. As Plaintiffs explain in their Opening Brief, the Mandates are the antithesis of neutral laws of general applicability which do not survive strict scrutiny. (Appellants' Brief at 44-50). Defendants attempt to defend the limited religious exemptions to the Mandates by pointing to the court-approved Internal Revenue Code section upon which the definition of exempted religious sects was based as if the approval of that provision for income tax purposes made its terms immune from challenge in every other

context. (Appellees' Brief at 60-61). As Plaintiffs explained in their Opening Brief, merely alluding to the underlying I.R.C. section does not validate the exemptions under the Constitution. (Appellants' Brief at 52-53).

Defendants do not even attempt to analyze Plaintiffs' Equal Protection, Establishment Clause or RFRA claims. Their failure to address those claims is a telling admission of their validity, and their silence waives any argument to the contrary.

III. THE DISTRICT COURT AND PRESIDENT OBAMA HAVE ESTABLISHED THAT THE MANDATES ARE PENALTIES, NOT TAXES ENACTED PURSUANT TO CONGRESS' POWER TO TAX AND SPEND FOR THE GENERAL WELFARE.

Defendants devote considerable time to an issue that they admit was not addressed by the district court nor raised by Plaintiffs in their appeal. Not only is the issue of Congress' power to enact the Mandates under the Taxing and Spending Clause not before this Court, but both the district court and President Obama have held that the Mandates are not taxes.

As Judge Vinson observed, to date, every court to consider the issue of whether the payments for non-compliance with the Mandates is a tax or penalty (even those that have ruled in favor of the federal government) has rejected Defendants' argument that they are taxes. *Florida v. H.H.S.*, 2011 WL 285683 at *2, n.4 (citing *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 2011 WL 223010, at *9-*12 (M.D.Pa. Jan.24, 2011); *Virginia v. Sebelius*, 728 F.Supp.2d

768, 786-88 (E.D.Va. 2010); *Liberty Univ., Inc. v. Geithner*, --- F.Supp.2d ----, 2010 WL 4860299, at *9-* 11 (W.D.Va. Nov.30, 2010); *U.S. Citizens Assoc. v. Sebelius*, ---F.Supp.2d ----, 2010 WL 4947043, at *5 (N.D.Ohio Nov.22, 2010); *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 890-91 (E.D.Mich.2010)).

More importantly, President Obama, the Act's chief proponent and the one who signed the bill into law has emphatically stated that the payments are not taxes. "For us to say you have to take responsibility to get health insurance is absolutely not a tax increase," and "Nobody considers that a tax increase." http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html (last visited January 11, 2011). For Defendants to now claim that the payments are in fact taxes, while perhaps convenient for trying to validate the law, is disingenuous and contrary to established precedent. Furthermore, as Plaintiffs explained in their Opening Brief, both Congress' reference to the payments as "penalties" while using the term "taxes" elsewhere in the Act, along with the legislative history of the Act, demonstrate that Congress clearly intended that the payments would be penalties, not taxes. (Appellants' Brief, at 40-43). Therefore, this Court should reject Defendants' invitations to 1. consider the issue and 2. hold that the payments are taxes.

CONCLUSION

The Individual and Employer Mandates are unprecedented extensions of Congress' Commerce Clause authority that are legally and factually insupportable. The Mandates violate Plaintiffs First Amendment and Fifth Amendment rights and rights under RFRA.

For these reasons, this Court should reverse the district court's order and find that the Mandates are unconstitutional.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Office Word 2007.

2. Exclusive of the table of contents; table of citations and the certificate of service, the brief contains 6,891 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

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