[ORAL ARGUMENT NOT YET SCHEDULED]

CASE NO. 11-5047

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUSAN SEVEN-SKY, *et al.*,
Plaintiffs-Appellants,

-vs.-

ERIC H. HOLDER, JR., *et al.*,
***Defendants-Appellees*.**

Appeal from the U.S. District Court for the District of Columbia

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OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Edward L. White III*
American Center for Law & Justice
[redacted]

Erik M. Zimmerman*
American Center for Law & Justice
[redacted]

Jay Alan Sekulow
Stuart J. Roth*
Colby M. May
Miles Landon Terry
James Matthew Henderson Sr.
Counsel of Record
American Center for Law & Justice
[redacted]

Dated: May 13, 2011

* Not admitted to this Court's bar

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for Plaintiffs-Appellants makes the following certificate pursuant to D.C. Circuit Rule 28(a):

A. Parties, amici, and intervenors

The following list includes all parties who appeared in the district court and who appear in this Court:

Plaintiffs-Appellants	Defendants-Appellees
Margaret Peggy Lee Mead (no longer a party to this appeal)	Eric H. Holder, Jr., Attorney General of the United States, in his official capacity
Charles Edward Lee	United States Department of Health and Human Services
Susan Seven-Sky	Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity
Kenneth Ruffo	United States Department of the Treasury
Gina Rodriguez	Timothy F. Geithner, Secretary of the United States Department of the Treasury, in his official capacity

No amici or intervenor appeared in the district court proceedings. Mountain States Legal Foundation and Judicial Watch, Inc., have indicated their intention to participate as amici curiae before this Court.

B. Rulings Under Review

Plaintiffs-Appellants are appealing from the final decision and supporting memorandum opinion of District Judge Gladys Kessler entered on February 22, 2011, granting Defendants-Appellees' motion to dismiss the amended complaint. JA 101-66. The memorandum opinion appears on Lexis with the following citation: *Mead v. Holder,* 2011 U.S. Dist. LEXIS 18592 (D.D.C. Feb. 22, 2011).

C. Related Cases

This case was never previously before this Court, or any other court, other than the district court from which this case has been appealed. Plaintiffs-Appellants are not aware of any cases pending in this Court that involve the same parties or substantially the same issues or any such cases previously before this Court. Plaintiffs-Appellants provide the following list of cases, of which they are aware, that involve substantially the same or similar issue(s) as this appeal and that are currently pending before other federal courts:

Court Name	**Case Name**	**Docket Number**
U.S. District Court for the District of Columbia	*Association of American Physicians & Surgeons v. Sebelius*	1:10-cv-499-RJL
U.S. Court of Appeals for the Fourth Circuit	*Virginia v. Sebelius*	11-1057 & 11-1058

U.S. Court of Appeals for the Fourth Circuit	*Liberty University* *v.* *Geithner*	10-2347
U.S. Court of Appeals for the Sixth Circuit	*TMLC* *v.* *Obama*	10-2388
U.S. Court of Appeals for the Sixth Circuit	*U.S. Citizens Association* *v.* *Obama*	11-3327
U.S. Court of Appeals for the Eighth Circuit	*Kinder* *v.* *Department of Treasury*	11-1973
U.S. Court of Appeals for the Eleventh Circuit	*Florida* *v.* *U.S. Department of Health & Human Services*	11-11021 & 11-11067
U.S. District Court for the Eastern District of Oklahoma	*Oklahoma* *v.* *Sebelius*	6:11-cv-30-RAW
U.S. District Court for the Northern District of Ohio	*U.S. Citizen Association* *v.* *Obama*	5:10-cv-1065-DDD
U.S. District Court for the Middle District of Pennsylvania	*Goudy-Bachman* *v.* *U.S. Department of Health & Human Services*	1:10-cv-763-CCC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, counsel for Plaintiffs-Appellants certifies that there are no non-governmental corporate parties to these proceedings.

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GLOSSARY

HCERA: Health Care and Education Reconciliation Act, 111 Pub. L. No. 152, 124 Stat. 1029, 111th Cong., 2d Sess., Mar. 30, 2010

JA: Joint Appendix

PPACA: Patient Protection and Affordable Care Act, 111 Pub. L. No. 148, 124 Stat. 119, 111th Cong., 2d Sess., Mar. 23, 2010

RFRA: Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

JURISDICTIONAL STATEMENT

This case involves a facial challenge to Section 1501 of the Patient Protection and Affordable Care Act ("PPACA")[1]/, which requires most Americans, including Plaintiffs, to buy and indefinitely maintain approved health insurance or pay annual penalties (also known as the individual mandate), and arises under the United States Constitution, 42 U.S.C. § 1983, 42 U.S.C. § 2000bb *et seq.*, and 28 U.S.C. §§ 2201-2202. The district court had original jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1346. This Court has jurisdiction over this appeal from a final decision of the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1291.

The district court entered a final decision dismissing all of Plaintiffs' claims with prejudice on February 22, 2011. JA 101-02. The order states: "[t]his is a final appealable Order subject to Federal Rule of Appellate Procedure 4." JA 102. Plaintiffs filed a timely notice of appeal on February 25, 2011. JA 167-68; Fed. R. App. P. 4(a)(1)(B).

[1]/ 111 Pub. L. No. 148, 124 Stat. 119, 111th Cong., 2d Sess., Mar. 23, 2010, as amended by Health Care and Education Reconciliation Act ("HCERA"), 111 Pub. L. No. 152, 124 Stat. 1029, 111th Cong., 2d Sess., Mar. 30, 2010. Section 1501 is codified at 42 U.S.C. § 18091 and 26 U.S.C. § 5000A. The most relevant sections of these statutes are provided in the Addendum and at JA 55-78.

STATEMENT OF THE ISSUES

I. Whether the PPACA's individual mandate, which requires most Americans to buy and indefinitely maintain approved health insurance or pay annual penalties, is unconstitutional because it exceeds Congress's authority under the Commerce and Necessary and Proper Clauses of Article I of the United States Constitution.

II. Whether, as a matter of first impression, the power "[t]o regulate commerce . . . among the several States," U.S. Const. Art. I, § 8, empowers Congress to regulate the "mental activity" of Americans (*e.g.*, the decision not to enter the market for health insurance), as the district court so concluded, and require those individuals who have declined to purchase health insurance to buy and indefinitely maintain health insurance or pay annual penalties.

III. Whether requiring Plaintiffs Seven-Sky and Lee to either indefinitely maintain health insurance or pay annual penalties violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*

STATEMENT OF FACTS AND THE CASE

Section 1501 requires Plaintiffs and many other lawful United States residents to buy and indefinitely maintain health insurance under the threat of annual financial penalties. The section begins with a series of findings that focus exclusively upon the purported Commerce Clause authority to impose the

"individual responsibility requirement," that is, the requirement that every person buy and indefinitely maintain health insurance. § 1501(a), as amended by § 10106(a); JA 47-48, 56-58, 64-66. The first substantive provision of Section 1501 is the individual mandate, which states that "[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." § 1501(b), at § 5000A(a); JA 44-45, 58.

Under the heading of "shared responsibility payment," a separate subsection of Section 1501 imposes a "penalty" upon a taxpayer for each applicable individual within his or her household who lacks health insurance coverage. § 1501(b), at § 5000A(b)(1), as amended by § 10106(b)(1); JA 45, 58, 66. The "administration and procedure" subsection of Section 1501 creates "special rules" to ensure that key traditional methods of tax enforcement are not available to collect the individual mandate penalty. § 1501(b), at § 5000A(g); JA 47, 63. Section 1501 sets a "flat dollar amount" of the penalty per uninsured person per year—$95 in 2014, $325 in 2015, $695 in 2016 and later years (increased in 2017 and later years in relation to cost-of-living adjustments)—although the amount may be raised or lowered in certain circumstances. § 1501(b), at § 5000A(c), as amended by § 10106(b)(2), (3), and as amended by HCERA § 1002; JA 46-47, 58-60, 66-67, 76-77.

Section 1501 excludes certain persons from the definition of "applicable individual" and provides a few exemptions. § 1501(b), at § 5000A(d), (e), as amended by § 10106(c), (d), and as amended by HCERA § 1002(b); JA 45, 60-62, 67, 76-77. None of these provisions excuse Plaintiffs from having to comply with the individual mandate. *See id.* Also, the PPACA does not include a severability provision.

Plaintiffs are United States citizens who do not currently have health insurance and do not want or need such insurance. JA 48-50. It is highly likely that each Plaintiff will be required to either buy and indefinitely maintain health insurance or pay annual penalties beginning in 2014. JA 49. For example, it is highly likely that Plaintiff Rodriguez will be required to pay, at a minimum, *$11,685 in penalties* on behalf of herself and her household through 2020. JA 51. As a direct result of the individual mandate's inevitable impact upon Plaintiffs' finances and lifestyle, they are compelled to adjust their finances now, by setting aside money, and will continue to do so to pay the annual penalties. JA 50-52. As a result, Plaintiffs will be unable to use or set aside that money for other purposes now, directly limiting their ability to plan for the future prudently. *Id.*

Plaintiffs alleged in their Amended Complaint that Section 1501 is unconstitutional because it exceeds Congress's power under Article I of the United States Constitution, and that the entire PPACA is invalid because Section 1501 is

not severable. JA 33-36, 38, 42. Plaintiffs Seven-Sky and Lee also alleged that the individual mandate violates their rights protected by RFRA. JA 37-38. The district court held that Plaintiffs have standing to bring their claims, which are ripe for review, because they have alleged a substantial probability that they will be subject to the individual mandate in 2014 and beyond, which directly impacts their present spending and financial planning.[2]/ JA 115-27. Defendants waived their jurisdictional arguments in a notice filed with the district court. JA 98.

Regarding the merits, the district court concluded that the individual mandate was a valid exercise of the powers to regulate commerce and to make laws necessary and proper to the exercise of the commerce power based primarily upon four determinations: 1) Congress can regulate an individual's "mental activity" of deciding not to buy health insurance, which substantially affects interstate commerce; 2) inevitably, all individuals will take part in the health care market, which Congress can regulate; 3) some uninsured individuals will receive health care services that they cannot pay for, the costs of which are shifted to others; and 4) the individual mandate is necessary to prevent the PPACA's other sections from causing negative consequences. JA 140-57. The court also held, however, that the taxing power does not authorize Section 1501 because "Congress

[2]/ The district court concluded that Plaintiff Mead lacked standing because she would likely be covered under Medicare, JA 115-17, but Mead is not a party to this appeal.

did not intend the mandatory payment . . . to act as a revenue-raising tax, but rather as a punitive measure." JA 159.

In addition, the court rejected the RFRA claims, holding that the ability to pay annual penalties in lieu of maintaining health insurance negates the existence of any substantial burden upon Plaintiff Seven-Sky and Lee's religious exercise, and also holding that the individual mandate was the least restrictive means of achieving the compelling government interests of safeguarding public health and increasing health insurance coverage. JA 163-66. This timely appeal by Plaintiffs followed.

SUMMARY OF THE ARGUMENT

The individual mandate is unconstitutional because it exceeds even the outermost bounds of Congress's Article I authority and is inconsistent with the constitutional system of dual sovereignty that divides power between the federal and State governments. Under the Commerce Clause, Congress cannot "regulate" inactivity by requiring individuals to buy a good or service as a condition of their lawful residence in the United States, and Congress does not have *carte blanche* to include unconstitutional provisions within a larger scheme of commercial regulation. Although Congress may regulate local economic activity that, when coupled with similar activity, substantially affects interstate commerce, it cannot regulate an entire group (uninsured individuals) because a small subset of that

group will, at some point in the future, engage in a class of economic activities within Congress's power to regulate (receiving health care without paying for it).

In addition, that virtually all Americans will participate in broadly defined markets at some point during their lifetimes (health care, housing, transportation, food, etc.) does not authorize Congress to regulate all Americans indefinitely without any connection to a specific, voluntary commercial or economic activity. The power to regulate an interstate market extends to those who *voluntarily enter it during the duration of their participation* in that market; that power does not authorize Congress to regulate non-participating individuals now based upon speculation about what they may do in the future.

The novel arguments offered in support of the individual mandate are not subject to any meaningful limiting principle and, if accepted, would eviscerate the Constitution's system of dual sovereignty and limited, enumerated federal powers.

Similarly, the Necessary and Proper Clause, often resorted to as "the last, best hope of those who defend *ultra vires* congressional action," *Printz v. United States*, 521 U.S. 898, 923 (1997), does not support the individual mandate. A principal justification offered for the individual mandate is the need to avoid numerous negative consequences that the PPACA's other provisions would cause absent the mandate to buy insurance. Accepting this reasoning would transform the Necessary and Proper Clause from a modest means of carrying out the

enforcement of federal laws tied to an enumerated power into an unwieldy vehicle for Congress to pass statutes containing provisions that would have negative effects coupled with otherwise unconstitutional provisions to mitigate those negative effects.

Moreover, the claim that the individual mandate is *necessary* to achieve a goal within Congress's authority is merely the beginning of the inquiry, not the end; to be valid the law must also be *proper*—"appropriate" and "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Given the wide-ranging implications of the arguments offered in support of the individual mandate for our system of dual sovereignty, the fact that the Commerce Clause does not authorize the individual mandate demonstrates that the mandate also exceeds the scope of the Necessary and Proper Clause.

Furthermore, the individual mandate violates RFRA as applied to Plaintiffs Seven-Sky and Lee. The Amended Complaint sets forth a plausible claim that the individual mandate substantially burdens their religious exercise by requiring them to either indefinitely maintain health insurance, which they sincerely believe would violate their religious belief that God will protect them from illness or injury, or pay annual penalties for declining to violate their faith. Defendants, moreover, cannot meet their burden of demonstrating that applying the individual mandate to

Seven-Sky and Lee is the least restrictive means of furthering any compelling government interest.

ARGUMENT

I. THE PPACA'S INDIVIDUAL MANDATE IS UNCONSTITUTIONAL. IT EXCEEDS CONGRESS'S AUTHORITY UNDER ARTICLE I OF THE UNITED STATES CONSTITUTION.

"The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const. Art. I, § 8. As James Madison wrote, '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.'" *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist No. 45*). The Supreme Court has emphasized the importance of dual sovereignty, observing that "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992); *see also U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one State and one federal, each protected from incursion by the other.").

The individual mandate exceeds the few and defined powers of Congress, including those provided by the Commerce and Necessary and Proper Clauses. It is, therefore, unconstitutional.

Review of the district court's dismissal of the constitutional claims under Fed. R. Civ. P. 12(b)(6) is *de novo*. *Kaemmerling v. Lappin*, 553 F.3d 669, 676 (D.C. Cir. 2008).

A. The individual mandate is not authorized by the Commerce Clause.

Congress has the power "[t]o regulate commerce . . . among the several States." U.S. Const. Art. I, § 8. Although the scope of this power has been broadened from the original understanding of a power to "prescribe the rule by which commerce is to be governed," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824), the Supreme Court has consistently held that Congress's exercise of this power is limited.

Although federal statutes are presumed to be constitutional, *United States v. Morrison*, 529 U.S. 598, 607 (2000), the unprecedented nature of the individual mandate is strong evidence that the Commerce Clause does not authorize Congress to require an individual to buy something. In *Printz*, the Supreme Court observed that "[t]he utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power." 521 U.S. at 907-08; *see also id.* at 905 ("if . . .

earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."); *id.* at 918 (finding significant the "almost two centuries of apparent congressional avoidance of the practice."); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (agreeing that "[p]erhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.").

Similarly, the individual mandate "forge[s] new ground and extends the Commerce Clause powers beyond its current high water mark." *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 775 (E.D. Va. 2010). "Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States." *Florida v. U.S. Dep't Health & Human Servs.*, 2011 U.S. Dist. LEXIS 8822, at *71-72 (N.D. Fla. 2011). For the reasons set forth below, the individual mandate exceeds the outer bounds of the Commerce Clause.

1. *Lopez* and *Morrison* emphasize that Congress may regulate voluntary economic activity, but the individual mandate regulates a person's inactivity.

The individual mandate applies to all individuals lawfully present in the United States who have not been given an exemption. The requirement to buy and indefinitely maintain health insurance, or indefinitely pay annual penalties, is not

triggered by the occurrence of any event or activity. As one district court noted in another case involving the PPACA, "[t]he threshold question . . . is whether activity is required before Congress can exercise its power under the Commerce Clause." *Id.* at *74. Another district court accurately observed that "[n]either the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market." *Virginia*, 728 F. Supp. 2d at 782.

A purported exercise of the Commerce Clause power must be predicated upon the regulation of existing, voluntary commercial or economic activity to be valid—not the failure to purchase a product. Because the individual mandate applies to individuals regardless of whether they are presently engaged in any specific commercial or economic activity, it exceeds the Commerce Clause power. As such, the district court erred in holding that the individual mandate regulates "an economic activity: deciding whether or not to purchase health insurance." JA 140-41.

District courts considering challenges to the individual mandate have recognized that prior cases upholding regulation under the Commerce Clause have

involved existing physical economic activity.[3]/ The fact that Supreme Court cases upholding statutes based on the Commerce Clause have all involved the regulation of existing commercial or economic activities is not a mere coincidence. *Lopez* and *Morrison* illustrate that the requirement of voluntary commercial or economic activity is derived from the Commerce Clause's text and history as well as the important constitutional principle of dual sovereignty.

a. *United States v. Lopez*, 514 U.S. 549 (1995)

In *Lopez*, the Supreme Court held that the Gun Free School Zones Act, which prohibited the possession of a firearm within 1,000 feet of a school, exceeded Congress's Commerce Clause authority because it was a law that "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. The *Lopez* Court reiterated that the Commerce Clause "'must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

[3]/ *See, e.g*, JA 147 ("previous Commerce Clause cases have all involved physical activity, as opposed to mental activity, *i.e.*, decision-making"); *TMLC v. Obama*, 720 F. Supp. 2d 882, 2010 U.S. Dist. LEXIS 107416, at *23 (E.D. Mich. 2010); *Florida*, 2011 U.S. Dist. LEXIS 8822, at *74-75; *Virginia*, 728 F. Supp. 2d at 771.

The Court identified three "categories of activity" that the Commerce Clause authorizes Congress to regulate, including "activities . . . that substantially affect interstate commerce," the only category relevant here. *Id.* at 558-59. The Court summarized previous cases dealing with this category as holding that, "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560 (emphasis added). The Court concluded that the Act exceeded Congress's authority because possessing a gun in a school zone was not economic activity, nor was the Act "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561.

The government argued that Congress may regulate non-economic activity (possessing guns in a school zone) that, in the aggregate, substantially affects interstate commerce. Of note, the government cited *the cost-shifting impact on the insurance system*, arguing that gun possession may lead to violent crime, and "the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population." *Id.* at 563-64. In rejecting these arguments, the Court responded by stating:

> We pause to consider the implications of the Government's arguments. The Government admits . . . that Congress could regulate not only all violent crime, but all activities that might lead to violent crime . . . . [as well as] any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. . . . *Under the*

> *theories that the Government presents . . . it is difficult to perceive any limitation on federal power. . . . Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.*

Id. (emphasis added).

The Court noted that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation," *id*. at 566, and stated,

> [t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . [That] would require us to conclude 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. This we are unwilling to do.

Id. at 567-68 (citations omitted); *see also id.* at 577-78 (Kennedy, J., concurring) (noting the importance of federalism principles in Commerce Clause interpretation).

The individual mandate does not withstand scrutiny under *Lopez*. Being lawfully present within the United States, like possessing a gun within 1,000 feet of a school, is not a *commercial or economic activity* that substantially affects interstate commerce. No support exists for the assertion that the power to "'prescribe the rule by which commerce is to be governed'" includes the power to force those who do not want to engage in a commercial or economic activity to do

so. *See id.* at 553 (quoting *Gibbons*, 22 U.S. at 196). As in *Lopez*, "[t]o uphold the Government's contentions here [would require] . . . convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

b. *United States v. Morrison*, 529 U.S. 598 (2000)

Morrison also demonstrates that the individual mandate exceeds Congress's power. There, the Court held that Section 13981 of the Violence Against Women Act, which provided a civil remedy for victims of gender-motivated violence, was unconstitutional because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613. Congress found that gender-motivated violence substantially affects interstate commerce, *id.* at 615, but the Court rejected the argument "that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617-18. The Court observed that cases in which it had upheld an assertion of Commerce Clause authority due to the regulated activity's substantial effect on interstate commerce involved the regulation of "commerce," an "economic enterprise," "economic activity," or "some sort of economic endeavor." *Id.* at 610-11.

Like *Lopez*, *Morrison* further illustrates that the individual mandate exceeds Congress's Commerce Clause authority. Accepting the government's arguments

would lead to a federal police power allowing Congress—for the first time—to mandate a host of purchases by individuals.

After *Morrison* was decided, this Court upheld the application of the Endangered Species Act to a proposed housing development that would jeopardize the existence of the arroyo southwestern toad. The Court reaffirmed the necessity of examining whether the regulation targets *economic activity*, stating that "[t]he first *Lopez* factor is whether the regulated activity has anything 'to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.'" *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003) (quoting *Lopez*, 514 U.S. at 561). This Court declined to decide whether the absence of economic activity would be dispositive, or merely one factor to consider, because the construction of a housing development was an economic activity. *Id.* at 1072.

Rancho Viejo reaffirms that whether the regulated activity is economic in nature is *at least* one factor to consider,[4]/ casting doubt upon dicta from D.C. Circuit cases decided before *Morrison* suggesting that the Commerce Clause

[4]/ *See also Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1158, 1160 (D.C. Cir. 2003) (opinions of Chief Judge Sentelle and now-current Supreme Court Chief Justice Roberts dissenting from the denial of rehearing en banc, noting that the majority's interpretation of the Commerce Clause was more expansive than the Supreme Court's).

allows Congress to regulate non-economic activities that substantially affect interstate commerce.[5]/

The individual mandate is unconstitutional because it does not regulate voluntary economic *activity*; declining to enter a commercial transaction is not the equivalent of entering a commercial transaction.

c. The individual mandate exceeds the Commerce Clause power because it does not regulate existing commercial or economic activity.

Through the individual mandate, Congress sought to obscure entirely the distinction between activity and inactivity, stating that Section 1501 "*regulates activity* that is commercial and economic in nature: economic and financial *decisions* about how and when health care is paid for, and when health insurance is purchased." § 1501(a)(2)(A), as amended by § 10106(a); JA 64 (emphasis added). Put differently, Congress asserted that being lawfully present in the United States without health insurance *is itself economic activity* that Congress can regulate. The district court accepted this argument, stating:

[5]/ *Navegar v. United States*, 192 F.3d 1050 (D.C. Cir. 1999) (upholding a statute prohibiting the manufacture, transfer, and possession of semi-automatic assault weapons); *Nat'l Assoc. of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding the application of the Endangered Species Act to the construction of a hospital); *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996) (upholding the Freedom of Access to Clinic Entrances Act's prohibition of activities preventing access to abortion clinics).

> this Court finds the distinction [between regulating activity and inactivity], which Plaintiffs rely on heavily, to be of little significance. It is pure semantics to argue that an individual who makes a choice to forgo health insurance is not "acting," especially given the serious economic and health-related consequences to every individual of that choice. Making a choice is an affirmative action, whether one decides to do something or not do something. They are two sides of the same coin. To pretend otherwise is to ignore reality.

JA 147. In other words, deciding not to buy something is "mental activity" that Congress can regulate. *Id.* The district court incorporated this reasoning into its legal analysis, asking "whether *the decision not to purchase* health insurance is an 'economic' one, like the activities in *Wickard* and *Gonzales*, or a 'non-economic' one like those in *Lopez* and *Morrison*." JA 137 (emphasis added).

The district court's conclusion that "[i]t is pure semantics" to differentiate between actual economic conduct and the failure to buy a product is flawed for several reasons. *See* JA 147. First,

> "economic decisions" are a much broader and far-reaching category than are "activities that substantially affect interstate commerce." . . . Every person throughout the course of his or her life makes hundreds or even thousands of life decisions that involve the same general sort of thought process that the defendants maintain is "economic activity." There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes.

Florida, 2011 U.S. Dist. LEXIS 8822, at *102. Some decisions lead to economic activity within Congress's power to regulate, while many more decisions lead to non-economic activity, or inactivity, that is not within Congress's power to regulate.

American adults decide daily whether to spend money on an array of goods and services. A person may choose to buy X and not Y. Under the district court's reasoning, so long as Congress has the authority to regulate the interstate market for Y (which is often the case), it can mandate that all individuals purchase Y. Congress would merely need to assert that the "mental activity" of deciding not to purchase Y is economic in nature, and that the failure to buy Y substantially affects interstate commerce. For example, Congress could cite its authority to regulate banking to justify a mandate that all individuals maintain a certain amount of money in a bank account or pay a penalty. In short, the government's defense of the individual mandate, which was adopted by the district court, "rests on a twisted revision of Descartes' syllogism: 'I think (about commerce), therefore I am (engaging in commerce).'" Brief for Revere America Foundation as Amicus Curiae Supporting Plaintiffs at 30, *Liberty University v. Geithner*, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. 2010) (No. 6:10-cv-00015-nkm).

Second, the district court cited "serious economic and health-related consequences to every individual" resulting from a failure to buy health insurance as a justification for Congress to mandate the purchase of health insurance. JA 147. *Any* failure to purchase something will have *consequences* for both the person declining to make the purchase and those who are voluntary market

participants, yet that is a woefully inadequate (and unprecedented) basis for Congressional regulation.

> There is quite literally no decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that—when aggregated with similar economic decisions—affect the price of that particular product or service and have a substantial effect on interstate commerce.

Florida, 2011 U.S. Dist. LEXIS 8822, at *98. In addition, addressing the perceived "health-related consequences" of an individual's actions is particularly within the purview of *the States' police powers*, not Congress's power.

Third, although at times a person's failure to buy a particular product is the result of a deliberate decision-making process, far more often, the individual has not contemplated buying the particular product at all. There is a vast and diverse array of services and products available for sale, many of which an individual will never make an active decision not to purchase. As has been observed, "it is 'a remarkable exaggeration of [the] rational aspects of human nature' to claim that the uninsured (as a rule) make structured and calculated decisions to forego insurance . . . as opposed to simply not having it." *Id.* at *96-97. The progression from a Congressional power to regulate commerce among the several States to a power to regulate a person's failure to buy a good or service, *even one that the*

person has never thought about, is staggering, and bears no connection to the Commerce Clause's text or the Constitution's system of dual sovereignty.

In light of these principles, federal judges in Florida and Virginia have correctly held that the Commerce Clause empowers Congress to regulate ongoing commercial or economic activity in some circumstances, *not mere* "*mental activity" or decisions*. "If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, we would go beyond the concern articulated in *Lopez* for it would be virtually impossible to posit anything that Congress would be without power to regulate." *Id.* at *80; *accord Virginia*, 728 F. Supp. 2d at 781. These judges also rightly concluded that the individual mandate is *ultra vires* because it does not regulate existing commercial or economic activity. *Id.*

2. *Wickard* and *Raich* do not suggest that Congress's authority to regulate local economic activity, as an essential part of a national scheme to regulate that activity, gives rise to a newly-minted power to force unwilling individuals into a market.

Wickard v. Filburn, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), stand for the proposition that federal regulation of a particular type of existing economic activity, such as producing a marketable commodity, can reach that activity at a purely local level when doing so is necessary and proper to effectively regulating that activity nationally. Neither *Wickard* nor *Raich* suggests

that Congress may compel people to join a market involuntarily as an "essential" part of a scheme to regulate that market.

a. *Wickard v. Filburn*, 317 U.S. 111 (1942)

In *Wickard*, the Supreme Court upheld provisions of the Agricultural Adjustment Act that authorized a penalty to be imposed on farmers who grew more wheat than the quotas set for their farms as a means of limiting supply and stabilizing market prices. 317 U.S. at 115-16. Roscoe Filburn grew more than twice the quota for his farm; he typically sold a portion of his wheat in the marketplace, used a portion for feeding his livestock and for home consumption, and kept the rest for future use. *Id.* at 114-15. Filburn argued that the Act exceeded Congress's power because his activities were local and had only an indirect effect upon interstate commerce. *Id.* at 119.

The Court upheld the Act, stating that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. The Court observed that the statute effectively "restrict[ed] the amount [of wheat] which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs." *Id.* at 127.

Wickard does not suggest that Congress may regulate *inactivity* that has some impact upon interstate commerce; rather, the Court held that Congress may regulate local *economic activity* (growing a marketable commodity) when that economic activity, taken in the aggregate with similar economic activity, substantially effects interstate commerce.

The district court incorrectly relied upon *Wickard* for the proposition that Congress may regulate those who decline to enter a market. JA 142. The law at issue in *Wickard* penalized overproduction of wheat, *a quintessential voluntary economic activity*, not the failure to make a purchase in the wheat market. *Wickard* did not hold that Congress could have dealt with the issue of low wheat prices by forcing all Americans to buy a specific amount of wheat or pay a penalty for failing to do so, even though virtually all Americans will inevitably eat wheat at some point, and an individual's failure to buy a specific amount of wheat, when viewed in the aggregate, would substantially affect overall demand for wheat and wheat prices. To do so, Congress would have violated the Commerce Clause as it has through the individual mandate.

The district courts that have held the individual mandate unconstitutional have correctly noted that a key aspect of *Wickard* and other cases upholding regulations under the Commerce Clause is the presence of *voluntary* economic activity subjecting an individual to Congressional power. *Virginia*, 728 F. Supp.

2d at 780 (noting that an economic activity "voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided."); *Florida*, 2011 U.S. Dist. LEXIS 8822, at *72, n.14 (noting that "the individuals being regulated . . . were engaged in an activity . . . and each had the choice to discontinue that activity and avoid penalty").

Unlike the law at issue in *Wickard*, the individual mandate is not triggered by any voluntary economic activity, nor can an individual avoid its application by ceasing an ongoing economic activity. As three former U.S. Attorneys General have explained,

> the private parties in *Wickard* and its progeny affected the relevant market in the same way local bootleggers affect, in the aggregate, the liquor market. But the *inactive* private parties here affect the market only in the way a teetotaler affects the liquor market. The fact that the "substantial effects" cases authorize regulating a local bootlegger does not remotely authorize conscripting a teetotaler to buy liquor.

Brief for Former U.S. Attorneys General William Barr, Edwin Meese, III, and Dick Thornburgh as Amici Curiae Supporting Plaintiffs at 11-12, *Virginia ex rel. Cuccinelli v. Sebelius* (4th Cir. Apr. 4, 2011) (Nos. 11-1057 & 11-1058).

b. *Gonzales v. Raich*, 545 U.S. 1 (2005)

Raich does not support the individual mandate either. In *Raich*, individuals who wanted to use marijuana for medicinal purposes brought an as-applied challenge (not a facial challenge as Plaintiffs bring here) to the Controlled Substances Act (CSA), which created a "closed regulatory system" governing the

manufacture, distribution, and possession of controlled substances to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." 545 U.S. at 12-13. Importantly, the *Raich* plaintiffs did not contend (as Plaintiffs do here with the PPACA) "that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority." *Id.* at 15. As such, the narrow issue before the *Raich* Court was "whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Id.* at 9.

The Court held that "[t]he CSA is a valid exercise of federal power, even as applied to the troubling facts of this case." *Id.* The Court stated, "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an *economic 'class of activities'* that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added) (citing *Perez v. United States*, 402 U.S. 146, 151 (1971)). Moreover, "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* (citing *Perez*, 402 U.S. at 154-55). As such, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* (citation omitted).

The Court stated that *Wickard*'s key holding was that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18. Unlike the non-economic activities at issue in *Lopez* and *Morrison*, "the activities regulated by the CSA *are quintessentially economic*. . . . The CSA . . . regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26 (emphasis added). In addition,

> Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority.

Id. at 22. The Court described the marijuana ban as "merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 24-25 (quoting *Lopez*, 514 U.S. at 561).

Significantly, unlike *Raich*, the instant case does not involve an as-applied challenge to a concededly valid regulatory scheme; rather, Plaintiffs contend that the individual mandate exceeds Congress's authority on its face. Thus, *Raich*'s

emphasis on the reluctance of courts to prohibit individual applications of a valid statutory scheme to local economic conduct is not implicated here.

Also, the statute in *Raich* discouraged an ongoing "quintessentially economic" activity: "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26. The Court repeatedly emphasized Congress's authority to target an ongoing economic class of activities. *Id.* at 17. By contrast, the individual mandate does not regulate an ongoing economic class of activities "within the reach of federal power." *See id.* at 23. Lawful presence in the United States, without more, is not an economic activity akin to producing and distributing a marketable commodity. *Raich* does not suggest that the targeted economic class of activities may include the failure to buy something.

In addition, statements in *Raich* concerning Congress's ability to enact a comprehensive regulatory scheme targeting ongoing economic activity have no bearing on the individual mandate. *Raich* held only that federal regulation of economic activity—such as producing and consuming a marketable commodity—can, in some circumstances, reach that economic activity at a local level when doing so is necessary and proper to the effective national regulation of that economic activity.

Raich and other Commerce Clause cases do not suggest that Congress can—for the first time in our Nation's history—use its Commerce Clause power to require individuals who are not engaging in a particular economic activity to do so solely because other statutory provisions are connected with that mandate. Consequently, the district court erred in concluding that *Raich* supports the individual mandate. JA 144-46.

3. Cases affirming Congress's power to regulate an economic class of activities, in the aggregate, do not support the district court's conclusion that Congress can regulate <u>all</u> uninsured individuals now because <u>some</u> will receive health care that they cannot pay for in the future.

The district court incorrectly held that the aggregation principle (or economic class of activities test) allows Congress to regulate a group now because a small subset of that group will, in the future, engage in an economic activity within Congress's power to regulate. JA 149-56. The district court's holding was based upon Defendants' argument that because *some* uninsured individuals will, at some point in the future, enter the health insurance market or receive health care services that they cannot pay for, Congress has the authority to regulate *all uninsured individuals now* and on a continuing basis for the rest of their lives.

As set forth in the Supreme Court's cases, the aggregation principle allows Congress to regulate individuals who are voluntarily engaged in economic activity when their individual conduct, taken in the aggregate with the similar conduct of

others, substantially affects interstate commerce. *See, e.g., Lopez*, 514 U.S. at 561; *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 277 (1981) (stating that local activity "may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States."). Under this line of cases, the "class" that Congress can regulate consists of individuals who are *voluntarily* engaged in the relevant economic activity; Supreme Court jurisprudence does not suggest that Congress may reach individuals *who are not engaged in the relevant economic activity*. *See Raich*, 545 U.S. 1 (upholding regulation of individuals who grew marijuana); *Katzenbach v. McClung*, 379 U.S. 294, 300-02 (1964) (upholding regulation of individuals who operated restaurants); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (upholding regulation of individuals who operated motels).[6]/

In *Perez v. United States*, 402 U.S. 146 (1971), a loan shark argued that a federal law prohibiting extortionate credit transactions could not be applied to his local activities. The Court stated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to

[6]/ Although courts must "determine whether Congress had a rational basis that is not overly attenuated for concluding that the class of activity substantially affects interstate commerce," JA 135-36, the individual mandate raises the distinct, novel issue of whether Congress may regulate a group because of the activities of a small subset of that group. Thus, the rational basis language from the Commerce Clause cases provides no support for Defendants' position on this issue.

excise, as trivial, individual instances' of the class." *Id.* at 154. The Court observed that, as a loan shark, "Petitioner is clearly *a member of the class which engages in 'extortionate credit transactions'* as defined by Congress." *Id.* at 153 (emphasis added). In other words, the relevant "class" subject to regulation consists of those *who actually engage in the relevant economic conduct*. *See also United States v. Bruce*, 405 F.3d 145, 148 (3d Cir. 2005) ("The Supreme Court . . . reasoned that, as long as Perez was a 'member of the class which engages in 'extortionate credit transactions' as defined by Congress,' then the statute was properly applied").

The district court greatly expanded the aggregation principle:

> [e]ven assuming . . . that Plaintiffs Lee and Seven-Sky do remain committed to refusing medical care throughout their lives, Congress may still regulate the larger class of individuals when it "decides that the total incidence of a practice poses a threat to a national market." . . . Consequently, the Court looks not to Plaintiffs' particular situation, but must ask instead whether *the practice of the broader class of uninsured individuals* threatens the national health care market. . . . Because this Court has determined that the practices of the broader class of uninsured individuals substantially affects the health care market, Plaintiffs' own individual activity may be regulated pursuant to Congress's Commerce Clause power.

JA 155 (emphasis added).

The district court erroneously imputed the future conduct of a small subset of uninsured individuals to the entire group of uninsured individuals, holding that Congress may force all uninsured individuals to maintain health insurance

indefinitely because some uninsured individuals will engage in a certain type of economic activity in the future. The *Florida* decision aptly pointed out the key flaw in this reasoning:

> The uninsured 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.
>
> . . . . [A] number of the uninsured are taking the five sequential steps. And when they do, Congress plainly has the power to regulate them at that time (or even at the time that they initially seek medical care) . . . . But, *to cast the net wide enough to reach everyone in the present, with the expectation that they will (or could) take those steps in the future, goes beyond the existing "outer limits" of the Commerce Clause*.

Florida, 2011 U.S. Dist. LEXIS 8822, at *92-95 (emphasis added).

The district court's broad expansion of the aggregation principle finds no support in the Supreme Court's cases. While Congress has broad authority "[*w*]*here the class of activities is regulated* and that class is within the reach of federal power," *Raich*, 545 U.S. at 23 (emphasis added), the individual mandate does not regulate a class of economic activities; its application is not tied to any specific commercial transaction or economic conduct. Under the district court's analysis, Congress could have regulated all individuals present within Montgomery County, Ohio, because some of those individuals (such as Roscoe Filburn, a party

in *Wickard*) would grow too much wheat in the future, and, inevitably, they would all eat American-grown wheat at some point in their lives. The district court's approach ignores the fact that, while Filburn subjected himself to Congressional authority by growing wheat, the application of the individual mandate is not triggered by any voluntary economic activity.

Moreover, in cases such as *Heart of Atlanta Motel* and *Katzenbach*, an individual's voluntary economic activity (operating a hotel, restaurant, etc.) is what brought him within the reach of Congress's regulatory power, and only for the duration of that economic activity. 379 U.S. 241; 379 U.S. 294. Congress could not have regulated all Americans who have business degrees on the theory that Americans with business degrees, in the aggregate, operate (or may operate in the future) many businesses that substantially affect interstate commerce.

If, for the first time in our nation's history, the Commerce Clause is interpreted to authorize Congress to regulate all Americans, for their entire lives, regardless of the lack of relevant current economic or commercial activity by those regulated, Congress would have "a plenary police power that would authorize enactment of every type of legislation," one "of the sort retained by the States." *Lopez*, 514 U.S. at 567.

4. There is no support for the district court's holding that Congress can regulate all Americans now, and indefinitely for their entire lives, based on their "inevitable" future participation in a market.

The inevitability of an individual's participation in a market at some point in his or her lifetime does not give Congress plenary authority to regulate that individual *for his or her entire lifetime*. Defendants have "provided no authority for the suggestion that once someone is in the health insurance market at a particular point in time, they are forever in that market, always subject to regulation, and not ever permitted to leave." *See Florida*, 2011 U.S. Dist. LEXIS 8822, at *96, n.22. The district court, however, held that Congress may regulate all Americans, indefinitely, without any showing that the regulated individual is presently engaged in a relevant economic activity, because all Americans will, at some point in their lives, receive health care services. JA 148-51.

The implications of this unprecedented line of reasoning are stunning. There are countless markets in which virtually all Americans will, at some point in their lives, take part: markets for food, water, clothing, transportation, housing, education, jobs, utilities, and recreation, to name a few. Congress has no authority to regulate the intricacies of all Americans' daily lives and mandate their purchases, every day from their birth until their death, simply because they will, at some point, participate in the market for these items and services. Congress may regulate commercial or economic activities *when they occur*. Congress cannot

impose onerous mandates on all Americans, owing to their mere existence, on the premise that all Americans will engage in interstate commerce at some point. *Virginia*, 728 F. Supp. 2d at 781 (noting that the government's "broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence").

The district court's analysis is based upon the false premise that declining to buy health insurance is "not simply a decision whether to consume a particular good or service, but ultimately a decision as to how health care services are to be paid and who pays for them." JA 150. The decisions of the other two district courts that have upheld the individual mandate under the Commerce Clause were based on this same faulty premise. *Liberty University v. Geithner*, 2010 U.S. Dist. LEXIS 125922, at *49-50 (W.D. Va. 2010); *TMLC*, 2010 U.S. Dist. LEXIS 107416, at *26. The *Florida* court correctly rejected this "financing decision" premise, noting that the government's theory

> is essentially true of any and all forms of insurance. It could just as easily be said that people without burial, life, supplemental income, credit, mortgage guaranty, business interruption, or disability insurance have made the exact same or similar economic and financing decisions based on their expectation that they will not incur a particular risk at a particular point in time; or that if they do, it is more beneficial for them to self-insure and try to meet their obligations out-of-pocket, but always with the benefit of "backstops" provided by law, including bankruptcy protection and other government-funded financial assistance and services. . . . The "economic decision" to forego virtually any and all types of insurance

> can (and cumulatively do) similarly result in significant cost-shifting to third parties.

Florida, 2011 U.S. Dist. LEXIS 8822, at *100-01.

The district court's reasoning is similar to Defendants' erroneous assertion that the individual mandate is akin to regulating "a decision to pay by credit card rather than by check." Memo Sup. Motion to Dismiss, Doc. 15-1, at 26 (Aug. 20, 2010). This analogy overlooks the speculative nature of insurance systems. Paying the exact amount of a debt that an individual has incurred with a check or credit card is entirely different from paying into a risk-based insurance system on a regular and continuous basis, regardless of whether the individual incurs any debts that insurance will partially offset. It is inaccurate to imply that medical care is paid for in advance by purchasing insurance; insurance only pays for a percentage of any health care services rendered (often a small one) in most instances. An insured person is still responsible to pay deductibles, co-pays, a percentage of the cost of any care rendered, and other costs out-of-pocket. As such, Congress has not merely chosen the method (check, credit card, etc.) by which a consumer pays for goods or services voluntarily purchased, but has dictated that all Americans join a distinct, risk-based insurance market to purportedly lessen, but not eliminate, speculative out-of-pocket costs of hypothetical health care purchases that they (or others) may or may not make in the future.

5. As in *Lopez* and *Morrison*, Defendants' arguments, adopted by the district court, lack a limiting principle and, if accepted, would give rise to a federal police power.

The Supreme Court has emphasized the need to identify clear limiting principles when assessing a purported exercise of the Commerce Clause power to prevent converting that power into "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567-68; *see also id.* at 578 (Kennedy, J., concurring) (stating that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). The Constitution's creation of a system of dual sovereignty is based upon the premise that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also Morrison*, 529 U.S. at 616, n.7 (characterizing the principle of dual sovereignty as a "central principle of our constitutional system. . . . crafted . . . so that the people's rights would be secured by the division of power").

The district court's novel theory of virtually unlimited Commerce Clause power is at odds with the Constitution's delegation of a few, limited powers to the federal government. As James Madison noted in *Federalist No. 45*,

> [t]he 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 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, at 241 (James Madison) (George Carey & James McClellan eds., 2001). The district court's analysis of the Commerce Clause would bestow upon Congress "numerous and indefinite" powers to regulate "the lives, liberties, and properties of the people," while leaving the States to regulate only that which Congress declines, for the moment, to regulate. *See id.*

The primary limiting principle that Defendants offer is the statement that no individual can permanently opt out of the interstate health care market. JA 148-51. As the *Florida* decision noted, however,

> 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. . . . [Under this logic,] 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.

Florida, 2011 U.S. Dist. LEXIS 8822, at *85-87. The *Virginia* decision also observed that the government's reasoning "could apply to transportation, housing,

or nutritional decisions." *Virginia*, 728 F. Supp. 2d at 781; *see also Florida*, 2011 U.S. Dist. LEXIS 8822, at *89 (asking whether Congress could "require individuals above a certain income level to purchase a home financed with a mortgage . . . in order to add stability to the housing and financial markets").

Another purported limiting principle that Defendants offer is the fact that federal law mandates that doctors and hospitals provide certain services, regardless of the recipient's ability to pay. JA 148-56; Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd.[7]/ The district court reasoned that this case is different from numerous hypothetical scenarios that would illustrate the breadth of Defendants' legal theories because, unlike in other markets, health care providers may not decline to provide services. JA 148-50.

This attempt to establish a limiting principle is flawed for at least three reasons. First, the hypotheticals that best illustrate the lack of any limiting principle *include a mandate to sell or provide services* analogous to the emergency treatment mandate. For example, as Plaintiffs' counsel noted at oral argument on the motion to dismiss, Defendants' theory would support a mandate that all

[7]/ The existence of so-called "uncompensated" care is unsurprising because, by definition, someone other than the recipient (taxpayers, the health care provider, other health care consumers, insurance companies, etc.) will end up bearing the cost for such care. Any federal law designed to address how such care is paid for, no matter how well intentioned, must comply with the Constitution, and the individual mandate exceeds Congress's authority.

Americans above a certain income level buy a General Motors vehicle so long as it was accompanied by a mandate that General Motors dealers provide vehicles to all who demonstrate a need for them (regardless of their ability to pay). JA 212-13. Defendants could cite Congress's authority to regulate the automobile market, the fact that there would (literally) be some "free riders" without the mandate to purchase, and the fact that, inevitably, everyone takes part in the transportation market.[8]/ The wide-ranging impact of Defendants' arguments cannot be avoided simply by stating that "automobile manufacturers are not required by law to give cars to people who show up at their door in need of transportation but without the money to pay for it." JA 149.

Second, this purported limiting principle is illusory, as it is based solely upon the fact that, at present, Congress has elected to impose a provider mandate regarding emergency health care but not other goods or services. The Supreme Court rejected a similar argument in *Morrison*. Although the statute prohibited its application in family law cases, the Court noted that "[u]nder our written Constitution, however, the limitation of congressional authority is not solely a

[8]/ With respect to this hypothetical, the *Florida* decision noted, "in the course of defending the Constitutionality of the individual mandate, . . . often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that . . . 'Congress could use its commerce power to require people to buy cars.' . . . When I mentioned this to the defendants' attorney at oral argument, he allowed for the possibility that 'maybe Dean Chemerinsky is right.'" *Florida*, 2011 U.S. Dist. LEXIS 8822, at *87-88.

matter of legislative grace." *Morrison*, 529 U.S. at 616; *see also id.* at 616, n.7 (noting that courts have the authority to decide whether Congress has *exceeded the outer bounds of its power*, while "political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds*"). Congress cannot support an unconstitutional assertion of power by simply making a non-binding promise not to go even further in the future. *Cf. United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

Third, the district court reasoned that "[w]hen a supplier is obligated by law to produce goods or services for free, there is bound to be a substantial effect on market prices if consumers' behavior results in that obligation's frequent invocation." JA 149. Rather than serving as a limiting principle, this illustrates the *lack* of a limiting principle by suggesting that Congress has broad power to impose mandates upon providers and then "correct" the Congressionally-exacerbated market imbalance by imposing mandates to buy upon unwilling individuals.

The findings Congress set forth in Section 1501 to support the individual mandate illustrate the limitless bounds of Congress's power under Defendants' theory. Congress stated that "[t]he economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured," and declared

that the individual mandate would "significantly reduce this economic cost." § 1501(a)(2)(E), as amended by § 10106(a); JA 65. If the economic impact of Americans' poor health provided a sufficient basis for Congress to mandate that individuals buy health insurance, Congress could also mandate that individuals take other actions considered necessary to improve health and lengthen life expectancies—such as requiring Americans to buy a gym membership, keep a specific body weight, or maintain a healthier diet—or pay penalties for failing to do so. *See Florida*, 2011 U.S. Dist. LEXIS 8822, at *103, n.25 ("under the defendants' rationale . . . Congress may also regulate the 'economic decisions' not to go to the doctor for regular check-ups and screenings."); Brief for Members of the United States Senate as Amici Curiae Supporting Plaintiffs at 11, *Florida v. U.S. Dep't Health & Human Servs.*, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT) ("this same rationale would allow Congress to punish individuals for not purchasing health-related products, like vitamin supplements, on the ground that their failure to do so would increase health care costs by not ameliorating or preventing health conditions, like osteoporosis.").

Congress also alleged that the individual mandate would lower the cost of health insurance premiums for those who buy insurance by reducing cost-shifting. § 1501(a)(2)(F), as amended by § 10106(a); JA 65. The government made a similar cost-shifting argument in *Lopez*, 514 U.S. at 563-64, but the Supreme Court

held that Congress can only reach "*economic activity*" that substantially affects interstate commerce; neither gun possession nor lawful presence in the United States is economic activity.

In a similar vein, Congress declared that requiring individuals to buy health insurance will benefit those who participate in the health insurance market in various ways, such as by "creating effective health insurance markets in which improved health insurance products . . . can be sold," "reduc[ing] administrative costs[,] and lower[ing] health insurance premiums." § 1501(a)(2)(I), (J), as amended by § 10106(a); JA 65-66. Similar arguments, however, could be made for virtually any market, as forcing unwilling participants into a market would likely benefit voluntary market participants in a variety of ways.

In sum, Section 1501's unprecedented mandate to buy a product from a private company is inconsistent with our constitutional tradition:

> What separates the United States from other countries is the minimal and fundamental nature of the duties its citizens owe the state. During World War II, the people were not commandeered to work in defense plants or buy war bonds. Even voting is not mandated in the United States.

Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 NYU J.L. & Liberty 581, 631 (2010). Although the PPACA is the first federal law relying on the Commerce Clause to

cross the line between *encouraging* increased market activity and *mandating* individual purchases, it will certainly not be the last if Section 1501 is upheld.

B. The individual mandate is not authorized by the Necessary and Proper Clause.

Article I, Section 8 grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The individual mandate exceeds Congress's authority under this Clause, a provision that the Supreme Court has characterized as "the last, best hope of those who defend *ultra vires* congressional action." *Printz*, 521 U.S. at 923.

Although Defendants have focused their attention on the alleged necessity of the individual mandate to avoid negative consequences that other portions of the PPACA would create, *necessity* is only half of the equation; a federal law must also be *proper* (*i.e.*, consistent with the letter and spirit of the Constitution and our system of dual sovereignty) to be within the scope of the Necessary and Proper Clause. *See, e.g.*, *id.* at 923-24 (noting that a law is not "proper" if it "violates the principle of state sovereignty").

Given the wide-ranging implications of the arguments offered in support of the individual mandate, the fact that the Commerce Clause does not authorize Section 1501 (as discussed previously) illustrates that it also exceeds the scope of

the Necessary and Proper Clause. *Virginia*, 728 F. Supp. 2d at 782 (the Clause "may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power. . . . [Section 1501] is neither within the letter nor the spirit of the Constitution."); *Florida*, 2011 U.S. Dist. LEXIS 8822, at *114, *116 ("the individual mandate is neither within the letter nor the spirit of the Constitution. To uphold that provision via application of the Necessary and Proper Clause would . . . effectively remove all limits on federal power. . . . By definition, it cannot be 'proper.'").

In a recent case, *United States v. Comstock*, 130 S. Ct. 1949 (2010), the Supreme Court upheld a federal civil commitment statute that authorized the continued detention of mentally ill, sexually dangerous federal prisoners beyond their normal release date. The Court based its conclusion "on five considerations, taken together":

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.

Id. at 1956, 1965.

Regarding the first factor, the Court stated that "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation." *Id.* at 1956. The Court quoted *McCulloch*, which stated, "'[l]et the end be legitimate, let it be

within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" *Id.* (quoting *McCulloch*, 17 U.S. at 421). A statute based upon the Necessary and Proper Clause must be "a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.*

With regard to the second and third factors, the Court characterized the statute as "a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id.* at 1958. The statute was a relatively minor supplement to another statute "which, since 1949, has authorized the post-sentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise)." *Id.* at 1961. The statute satisfied "'review for means-end rationality'" because it "represent[ed] a rational means for implementing a constitutional grant of legislative authority." *Id.* at 1962. The Court held that the statute was "reasonably adapted" to "Congress' power to act as a responsible federal custodian." *Id.* at 1961.

The Court also held that the statute met the fourth factor of "properly account[ing] for state interests." *Id.* at 1962. The statute "require[d] *accommodation* of state interests" by providing the State in which the prisoner lived or was tried with a right to assume responsibility for the prisoner, which

would end federal government involvement. *Id.* at 1962-63; *see also id.* at 1967-68 (Kennedy, J., concurring) ("It is of fundamental importance to consider whether essential attributes [of federalism] are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.").

Finally, the Court held that "the links between [the statute] and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope." *Id.* at 1963. The link between the power to imprison offenders and the power to ensure that they do not endanger the safety of other prisoners or the public is a close one. *Id.* at 1964. Importantly, the Court's holding would not "confer[] on Congress a general 'police power, which the Founders denied the National Government and reposed in the States'" because the statute was "narrow in scope." *Id.* (quoting *Morrison*, 529 U.S. at 618). The statute had "been applied to only a small fraction of federal prisoners," and its reach was "limited to individuals already in the custody of the Federal Government." *Id.* (citations omitted). As such, the Court concluded that the statute was "a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." *Id.* at 1965.

Section 1501 fails the *Comstock* factors and, therefore, exceeds Congress's authority under the Necessary and Proper Clause. Unlike the statute at issue in *Comstock*, the individual mandate is not "a modest addition" to previous federal law but rather is "sweeping in its scope." *See id.* at 1958, 1963. There is no history at all of congressional mandates based upon the Commerce Clause requiring individuals to purchase a good or service. *See also Lopez*, 514 U.S. at 563 (finding it significant that the Act "plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation."). It takes an immense (and unconstitutional) leap to go from imposing regulations upon the health insurance industry to mandating individual participation in the health insurance market. *Florida*, 2011 U.S. Dist. LEXIS 8822, at *106-07 ("A statute mandating that everyone purchase a product from a private company or be penalized (merely by virtue of being alive and a lawful citizen) is not a 'modest' addition to federal involvement in the national health care market, nor is it 'narrow [in] scope.'").

Moreover, the individual mandate tramples upon State interests. Before Section 1501, States were free to determine whether to adopt a mandatory insurance system similar to Massachusetts's or maintain a voluntary free market system. *See* § 1501(a)(2)(D), as amended by § 10106(a); JA 65. That is no longer the case. If the individual mandate is upheld, many similar federal laws requiring

individuals to buy goods or services would be possible (perhaps likely), further eroding State and local government authority in favor of a broad federal police power.

In addition, the Constitution does not give Congress *carte blanche* to enact any provision of its choosing so long as it bears some connection to a larger regulatory scheme. *See generally Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring) ("The Necessary and Proper Clause does not give Congress *carte blanche*"). Section 1501's findings section declares:

> [T]he Federal Government has a significant role in regulating health insurance. [Section 1501] is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.

§ 1501(a)(2)(H), as amended by § 10106(a); JA 65. Congress made a similar argument with respect to the individual mandate's connection to PPACA provisions prohibiting insurance companies from denying coverage based upon preexisting medical conditions. § 1501(a)(2)(I), as amended by § 10106(a); JA 65. The implications of this line of reasoning are far-reaching for the reasons stated above with respect to the Commerce Clause. Such a broad, unprecedented assertion of power clearly fails the test for "means-end rationality," *see Comstock*, 130 S. Ct. at 1961-62, and is by no means "appropriate" or "consist[ent] with the letter and spirit of the constitution," *McCulloch*, 17 U.S. at 421. In a word, it is not proper.

In addition, Defendants have

> essentially admit[ed] that the Act will have serious negative consequences . . . unless the individual mandate is imposed. Thus, rather than being used to implement or facilitate enforcement of the Act's insurance industry reforms, the individual mandate is actually being used as the means to avoid *the adverse consequences of the Act itself*. Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or "necessary" the statutory fix would be. . . . This result would, of course, expand the Necessary and Proper Clause far beyond its original meaning, and allow Congress to exceed the powers specifically enumerated in Article I.

Florida, 2011 U.S. Dist. LEXIS 8822, at *110-11 (emphasis added).

Because Congress lacked the Article I authority to enact the PPACA's individual mandate, that mandate is unconstitutional.[9]/

II. THE THREATENED ENFORCEMENT OF THE INDIVIDUAL MANDATE AGAINST PLAINTIFFS SEVEN-SKY AND LEE VIOLATES THEIR RIGHTS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

Section 1501 substantially burdens Plaintiffs Seven-Sky and Lee's religious exercise by requiring them to either take actions contrary to their religious faith or

[9]/ Because the district court held that the individual mandate was valid, the court did not address the issue of severability that Plaintiffs raised in the Amended Complaint. JA 38. For the reasons set forth in the *Florida* decision, 2011 U.S. Dist. LEXIS 8822, at *116-36, and Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, Doc. 12, at 58-60 (Aug. 10, 2010), Section 1501 is not severable and the PPACA is unconstitutional in its entirety.

pay annual penalties. Because applying the individual mandate to these Plaintiffs is not the least restrictive means of furthering a compelling governmental interest, doing so violates their rights as set forth in RFRA, 42 U.S.C. § 2000bb *et seq*. The district court erred in concluding that "§ 1501 does not place a substantial burden on the exercise of Plaintiffs' Christian faith, and . . . is the least restrictive means of serving a compelling governmental interest." JA 166.

Review of the district court's dismissal of the RFRA claims is *de novo*, *Kaemmerling*, 553 F.3d at 676, and on a motion to dismiss, "a court must accept as true all of the [factual] allegations contained in a complaint," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

RFRA states that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), unless the government "demonstrates that application of the burden to the person . . . 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). RFRA "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b).

A. Substantial Burden

The religious exercise protected by RFRA "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (citing 42 U.S.C. § 2000cc-5(7)(A)). "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling*, 553 F.3d at 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

The individual mandate substantially burdens Seven-Sky and Lee's religious exercise for the reasons set forth in their Amended Complaint (as well as in their Statement of Material Facts and accompanying declarations). JA 19-24, 37-38, 48-52, 79-86. In sum, these Plaintiffs strongly object to being required to either maintain health insurance or pay annual penalties because they believe that God will provide for their health and financial needs. JA 49-52. Their religious exercise is substantially burdened because they will be forced to pay penalties for refusing to act contrary to their religious principles.

The district court concluded that Plaintiffs' religious exercise is not substantially burdened because Section 1501 "permits them to pay a shared responsibility payment in lieu of actually obtaining health insurance." JA 164. This holding squarely conflicts with *Sherbert v. Verner*, 374 U.S. 398 (1963), the case on which RFRA is modeled.

In *Sherbert*, the State of South Carolina denied a Seventh-Day Adventist's application for unemployment benefits because she was fired for refusing to work on Saturday, even though Saturday was the Sabbath Day of her faith, and she was unable to obtain another job due to her religious objection. *Id.* at 399-401. Similar to the district court's ruling here, the South Carolina Supreme Court concluded that the law did not substantially burden her religious exercise because she was not forced to work on her Sabbath. *Id.* at 401.

The United States Supreme Court reversed, stating,

> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. . . . [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. *The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.*

Id. at 403-04 (emphasis added).

Similarly, the individual mandate "forces [Seven-Sky and Lee] to choose between following the precepts of [their] religion and [paying annual penalties], on the one hand, and abandoning one of the precepts of [their] religion . . . on the other hand." *See id.* It is especially telling that the *Sherbert* Court compared the loss of unemployment benefits to "a fine imposed against appellant for her

Saturday worship" because the individual mandate authorizes annual penalties against Seven-Sky and Lee for failing to indefinitely maintain health insurance.

The district court also stated (contrary to the factual allegations in the Amended Complaint, JA 19-24, 37-38, which a court must accept as true on a motion to dismiss, and without providing leave to amend) that "Plaintiffs have failed to allege any facts demonstrating that this conflict is more than a de minimus [sic] burden on their Christian faith." JA 163-64. In effect, the court imposed a heightened pleading standard based upon this Court's statement that "a burden on activity unimportant to the adherent's religious scheme" cannot be a substantial burden, *Kaemmerling*, 553 F.3d at 678, which is simply another way of stating that the burden imposed must be *substantial*.[10]/ The district court's heightened pleading standard conflicts with RFRA's protection of "any exercise of religion, whether or not . . . central to, a system of religious belief" and ignores the sufficient allegations in the Amended Complaint. 42 U.S.C. § 2000bb-2; *see also* JA 19-24, 37-38; *Iqbal*, 129 S. Ct. at 1949-50 (noting that Fed. R. Civ. P. 8 "does not require 'detailed factual allegations'" and "marks a notable and generous

[10]/ In *Kaemmerling*, the plaintiff merely objected to *the government's own conduct* (extracting DNA from his blood, hair, etc.); he did not object to the removal of hair from his body. As such, he was not put to a choice between some penalty and taking action that would violate his faith, as Plaintiffs here have alleged in their Amended Complaint concerning the individual mandate. JA 19-24, 37-38.

departure from the hyper-technical, code-pleading regime of a prior era"). As noted previously, one's religious exercise is substantially burdened when the government puts him to the choice of either incurring a penalty or violating his faith, and the Amended Complaint clearly illustrates how that is the case for Seven-Sky and Lee. JA 19-24, 37-38.

B. Strict Scrutiny

Defendants failed to meet their burden of demonstrating that applying Section 1501 to Seven-Sky and Lee is the least restrictive means of achieving a compelling government interest, and the district court erred in concluding otherwise. JA 163-66. "RFRA demands that 'the compelling interest test [be] satisfied through application of the challenged law '*to the person*'—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Kaemmerling*, 553 F.3d at 682 (emphasis added). "A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Id.* at 684 (quoting *Sherbert*, 374 U.S. at 407).

Defendants cannot prove the existence of any compelling governmental interest that can be furthered *only* by requiring Seven-Sky and Lee to buy health insurance. The justifications offered for the individual mandate, such as a desire to lower insurance premiums for those who are voluntarily insured, are not

"compelling" government interests, and forcing Plaintiffs to buy health insurance is not the least restrictive way to further such interests.

In addition, although protecting public health is a compelling interest justifying some forms of regulation, the attenuated chain of reasoning it takes to go from the mere fact of being lawfully present in the United States without health insurance to a threat to public health is similar to Defendants' attenuated reasoning concerning the impact on interstate commerce. *See Florida*, 2011 U.S. Dist. LEXIS 8822, at *92-95. The reality is that the individual mandate was designed to force Plaintiffs into the health insurance market to benefit voluntary market participants and alleviate the PPACA's negative consequences; Defendants' claim that the individual mandate is necessary to protect public health during this litigation is merely self-serving.

Moreover, Plaintiffs do not object to the government spending public funds to provide other individuals with insurance; their objection to being required to *maintain health insurance themselves* is fundamentally different—it is specifically based on their religious faith and the government coercion to violate that faith or pay financial penalties for adhering to that faith. JA 19-24, 37-38. The government's interest in ensuring that Americans who cannot provide for themselves receive public support of some kind is much stronger than its interest in forcing Plaintiffs to maintain health insurance. *See generally United States v. Lee*,

455 U.S. 252, 258-60 (1982) (rejecting a challenge to the payment of Social Security taxes because it was indistinguishable from the payment of general income taxes, and the income tax system could not function if all individuals who object to any use of public funds were exempted or if contributions were voluntary).

Concerning Defendants' attempt to demonstrate that the individual mandate is the least restrictive means available, the district court cited to Section 1501's exceedingly narrow exemptions. JA 165. Seven-Sky and Lee have no reason to anticipate joining an Amish community or seeking and finding a health care sharing ministry eligible for an exemption *whose religious tenets match their own*. More importantly, Plaintiffs object to being forced to join a health insurance system against their will, regardless of whether that system is run by a private company or a religious organization to which Plaintiffs do not belong. Section 1501's narrow religious exemptions are not a one-size-fits-all means of relieving any and all substantial burdens imposed by the individual mandate.[11]/

[11]/ At oral argument, Plaintiffs' counsel cited the possibility of imposing a tax at the point of sale for those who receive health care without having health insurance as a less restrictive means of dealing with the issue of uncompensated care. JA 215, 236. Therefore, the District Court's statement that Plaintiffs could not name a less restrictive alternative at oral argument is incorrect. JA 165.

CONCLUSION

This Court should reverse the district court's final decision and, in particular, hold that Section 1501 is unconstitutional and that the district court erred in dismissing Plaintiffs' RFRA claims. This case should be remanded for further consideration.

Respectfully submitted this 13th day of May, 2011.

/s/ James Matthew Henderson, Sr.
James Matthew Henderson Sr.
Counsel of Record
Jay Alan Sekulow
Stuart J. Roth*
Colby M. May
Miles Landon Terry
American Center for Law & Justice
[redacted]

Edward L. White III*
American Center for Law & Justice
[redacted]

Erik M. Zimmerman*
American Center for Law & Justice
[redacted]

* Not admitted to this Court's bar

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32

I certify that the foregoing opening brief of Plaintiffs-Appellants complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). In reliance on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 13,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

The foregoing opening brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

Respectfully submitted,

/s/ James Matthew Henderson, Sr.
James Matthew Henderson, Sr.
American Center for Law & Justice
[redacted]

Dated: May 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2011, by Federal Express next business day delivery, two true and correct copies of the foregoing opening brief and attached addendum were sent to the following counsel for Defendants-Appellees: Alisa B. Klein, United States Department of Justice, 950 Pennsylvania Avenue, NW, Room 7235, Washington, D.C. 20530.

I also certify that on May 16, 2011, I will cause eight true and correct copies of the foregoing opening brief and attached addendum of Plaintiffs-Appellants to be hand-delivered to the Clerk of Court's Office, United States Court of Appeals for the District of Columbia Circuit, 333 Constitution Ave., NW, Washington, D.C. 20001.

In addition, on May 16, 2011, an identical electronic copy of the foregoing opening brief and attached addendum will be uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

/s/ James Matthew Henderson, Sr.
James Matthew Henderson, Sr.
American Center for Law & Justice
[redacted]