[ORAL ARGUMENT: SEPTEMBER 23, 2011]

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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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Dated: July 25, 2011

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GLOSSARY

AAPD Br.:	Amici Curiae Brief of the American Association of People with Disabilities *et al.* in Support of Appellees and Affirmance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
AARP Br.:	Brief Amicus Curiae of AARP in Support of Defendants-Appellees and Affirmance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
AHA Br.:	Corrected Brief Amici Curiae of the American Hospital Association *et al.* in Support of Appellees and Affirmance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
ANA Br.:	Brief of Amici Curiae American Nurses Association *et al.* in Support of Appellees and Affirmance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
Authors' Br.:	Brief of Authors of *Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson, & Guy Seidman) and the Independence Institute as Amici Curiae in Support of Appellants, Urging Reversal, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
CatholicVote Br.:	Brief of Amicus Curiae CatholicVote.org, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
Cato Br.:	Brief Amici Curiae of the Cato Institute, Mountain States Legal Foundation, Pacific Legal Foundation, Competitive Enterprise Institute, Goldwater Institute, Revere America, Idaho Freedom Foundation, and Professor Randy E. Barnett Supporting Appellants and Reversal, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
Chamber Br.:	Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of Neither Party, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047

Const. Acct. Br.:	Brief of Amicus Curiae Constitutional Accountability Center in Support of Appellees and Affirmance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
Defs.' Br.:	Defendants-Appellees' Responsive Brief
Docs Br.:	Brief of Amici Curiae Docs4PatientCare, the Benjamin Rush Society, and the Pacific Research Institute in Support of Plaintiffs-Appellees, filed in *Florida v. U.S. Dep't of Health & Human Servs.*, 11th Cir., Nos. 11-11021 & 11-11067 (May 12, 2011), available in electronic format from the court's docket
Econ. Schol. Br.:	Brief Amici Curiae of Economic Scholars in Support of Defendants-Appellees Supporting Affirmance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
Economists' Br.:	Brief for Amici Curiae Economists in Support of Appellees/Cross-Appellants and Affirmance, filed in *Florida v. U.S. Dep't of Health & Human Servs.*, 11th Cir., Nos. 11-11021 & 11-11067 (May 12, 2011), available at http://www.jdsupra.com/post/documentViewer.aspx?fid=aeaf102d-88b5-4c2f-81d2-7b5e020b1dd4
EMTALA:	Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd
Friedman Br.:	Brief of Law Professors Barry Friedman *et al.* as Amici Curiae in Support of Defendants-Appellees, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047
Heritage Br.:	Brief of Amicus Curiae the Heritage Foundation in Support of Plaintiffs-Appellees, filed in *Florida v. U.S. Dep't of Health & Human Servs.*, 11th Cir., Nos. 11-11021 & 11-11067 (May 11, 2011), available at http://blog.heritage.org/wp-content/uploads/Heritage-Foundation-Amicus-Brief-05-11-11.pdf
JA:	Joint Appendix

Judicial Br.: Amicus Curiae Brief of Judic ial Watch, Inc. in Support of Appellants, filed in *Seven-Sky v. Holder* , D.C. Cir., No. 1 1-5047

Maryland Br.: Brief of the States of Maryland, California, Connecticut, Delaware, Hawaii, Iowa, New York, Oregon, and Vermont, and the District of Columbia as Am ici Curiae in Support of Defendants-Appellees, filed in *Seven-Sky v. Holder* , D.C. Cir., No. 11-5047

Mass. Br.: Amicus Brief of the Commonwealth of Massachusetts in Support of Appellees, Seeking Affirmance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047

NFIB Br.: Brief for Private Plain tiffs-Appellees National Federation of Independent Business, Kaj Ahlbur g, and Mary Brown, filed in *Florida v. U.S. Dep't of Health & Human Servs.* , 11th Cir., No. 11-11021 (May 5, 2011), availa ble in electronic form at from the court's docket

NWLC Br.: Brief Ami cus Curiae of the National Women's Law Center *et al.* in Support of Defendants-Appe llees Supporting Affirm ance, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047

Pls.' Br.: Plaintiffs-Appellants' Opening Brief

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

Rodney Br.: Brief of Caesar Rodney Ins titute as Ami cus Curiae in Support of Plaintiffs-Appellants, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047

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

Texas Br.: Brief of Texas, Florida, Alabam a, Indiana, Kansas, Maine, Michigan, Nebraska, North Dakota, Ohio, Pennsyl vania, South Dakota, Washington, and Wisconsin as Amici Curiae Supporting Appellants a nd Reversal , filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047

Willis Br.:	Brief of Amicus Curiae Steven J. Willis, Urging Reversal, filed in *Seven-Sky v. Holder*, D.C. Cir., No. 11-5047

STATUTES AND REGULATIONS

All applicable statutes are contained in the Addendum to Plaintiffs' Opening Brief.

INTRODUCTION

Defendants' legal arguments rest on five novel propositions that lack support in the text, history, or related Supreme Court jurisprudence of the Commerce or Necessary and Proper Clauses:

1. Congress can regulate all Americans now, and indefinitely, because they continuously engage in an economic activity throughout their adult lives.

2. Congress can regulate all Americans now, and indefinitely, because an individual's one-time purchase of goods or services in a market makes him a lifetime "market participant."

3. Congress can regulate all Americans now, and indefinitely, based on their anticipated economic activity at some undetermined point in the future.

4. Congress can regulate all Americans now, and indefinitely, because *some* Americans will eventually engage in an economic activity that results in cost-shifting.

5. Congress can mandate that all Americans enter a market now, and remain in that market indefinitely, to benefit voluntary market participants or prevent adverse consequences of Congress's regulation of that market.

The novelty and broad reach of these arguments counsel strongly against their validity. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 905 (1997) ("if . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."); Texas Br. 7-11. The Sixth Circuit's recent decision upholding Section 1501 of the PPACA by a 2-1

vote relies on the same novel, flawed arguments. *TMLC v. Obama*, 2011 U.S. App. LEXIS 13265 (6th Cir. 2011).

By contrast, Plaintiffs' arguments are grounded in the Constitution and the Supreme Court's cases. Congress may regulate individuals who are *voluntarily engaging* in a commercial or economic activity, but the Commerce Clause does not authorize Congress to mandate that individuals who are not presently engaged in a particular commercial or economic activity must do so indefinitely. Lawful presence in the United States, which triggers Section 1501's mandate to buy and indefinitely maintain health insurance unless otherwise exempted, is not an ongoing commercial or economic activity akin to operating a business or growing wheat.

Defendants acknowledge the *de novo* review applicable to the dismissal of Plaintiffs' claims, Defs.' Br. 21, but attempt to wrap their legal arguments in a cloak of deference and rational basis review. Defs.' Br. 17, 19, 22, 23, 37. The terminology Defendants rely upon refers to deference given to Congress's "empirical and operational judgments," Defs.' Br. 23, *not* to Defendants' legal characterization of undisputed facts. Thus, Defendants' novel interpretation of the Commerce Clause and their legal characterization of lawfully residing in the United States without health insurance as an "economic activity" are not entitled to deference. Merely incorporating a legal argument into a Congressional "finding"

does not make it a factual determination entitled to deference. Contrary to Defendants' view, the federal judiciary is empowered to independently examine the constitutionality of Congressional action. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

SUMMARY OF ARGUMENT

Defendants' alternative argument that Section 1501's shared responsibility payment is authorized by Congress's taxing power is flawed and has been rejected by every court to consider it. Also, Defendants have not countered Plaintiffs' arguments that the Commerce and Necessary and Proper Clauses, U.S. Const. Art. I, § 8, do not authorize Congress to compel millions of Americans to purchase a product. Moreover, Defendants have not shown that Plaintiffs Lee and Seven-Sky failed to sufficiently allege that Section 1501 substantially burdens their religious exercise, nor have Defendants shown that the individual mandate, as applied to Lee and Seven-Sky, is the least restrictive means of furthering a compelling governmental interest.

ARGUMENT

I. SECTION 1501 IS NOT AUTHORIZED BY CONGRESS'S TAXING POWER.

In making their alternative argument that Section 1501 is supported by Congress's taxing power, Defs.' Br. 53-59, Defendants fail to mention that, in addition to the district court here, every court to consider this argument has

squarely rejected it. JA 158-61; *TMLC*, 2011 U.S. App. LEXIS 13265, at *53-64 (Sutton, J., concurring); *id.* at *100 (Graham, J., dissenting); *Goudy-Bachman v. HHS*, 2011 U.S. Dist. LEXIS 6309, at *28-33 (M.D. Pa. 2011); *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 627-29 (W.D. Va. 2010); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909, 911-24 (N.D. Ohio 2010); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 782-88 (E.D. Va. 2010); *TMLC v. Obama*, 720 F. Supp. 2d 882, 890-91 (E.D. Mich. 2010); *Florida v. HHS*, 716 F. Supp. 2d 1120, 1130-44 (N.D. Fla. 2010).

When a court is presented with the question of which Congressional power(s) a statute was enacted under, the character of the statute is determinative, not the federal government's characterization of the statute during litigation. *Ry. Execs. Ass'n v. Gibbons*, 455 U.S. 457, 465-66 (1982). The character of Section 1501's penalty is clearly one of a regulatory penalty, not a tax, as multiple courts have concluded: (1) Congress replaced the term "tax" with the term "penalty" in the final version of Section 1501; (2) Congress used the term "tax" to describe other exactions in the PPACA; (3) Congress expressly relied on its Commerce Clause power, not its taxing power, to enact Section 1501; (4) Congress deleted traditional IRS enforcement methods (criminal penalties, liens, and levies) for failure to pay the penalty; and (5) Congress did not identify in the PPACA any revenue that would be raised from this penalty, whereas Congress specifically

listed seventeen other revenue-generating provisions in the PPACA. *TMLC*, 2011 U.S. App. LEXIS 13265, at *5 3-64 (Sutton, J., concurring); *Florida*, 716 F. Supp. 2d at 1139-40; *Virginia*, 728 F. Supp. 2d at 782-88; Texas Br. 25-29; Willis Br. 4-29. Defendants' citation to snippets of legislative history does not override the overwhelming evidence that Section 1501's "penalty" was enacted as a regulatory measure to support the mandate to buy and maintain health insurance and is not a tax. *See* Defs.' Br. 55-56.

Further undercutting Defendants' taxing power argument is Defendants' purposeful waiver in the district court of their flawed argument that the Anti-Injunction Act bars this action. JA 98, 104 n.1. The Anti-Injunction Act applies to taxes and related collection penalties. 26 U.S.C. § 7421(a); *Liberty Univ.*, 753 F. Supp. 2d at 627-29; *Florida*, 716 F. Supp. 2d at 1140-44. If Defendants had a viable argument that Section 1501's penalty is a tax, they would not have abandoned their Anti-Injunction Act argument.

In sum, Section 1501 contains a regulatory penalty, not a tax, as every court has correctly concluded.[1]/

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[1]/ A footnote in *Bob Jones University v. Simon*, 416 U.S. 725, 741 n. 12 (1973), Defs.' Br. 57-58, stating that the Court had abandoned "distinctions between regulatory and revenue-raising taxes" is dicta and did not overturn cases distinguishing taxes from regulatory penalties. *E.g.*, *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779, 784 (1994) (relying on the difference between a tax and a penalty in concluding that a Montana "tax" was an unconstitutional penalty).

II. DEFENDANTS' ARGUMENTS BASED ON THE COMMERCE AND NECESSARY AND PROPER CLAUSES ARE FLAWED AND LACK LEGAL SUPPORT.

A. Congress may regulate ongoing commercial and economic activities, not decisions or inaction.

Defendants agree that Congress's power under the Commerce Clause extends to "activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); Defs.' Br. 2, 16, 22. That commercial or economic *activity* is the proper subject of Congress's power to regulate interstate commerce is not a formalistic or artificial limitation, but comes directly from the text and history of the Commerce Clause. The power to regulate "commerce," that is, the power to "prescribe the rule by which commerce is to be governed," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824), when viewed in light of our tradition of a capitalist free-market economy, is the power to regulate the *voluntary* sale or exchange of goods and services. There is no American tradition of *forcing* unwilling individuals to operate a business or buy a good or service in the name of "regulating commerce," and it is not a coincidence that the Supreme Court's Commerce Clause cases upholding regulation under the "substantial effects" test have involved the regulation of ongoing commercial or economic activities, unlike Section 1501.

Nothing in law or logic supports Defendants' novel extension of this federal regulatory authority to mere *inaction, decisions, or thought processes* that relate to

an economic topic. A key Congressional finding providing the basis for Section 1501 declares that it 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," and also targets individuals who would otherwise "make an economic and financial *decision* to forego health insurance coverage and attempt to self-insure." JA 64 (emphasis added). In the district court, Defendants relied heavily upon the theory that Congress can regulate economic "decisions." Memo. Sup. Mot. Dismiss 2, 4, 19, 21, 24, 26, 27, 28. The district court accepted this argument, holding that Congress's authority extends to *decisions* that have some economic impact, even though "previous Commerce Clause cases have all involved physical activity, as opposed to mental activity, *i.e.*, decision-making." JA 141, 147. The theory that Congress can regulate "mental activity" or decision-making under the Commerce Clause is untenable. Perhaps recognizing that, Defendants have *abandoned on appeal* their express reliance upon a Congressional power to regulate decisions and instead have *recast* their arguments purely in terms of economic *activity* and *conduct*.[2]/ Defendants' revised arguments, like their old arguments which the district court adopted, do not justify the constitutionality of the individual mandate.

[2]/ Rather than fully quote the Congressional finding that Section 1501 regulates "economic and financial decisions," Defendants omit those words when referring to that finding. Defs.' Br. 3, 23-24.

B. Lawfully residing in the United States without health insurance, which Defendants characterize as the activity of "attempting to self-insure," is not ongoing economic activity that Congress can regulate.

Although the failure to act (for example, not purchasing health insurance) may have *consequences* in some situations, that does not transform the failure to act into the kind of *economic activity* Congress may regulate. The Government argued in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), that the laws at issue were justified by the economic impact of the regulated conduct, yet that did not negate the *absence of economic activity* and make those laws constitutional. Supreme Court Commerce Clause jurisprudence contains a key characteristic concerning the type of commercial and economic activities Congress may regulate (for example, the manufacture, distribution, and sale of commodities): an individual subjects himself to Congress's authority by *voluntarily engaging in the relevant activity* and may place himself outside of Congress's regulatory power by voluntarily ending the relevant activity. Judicial Br. 5-15 (discussing the Supreme Court's cases and definition of activity); *id.* at 13 (noting the analogy of a person avoiding certain activity to avoid personal jurisdiction); CatholicVote Br. 8-10 (same).

By contrast, Defendants' novel theory would allow Congress to use the Commerce Clause—for the first time in our Nation's history—to impose ongoing, lifetime purchase mandates on all non-exempted American adults without regard to

whether they engage in the type of commercial or economic activity traditionally subject to Congressional regulation.

> The conduct being regulated [by the individual mandate] is the decision not to enter the market for insurance. Plaintiffs have not bought or sold a good or service, nor have they manufactured, distributed, or consumed a commodity. . . . Rather, they are strangers to the health insurance market. This readily differentiates the present case from others cited by the government.
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> . . . [The Government's] argument deftly switches the focus from the private, non-commercial nature of plaintiffs' conduct (the decision to be uninsured) to the perceived economic effects of their absence from the insurance market. . . . *[T]he Commerce Clause cannot be satisfied when economic activity is lacking in the first instance*.

TMLC, 2011 U.S. App. LEXIS 13265, at *109-10 (Graham, J., dissenting) (emphasis added).

Defendants rely on the "unique" nature of the health care and health insurance markets.[3]/ Under Defendants' theory, all Americans are *always* engaged in the economic activity of "attempting to self-insure" with respect to *any and all actual or potential "risks"* for which they fail to obtain an insurance policy. As one court observed,

> [i]t 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

[3]/ The individual mandate is directed to the health insurance market, not the health care market. It forces citizens to buy health insurance, not to use that insurance or participate in the health care market. Texas Br. 13-14; Rodney Br. 8-13.

> 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. . . . 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 v. HHS, 2011 U.S. Dist. LEXIS 8822, at *100-01 (N.D. Fla. 2011). Acceptance of Defendants' novel theory would expand Congress's power to authorize Congress to mandate a host of purchases in a variety of markets on the theory that failing to make a purchase is economic "activity."

C. Congress's power to regulate an economic class of activities does not include a novel power to regulate *all* uninsured Americans now, and indefinitely, because *some* will not be able to afford their future medical expenses.

The aggregation principle (or economic class of activities test) allows Congress to apply a regulation of commercial or economic activity to all individuals who are *presently engaged* in the regulated activity when their individual activity, taken in the aggregate with the similar conduct of others, substantially affects interstate commerce. *Lopez*, 514 U.S. at 561; Pls.' Br. 29-33. Borrowing terminology from Commerce Clause cases, Defendants repeatedly assert the much broader, novel proposition that individuals *who are not engaged in the relevant economic activity* may be characterized as part of a "class" engaged in that activity, and regulated as such, solely because Congress cannot determine in advance which individuals will eventually engage in that activity. Although Defendants frequently assert that "they" (the uninsured) shift costs by not paying

all of "their" medical debts, Defendants acknowledge that only *some* of those who are uninsured will ever incur medical costs for which they can not pay, while *many others* will never incur such costs. Relying on *Raich*, Defendants argue that "Congress may consider the aggregate effect of a particular category of conduct, and need not predict case by case whether and to what extent particular individuals in the class will contribute to those aggregate effects"; Defendants add, "it is irrelevant that some uninsured individuals may not generate uncompensated costs in a particular month or year." Defs.' Br. 22, 27.[4]/

Defendants' bold assertion of a power to regulate a large number of Americans now because some will one day engage in an economic activity is unsupported by Supreme Court jurisprudence; in particular, *Raich* provides no support for this "guilt by association" theory of the Commerce Clause. *Raich* observed that "[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." *Raich*, 545 U.S. at 17. *Raich*'s recognition of Congressional authority to apply a regulation of the national market for marijuana to local growers and distributors does not imply that it is irrelevant

[4]/ There is no basis in the Amended Complaint or the record to substantiate Defendants' assertion that hypothetical future medical expenses would exceed Plaintiffs' means just because Plaintiffs allege that the future payment of annual penalties impacts them now. Defs.' Br. 29. Defendants admit the inability to predict the future, but wrongly attempt to lump Plaintiffs into the category of future free-loaders.

whether the regulated individuals are actually engaged in the regulated economic activity.[5]/

Defendants' novel theory improperly *divorces the term "class" from the term "activities"* due to Congress's inability to predict which individuals will actually incur medical costs they cannot pay for in the future. Acceptance of that theory requires a significant and unwarranted expansion of existing Commerce Clause jurisprudence, one without limits and contrary to a federal government of "few and defined" powers. *Lopez*, 514 U.S. at 552; Cato Br. 4-7; Texas Br. 15-17.

Defendants mask the novelty of their use of the class of activities language by citing statistics about the amount of unpaid expenses that *some* uninsured individuals incur. It is misleading, however, for Defendants to assert that "the uninsured as a class" incurred a certain amount of unpaid expenses and shifted costs to others, implying that all or most uninsured individuals each contributed to the total, when in reality many uninsured individuals cover their own expenses or incur none at all. It is akin to saying that residents of a city, as a "class," commit a certain number of crimes every year when, in reality, most residents never commit a crime.

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[5]/ Defendants wrongly rely on *United States v. Sullivan*, 451 F.3d 884, 888, 890 (D.C. Cir. 2006). Lawful residence in the United States without health insurance is not akin to the production, distribution, and possession of child pornography, a marketable (albeit illegal) commodity.

Defendants' example on pages 25-26 illustrates that their reliance upon the class of activities test is misplaced. Defendants cite figures stating that some uninsured individuals are hospitalized each year, some of those hospitalizations lead to bills of at least $20,000, and some of those bills are not fully paid. In other words, a subset of a subset of a subset of the uninsured will not be able to pay for their medical expenses at some future point. "[T]o cast the net wide enough to reach [all uninsured individuals] 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."[6]/ *Florida*, 2011 U.S. Dist. LEXIS 8822, at *94-95.

Defendants' reliance on "cost-shifting" is not an independent basis for Congress to regulate where, as here, the targeted individuals are not presently engaged in an economic activity. The Government relied on a similar cost-shifting argument in *Lopez*, 514 U.S. at 563-64, but the Court held that Congress can only reach "*economic activity*" that substantially affects interstate commerce. Neither gun possession near a school nor lawful presence in the United States without

[6]/ Defendants cite the "Economic Scholars" amici brief filed in the Eleventh Circuit, Defs.' Br. 8, 27, 36, but omit mention that 105 economists filed an opposing amici brief in that court to refute the arguments of the Government and the "Economic Scholars." Economists' Br. 1-4, 7-27. Also, numerous organizations have explained that the individual mandate will do little to address the issue of uncompensated care and could actually *increase* the amount of medical costs shifted to others. NFIB Br. 1-6; Docs Br. 3-4, 9-13, 16-18; Heritage Br. 10-14.

health insurance is a class of economic activities that Congress can regulate. Pls.' Br. 14-15, 42-43; *see also* Texas Br. 17-20.

Although Defendants cite 49 U.S.C. § 13906(a) to state that "[i]t is hardly novel for the government to require the purchase of insurance to prevent the externalization of costs," Defs.' Br. 39, that statute imposes an insurance requirement upon "motor carriers" that "provid[e] motor vehicle transportation *for compensation*." 49 U.S.C. § 13102(14) (emphasis added). That Congress may regulate the commercial activity of providing transportation for a fee is unsurprising and irrelevant to the imposition of a lifetime health insurance purchase mandate upon all non-exempted Americans because they exist. [7]/ Similarly, although Defendants attempt to recast Plaintiffs' arguments as premised upon a constitutional right "to consume health care services without insurance and to pass costs on to other market participants," Defs.' Br. 52, the issue is whether Congress has exceeded its constitutional authority by enacting Section 1501.[8]/

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[7]/ Defendants rely on *Consolidated Edison v. NLRB*, 305 U.S. 197, 222 (1938), Defs.' Br. 38-39, which held that federal authority to regulate labor disputes affecting interstate commerce is broad and may include "reasonable preventive measures." *Consolidated Edison* does not suggest that Congress may proactively regulate those who are not presently engaged in an economic activity to prevent undesirable future economic activity by others.

[8]/ Defendants state that for a facial challenge to succeed there can be no constitutional application of the law. Defs.' Br. 45 (citing *United States v. Salerno,* 481 U.S. 739 (1987)). Plaintiffs, though, are challenging Congress's authority to enact Section 1501. Because Section 1501 is *ultra vires*, it is unconstitutional in

D. Congress's power to regulate a market does not give it the power to indefinitely regulate a citizen who once participated in that market, or who may one day participate in that market.

Defendants argue that the individual mandate merely regulates the "timing and method of payment" individuals use to pay for their own health care services, which virtually all Americans will receive at some point. Defs.' Br. 1. This argument rests on several flawed premises.

Defendants' reliance on the perceived inevitability of the need to participate in the market for health care services ignores the absence of any *ongoing, continuous* economic activity that would indefinitely subject all Americans to Congressional power under the Commerce Clause. Defendants characterize all Americans as lifetime "participants in the health care market" that can be indefinitely regulated, Defs.' Br. 42, but an individual's actual *participation* in the health care market (for example, a visit to a doctor or hospital) is occasional, sporadic, or virtually non-existent for many Americans, including Plaintiff Lee, who does not use *any* medical care based on his religious beliefs. JA 20. That an individual once received health care services does not make him a *lifetime* "participant" in the health care services market that Congress can continuously regulate. Defendants do not point to a single case in which a court has upheld a

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all applications. *TMLC*, 2011 U.S. App. LEXIS 13265, at *100-01 (Graham, J., dissenting) ("*Lopez* and *Morrison* struck down statutes as facially unconstitutional under the Commerce Clause and did so without reference to *Salerno*."); *Virginia*, 728 F. Supp. 2d at 773-74 (*Salerno* does not apply).

statute, pursuant to the Commerce Clause, on the grounds that because some individuals *had* engaged in an economic activity (or *will* engage in an economic activity), Congress could continue to regulate them indefinitely when they were *no longer* engaging in that economic activity. Similarly, that some individuals have maintained health insurance coverage for a period of time in the past does not mean they are lifetime participants in the health insurance market and can be indefinitely regulated by Congress.

Moreover, Defendants wrongly state that Section 1501 "regulates the way people pay for health care services." Defs.' Br. 18. Defendants characterize Section 1501 as if it were a transaction-based provision requiring medical professionals to impose an additional fee whenever patients meeting certain requirements are not enrolled in an insurance program. Section 1501, however, requires all Americans to indefinitely maintain health insurance coverage without regard to when and whether they actually receive health care services.

> [T]he government's argument turns the mandate into something it is not. The requirement that all citizens obtain health insurance does not depend on them receiving health care services in the first place. Individuals must carry insurance each and every month regardless of whether they have actually entered the market for health services. Simply put, *the mandate does not regulate the commercial activity of obtaining health care. It regulates the status of being uninsured*.

TMLC, 2011 U.S. App. LEXIS 13265, at *106 (Graham, J., dissenting) (emphasis added).

Defendants characterize Plaintiffs' arguments concerning the individual mandate's constitutionality as an invalid objection to the *timing* of the mandate, faulting Plaintiffs for drawing a line between Section 1501's mandate to indefinitely maintain health insurance and a hypothetical law imposing an additional fee at the time medical services are obtained whenever patients meeting certain requirements are not enrolled in an insurance program. Defs.' Br. 18, 37, 45. The distinction Plaintiffs draw, however, is based on the clear difference between the *legitimate* Congressional power to regulate *ongoing* commercial and economic activities and the *illegitimate* assertion of a Congressional power to mandate that individuals not presently engaged in a commercial or economic activity must do so. Plaintiffs' objection is to *ultra vires compulsion*, not mere *timing*.

In addition, Defendants wrongly state that Section 1501 "regulates the way participants in the health care market pay for the services *they obtain*." Defs.' Br. 42 (emphasis added). Defendants imply that Section 1501 merely requires each individual to pay for his *own* eventual future health care services in advance (similar to a health care savings account). To the contrary, Section 1501 requires millions of Americans to pay indefinitely into the risk-based private health insurance system, which will then cover a *portion* of *some* individuals' future health care expenses. Some individuals will end up benefiting from the system by

receiving more in subsidized expenses than they pay in premiums, while others will end up subsidizing the costs of others by paying more in premiums than they receive in subsidized expenses. The Commerce Clause does not authorize Congress to force all Americans into the private insurance system so that some individuals will subsidize others' medical costs.

E. The Commerce and Necessary and Proper Clauses do not authorize Congress to force citizens to enter and indefinitely remain in a market to benefit voluntary market participants or prevent adverse consequences from Congress's regulation of that market.

Defendants rely on *Raich* in asserting that Congress has the authority to require all Americans to buy and indefinitely maintain health insurance because, without that mandate, other PPACA provisions imposing requirements on insurance companies to benefit individuals who desire to buy health insurance would cause the health insurance market to collapse. Defs.' Br. 30-34. Although Defendants rely on the interstate character of the health care and health insurance markets, Congress's extensive regulation of insurance providers, and the Government's operation of public insurance programs, those facts do not support the novel assertion of a power to *force* all Americans into a market until they die.[9]/

[9]/ Defendants' statement that "[i]t is difficult to conceive of *statutory provisions more clearly economic* than the ones here," Defs.' Br. 48 (emphasis added), is meaningless. What matters is that the *regulated individuals* are presently engaging in economic activity, not that the *statute* mandating they enter a market can be characterized as "economic."

In *Raich*, the Court rejected an as-applied challenge to a concededly valid federal law regulating the interstate market for marijuana, holding that it could be applied to *local economic activity* (growing and distributing marijuana). *Raich* relied heavily on the key difference between cases such as *Lopez*, *Morrison*, and the present case alleging that a federal law exceeds Congress's power (facial challenges), and cases, such as *Raich*, challenging a specific application of an admittedly valid law (as-applied challenges). *See Raich*, 545 U.S. at 23. The Court considered the distinction "pivotal." *Id.*

The Court concluded in *Raich*, as in *Wickard v. Filburn*, 317 U.S. 111 (1942), that preventing Congress from reaching the regulated economic activities at the local level would "undercut the regulation of the interstate market in that commodity" and "leave a gaping hole in" the national regulation of that economic activity. *Id.* at 18, 22. Unlike in *Lopez*, in *Raich*, reaching the local economic activity was 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 24-25 (quoting *Lopez*, 514 U.S. at 561). These statements signified only that, in the context of an as-applied challenge to an unquestionably constitutional regulation of economic activity nationwide, Congress may reach that existing economic activity at the local level. *Raich* and *Wickard* do not even remotely suggest any authority to require individuals who are not presently

engaged in a commercial or economic activity to do so to benefit voluntary market participants or prevent negative consequences of Congress's regulation of the market.[10]/

Defendants rely heavily upon selective quotes from Justice Scalia's concurring opinion in *Raich* that illustrate Congress's power to regulate local activities. Defs.' Br. 19, 34, 38, 46-47. That concurring opinion provides no support for Section 1501. For example, Justice Scalia observed that when the Government asserts that it must include local activity as a necessary part of a regulation of interstate commerce, as it did in *Raich*, "[t]he relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Raich*, 545 U.S. at 37 (Scalia, J., concurring) (citing *United States v. Darby*, 312 U.S. 100, 121 (1941)). Compelling an American citizen to purchase a product is not reasonably adapted to a legitimate end. *Virginia*, 728 F. Supp. 2d at 782; *see also* Authors' Br. 1-31.

Defendants also selectively quote portions of *United States v. Comstock*, 130 S. Ct. 1949 (2010), to suggest that a rational claim that the means chosen bear some connection to a perceived "necessity" is all that is required to establish a valid claim of authority under the Necessary and Proper Clause. Defendants

[10]/ Likewise, Defendants' reliance on *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981), Defs.' Br. 30, is misplaced; the statute there did not compel involuntary economic activity as does the individual mandate.

notably fail to mention, however, that the Court's analysis hinged upon "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.

Application of these factors is consistent with the Court's longstanding insistence that the end must be "legitimate" and "within the scope of the constitution," and the means must be "appropriate" and consistent with "the letter and spirit of the constitution." *Id.* at 1956 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). *Necessity* is insufficient where, as here, the means chosen are not *proper*. The Necessary and Proper Clause is not a Machiavellian ends-justify-all-means provision.

The individual mandate fails the *Comstock* factors. Pls.' Br. 48-49. Section 1501 is not a modest addition to existing law, is unprecedented in the history of the United States, is not narrow in scope, does not accommodate State interests (illustrated by the twenty-eight States currently challenging the PPACA), and rests upon numerous attenuated inferences. The newly-asserted Congressional power to force Americans to buy goods or services to benefit voluntary market participants is by no means "appropriate" and consistent with "the letter and spirit of the

constitution." *Comstock*, 130 S. Ct. at 1956; *see also Bond v. United States* , 2011 U.S. LEXIS 4558, at *29 (U.S. 2011) (Gi nsburg, J., concurring) ("[A] law beyond the power of Congre ss, for any reason, is no law at all.") (quotations and citation omitted).

F. Defendants' arguments have no limiting principle and w ould convert the Commerce Clause into a federal police power.

Defendants largely ignore *Lopez*, a case in which the Court clearly expressed the im portance of "consider[ing] the im plications of Defendants' argum ents" where, as here, the outer bounds of t he Co mmerce Cl ause power are tested, to preserve the constit utional system of federalism . *Lopez* , 514 U.S. at 563. As Justice Kennedy noted in his c oncurring opinion in *Comstock*, assertions of power under the Necessary and Proper Clause are not given mere cursory judicial review, as Defendants im ply, but m ust be clos ely exam ined to ga uge their imp act on principles of federalism. *Comstock*, 130 S. Ct. at 1966-69 (K ennedy, J., concurring); *Bond*, 2011 U.S. LEXIS 4558, at *17- 19 (discussing the i mportant role of federalism in our system of gove rnment); Cato Br. 7-17, 25-30; Texas Br. 15-25.

Lopez indicates that considering the ki nd of hypothetical legislation the Government's theory of the Commerce Clause would authorize is key; acceptance of an assertion of power in one case will tr igger similar assertions of power in the

future. Although the statute in *Lopez* regulated the possession of guns in a school zone, the Court observed that,

> [u]nder the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 563-64. As such, Defendants cannot dodge the far-reaching implications of their arguments by simply characterizing the kinds of laws that would be supported by their arguments as "far-fetched" and "imaginary." Defs.' Br. 50, 51.

Plaintiffs reiterate that Defendants' novel theories supporting the individual mandate would also support a mandate that all Americans above a certain income level buy a General Motors vehicle so long as it was accompanied by a mandate that GM dealers provide vehicles to all who demonstrate a need for them regardless of their ability to pay. Pls.' Br. 39-40; JA 212-13. In response, Defendants rely on the existence of EMTALA as a purported limiting principle, stating that "health care is different" because "no state or federal law requires GM dealers to give away vehicles to those who cannot pay." Defs.' Br. 51. That Defendants *must change the hypothetical*, which includes a mandate imposed upon dealers, speaks volumes and is a tacit admission that a mandate to buy a GM vehicle *would* be valid under Defendants' theory if it were coupled with a dealer

mandate. Given the many ways in which Defendants' arguments would expand Congressional power far beyond existing law, it is no wonder why Defendants attempt to gloss over the implications of their arguments.

Defendants' purported limiting principle of "uniqueness," and the assurance that similar measures would never be attempted in other markets, are illusory. There is a large measure of uniqueness, unpredictability, suddenness, and risk in many aspects of life, and many of the justifications Defendants offer in favor of the individual mandate—that individuals' decisions not to buy something have some economic impact, that voluntary market participants would benefit if others were required to join the market, etc.—are equally applicable to other markets. Pls.' Br. 34-36; Cato Br. 21-24.

In addition, there are many markets in which some level of sporadic participation is virtually "inevitable," yet perceived inevitability is not a justification for imposing mandates upon individuals regardless of when or whether they actually participate in that market. It does not take much to go from a mandate to buy health insurance to a mandate to buy certain foods or pay a penalty given individuals' inevitable need for food. Putting aside the red herring of due process objections to a mandate to *eat* certain foods, Defs.' Br. 51-52, Defendants offer no explanation why their arguments supporting the individual mandate would

not also support a mandate to *buy* certain foods since the failure to buy those foods ultimately impacts the economy.

In sum, the individual mandate is much like the laws at issue in *Lopez* and *Morrison* in that they *are not triggered by the occurrence of an economic activity*, but are premised upon broad theories of Commerce Clause power that are inconsistent with our system of limited, enumerated federal power.[11]/

G. Response to *Amici* Supporting Defendants

Amici supporting Defendants filed thirteen briefs reiterating each others' arguments *ad nauseam*, contrary to D.C. Cir. R. 29(d), even including mistaken references to a district court decision *invalidating* Section 1501 obviously drawn from briefs filed in other courts. NWLC Br. 12; ANA Br. 9. The briefs illustrate that Defendants' theories lack limiting principles, arguing that Congress may mandate the purchase of a product to make it more affordable, Mass. Br. 7; AARP Br. 3, 5; Econ. Schol. Br. 16, improve Americans' health and productivity, AAPD Br. 22, and improve efficiency in federal spending programs, ANA Br. 5-6, 14-15.

Furthermore, Article I, Section 8 does not provide Congress with an amorphous "problem-solving" power akin to the States' police powers as several *amici* allege. Maryland Br. 6-8; Friedman Br. 1-2, 9; Const. Acct. Br. 11-12, 27.

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[11]/ Because the district court did not address severability, this Court should remand on that point. Pls.' Br. 50 n.9, 58; *see also* Chamber Br. 2-30 (Section 1501 is not severable from the PPACA).

Amici's attem pt to com pare Section 1501 to ci vil rights statutes applicable to businesses, employers, landlords, etc. is flawed; Section 1501's mandate is not triggered by conti nuous, voluntary comme rcial or econom ic activity. NWLC Br. 20-22; AHA Br. 20-21; Pls.' Br. 33. More over, Congress requiring m ilitiamen to purchase weapons i n 1792 under the enum erated power to "raise and support armies," U.S. Const. Art. I, § 8, and the fact that an action-inaction disti nction was not drawn with respect to the comm on law de finition of sui cide, are irrelevant to Section 1501's unpreced ented mandate to buy a product prem ised upon t he Commerce Clause. Friedman Br. 31; Cons t. Acct. Br. 31; Maryland Br. 28; ANA Br. 9; *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring).

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' RFRA CLAIM.

Plaintiffs Lee and Seven-Sky have se t forth a "short and plain statement" that they have a plausible claim for relief under RFRA by a lleging fa cts showing that the indivi dual mandate substantially burdens thei r reli gious exe rcise by placing substantial pressure on them to violate their religious beliefs or be penalized for adheri ng to thos e beliefs. JA 20-24, 37-38; Fed. R. Civ. P. 8(a); 42 U.S.C. § 2000bb-1; *Ashcroft v. Iqbal* , 129 S. Ct. 1937, 1949-50 (2009); *Kaemmerling v. Lappin* , 553 F.3d 669, 682 (D.C. Cir. 2008). Plaintiffs' factual allegations m ust be considered true, and from those facts this Court can draw the

reasonable inference of Defendants' liability. *Iqbal*, 129 S. Ct. at 1949-54. The district court, however, overlooked the sufficient allegations in Plaintiffs' Amended Complaint and instead wrongly imposed a heightened pleading standard. Pls.' Br. 54-55.[12]/

Defendants avoid any response to Plaintiffs' contention that the district court's dismissal of their RFRA claim conflicts with *Sherbert v. Verner*, 374 U.S. 398 (1963), the case upon which RFRA was modeled. Pls.' Br. 52-54. Consistent with the holding in *Sherbert*, Plaintiffs alleged that 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." Pls.' Br. 53; JA 20-24, 37-38. *Sherbert* is dispositive and compels the reversal of the district court's order.

Defendants have recast Plaintiffs' arguments by wrongly analogizing Plaintiffs' claim to a complaint about the spending of tax dollars. *Plaintiffs are not objecting to how the Government spends tax dollars.* Lee and Seven-Sky's consistent objection is to being forced to join the health insurance system, which

[12]/ Plaintiffs amended their original complaint "as a matter of course" before Defendants' responsive pleading was filed. Fed. R. Civ. P. 15(a)(1). Even if a heightened pleading standard were permissible, which it is not, this Court should remand for the district court to grant Plaintiffs leave to re-allege their RFRA claims to satisfy those heightened requirements. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend a complaint] when justice so requires."); *Iqbal*, 129 S. Ct. at 1954.

substantially burdens their religious exercise. Pls.' Br. 50-57; JA 20-24, 37-38. Also, Lee and Seven-Sky's circumstances are not the same as those who claim a violation of RFRA but have alternative ways to exercise their religion. *E.g.*, *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001). Section 1501 requires Lee and Seven-Sky to purchase health insurance, which runs counter to their religious faith, or pay a penalty for following their religious faith. They have no other valid options.[13]/

Lastly, Defendants fail to show—as RFRA requires—that applying the individual mandate *to Lee and Seven-Sky* is the least restrictive means of achieving a compelling governmental interest. *Kaemmerling*, 553 F.3d at 682 (the compelling interest test must be satisfied through application of the law "to the person."). Defendants can only say that "Congress was not required" to exempt Lee or Seven-Sky since they do not fit within the narrow religious exemptions Congress included in Section 1501. Defs.' Br. 61-62. RFRA does not require Lee and Seven-Sky to change their religious beliefs to conform to what Congress has approved—for example, to join the Amish faith or a health care sharing ministry—in order to receive RFRA's protections. Instead, RFRA requires Defendants to

[13]/ Defendants imply that Plaintiffs have the *option* of buying health insurance and not using it, which is the equivalent of Congress compelling a religious person to buy pornography to help the economy because he has the *option* of not looking at it, even though the purchase violates his religion. As stated in the Amended Complaint, Plaintiffs' *forced entry into the health insurance system* itself violates their religious beliefs. JA 19-24, 37-38.

show that Congress's imposition of the individual mandate on Lee and Seven-Sky is the least restrictive means available, that is, that Congress has no alternative forms of regulation that would accomplish the Government's compelling interest while imposing less of a burden upon Plaintiffs' religious exercise. *Kaemmerling*, 553 F.3d at 684. Defendants have not made that showing.

CONCLUSION

This Court should reverse the district court's decision for the reasons stated herein and in the Opening Brief and remand for further proceedings.

Respectfully submitted on July 25, 2011,

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

The undersigned counsel certifies tha t the foregoing Reply Brief of Plaintiffs-Appellants complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that, relying on the word count feature of t he word-processing system used to prepare the brief, Micr osoft Word 2007, t he brief cont ains 6,989 words, excluding the parts of t he br ief exem pted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). The undersigned counsel also certifies that the foregoing Reply Brief co mplies with the typefa ce requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) in that the brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

Respectfully submitted,

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Dated: July 25, 2011

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on July 25, 2011, by Federal Express next business day delivery, two true and correct copies of the foregoing Reply Brief of Plaintiffs/Appellants were caused to be 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.

The undersigned counsel also certifies that on July 25, 2011, eight true and correct copies of the foregoing Reply Brief of Plaintiffs-Appellants were caused to be hand-delivered to the Clerk of Court's Office, United States Court of Appeals for the District of Columbia Circuit, 333 Constitution Avenue, NW, Washington, D.C. 20001.

In addition, the undersigned counsel certifies that on July 25, 2011, an identical electronic copy of the foregoing Reply Brief was caused to 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.

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