

No. 11-117

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In the  
**Supreme Court of the United States**

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THOMAS MORE LAW CENTER, et al.,

*Petitioners,*

v.

BARACK H. OBAMA,  
President of the United States, et al.,

*Respondents.*

—◆—  
**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Sixth Circuit**

—◆—  
**BRIEF AMICUS CURIAE OF PACIFIC  
LEGAL FOUNDATION AND MATTHEW SISSEL  
IN SUPPORT OF PETITIONERS**

—◆—  
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## **QUESTIONS PRESENTED**

1. Does Congress have authority under the Commerce Clause or the Necessary and Proper Clause to require private citizens to purchase and maintain “minimum essential” health insurance coverage under penalty of federal law?

2. Is the individual mandate provision of the Act unconstitutional as applied to Petitioners who are without healthcare insurance?

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
IDENTITY AND INTEREST OF AMICI CURIAE .....	1
SUMMARY OF REASONS FOR GRANTING THE PETITION .....	2
ARGUMENT .....	8
I. WHETHER CONGRESS MAY COMPEL A PERSON TO ENGAGE IN COMMERCE IS A CRITICAL QUESTION OF FIRST IMPRESSION THAT THIS COURT ALONE CAN RESOLVE .....	8
A. The Decision Below, in Conflict With the Eleventh Circuit, Expands Federal Power to Allow Congress to Force Individuals to Engage in Commerce .....	8
B. The Decision Below, in Conflict With the Eleventh Circuit, Refused to Apply Meaningful Scrutiny Under the <i>Raich</i> “Essentiality” Theory, Thereby Transforming Congress’ Commerce Power into a <i>De Facto</i> Police Power and Radically Altering the Federalist Structure .....	12
C. The Court Must Also Determine Whether Congress Has Power Under the Necessary and Proper Clause to Compel Participation in Commerce .....	17

**TABLE OF CONTENTS—Continued**

	<b>Page</b>
II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DETERMINE HOW TO ADJUDICATE THE PENDING APPEALS INCASES INVOLVING THE INDIVIDUAL MANDATE BY COMBINING THIS CASE WITH REVIEW OF THE <i>FLORIDA</i> DECISION . . .	22
CONCLUSION .....	24

## TABLE OF AUTHORITIES

Page

## Cases

<i>Alabama-Tombigbee Rivers Coal. v. Kempthorne</i> , 477 F.3d 1250 (11th Cir. 2007) . . . . .	6
<i>Brown v. Bd. of Educ.</i> , 344 U.S. 1 (1952) . . . . .	8, 22-23
<i>Coons v. Geithner</i> , No. 2:10-cv-01714 (D. Ariz. filed Aug. 12, 2010) . . . . .	2
<i>FCC v. Beach Communications, Inc.</i> , 508 U.S. 307 (1993) . . . . .	13
<i>Florida v. Dep't of Health &amp; Human Servs.</i> , Nos. 11-11021 & 11-11067, 2011 U.S. App. LEXIS 16806 (11th Cir. Aug. 12, 2011) . . . . .	passim
<i>Florida v. U.S. Dep't of Health &amp; Human Servs.</i> , No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011) . . . . .	18
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005) . . . . .	passim
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 U.S. 241 (1964) . . . . .	10
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964) . . . . .	10
<i>Kinder v. Geithner</i> , No. 11-1973 (8th Cir. filed May 4, 2011) . . . . .	7
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819) . . . . .	4, 18-19, 21
<i>NLRB v. Jones &amp; Laughlin Steel Corp.</i> , 301 U.S. 1 (1937) . . . . .	10, 14
<i>Printz v. United States</i> , 521 U.S. 898 (1997) . . . . .	19

**TABLE OF AUTHORITIES—Continued**

	<b>Page</b>
<i>Radio Television News Directors Ass’n v. United States</i> , 390 U.S. 922 (1968) . . . . .	22
<i>Radio Television News Directors Ass’n v. United States</i> , 400 F.2d 1002 (7th Cir. 1968) . . . . .	22
<i>Rapanos v. United States Army Corps of Eng’rs</i> , 547 U.S. 715 (2006) . . . . .	1
<i>Red Lion Broadcasting Co., Inc. v. FCC</i> , 389 U.S. 968 (1967) . . . . .	22
<i>Red Lion Broadcasting Co., Inc. v. FCC</i> , 390 U.S. 916 (1968) . . . . .	8
<i>Red Lion Broadcasting Co., Inc. v. FCC</i> , 395 U.S. 367 (1969) . . . . .	22
<i>San Luis &amp; Delta-Mendota Water Auth. v. Salazar</i> , 638 F.3d 1163 (9th Cir. 2011) . . . . .	6
<i>Selective Draft Law Cases</i> , 245 U.S. 366 (1918) . . . . .	9
<i>Seven-Sky v. Holder</i> , No. 11-5047 (D.C. Cir. filed Feb. 28, 2011) . . . . .	2
<i>Sissel v. U.S. Dep’t of Health &amp; Human Servs.</i> , No. 1:10-cv-01263 (D.D.C. filed July 26, 2010) . . . . .	2
<i>Stewart &amp; Jasper Orchards v. Salazar</i> , No. 10-1551 (U.S. filed June 22, 2011) . . . . .	1, 6, 16
<i>United States Nuclear Regulatory Comm. v. Sholly</i> , 463 U.S. 1224 (1983) . . . . .	8

**TABLE OF AUTHORITIES—Continued**

	<b>Page</b>
<i>United States v. Comstock</i> , 130 S. Ct. 1949 (2010) . . . . .	18-21
<i>United States v. Lopez</i> , 514 U.S. 549 (1995) . . . . .	1, 3, 5, 11-14
<i>United States v. Morrison</i> , 529 U.S. 598 (2000) . . . . .	1, 3, 5, 12-14
<i>Virginia ex rel. Cucinelli v. Sebelius</i> , Nos. 11-1057 & 11-1058 (4th Cir. filed Jan. 20, 2011) . . . . .	2, 7
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942) . . . . .	10
<b>Rules of Court</b>	
U.S. Sup. Ct. R. 37.2(a) . . . . .	1
U.S. Sup. Ct. R. 37.6 . . . . .	1
<b>Miscellaneous</b>	
Barnett, Randy E., <i>The Original Meaning of the Commerce Clause</i> , 68 U. Chi. L. Rev. 101 (2001) . . . . .	9
Currie, David P., <i>The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835</i> , 49 U. Chi. L. Rev. 887 (1982) . . . . .	18
Gardbaum, Stephen, <i>Rethinking Constitutional Federalism</i> , 74 Tex. L. Rev. 795 (1996) . . . . .	21
Gokhale, Jagadeesh, <i>The New Health Care Law’s Effect on State Medicaid Spending</i> (Cato Institute White Paper, Apr. 6, 2011) . . . . .	20

**TABLE OF AUTHORITIES—Continued**

	<b>Page</b>
Haislmaier, Edmund & Blase, Brian, <i>Obamacare: Impact on States (Heritage Foundation Backgrounder, July 1, 2010)</i> . . . . .	20
Johnson, Samuel, <i>2 A Dictionary of the English Language</i> (J.F. Rivington, et al. eds., 6th ed. 1785) . . . . .	9
Kronenfeld, Jeannie Jacobs, <i>The Changing Federal Role in U.S. Health Care Policy</i> (1997) . . . . .	19
Lawson, Gary & Granger, Patricia B., <i>The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause</i> , 43 Duke L.J. 267 (1993) . . . . .	18-19
Shapiro, Ilya & Burrus, Trevor, <i>Not Necessarily Proper: Comstock’s Errors and Limitations</i> , 61 Syracuse L. Rev. 413 (2011) . . . . .	21

**IDENTITY AND  
INTEREST OF AMICI CURIAE<sup>1</sup>**

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) and Matthew Sissel respectfully submit this brief amicus curiae in support of the petition for certiorari.

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced non-profit legal foundation of its kind. PLF attorneys engage in research and litigation over a broad spectrum of legal issues, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and federalism. In pursuit of this mission, PLF has litigated before this Court, both directly and as amicus curiae, in every major Commerce Clause case in the past 30 years. *See, e.g., Stewart & Jasper Orchards v. Salazar*, No. 10-1551 (U.S. filed June 22, 2011); *Rapanos v. United States Army Corps of Eng'rs*, 547 U.S. 715 (2006); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995). PLF has also participated as amicus curiae in several lawsuits challenging the constitutionality of the Patient

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<sup>1</sup> Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Protection and Affordable Care Act (PPACA), including *Florida v. Dep't of Health & Human Servs.*, Nos. 11-11021 & 11-11067, 2011 U.S. App. LEXIS 16806 (11th Cir. Aug. 12, 2011); *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. filed Feb. 28, 2011); *Virginia ex rel. Cucinelli v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir. filed Jan. 20, 2011); and *Coons v. Geithner*, No. 2:10-cv-01714 (D. Ariz. filed Aug. 12, 2010). In addition, PLF attorneys represent Matthew Sissel in a lawsuit challenging the constitutionality of PPACA, *Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10-cv-01263 (D.D.C. filed July 26, 2010), now pending in the District Court for the District of Columbia.

Matthew Sissel is a citizen of Iowa and decorated Iraq War veteran who operates a small business, an art gallery called The Art of Matt Sissel, and contends that the Individual Mandate provision of PPACA is unconstitutional. PLF and Sissel have appeared as amicus curiae in the cases listed above. Amici believe their experience and public policy expertise will assist this Court in considering this petition.

### **SUMMARY OF REASONS FOR GRANTING THE PETITION**

The nationwide importance of this case needs little elaboration. The Sixth and Eleventh Circuits are now divided—and two other circuits are deliberating—over whether Congress' authority to “regulate commerce . . . among the several states” entitles it to compel individuals to participate in commerce by requiring them to buy a product or service. Obviously, only this Court can ultimately resolve this question, but its consideration of the full question involved would best be served by granting this petition and consolidating it

for hearing on the merits with *Florida v. Dep't of Health & Human Servs.*, Nos. 11-11021 & 11-11067, 2011 U.S. App. LEXIS 16806 (11th Cir. Aug. 12, 2011).

In his concurring opinion below, Judge Sutton was frank about the critical importance of the questions involved in this case: resolution of these questions will essentially determine whether any effective, principled, constitutional limits remain on Congress' power under the Commerce Clause, or whether it can exercise a de facto nationwide police power. If Congress can, as part of a nationwide legislative scheme, not only regulate the commerce in which people choose to engage, but also compel people to engage in commerce in the first place, there would appear to be little, if anything, that Congress can *not* do, and little remaining of the "first principle" that Congress enjoys only limited, enumerated powers. *United States v. Lopez*, 514 U.S. 549, 552 (1995). This Court, wrote Judge Sutton, "either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so." *Thomas More Law Ctr. v. Obama*, Pet. App. at 50a.

It is difficult to imagine a question of greater importance as a matter of constitutional principle, or one with which this Court has more frequently struggled. Under the prevailing "substantial effects" test, Congress has asserted power to govern virtually any individual act, even where the connection between that act and the national economy is extremely attenuated. In *Lopez*, and again in *United States v. Morrison*, 529 U.S. 598 (2000), this Court began to formulate a meaningful limit on the commerce power, holding that Congress may not assert authority over non-economic, intrastate activities merely by

aggregating the economic consequences of those activities as if they were a national commercial market subject to regulation. Yet those cases, and the later decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), left two crucial questions unresolved.

First, those cases involved the meaning of the term “commerce,” not the meaning of the word “regulate”—in other words, they did not address whether Congress can, in addition to *setting the terms* on which commercial activity is engaged, also *force* people to *engage* in that activity in the first instance.

Second, when this Court upheld the Controlled Substances Act in *Raich*, it did so on the grounds that a national legislative scheme regulating a nationwide market may include restrictions on non-economic, intrastate activity, if such restrictions are “essential” to the broader legislative scheme. *Id.* at 27. As Justice Scalia observed in his concurring opinion, this is not simply a Commerce Clause inquiry; it requires a further inquiry into the scope of the Necessary and Proper Clause. But *Raich* did not decide how courts should determine whether Congress’ claim of “essentiality” is valid or merely a “pretext . . . for the accomplishment of objects not entrusted to the government.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). While the plurality used the rational basis test, 545 U.S. at 22, the concurring opinion appeared to use a heightened scrutiny. *Id.* at 38-39 (Scalia, J., concurring in the judgment).

How courts should analyze a claim of “essentiality” is crucial because if Congress can simply declare, without significant judicial checks and balances, that the success of a nationwide legislative scheme depends on its controlling activity that is

quintessentially local, the viability of *Lopez* and *Morrison* will be undermined and the principle of limited, enumerated powers will transmogrify into a generalized police power. So long as it abides by what Justice O'Connor called the *Lopez* "drafting guide" (see *Raich*, 545 U.S. at 46 (O'Connor, J., dissenting)), Congress could assert power over any activity whatsoever that it claimed to be essential to the success of a national legislative scheme. As the Eleventh Circuit recently observed, if the essentiality inquiry operates like "a magic words test, where Congress's statement that a regulation is 'essential' thereby immunizes its enactment from constitutional inquiry," then Congress would enjoy a "general police power" rather than limited, enumerated powers. *Florida*, 2011 U.S. App. LEXIS 16806, at \*230.

Whether the "essentiality" inquiry even applies in a facial challenge like that presented here is also a critical question that has divided the circuits and requires this Court's review. The decision below concluded that it does, and that "where Congress comprehensively regulates interstate economic activity, it may regulate non-economic intrastate activity if it rationally believes that, in the aggregate, the failure to do so would undermine the effectiveness of the overlying regulatory scheme." *Thomas More Law Ctr.*, Pet. App. at 29a. The Eleventh Circuit, on the other hand, held that "essentiality" is only a proper test when a plaintiff brings an as-applied challenge, arguing that the application of the statute in a particular instance exceeds federal authority. *Florida*, 2011 U.S. App. LEXIS 16806, at \*\*223-26.

This division is particularly important because if "essentiality" applies at the facial level, then no

plaintiff could prevail in a subsequent as-applied challenge, regardless of how trivial or local his or her actions might have been. In other words, if federal control over a local, non-economic activity is *facially* constitutional whenever Congress asserts that such control is essential to the success of a larger regulatory scheme, then no as-applied challenge could succeed, since the plaintiff's argument that his activities had no meaningful effect on interstate commerce would be legally irrelevant. *See Thomas More Law Ctr.*, Pet. App. at 25a n.4 (opn. of Martin, J.) (“[I]f the minimum coverage provision is facially constitutional, then it is difficult to imagine a circumstance under which an as applied Commerce Clause challenge to the provision would succeed.”).

This issue is crucial not only in the health care context, but in other areas of law as well. In *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1175 (9th Cir. 2011), *pet. for cert. filed*, *Stewart & Jasper Orchards v. Salazar*, No. 10-1551 (U.S. filed June 22, 2011), the Ninth Circuit Court of Appeals rejected an as-applied challenge to a federal law enacted under the Commerce Clause because, even though the plaintiff's conduct had no realistic connection to interstate commerce, the law as a whole substantially affected national commerce. Thus a plaintiff can have no ground for claiming that her actions have no realistic effect on interstate commerce. *Accord*, *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1253 (11th Cir. 2007). This would reduce every Commerce Clause case to a rubber-stamp type of review and magnify federal authority into a de facto police power. On the other hand, if the “essentiality” inquiry is appropriate in the as-applied context, as the Eleventh Circuit held,

*Florida*, 2011 U.S. App. LEXIS 16806, at \*\*223-26, there would still be room for a meaningful judicial check on congressional assertions of power, since courts would be free to determine whether, in fact, the individual's *de minimis* activity is nonetheless rightly subject to federal power as part of a national regulatory framework.

This case therefore presents clear, judicially manageable questions, that involve no complicated economic analysis or political questions: (1) Can Congress, under the guise of a "regulation of interstate commerce," or as a "necessary and proper" adjunct thereto, not only set the ground rules for voluntarily undertaken commercial activity, but also compel people to engage in economic activity? (2) Does the "essentiality" analysis of *Raich* apply to *facial* challenges to a purported Commerce Clause enactment, and if so, what standard of scrutiny applies to the determination of whether a non-commercial, intrastate activity is "essential" to the success of a national legislative scheme enacted under the Commerce Clause?

These are questions of obvious importance to the states. That is why more than half of the states are currently litigating challenges to the constitutionality of PPACA in the Eleventh and Fourth Circuits.<sup>2</sup> The Eleventh Circuit recently rendered its decision in conflict with the Sixth Circuit, addressing these

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<sup>2</sup> In addition to the *Florida* and *Virginia* cases, the Eighth Circuit is currently considering *Kinder v. Geithner*, No. 11-1973 (8th Cir. filed May 4, 2011), in which the Lieutenant Governor of Missouri is challenging the constitutionality of the Individual Mandate on his own behalf; twenty-one states have filed a brief amicus curiae in support of him.

questions with great thoroughness. Given the extensive record and analysis provided by those cases and the magnitude of the issues involved, this Court should grant the petition but defer its consideration of the merits to consolidate this case with the *Florida* case for final review. See *Red Lion Broadcasting Co., Inc. v. FCC*, 390 U.S. 916 (1968); *Brown v. Bd. of Educ.*, 344 U.S. 1, 3 (1952) (postponing cases and noting probable jurisdiction in case pending in the court of appeals “[t]o the end that arguments may be heard together in all four of these cases”); and *cf. United States Nuclear Regulatory Comm. v. Sholly*, 463 U.S. 1224, 1225 (1983) (Blackmun, J., dissenting from denial of Court order) (noting that Court had twice postponed oral argument after grant of certiorari to allow Congress to consider proposed legislation).

## ARGUMENT

### I

#### WHETHER CONGRESS MAY COMPEL A PERSON TO ENGAGE IN COMMERCE IS A CRITICAL QUESTION OF FIRST IMPRESSION THAT THIS COURT ALONE CAN RESOLVE

**A. The Decision Below,  
in Conflict With the Eleventh  
Circuit, Expands Federal Power  
to Allow Congress to Force  
Individuals to Engage in Commerce**

This Court is presented with a clear division between the Sixth and Eleventh Circuits on the question of whether Congress may, under its power to regulate commerce among the several states, compel all persons to enter the commercial market when they

have chosen not to do so. Several courts considering constitutional challenges to the Individual Mandate, including the Court of Appeals below, have noted that the question is a novel one, indeed, a question of first impression, *Thomas More Law Ctr.*, Pet. App. at 33a; *Florida*, 2011 U.S. App. LEXIS 16806, at \*286. Moreover, the question is critical to the future of the constitutional principle of limited, enumerated powers.

The term “regulate” in the Commerce Clause implicitly limits Congress’ power to setting the rules and boundaries for commerce that individuals choose to undertake. The word “regulate” is not normally used as a synonym for “compel,” or understood to include such a power. At the time of the Constitution’s framing, it was originally understood as meaning the power to “make regular” activities that originate by voluntary initiative. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001) (“The power to regulate is, in essence, the power to say, ‘if you want to do something, here is how you must do it.’”); Samuel Johnson, 2 *A Dictionary of the English Language* (no pagination) (J.F. Rivington, et al. eds., 6th ed. 1785) (Defining “to regulate” as: “1. To adjust by rule or method . . . 2. To direct”). The distinction is most obvious when contrasting the words of the Commerce Clause with the words in other clauses which *do* allow Congress to compel activity. For example, Congress can draft a military under its powers “to raise . . . armies” and “provide for calling forth the Militia.” See *Selective Draft Law Cases*, 245 U.S. 366, 382 (1918). The verbs “raise,” “provide,” and “call forth” imply compelling action in a way that the verb “regulate” does not. As Judge Sutton observed in his concurring opinion, even the examples proffered by the government actually did

not involve compelling people to act—or, if they did, were enacted under different provisions of the Constitution. See *Thomas More Law Ctr.*, Pet. App. at 57a-58a.

While existing Commerce Clause precedent has expanded federal power in ways not intended by the Constitution’s framers, every previous case has at least involved some voluntarily undertaken commercial activity. The farmer involved in *Wickard v. Filburn*, 317 U.S. 111 (1942), was actively and voluntarily growing wheat. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the company voluntarily employed people in steelmaking. Cases during the civil rights era concerned parties that voluntarily chose to engage in the economic activity of operating a restaurant, *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964), or a hotel, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). And the plaintiffs in *Raich* grew and processed marijuana—a voluntary activity that this Court characterized as a form of “manufacture.” 545 U.S. at 22.

If Congress were entitled under the “regulate” power to compel any individual activity that has economic consequences, or any action essential to a broader national regulatory scheme that has a substantial effect on interstate commerce, the remainder of Congress’ specified powers in Article I, section 8, would be rendered surplusage. Raising armies, laying and collecting taxes, providing a navy, designating post roads, and all other powers enumerated in Article I, section 8, have *some* economic consequences or effects on the national economy, and if the Commerce Clause were meant to allow Congress the breadth of authority claimed by the government

here, there would have been no need to list these powers separately. “An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.” *Lopez*, 514 U.S. at 589 (Thomas, J. concurring).

The decision below held that the Individual Mandate does not compel activity, but instead regulates the general market for health care—specifically, that it requires people to pay now for the health care that they will inevitably seek in the future. *See Thomas More Law Ctr.*, Pet. App. at 27a (“The activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic than the activity of purchasing an insurance plan.”). Because the court found that the question should be resolved only on the most lenient level of judicial review, it upheld that Mandate because Congress might have believed that “the practice of self-insuring . . . has a substantial effect on interstate commerce, and that the minimum coverage provision is an essential part of a broader economic regulatory scheme.” *Id.* at 34a.

But in its conflicting decision, the Eleventh Circuit rejected this view as overly hasty and simplistic, because the Individual Mandate “is not tied to those who do not pay for a portion of their health care (*i.e.*, the cost-shifters) [or] to those who consume health care. Rather, the language of the mandate is unlimited, and covers even those who do not enter the health care market at all.” *Florida*, 2011 U.S. App. LEXIS 16806, at \*178. Indeed, the Mandate *does not apply* to those classes of persons most likely to “shift costs,” such as illegal aliens and low-income persons, who are exempted from the Mandate, *id.* at \*196, but

does “primar[ily]” apply to “*healthy individuals* who forego purchasing insurance.” *Id.* at \*198. Thus the Mandate is best seen, not as a mere regulation of a commercial market, but as an attempt to “regulate individuals outside the stream of commerce, on the theory that those ‘economic and financial decisions’ to avoid commerce *themselves* substantially affect interstate commerce.” *Id.* at \*175.

Whether Congress may compel participation in a commercial market as part of its power to regulate interstate commerce is a question of national importance that only this Court can resolve.

**B. The Decision Below, in Conflict  
With the Eleventh Circuit, Refused  
to Apply Meaningful Scrutiny  
Under the *Raich* “Essentiality”  
Theory, Thereby Transforming  
Congress’ Commerce Power into a  
*De Facto* Police Power and Radically  
Altering the Federalist Structure**

*Lopez* and *Morrison* drew a principled distinction between *economic* and *non-economic* activities. Where an activity is *qualitatively* non-economic, Congress may not aggregate the effects of that activity, then find that this aggregate has economic consequences, and use those consequences as the basis for legislating over things that are fundamentally local matters that the Constitution reserves to state jurisdiction. Of course, the absence of a decision to buy health insurance is not “economic” for the same reason that it is not “flavorful” or “yellow” or “happy”—because it is nothing whatsoever. It would be arbitrary to attach an adjective like “economic” to it. Thus a strict application of *Lopez* and *Morrison* would qualitatively

bar the federal government from governing something that is not economic activity.

The Court below, however, employed the *Raich* “essentiality” theory to clear this hurdle, ruling that while the non-purchase of health insurance is not itself an economic transaction subject to federal regulation, it nevertheless is “essential” to the success of a federal economic scheme and therefore falls within federal power. Such a holding vividly illustrates the confusion caused by the “essentiality” theory of *Raich*. First, the court defined the target of the regulation in the broadest possible terms, as “the market for health care delivery.” *Thomas More Law Ctr.*, Pet. App. at 24a. Then it concluded that, because Congress could reasonably have believed that an individual’s not deciding to buy health insurance has an effect on *that* market, Congress was within its authority when it forced every individual to participate in the market by buying health insurance. *Id.*

If the “essentiality” theory is this flexible, then *Lopez* and *Morrison* cannot stand as realistic limits on Congress’ power, because it would be a simple matter for Congress to legislate in terms of broad, vaguely defined markets, and then to declare that regulation of *any* discrete, local, non-economic activity is “essential” to the success of that national legislative scheme. The danger is exacerbated if rational-basis review applies to such assertions. *Cf. FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., dissenting) (“[I]t is difficult to imagine a legislative classification that could *not* be supported by a ‘reasonably conceivable state of facts.’ Judicial review under the ‘conceivable set of facts’ test is tantamount to no review at all.”).

Such an approach would, as Justice O'Connor warned, *Raich*, 545 U.S. at 46 (O'Connor, J., dissenting), render *Lopez* and *Morrison* “nothing more than a drafting guide,” which instructs Congress to begin by characterizing any quintessentially local activity as an essential part of some national regulation due to its ultimate, cumulative effect on the national economy, and then to assert federal jurisdiction over it. The only preventative against this abuse is for courts to apply a realistic degree of judicial scrutiny to congressional claims of “essentiality.” Indeed, Justice Scalia appeared to apply a meaningful scrutiny to claims of “essentiality” for just this reason. His separate opinion found Justice O'Connor’s criticism “unjustified” because, in his eyes, the “essentiality” rule would only allow Congress to take “those measures *necessary* to make the interstate regulation [of commerce] effective . . . . Congress may regulate noneconomic intrastate activities *only where the failure to do so ‘could . . . undercut’ its regulation* of interstate commerce.” *Id.* at 38 (Scalia, J., concurring) (emphasis added) (citing *Lopez*, 514 U.S. at 561). This argument only works if courts apply genuine, independent scrutiny—something more than the passive rational-basis test—to be effective.

In direct conflict with the decision below, the Eleventh Circuit rejected the argument that the Individual Mandate meets the “essentiality” standard. *Florida*, 2011 U.S. App. LEXIS 16806, at \*\*157-66. It held that this standard reiterates the analysis provided in *Jones & Laughlin Steel*, 301 U.S. at 37, which held that Congress could assert jurisdiction over local activities that are “essential or appropriate to protect [interstate commerce] from burdens and obstructions.” *Florida*, 2011 U.S. App. LEXIS 16806,

at \*230 (emphasis omitted). That analysis requires something more than passive, rational-basis scrutiny. If “Congress’s statement that a regulation is ‘essential’ thereby immunizes its enactment from constitutional inquiry,” Congress would enjoy “carte blanche” authority “to enact unconstitutional regulations so long as such enactments were part of a broader, comprehensive regulatory scheme . . . . Such a reading would eviscerate the Constitution’s enumeration of powers and vest Congress with a general police power.” *Id.* at \*230. In short, if courts do not take an independent and meaningful look at the question of whether the measures Congress takes actually *are* necessary to make a regulation of commerce effective, then Congress could declare anything “essential,” and thereby exercise powers denied it by the Constitution.

*Raich* did not say what level of scrutiny applies when Congress regulates a local, non-economic activity on the grounds of its purported “essentiality” to a national legislative scheme. While four Justices employed rational basis scrutiny, 545 U.S. at 22, Justice Scalia concurred only in the judgment, and did not address that question, finding instead that non-economic, intrastate activity could be regulated only when necessary and proper to carrying into effect the enumerated commerce power. *Id.* at 34-35. But his separate opinion implied that a meaningful standard of scrutiny should apply to this question. *See id.* at 40 n.3 (“[I]t is . . . difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1000 feet of schools (and nowhere else).”).

The question therefore remains open whether courts must use rational-basis deference to accept at face value Congress' assertion that the regulation of non-commercial, local activity is "essential" to effectuating a national legislative scheme, and thus falls within federal control—or whether courts should apply meaningful review to such assertions in order to preserve individual rights and the federalist structure.

Not only are the Courts of Appeals now in conflict on this issue, but resolution of this question is crucial both for the future of the PPACA and more broadly for future federal regulation in a variety of contexts. See *Thomas More Law Ctr.*, Pet. App. at 86a-87a (Graham, J., dissenting) ("The uniqueness that justifies one exercise of power becomes precedent for the next contemplated exercise. And permitting the mandate would clear the path for Congress to cause or contribute to certain 'unique' factors, such as free riding and adverse selection, and then impose a solution that is ill-fitted to the others."); *Florida*, 2011 U.S. App. LEXIS 16806, at \*150 ("[I]n determining if a congressional action is within the limits of the Commerce Clause, we must look not only to the action itself but also its implications for our constitutional structure."). For example, amicus PLF currently represents petitioners in *Stewart & Jasper Orchards v. Salazar*, No. 10-1551 (U.S. filed June 22, 2011), now pending before this Court, which seeks review of the constitutionality of federal jurisdiction over the delta smelt, a fish with no commercial value that is located wholly within a single state, but which the Environmental Protection Agency seeks to regulate under federal environmental laws. If, as the Court of Appeals held in that case, an intra-state species can be subjected to federal jurisdiction regardless of its

commercial triviality because Congress has declared that the success of its regulatory scheme depends on such regulation, then the federal government would be free to control any land use, development, or activity of any sort that affects any species Congress sees fit to regulate.

**C. The Court Must Also Determine  
Whether Congress Has Power Under  
the Necessary and Proper Clause to  
Compel Participation in Commerce**

The petition in this case does not specify the scope of the Necessary and Proper Clause as a question presented, but as the concurring opinion in *Raich* suggested, 545 U.S. at 34-35, the constitutionality of the Individual Mandate cannot be determined by recourse to the Commerce Clause alone. The Necessary and Proper Clause gives Congress power to make its regulations of commerce effective, so long as it does so in a manner that is necessary and proper. Although the decision below that the Individual Mandate was constitutional under the Commerce Clause rendered it unnecessary for that court to consider the Necessary and Proper Clause, full resolution of the case by this Court would require addressing that provision as well. Indeed, the Eleventh Circuit panel examined the Necessary and Proper Clause in depth, *see Florida*, 2011 U.S. App. LEXIS 16806, at \*\*212-21; *id.* at \*\*362-68 (Marcus, J., dissenting), and the dissent below found that the Individual Mandate was not constitutional under the Necessary and Proper Clause, because “an attempted exercise of power . . . cannot be justified [on the grounds that] it is ‘necessary’ to cure the economic disruption caused [by] another part of the legislation.”

*Thomas More*, Pet. App. at 81a n.2 (opn. of Graham, J.) (citing *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822, at \*\*110-11 (N.D. Fla. Jan. 31, 2011)).

The relevant Necessary and Proper Clause precedents, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819), and *United States v. Comstock*, 130 S. Ct. 1949 (2010), both weigh strongly against the decision in this case. *McCulloch* held that an asserted federal power is constitutional so long as Congress' goal is within its legitimate powers, and the means it chooses are "not prohibited . . . [and] consist[ent] with the letter and spirit of the constitution." 17 U.S. (4 Wheat.) at 421. The Individual Mandate cannot satisfy this test. First, it is inconsistent with the *letter* of the Constitution, because the term "to regulate" does not imply a power to require a person to engage in economic activity, and because construing the term in such a way would render the remainder of Article I, section 8, unnecessary surplusage. Second, it is inconsistent with the *spirit* of the Constitution because it would convert the federal government from one of delegated, enumerated powers, into a government enjoying a generalized police power of the kind reserved to the states. *McCulloch*, as Professor David Currie observed, establishes a relatively narrow conception of implied power: "incidental authority must not be so broadly construed as to subvert the basic principle that Congress has limited powers." David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. Chi. L. Rev. 887, 932 (1982). See also Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the*

*Sweeping Clause*, 43 Duke L.J. 267, 297 (1993) (under *McCulloch*, “executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights”).

The Individual Mandate fares no better under the factors articulated in *Comstock*, 130 S. Ct. at 1965. The first factor that *Comstock* considered relevant was the breadth of the Necessary and Proper Clause, but however broad that Clause is, it is not toothless; it prohibits Congress from enacting laws that are “forbidden” or “inconsistent” with fundamental constitutional principles like federalism and limited, enumerated powers. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

The second factor on which *Comstock* relied was the longstanding tradition of federal involvement with the subject matter at issue. 130 S. Ct. at 1965. But the Individual Mandate is a novelty without historical parallel. *Cf. Printz v. United States*, 521 U.S. 898, 918 (1997) (“almost two centuries of apparent congressional avoidance” of a practice calls into question that practice’s constitutionality). And while *Comstock* turned largely on the long history of the federal prison system, 130 S. Ct. at 1961, federal involvement in private health insurance is a very recent phenomenon. *See, e.g.,* Jeannie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy* 67 (1997) (“Federal involvement in health is a fairly new occurrence in U.S. history . . . . [T]he bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years.”).

The third factor emphasized by *Comstock* was the accommodation of state interests, 130 S. Ct. at 1962,

but the Individual Mandate does not accommodate state interests. The civil commitment provision challenged in that case allowed states to assert authority over, and take custody of, any individual committed under it, *id.*, and indeed to prevent federal detention at the outset. *Id.* at 1963. But PPACA does not allow states to assert an analogous authority. Instead, it ejects states from their role as the primary authority for regulating the health insurance purchases of their citizens, and forces states to overhaul their health care systems at drastic expense. See Jagadeesh Gokhale, *The New Health Care Law's Effect on State Medicaid Spending* (Cato Institute White Paper, Apr. 6, 2011); Edmund Haislmaier & Brian Blase, *Obamacare: Impact on States* (*Heritage Foundation Backgrounder*, July 1, 2010). With most of the states now challenging the constitutionality of PPACA in federal courts, and many enacting legislation to shield citizens from the Individual Mandate, it is clear that the states do not believe their interests are being accommodated.

The final *Comstock* factor was the relative narrowness of the challenged law, but the Individual Mandate is not narrow in scope. It applies to every resident American, excepting only the impoverished, and it prescribes a blanket rule: buy insurance, or pay a fine. It is not conditional on any activity; it is, in principle and by design, unavoidable. And, as noted above, it rests upon an interpretation of the Commerce Clause that would stretch federal power into a national police power, under which Congress could control any individual behavior that has any ultimate effect on the economy—meaning, essentially, all individual behavior. This is hardly “narrow.”

Review by this Court is necessary, however, because *Comstock* did not make clear to what degree these factors are binding, or how the factors inter-relate, which weigh most heavily, or what to do when different factors point in different directions. See Ilya Shapiro & Trevor Burrus, *Not Necessarily Proper: Comstock's Errors and Limitations*, 61 Syracuse L. Rev. 413, 415 (2011). The *McCulloch* test is not particularly clear, either. See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795, 814 (1996) (“*McCulloch* has the . . . distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*.”).

Therefore, in addition to deciding whether the Individual Mandate falls within Congress’ power to regulate commerce, as requested by the petition, the Court should also take this opportunity to clarify the standards for determining whether a law is necessary and proper for carrying into effect the commerce power—and, more specifically, to provide guidance for lower courts in determining whether federal authority over a wholly local, non-commercial action—or, in this case, *inaction*—is necessary and proper for carrying into effect the power to regulate interstate commerce.

## II

**THIS COURT SHOULD  
EXERCISE ITS DISCRETION TO  
DETERMINE HOW TO ADJUDICATE  
THE PENDING APPEALS IN  
CASES INVOLVING THE INDIVIDUAL  
MANDATE BY COMBINING THIS CASE WITH  
REVIEW OF THE *FLORIDA* DECISION**

More than half of the states, as well as many individual citizens, are now litigating constitutional challenges to the Individual Mandate. Given the profound federalism implications of this case, as well as the importance of the Necessary and Proper Clause issue, Amici suggest that a full evaluation of this case would be best achieved by combining this case with review of the Eleventh Circuit's decision in the *Florida* case.

This Court has exercised such discretion in the past. In 1967, petitioners brought forward two cases challenging the constitutionality of certain regulations promulgated by the Federal Communications Commission. The Court granted certiorari in *Red Lion Broadcasting Co., Inc. v. FCC*, 389 U.S. 968 (1967), on December 4, 1967, but on January 29, 1968, it postponed consideration of the merits until the Court of Appeals decided the then-pending appeal in *Radio Television News Directors Ass'n v. United States*. See 390 U.S. 922 (1968). The Seventh Circuit issued its decision on September 10, 1968, see *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968), and then this Court granted certiorari in that case and issued a final, consolidated decision. See *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969). Likewise, in *Brown v. Bd. of Educ.*,

344 U.S. 1 (1952), the Court, believing that it would be best for the several appeals challenging the constitutionality of segregation to “be heard together,” granted several petitions for certiorari and invited a petition for certiorari in a pending case.

Nor is there reason to await a possible *en banc* review of the *Florida* decision prior to this Court’s review, since even if the Eleventh Circuit were to reverse itself, the question involved in this case is of such immense significance to warrant this Court’s ultimate review.

Given the significant division between the Sixth and Eleventh Circuits, the Eleventh Circuit’s more thorough discussion of standards of scrutiny applicable to the *Raich* “essentiality” analysis, and the importance of the Necessary and Proper Clause question that, though critical to resolution of this case, was not significantly addressed by the panel below, Amici suggest that full resolution of this matter would be best served by combining this case with review of the *Florida* decision. Reviewing the cases together would not unduly delay resolution of this case, or prejudice any party.

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**CONCLUSION**

The Court should grant the petition and postpone consideration of the merits to resolve this case simultaneously with the *Florida* decision.

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Respectfully submitted,

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