

NO: 11-398

In The
Supreme Court of the United States

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UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES ET AL,
Petitioners,

V.

STATE OF FLORIDA ET AL,
Respondents.

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On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

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**BRIEF OF LIBERTY LEGAL FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

(MINIMUM COVERAGE PROVISION)

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QUESTION PRESENTED

This brief will address the following question:

Whether Congress had the authority under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A.

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of Interest	1
Summary of Argument	2
Argument	3
I. <i>Wickard</i> and Its Effect	3
II. Proper Scope of the Commerce Clause Must Be Reestablished	4
III. Standard for Overturning Precedent	10
IV. <i>Wickard</i> Drastically Departed from 150 Years of Prior Commerce Clause Precedent	12
V. Experience has Confirmed that the Substantial Effects Test Leaves No Limits on Congressional Authority	16
VI. Continued Adherence to the Substantial Effects Test Will Impede Stability of Future Cases	19
VII. Returning to Intrinsically Sounder Doctrine Will Better Serve <i>Stare</i> <i>Decisis</i>	23
Conclusion	28

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995)	11, 23
<i>Alderman v. United States</i> , 131 S.Ct. 700 (2011)	16
<i>Bond v. United States</i> , 131 S.Ct. 2355 (2011)	9
<i>Burnet v. Coronado Oil & Gas Co.</i> , 285 U.S. 393 (1932)	10
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936)	13, 26
<i>Champion v. Ames</i> , 188 U.S. 321 (1903)	17
<i>Citizens United v. FEC</i> , 130 S.ct. 876 (2011)	10,11,19,23
<i>Florida v. U.S. Dept. of HHS</i> , 648 F.3d 1235 (11 th Cir. 2011)	17, 22
<i>Gonzalez v. Raich</i> , 545 U.S. 1 (2005)	18
<i>Heart of Atlanta Motel v. United States</i> , 379 U.S. 241 (1964)	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Heisler v. Thomas Colliery Co.</i> , 260 U.S. 245 (1922)	26
<i>Helvering v. Hallock</i> , 309 U.S. 106 (1940)	10,11,23
<i>Liberty University Inc. v. Geithner</i> , __F.3d__, 2011 WL 3962915 (4 th Cir. 2011).	19
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	9,14,15,25
<i>Montejo v. Louisiana</i> , 129 S.Ct. 2079 (2009)	11,19,24
<i>Newberry v. United States</i> , 256 U.S. 232 (1921)	13, 14
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937)	4, 25
<i>Oliver Iron Co. v. Lord</i> , 262 U.S. 172 (1923)	26
<i>Pearson v. Callahan</i> , 129 S.Ct. 808 (2009)	11,19,24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Runyon v. McCrary</i> 427 U.S. 160 (1976)	11
<i>Seven-Sky v. Holder</i> , 661 F.3d 1 (D.C. Cir. 2011)	16,19-20
<i>Shreveport Rate Cases</i> , 234 U.S. 342 (1914)	26
<i>Smith v. Allwright</i> , 321 U.S. 649 (1944)	10
<i>Southern R. Co. v. United States</i> , 222 U.S. 20 (1911)	26
<i>Thomas More Law Center v. Obama</i> , 651 F.3d 529, (6 th Cir. 2011)	19,18,21
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	4, 25
<i>United States v. E.C. Knight Co.</i> , 156 U.S. 1 (1879)	13, 14
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	12,14-18
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	8,25-26

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942)	Passim
<u>Dictionary</u>	
<i>Black’s Law Dictionary</i> (Bryan Garner ed., 7 th Ed., West 1999)	13
<u>Other Authority</u>	
<i>The Federalist</i> No. 45, Madison	9
<i>The Nature of the Judicial Process</i> , B. Cardozo (1921)	11
<i>A Compilation of the Messages and Papers of the presidents, 1789-1897</i> , Richardson, (U.S.Gov. Print. Off. 1902)	13
<i>Historical Tables, Budget of the U.S. Government</i> , (Off. of Man. & Budg. 2012)	5-7
<i>Federal Register, Agency List</i> , (National Archives Off. Fed. Register, 2012)	6-7
<i>Federal Register, Pages Published 1836-2012</i> (National Archives Off. Fed. Register, 2012)	6-7
<i>Voting and Registration, Time Series Tables</i> , Tables A-7 and A-9 (U.S. Census Bureau, 2012)	8

STATEMENT OF INTEREST¹

Liberty Legal Foundation is a nonpartisan, non-profit organization dedicated to restoring Constitutional government by strategically challenging flawed precedent. Liberty Legal Foundation currently has over 32,000 members from all 50 states.

In response to increasing governmental intrusion into personal health decisions, Liberty Legal Foundation filed a lawsuit in Federal court on behalf of its members, challenging the authority of Congress to regulate personal health decisions. See *Enloe v. Obama*, Docket #5:11-cv-26-C (N.D. Tex.). That action is pending and will likely be directly affected by this Court's decision in the instant action.

Unlike many parties and amici curie to the instant litigation, Liberty Legal Foundation doesn't stand to make billions of dollars from health care related businesses. Liberty Legal Foundation's members are not looking to control millions of Americans, or gain political authority. This brief was prepared and filed in a genuine effort to restore and protect the Constitutional structure of our government.

¹ Pursuant to This Court's Rule 37.6 all parties have consented to the filing of this brief. No counsel for a party has 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 amicus or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Since 1942 this Court's Commerce Clause precedent has left no meaningful limitations on Congressional authority to regulate non-criminal matters. The minimum coverage provision at issue is simply the latest in a long line of Congressional invasions into the private lives of all Americans. This creeping invasion of Congress into all aspects of society is a predictable and inevitable result of this Court's *Wickard v. Filburn* decision. 317 U.S. 111 (1942).

All parties to the instant litigation appear to begin their analysis by assuming that this Court's current Commerce Clause precedent properly reflects the Constitutional limitations placed upon Congress. This assumption is incorrect. Any attempts to find meaningful limits within current Commerce Clause precedent will result in compounding the problem, because *Wickard* and its progeny amount to a house of cards built upon a shaky foundation.

The faulty *Wickard* precedent has introduced a systemic and potentially fatal disease to our system of government. The brilliant structure of our government, balancing power between the three branches as well as between the states, federal government, and citizens, simply cannot survive when proper limitations on that power are not maintained. Since *Wickard* Congress has been genuinely *unable* to control its own assertion of power.

This conclusion is not intended to be an indictment of Congress, or the individuals that make up that body, or any political party, or the voting citizens of the United States. Without Constitutional limitations Congress has no ability function properly. Seventy years of history have proven this conclusion. After *Wickard* no political party nor any individual member of Congress has had the political ability to prevent unchecked governmental growth.

The problem is a systemic problem that arose when this Court removed all meaningful limits on Congressional authority to regulate. The only cure is for this Court to correct its Commerce Clause precedent. Without such correction Congress will *inevitably* continue its invasion into all aspects of American life. Without correction, whatever freedom Americans still have will be completely lost. It is just a matter of time.

ARGUMENT

I. *Wickard* and Its Effect

In 1942 this Court ruled that Congress had authority under the Commerce Clause to forbid an individual farmer from growing wheat on his own land, for use on his own farm to feed his own family and livestock.² *Wickard v. Filburn*, 317 U.S. 111 (1942).

² By the time the *Wickard* reached the Supreme Court, the facts had been stipulated that none of the product that Mr. Filburn produced allegedly in violation of the Agriculture Adjustment

The “substantial effects test” applied in *Wickard* has its roots in two previous rulings from the New Deal Court. See *United States v. Darby*, 312 U.S. 100 (1941); and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). However, *Wickard* completed the creation of what are now known as the “substantial effects” and “aggregation” doctrines. Under these doctrines, “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect.” *Wickard*, 317 U.S. at 125.

Seventy years of subsequent history has proven that *Wickard*’s substantial effects and aggregation doctrines leave no meaningful limits on Congressional authority to regulate non-criminal activities.

II. Proper Scope of the Commerce Clause Must Be Reestablished

While every decision of this Court changes the future of the United States, the instant case is

Act of 1938 left the farm, much less the state. Therefore, the clean question arose: does the Commerce Clause grant Congress power to regulate personal property that is produced and consumed on private land and that is never sold to anyone.

unique. The instant case will likely determine whether the United States will survive the 21st Century. Without re-establishment of Constitutional limits on Congressional authority, America simply cannot survive in its present form.

This stark conclusion is supported by equally stark facts. In 1940 the federal government spent \$72 per year per American. *Historical Tables, Budget of the U.S. Government*, at 21, Table 1.1 (Off. of Man. & Budg. 2012) (total budget divided by total U.S. population for 1940 as per the U.S. Census Bureau). In 2010 the federal government spent \$11,194 per American. *Id.* That is a 156 fold increase, or 15,600%.³ The annual federal budget has increased 364 fold from \$10 Billion in 1940 to \$3,456 Billion in 2010. *Id.* The federal debt has ballooned from \$51 Billion in 1940 to \$13,529 Billion in 2010. *Id.* at 23, Table 7.1. Every American child born today owes over \$53,000 at birth. *Id.* To put this into perspective the current average household income is \$51,914 per year, for the entire household, not per earner. *QuickFacts, People*, (U.S. Census Bureau, 2012). This statistic is confirmed by the related statistic that America's debt is now estimated to be 105.3% of its GDP for 2012. *Historical Tables, Budget of the U.S. Government*, at 21, Table 7.1 (Off. of Man. & Budg. 2012). Such unchecked growth in debt and spending is simply unsustainable.

³According to the Office of Management and Budget these numbers have been "adjusted to provide comparability over time." *Historical Tables, Budget of the U.S. Government*, at 1 (Off. of Man. & Budg. 2012).

The number of federal regulations, federal agencies, and federal codes have similarly skyrocketed since *Wickard*. In 1940 the federal government had 97 agencies. *Federal Register, Agency List*, (National Archives Off. Fed. Register, 2012). It now has 529 agencies. *Id.* In 1940 there were 5,307 pages of federal regulations. *Federal Register, Pages Published 1836-2012*, (National Archives Off. Fed. Register, 2012). Now there are 82,480 pages of federal regulations. *Id.*

This dramatically increased regulation reflects Congress actively picking winners and losers in our formerly free-market economy. Preferential treatment via the federal tax code, for example, coupled with punitive taxes against competitors has become a primary method for large businesses to squash smaller and more innovative businesses. Manipulation of the tax code and other federal regulations create unfair business advantages for those with influence, decreases innovation, raises costs, increases inflation, and decreases GDP. All of this makes it more difficult to pay America's debt. All of this was made possible by *Wickard*.

In stark contrast, statistics for the same parameters reflecting pre-*Wickard* years reveal slow, steady growth in the federal government. See generally *Historical Tables, Budget of the U.S. Government*, (Off. of Man. & Budg. 2012); *Federal Register, Agency List*, (National Archives Off. Fed. Register, 2012); *Federal Register, Pages Published*

1836-2012, (National Archives Off. Fed. Register, 2012). Before 1942 federal government growth mirrored increases in population coupled with inflation. Before *Wickard* the federal government grew in direct proportion to the country's population and economy. After *Wickard* federal expansion grew like a cancer, reflecting exponential increases decade after decade. Seventy years later we are experiencing the vertical spike present in every exponential growth curve.

Unchecked Congressional power has also led to a complete lack of respect for the Constitution by Congress and the Executive branch. Upon passage of the Patient Protection and Affordable Care Act a reporter asked then-Speaker of the House Nancy Pelosi if the Act was constitutional. Her response was to look surprised at the question, scoff, and ask the reporter "Are you serious?" Sam Baker, *Court Angst for Left Over Health Care*, The Hill, (Jan. 18, 2012). The clear implication was that she did not think the Constitution needed to be considered. This is just one example of rampant disrespect for the Constitution coming from both ends of the political spectrum, reflecting a pervasive and growing attitude in our nation's capitol.

Such disregard for the Constitution is a direct result of *Wickard*. Justice Thomas explained:

"By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that

the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.” *United States v. Morrison*, 529 U.S. 598, (2000) (Thomas, Justice concurring).

While members of Congress and the Executive branch have lost respect for the Constitution, members of the public have lost faith in our form of government. Decreased voter turnout reflects this additional destructive effect of *Wickard*. Voter turnout nationwide is approximately 20% lower than it was in 1960 and has trended steadily downward over the past 50 years. *See Voting and Registration, Time Series Tables*, Tables A-7 and A-9 (U.S. Census Bureau, 2012)). Such low turnout persists despite recent increased public concern and interest in national elections. This seeming contradiction is explained by the fact that the public understands that its government is broken. The public has learned through decades of frustration that its input no longer matters. The growth of the federal government has gone unchecked regardless of which political party is in power and regardless of who the public elects to represent them in Congress. Such lack of change in policy regardless of the outcome of elections has not gone unnoticed by the public. Faith in our representative form of government has been lost. Decreasing voter turnout is the undeniable evidence of this fact. This too was caused by *Wickard*.

Our Founding Fathers feared too much power being in the hands of the federal government and were determined to prevent our elected officials from becoming a ruling class. This is why both early and recent Supreme Court precedent confirms that a primary purpose of the Constitution is to permanently limit the scope of Congressional authority:

“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011); see also *The Federalist* No. 45 (Madison).

If these precedent and the words of the Constitution are to have any meaning, *Wickard* and its progeny must be overturned. The minimum coverage provision at issue here simply reflects the latest step in a long line of federal abuses of authority. The instant case presents this Court with an opportunity to correct a 70 year-old mistake, and save America from the unchecked government growth rooted in *Wickard*.

III. Standard for Overturning Precedent

Stare decisis is not an inexorable command, but is instead a principle of policy. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Its purpose is to serve a Constitutional ideal: consistent rule of law. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 921 (2011) (Roberts, Chief J., concurring). When it becomes clear that continued adherence to a particular rule does more harm than good to consistent, Constitutional rule of law, this Court has departed from such precedent. *See cases collected in Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410 (1932); *and Smith v. Allwright*, 321 U.S. 649 at FN 10 (1944).

“When convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.”⁴ *Smith*, 321 U.S. at 665.

⁴ While the instant case involves legislative action, the legislation is based upon authority presumably granted to Congress via a decision of this Court construing the Constitutional scope of authority within the Commerce Clause. Therefore, the question presented to this Court is properly founded upon Constitutional construction rather than statutory construction.

When determining whether prior decisions were in error, this Court has considered several factors:

First, the degree to which the precedent under consideration itself departed from this Court's earlier jurisprudence. *Citizens United*, 130 S.Ct. at 921 (Roberts, Chief J., concurring).

Second, whether the precedent under consideration, "after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring), quoting B. Cardozo, *The Nature of the Judicial Process* 149 (1921).

Third, whether adherence to precedent actually impedes the stable and orderly adjudication of future cases. *Citizens United*, 130 S.Ct. at 921 (Roberts, Chief J., concurring) (citing *Pearson v. Callahan*, 129 S.Ct. 808, 817 (2009); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009)).

Finally, whether returning to the "intrinsically sounder doctrine established in prior cases may better serve the values of stare decisis." *Id.* (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995); see also *Helvering*, 309 U.S. 106, 119).

IV. *Wickard* Drastically Departed from 150 Years of Prior Commerce Clause Precedent

The *Wickard* Court itself acknowledged that its decision represented a departure from precedent: “there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof.” 317 U.S. at 120.

In 1995 Justice Thomas provided a detailed history of Commerce Clause precedent and compared pre-*Wickard* principals to the current substantial effects test:

“[O]ur case law has drifted far from the original understanding of the Commerce Clause...I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th Century.” *United States v. Lopez*, 514 U.S. 549, 584 & 596 respectively (1995) (Thomas, J., concurring).

The conclusion that the substantial effects test drastically conflicts with the original understanding of the Commerce Clause is supported by the writings and acts of the “Father of the Constitution,” President James Madison. In 1817 President Madison vetoed a public works bill that was intended

to provide “for the construction of roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several states.” President Madison’s letter to Congress explaining his veto stated “The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers.” Richardson, *A compilation of the messages and papers of the presidents, 1789-1897*, (U.S. Gov. Print. Off. 1902). Either the Father of the Constitution misunderstood the document that he helped draft, or the original intent of the Commerce Clause has been completely destroyed.

As late as 1936 it was well established that “commerce” did not include agriculture, manufacturing, or mining. *Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936). If federal power extended to these types of production “comparatively little of business operations and affairs would be left for state control.” *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1879). It was well understood, at least prior to *Wickard*, that commerce is the sale and transport of tangible products that have *already been produced*. *Id.* at 14-16; *see also Newberry v. United States*, 256 U.S. 232, 257 (1921).

This understanding of the limitations on the Commerce Clause flows from a plain meaning understanding of the term “commerce.” Commerce is “the exchange of goods and services, especially on a large scale involving transportation between cities,

states, and nations.” *Black’s Law Dictionary* 263 (Bryan A. Garner ed., 7th ed., West 1999). A company selling or transporting products across state lines is clearly engaged in commerce “among the several states.” In contrast, however, a farmer growing wheat on his farm cannot “grow among the several states.” Similarly a factory worker building a car cannot “build among the several states.” It is simply contrary to plain meaning of the word “commerce” to decree such activities within interstate commerce. *See Id.*; *Newberry*, 256 U.S. at 257; *E.C. Knight Co.*, 156 U.S. at 16.

Prior to *Wickard* this Court’s rule was exactly opposite to *Wickard*’s substantial effects test: “It is settled...that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress.” *Newberry*, 265 U.S. at 257.

The fact that prior precedent ran opposite to *Wickard* is not surprising when considering first principles of Constitutional construction: “It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.” *Marbury v. Madison*, 5 U.S. 137, 174 (1805).

Yet *Wickard*’s substantial effects and aggregation doctrines leave much of the Constitution without meaning. If Congress may regulate all matters that substantially affect commerce as

established by these doctrines, then there is no need for article I section 8 to specify that Congress may enact bankruptcy laws, or coin money, or punish counterfeiters. Under current precedent Congress already has all these powers under the Commerce Clause because all these other powers substantially effect interstate commerce in the aggregate. See *Lopez*, 514 U.S. at 588-89 (Thomas, J., concurring).

Similarly, under the substantial effects test Congress wouldn't need separate authority to protect discoveries and writings via patent and copyright law, or to establish post offices, or to regulate land and naval forces, or to punish acts of piracy on the high seas. All of these things are within Congressional authority via the commerce clause, as interpreted by *Wickard*. The Commerce Clause under the substantial effects test leaves the rest of article I "without effect." *Id.* Such a construction violates first principles of Constitutional construction. *Marbury*, 5 U.S. at 174.

Wickard and its progeny fundamentally changed the way our government operates, destroying federalism and leaving Congress with essentially unlimited power. While granting Congress unfettered authority certainly has the advantage of giving it the power to solve national problems, our Founders understood that such unchecked power always leads to despotism.

V. Experience Has Confirmed that the Substantial Effects Test Leaves No Limits on Congressional Authority

Seventy years of subsequent history has proven that *Wickard's* substantial effects test leaves no meaningful limits on Congressional authority to regulate non-criminal activities. This conclusion has been admitted by the federal government on several occasions:

“When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words.” *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas J., concurring).

“The Government actually conceded at oral argument in the Ninth Circuit that Congress could ban possession of French fries that have been offered for sale in interstate commerce.” *Alderman v. United States*, 131 S.Ct. 700 (2011) (Thomas, J., dissenting from denial of cert; Scalia, J., joining in dissent.)

“The Government concedes the novelty of the [individual] mandate and the lack of any doctrinal limiting principles; indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause.” *Seven-Sky v. Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011).

In the instant case the Eleventh Circuit found the individual mandate to be beyond Congressional authority, even under the substantial effects test. *Florida v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011). However, its ruling rested on the “activity” “non-activity” dichotomy. While the Court buttressed this conclusion with an extensive discussion of “truly local activity” versus “truly national activity,” a cursory reading of this discussion reveals that it does nothing to create any real limitations on Congressional authority. Nor does it really support the Circuit Court’s proposed new “activity” “non-activity” standard.

The only real test established by the Eleventh Circuit rests on the “activity” “non-activity” dichotomy. However, this test also leaves no real limits on Congressional authority. Such a test would simply require Congress to change its description of the inactivity it wishes to regulate so that the inactivity reflects an activity. The instant case provides an example: not purchasing health insurance may be inactivity. However, *choosing* to not have insurance is the same behavior, but is now linguistically an activity. It can also be described as actively risking financial obligations.

The activity/non-activity test also fails because the power to regulate includes the power to prescribe and proscribe. *See Champion v. Ames*, 188 U.S. 321, 328 (1903).

The distinction upon which the Eleventh Circuit rests its decision unfortunately serves as further demonstration that the substantial effects test lacks outer limits. Logical attempts to create such limits simply prove that the test defies logic.

Justices O'Connor and Thomas have both, independently confirmed this conclusion:

“To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic.” *Gonzalez v. Raich*, 545 U.S. 1, 50 (2005) (O'Connor J., dissenting).

“The aggregation principle is clever, but has no stopping point...Under our jurisprudence, if Congress passed an omnibus ‘substantially affects interstate commerce’ statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional.” *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas J., concurring). “Such a formulation of federal power is no test at all: It is a blank check. At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence.” *Id.* at 602.

Seventy years of experience has proven that the substantial effects test leaves no limits on Congressional authority. This extreme result is completely inconsistent with our Federalist system of government and threatens to destroy our nation.

VI. Continued Adherence to the Substantial Effects Test Will Impede Stability of Future Cases

Where adherence to precedent actually impedes the stable and orderly adjudication of future cases, its stare decisis effect is diminished. *Citizens United v. FEC*, 130 S.Ct. 876, 921 (2011) (Roberts, Chief J., concurring) (*citing Pearson v. Callahan*, 129 S.Ct. 808, 817 (2009); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009)).

“This can happen... when the precedent’s validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake” *Citizens United* 130 S.Ct. at 921.

Current Commerce Clause precedent as applied to the individual mandate has resulted in numerous courts expressing discomfort with their own rulings. See *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011); *Thomas More Law Center v. Obama*, 651 F.3d 529, 554-55 (6th Cir. 2011) *Liberty University Inc. v. Geithner*, __F.3d__, 2011 WL 3962915 (4th Cir. 2011). In addition to conflicting rulings between Circuits, almost every Circuit to

review the individual mandate has encountered *internal* disagreement on the issue. *See Id.* All of this disagreement arises from the conflict between foundational principals of federalism and *Wickard*. The substantial effects test has become a hindrance to stare decisis.

Courts reviewing the individual mandate have expressed concern over the apparent lack of limitations on Congressional authority under the substantial effects test:

“We acknowledge some discomfort with the Government’s failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce. But to tell the truth, those limits are not apparent to us, either because the power to require the entry into commerce is symmetrical with the power to prohibit or condition commercial behavior, or because we have not yet perceived a qualitative limitation. That difficulty is troubling...” *Seven-Sky*, 661 F.3d at 18.

“A short history of decisions in this area shows that the Court has given Congress wide berth in regulation of commerce, frequently adopting limits on that authority and just as frequently abandoning them, all while continuing to deny that Congress has unlimited national police powers...[O]ne tilts at hopeless causes in proposing new categorical limits on the commercial

power...[T]he Court either should stop saying that a meaningful limit on Congress's commercial powers exists or prove that it is so." *Thomas More Law Center*, 651 F.3d at 554-55.

While the Sixth Circuit upheld the individual mandate at issue in the instant case, it appears to be unhappy with its own conclusion. The three-judge panel wrote three separate opinions with one dissenting. All three opinions agreed on one point: *Wickard* leaves no appreciable limitations on Congressional authority. See *Id.* at 554-55 and 573. The only real disagreement between the Sixth Circuit's panel was what to do about this conflict between the clear meaning of the Constitution and *Wickard*. Two judges decided to follow *stare decisis* with one of those two writing separately to describe reservations about the decision. The third, dissenting judge was so opposed to this clear violation of Constitutional limits on federal authority that he instead read a limitation into *Wickard* that simply doesn't exist. See *Id.* at 573 (Judge Graham, dissenting).

In his dissent Judge Graham summarizes the problem and openly urges this Court to correct its Commerce Clause precedent:

"In *Lopez* the Supreme Court recognized that the direction of its existing Commerce Clause jurisprudence threatened the principle of a federal government of defined and limited powers,... I believe the Court remains

committed to the path laid down by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, and Thomas to establish a framework of meaningful limitations on congressional power under the Commerce Clause. The current case is an opportunity to prove it so. If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power?... Such a power feels very much like the general police power that the Tenth Amendment reserves to the States and the people." *Id.* at 573.

In the instant case the 11th Circuit concluded, "The 'substantial effects' doctrine, along with the related 'aggregation' doctrine, expanded the reach of Congress's commerce power exponentially." *Florida v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235, 1269 (11th Cir. 2011). Circuit Judge Marcus' dissent serves as yet another example of how the substantial effects test has become a "hotly contested" issue.

All of this disagreement among Circuit judges is easily understood if we recognize that current precedent directly contradicts the foundations of our federalist government. This Court continues to insist that Congress does not have unlimited police powers. Yet when current commerce clause precedent is tested in the real world, neither the government nor the Courts can identify any non-criminal activity that Congress cannot reach. This forces Circuit

judges to decide between following precedent that completely destroys federalism, or violating stare decisis. Many have tried valiantly to create exceptions out of this Court's dicta and generalizations, but all such attempts have required weak reasoning or intellectual dishonesty.

All of this controversy points to the same cause: the substantial effects and aggregation doctrines are fundamentally flawed. No correction or buttressing of these doctrines can lead to consistent, enforceable limits on Congressional authority. These doctrines must be abandoned.

This Court should take this opportunity to return to a sounder foundation for its commerce clause jurisprudence, starting with express rejection of *Wickard* and all other cases using substantial effects and aggregation doctrine.

VII. Returning to Intrinsically Sounder Doctrine Will Better Serve Stare Decisis

Where the precedent under consideration has itself departed from this Court's earlier jurisprudence, returning to the "intrinsically sounder doctrine established in prior cases may better serve the values of stare decisis." *Citizens United v. FEC*, 130 S.Ct.876, 921 (2011) (Roberts, Chief J., concurring) (*citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995); *see also Helvering*, 309 U.S. 106, 119). In such cases abrogating the

errant precedent better preserves the law's coherence and curtails the precedent's disruptive effects. *Id.* (citing *Pearson v. Callahan*, 129 S.Ct. 808, 817 (2009); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009)).

For 150 years Congress regulated interstate commerce within the bounds of the Constitution. This left the individual states free to determine when and to what extent intrastate activities required regulation. More importantly, the restraints placed upon Congress allowed that branch of government to function properly, without exponential growth and without corrupting the free market economy.

While many may argue that modern problems wouldn't allow for a return to functional federalism, such an argument fails to recognize that most of our modern problems are a direct result of our 70-year departure from Constitutional federalism. The only solution is to re-establish the government that has been lost.

So-called "reliance considerations," should not prevent this Court from restoring federalism. As we have shown above, the current lack of restrictions on federal authority has caused systemic problems that will destroy America if the situation is not corrected. Whatever reliance has been placed upon *Wickard*, such reliance will not survive the collapse of our nation and the resulting global economic effects.

More importantly, reliance considerations should never effect this Court's decisions. Citing

reliance to support sustaining the status quo amounts to admitting that precedent did not accurately reflect the Constitution, yet should continue to be followed. Such reasoning requires a conscious disregard for the duty of this Court to uphold the Constitution. No circumstances can justify ignoring our most fundamental rights and principles, even temporarily. This Brief shows that ignoring principles in order to address temporary circumstances always leads to more devastating circumstances. Once a principle is forced to bend to circumstance it ceases to be a principle. “[T]hat those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

Both fidelity to founding principles and practical considerations require a return to pre-*Wickard*, pre-*Darby*, pre-*Laughlin Steel* standards. 317 U.S. 111 312 U.S. 100; 301 U.S. 1, *respectively*.

Such a return to founding principles would not require complex re-drafting of Commerce Clause precedent: The first two categories from *Morrison* should remain unaffected: “‘First, Congress may regulate the use of the channels of interstate commerce.’ 514 U.S., at 558, 115 S.Ct. 1624 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *United States v. Darby*, 312 U.S. 100, 114, 61 S.Ct. 451, 85 L.Ed. 609 (1941)). ‘Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.’ 514

U.S., at 558, 115 S.Ct. 1624 (citing *Shreveport Rate Cases*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914); *Southern R. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911); *Perez, supra*, at 150, 91 S.Ct. 1357).” *Morrison*, 529 U.S. 598, 609 (2000).

The third category from *Morrison* should be abandoned and replaced by the standards that were in place before *Wickard, Darby*, and *Laughlin Steel*. 317 U.S. 111 312 U.S. 100; 301 U.S. 1, *respectively*. Specifically, production or manufacturing is not subject to federal regulation under the commerce clause. *Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936). Mining and agriculture are not interstate commerce; these are local businesses and are subject to local regulation. *Id.* (citing *Oliver Iron Co. v. Lord*, 262 U.S. 172, 178 (1923)). This is true regardless of whether a commodity manufactured or produced within a state is intended for interstate commerce. *Id.* at 302 (citing *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259 (1922)). A commodity that is meant to be sold in interstate commerce is not considered to be part of interstate commerce before the commencement of its movement from the state. *Id.* at 309. Federal regulatory power ceases when interstate commerce ends; and, the power does not attach until interstate commercial intercourse begins. *Id.* Finally, if the production of any commodity by a single person does not have a direct effect on interstate commerce, then the production of that commodity by many people also cannot have a direct effect on interstate commerce. *Id.* at 308.

Applying these venerable standards to the individual mandate reveals how far from

foundational principles *Wickard* has taken us. An individual purchasing health care insurance doesn't necessarily involve channels of interstate commerce or instrumentalities of interstate commerce and is not a person or thing moving in interstate commerce. Even if health insurance is "a commodity that is meant to be sold in interstate commerce," at the point where the individual mandate touches the individual, the insurance has not yet commenced its movement from the state. Therefore, it is not part of interstate commerce. Purchase of health insurance by a single individual does not have a direct effect upon interstate commerce. Therefore, purchase of health insurance by many people cannot be considered to directly "effect" interstate commerce.

The substantial effects and aggregation doctrines represented a radical power shift in our federalist system. The *Wickard* Court eliminated all meaningful limitations on Congressional authority. Returning to pre-*Wickard* principles would not be a radical move by this Court, but would instead reflect a necessary correction of the *Wickard* Court's radical departure from our Constitutional system of government.

Returning to the intrinsically sounder doctrines discussed here will return balance to our federalist system of government, will return federal spending to sustainable levels, and will revitalize our free market economy. This Court has the ability, authority, and duty to restore our federalist form of government.

CONCLUSION

For the reasons discussed above this Court should correct its commerce clause precedent to restore Constitutional limits on Congressional authority. Restoration of intrinsically sounder doctrine would result in the common-sense conclusion that the individual mandate is far beyond Congressional authority.

Respectfully submitted,

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