No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

ARGUMENT ON BEHALF OF AMICUS CURIAE, CITIZENS' COUNCIL FOR HEALTH FREEDOM, SUPPORTING THE RESPONDENTS, AND ADDRESSING THE MINIMUM COVERAGE PROVISION ISSUE

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INTEREST OF AMICUS CURIAE

The Citizens' Council for Health Freedom is a private non-profit corporation organized under the laws of the State of Minnesota, with a mission promoting "patient and doctor freedom, medical innovation, and the right of citizens to a confidential patient-doctor relationship." Our goals include reduced dependency on government health care programs, and a free and open health care market, a charitable safety net strengthened by tax incentives, and elimination of taxes on health care services.[1]

The Citizens' Council for Health Freedom believes the Patient Protection and Affordable Care Act of 2010, (Public Law 111-148, 124 U. S. Statutes 119 as amended by Public Law 111-152, 124 U. S. Statutes at Large 1029), is so fiscally irresponsible, so intrusive of freedom of choice in medical treatment, so dangerous to the preservation of human privacy in the patient-doctor relationship and in medical records, so fraught with bureaucratic complexity, so

[1] As regards Rule 37.6 of the Rules of the United States Supreme Court, counsel for amicus curiae prepared this entire submission, with helpful and appreciated guidance and suggestions of the president and chief executive officer of the Citizens' Council for Health Freedom on certain points of detail. Neither counsel for amicus curiae, nor any party to any of the three causes, with respect to which writs of certiorari were granted on November 14, 2011 (Ns. 11-393, 11-398, and 11-400) has made any monetary contribution to fund the preparation and submission of this amicus brief. Blanket consents have been filed by the parties in this case.

expansive in growth of government, so incomprehensible in language and length, so destructive of our American health care system, and so manifestly and incurably unconstitutional, that the entire bulwark of this legislation should be legislatively repealed or judicially set aside, and the vital work of health care reform must be commenced anew.

In keeping with Rule 37.1 of the United States Supreme Court, the Citizens' Council appears as amicus curiae by the undersigned, who was admitted to the bar of the Minnesota Supreme Court on October 20, 1967 (#3664X), and to the bar of the United States Supreme Court on August 5, 1971. He is in good standing as an officer in both courts.

SUMMARY OF THE ARGUMENT

Blanket consents having graciously been filed by the parties of record in this cause, the Citizens' Council for Health Freedom proceeds with its contribution as allowed by Rule 37.3, acutely aware of the admonition set forth in Rule 37.1 of the Rules of the United States Supreme Court. The Citizens' Council for Health Freedom does not wish to reargue the case for the attorneys general of more than half the States of the Union who will be heard through eminent counsel of their choosing in these proceedings. While we shall briefly outline our views in broader context, we here offer **a focused argument for the following specific proposition** in relation to the first question on

which a writ of certiorari has been granted in this cause, to wit: **that the opinion of the court in *Wickard v. Filburn*, 317 U. S. 111 (1942), is inconsistent with the intended meaning and historic purpose of the third clause of Article I, Section 8 of the United States Constitution, commonly known as the Commerce Clause, as made evident from the records of the Philadelphia Convention of 1787, and certain writings of Alexander Hamilton in *The Federalist,* his Opinion on the Bank, and his Report on Manufactures, and that, therefore, *Wickard v. Filburn* should be overruled or disregarded in this case.**

We are aware of relevant scholarly articles, including especially those by Robert L. Stern, *That Commerce which Concerns More States than One*, 47 Harvard Law Review 1335 (1934), and Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 University of Chicago Law Review 101 (2001), and we are familiar with the decisions of this Court on the Commerce Clause from *Gibbons v. Ogden*, 9 Wheaton 1 (U. S. 1824), up through the contemporary trilogy of *United States v. Lopez,* 514 U. S. 549 (1995); *United States v. Morrison*, 529 U. S. 598 (2000); and *Gonzales v. Raich*, 545 U. S. 1 (2005).

We do not entirely agree with either Stern or Barnett on the intention of the Framers. We believe that judicial interpretation of the Commerce Clause has been badly flawed from the time of John Marshall to the present, occasioned by making too much of the dicta found in *Gibbons v. Ogden* on the distinction

between interstate and intrastate commerce and supposed exclusive authority of Congress over commerce, as well as an erroneous identification of production with intrastate commerce, and failure to understand labor relations as a part of commerce. This confusion led to the unfortunate result in *Wickard v. Filburn* which should not be allowed to mislead this Court in dealing with the individual mandate in Section 1501 in the Patient Protection and Affordable Care Act in this cause (No. 11-398)

In order to show why *Wickard v. Filburn* should be overruled, and why the individual mandate should be struck down as unconstitutional, we shall reconsider the proper definition of the so-called "intended meaning" of the United States Constitution, and explain the idea as the Framers themselves understood it. Then we shall give attention to the historical facts and interpretative rules for discovering "intention of the Framers" regarding the Commerce Clause.

ARGUMENT OF AMICUS CURIAE

A. The "intended meaning" of the United States Constitution

The long and involved controversy between those who favor the "intention of the Framers" and those who favor the "living Constitution" is neatly resolved by Alexander Hamilton in his Opinion on the Bank (1791) where he said, "Whatever may have been the intention of the framers of a constitution or a law,

that intention is to be sought for in the instrument itself, according to **the usual and established rules of construction**." – Jacob E. Cooke (ed.), *The Reports of Alexander Hamilton*, Harper & Row, New York, 1964, p. 94, hereinafter given reference as Cooke's Reports. [Emphasis supplied] In these words Hamilton did away with the notion that the intended meaning of the United States Constitution is an historical or political consensus among the Framers. There really is an intended meaning, and Hamilton defined what it consists of. It embraces the true and ageless Constitution which cannot be changed to suit political agendas or perceived exigencies, but it is different than what some have supposed. **The "intended meaning" is an objective idea or abstract significance which emerges when the document is correctly interpreted according to certain rules of construction which came to us from the common law of England, and no less the civil law of Rome, and in light of certain historical information contemplated by those rules.**

And what were "the usual and established rules of construction" in Hamilton's thinking? They are found in the first book of Sir William Blackstone's renowned treatise, from which the founding fathers of the United States learned their law. In Book I, page 59 of Edward Christian's edition of *Commentaries on the Laws of England*, published in London in 1765, Blackstone observed, "The fairest and most rational method to interpret the will of the legislator is by

exploring his intentions at the time the law was made, by signs the most natural and probable. And these signs are **either the words, the context, the subject matter, the effects and consequences, or the spirit and reason for the law**." [Emphasis supplied] He then proceeded to give us five rules on pages 59-61. These rules, used for the interpretation of acts of Parliament in Great Britain but assumed by the founding fathers of the United States for construction of American statutes and constitutions, are found in case reports and other authorities. They may be summarized as follows:

– General words are to be taken in their usual and natural meaning, not necessarily in point of strict grammar, but as widely understood at the time of adoption. See, e. g., Chief Justice John Marshall in *Gibbons v. Ogden*, 9 Wheaton at 188. Terms of art or technical words are to be taken as they were understood by those learned in the field at the time of adoption. Often, for example, terms of the common law are used, in which case the meaning must be derived from the common law. See, e. g., Chief Justice Oliver Ellsworth in *Wiscart v. D'Auchy*, 3 Dallas 321 at 327-330 (U. S. 1796).

– If a word, phrase, or clause is still dubious, the meaning may be established from the context of the document by comparing it with another part of the same instrument or its predecessor containing similar or related language, enabling corresponding provisions to shed light upon each other and thereby to efface ambiguity. See, e. g., Chief Justice John

Marshall in *Gibbons v. Ogden*, 9 Wheaton at 191. Cf. Alexander Hamilton, *The Federalist,* No. 32, Mentor edition from the New American Library, New York, 1961, pp. 199-200, hereinafter given reference as the Federalist, using ordinal numbering for each of the papers, and pagination from the Mentor edition. This rule on context blends into a like precept, to wit:

– A provision may be read in reference to its subject matter. Hence, provisions concerning the same or a related question should all be read together to avoid inconsistency and achieve harmony between them in relation to a common end, and also, if possible, to give each a useful meaning and thereby avoid redundancy, surplusage, or idle language. See James Madison in the 40th Federalist, p. 248, and Alexander Hamilton in the 78th Federalist, p. 468.

– As to effects and consequences, if an expression, either generally or in relation to particular facts, can be read in different ways, the construction more in conformity with natural justice as confirmed by legal tradition should be adopted. See, e. g., Justice Smith Thompson in *Ogden v. Saunders*, 12 Wheaton 213 at 312 (U. S. 1827).

– But, when ambiguities cannot be adequately resolved by reference to the general or technical meaning of words, context, subject matter, and effects and consequences, resort should be had to the reason and spirit of the provision in question, or, in other words, **the historic purpose sought to be accomplished at the time of framing and adoption**, in

keeping with which language should be clarified, so that language should be given more general or specific meaning as required to fit the objective. See, e. g., Chief Justice John Marshall in *Gibbons v. Ogden*, 9 Wheaton at 188-189, and Justice Joseph Story in *Prigg v. Pennsylvania*, 16 Peters 539 at 610-611 (U. S. 1842). And here we should take note of the observation by Judge Thomas Cooley, supported by an abundance of authority, where he said, "**When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument.**" – *Constitutional Limitations*, Little Brown & Co., Boston, 8th edition 1927, Vol. 1, p. 142 [Emphasis supplied] An excellent example of examining convention debates for this purpose is found in the opinion of Chief Justice Earl Warren in *Powell v. McCormack*, 395 U. S. 486 at 522-548 (1969).

B. The Framers and the Commerce Clause

We propose here to undertake an analysis of the Philadelphia Convention of 1787 and related events in order to assist this Court in rediscovering the intended meaning of the power of Congress to regulate commerce among the several States. For this purpose we shall make reference to the five-volume compendium edited by Jonathan Elliot, *Debates on the Federal Constitution*, J. B. Lippincott & Co., Philadelphia, 2nd edition

1859, which has often been cited by this Court and is hereinafter given reference as Elliot's Debates.

It is well known that the Philadelphia Convention was summoned by the Congress of the Confederation on recommendation of the Annapolis Convention which had concluded a year earlier that there was a need for consideration of a "uniform system" of regulating "the commerce and trade of the United States," but that "the power of regulating trade" was of "such comprehensive extent" that providing for and adopting it would probably require "other adjustments" in the then-existing federal system. See 1 Elliot's Debates 116-119.

At the Philadelphia Convention, the plan of Governor Edmund Randolph of Virginia emerged from the committee of the whole as the working draft of what later became the United States Constitution. Governor Randolph's plan included a proposed grant of legislative authority to Congress, and, as adopted as a sixth resolution by the Convention on July 26, 1787, and referred to the committee on detail, this proposed grant was described as a power "to legislate in all cases for the general interests of the Union, and also those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by individual legislation." See 1 Elliot's Debates 144, 153, 181-182, 206-207, and 221 (Journal, May 29 and 31, June 13 and 19, July 16, 17, and 26, 1787); and 5 Elliot's Debates 127-128, 139, 190, 317, 319-320, and 375 (Madison's Notes, May 29 and 31, June 13 and 19, July 16, 17, and 26, 1787).

The records of the Convention disclose that this broad description of proposed authority was meant only as a preliminary sketch of what the subsequent enumeration of powers was supposed to accomplish. Governor Randolph himself emphatically disclaimed any intention of giving "indefinite powers to the national legislature, declaring that he was entirely opposed to such an inroad on state jurisdictions." See 5 Elliot's Debates at 139 (Madison's Notes, May 31, 1787). Hence, it may be inferred that the specific enumeration of powers should be read to prevail over any intimation that Congress possesses a general power of legislation. In the 83rd Federalist, p. 497, Alexander Hamilton was crystal clear on this point when he later said, "The plan of the convention declares that the power of Congress, or, in other words, of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently **excludes all pretension of a general legislative authority**." [Emphasis supplied]

A further inference must be that **the construction of any clause effectively giving Congress a general legislative authority is necessarily in error**. But at the same time, given the nature of the broad purpose set forth in the sixth resolution of the Convention on July 26, 1787, the powers thereafter enumerated by the Convention should be liberally construed as remedial provisions, resolving ambiguity in favor of adequate, though not more than required discretion in addressing problems common among the

several States to promote the general interests of the whole Union.

In light of this background on historic purpose, it is easier to grasp the intended meaning of the third clause of Article I, Section 8 of the United States Constitution, insofar as it provides that Congress shall have power "to regulate commerce . . . among the several States. . . ." The adoption of this provision by the Convention on August 16, 1787, as one of the most important enumerated powers proposed by the committee on detail, was routine, uneventful, and unanimous. See 1 Elliot's Debates 226, 245, 247, 256, 280, 283 (Journal, August 6, 16, 18, 22, and 31, September 4, 10, 12, and 17, 1787); and 5 Elliot's Debates 378, 434, 439, 462, 503, 506-507, 536, 560 (Madison's Notes, August 6, 16, 18, 22, and 31, September 4, 10, 12, and 17, 1787).

We can infer from the records of the Philadelphia Convention just recited that the power to regulate commerce "among the several States" was a power to regulate commerce whenever, in the reasoned judgment of Congress, the general interests of the Union should require it, or whenever, in the prudent judgment of Congress, regulation by legislatures of the several States might not be adequate to produce national harmony. **Let it be remembered here that this power over commerce, though broad, was meant to be qualified by the eighteenth clause of Article I, Section 8 of the United States Constitution, which is, not an additional source of power, but rather a limit on the means which**

may be used, viz., means necessary and proper, – i. e., means reasonably conducive to, but consistent in principle with the end authorized, and not expressly or impliedly prohibited by the Constitution. See the 33rd Federalist, pp. 201-204 (Hamilton); the 44th Federalist, pp. 283-286 (Madison); and Cooke's Reports, pp. 88-91 (Hamilton's Opinion on the Bank).

The opinion of John Marshall in *Gibbons v. Ogden* in 9 Wheaton at 186-197 was very good insofar as he held that the power of Congress includes not merely trade concerning more States than one, but also the avenues of such trade, including navigation.

But Marshall's dicta, having nothing to do with the matter before him, caused trouble in later years, as where in 9 Wheaton at 194 he made reference to commerce completely internal to a State as if such trade was necessarily reserved to the several States by the 10th Amendment, giving rise to confusion over an imagined distinction between **interstate** commerce and **intrastate** commerce, which was never mentioned in the Philadelphia Convention. See, e. g., *United States v. E. C. Knight & Co*, l56 U. S. 1 at 13-16 (U. S. 1895). This confusion lingered for years, and induced unfortunate decisions in the early years of the Great Depression.

Again in 9 Wheaton at 209, Marshall suggested the notion that the power of Congress over commerce was exclusive of the several States, as if the Commerce Clause **standing alone was in and of itself** a restraint on commercial regulation by the States,

even where Congress had passed no statute addressing a particular problem under consideration. This notion led to judicial decisions which actually regulated commerce, thereby confounding judicial with legislative power. See, e. g., *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1944).

Even so Hamilton, who attended the Annapolis Convention and was on the committee on style in the Philadelphia Convention, stated in the 32nd Federalist, pp. 198-199, that powers granted to Congress were not meant to be exclusive of the States unless made exclusive in express language, or expressly given to Congress but expressly denied the States, or inconsistent, not in mere policy or convenience, but in principle with a concurrent authority of the States. Nothing of the sort can be said of the power conferred upon Congress in the third clause in Article I, Section 8, at least insofar as it concerns domestic commerce.

It follows that, under the intended meaning of the United States Constitution, the Commerce Clause leaves the States free to regulate commerce as they see fit unless Congress, in the exercise of sound discretion, intervenes with uniform regulations for the good of the whole Union in light of conditions prevailing at any particular time in history. As expounded by Hamilton, therefore, **the intended meaning of the power of Congress to regulate commerce is not a quaint antique, but a modern, practical, and dynamic provision,** – good

when Marshall wrote in 1824, also good in the troubled year of 1937, and still good in the uncertainty of 2012.

In any event, it is important not to confound a distinction between interstate and intrastate commerce, which was not even discussed by the Framers, and a very different distinction, which the Framers plainly did have in mind, between commerce on the one hand, and on the other agriculture, manufacturing, and other activities which, whether or not economic in nature, were not considered part of commerce, and were thus understood as lying beyond the power of Congress.

In his Opinion on the Bank, for example, Hamilton gave us a far-reaching explanation of what the Commerce Clause was meant to authorize. See Cooke's Reports at 98-99, where he mentioned regulation of trade and navigation, thus anticipating Marshall, but went further to mention "regulating the manner of contracting with seamen," in other words labor relations, and "regulation of policies of insurance." Given dictionaries then published – e. g., Samuel Johnson's *Dictionary of the English Language*, 4th edition 1773 –, and Hamilton's enumeration, **the power of Congress to "regulate commerce," as the phrase was generally understood when George Washington became President, includes necessary and proper statutes touching upon the marketing, buying, selling, barter, and exchange of all forms of property**

both tangible and intangible, and even labor relations. And it is fair enough to say that, under Hamilton's view, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), and even *United States v. Darby*, 312 U. S. 494 (1941), can be seen as having rightly decided that Congress may regulate labor relations, for Hamilton believed that labor relations were part of commerce. Nor was it a mistake in these decisions to soften the distinction between interstate and intrastate commerce. But error lurks in **the false rationale or premise that Congress can regulate manufacturing, agriculture, and other forms of production as such, if Congress finds, however feeble the pretext, that such activity "substantially affects" commerce. Congress was never meant to have such power.** Let this latter point be examined:

Alexander Hamilton is not a character to be stereotyped, for his actual views, when discovered, are often surprising, – stunning is a better word. It cannot be gainsaid that Hamilton attended the Philadelphia Convention, determined to establish a strong, centralized government under which the States would be reduced to mere administrative provinces. See his grand day-long oration recorded in 1 Elliot's Debates 417-428 (Yates' Minutes, June 18, 1787), and 5 Elliot's Debates 198-205 (Madison's Notes, June 18, 1787). Yet, at the Convention, he learned much and changed his mind. Afterwards, Hamilton forthrightly proclaimed that, under the work of the Philadelphia Convention, the United

States would be a "confederate republic" in which the States would "preserve their sovereignty;" that the Union "could be dissolved;" and that the "friends of the proposed Constitution" conceded "the right of the people" (acting through their elected delegates sitting in convention to exercise sovereign power) "to alter or abolish the established Constitution whenever they find it inconsistent with their happiness" (as actually happened in England in 1688-1689, and in American colonies of England in 1775-1776). See the 9th Federalist, pp. 74-75; and the 78th Federalist, p. 469. Cf. the 16th Federalist, p. 118.

Likewise Hamilton astonishes us in what he had to say about intended constitutional limitations on the power of Congress to regulate commerce. Gouverneur Morris made it unmistakable in the Philadelphia Convention that **"agriculture and manufacturing" were considered distinct from "commerce and finance,"** as appears in 1 Elliot's Debates 250 (Journal, August 20, 1787); 5 Elliot's Debates 446 (Madison's Notes, August 20, 1787). In those days, **"agriculture, commerce, and manufactures" were thought of as distinct activities**. See, e. g., the speech of Melancton Smith in the New York Convention of 1788, as recorded in 2 Elliot's Debates 336-337. Generous though his idea of commerce was, **Hamilton himself distinguished "trade and finance" over which Congress was granted power, from "the supervision of agriculture," or "agriculture and manufactures" which were consigned to the States**. See the

17th Federalist, p. 118, the 22nd Federalist, pp. 143-144, and the 34th Federalist, p. 209.

Let it be conceded that Congress was meant to have broad discretionary authority over commerce throughout the Union. Even so, **under the intended meaning of the United States Constitution, Congress cannot regulate production, or any activity that is not commerce, on the pretext that such activity "substantially affects" commerce**. In exercising power over commerce, Congress can prescribe rules for the hiring of artisans and workers in the private sector. But Congress cannot dictate by normative statutes what those artisans and workers shall produce, or how they shall produce it, because, under the **intended meaning of the United States Constitution**, such responsibility belongs to the States.

It is true that the Framers were aware and intended that Congress could tax and spend in ways calculated to encourage or discourage other activities not in themselves commerce, as may be illustrated:

George Mason wanted a power of Congress to enact sumptuary laws, in other words to regulate consumption of luxury items – activity in any event different from commerce as such –, but his proposal was voted down because it was said in opposition that taxation could better be used to entice people to be sensible about such matters. See 1 Elliot's Debates 251 (Journal, August 20, 1787), and 5 Elliot's Debates 447 (Madison's Notes, August 20, 1787). If the power to

regulate commerce had been understood as including power to prohibit or regulate consumption, Mason would not have made his motion, because there would have been no need for it.

Another example is found in one of the most brilliant of Hamilton's papers. In his Report on Manufactures (1791), Hamilton proposed the use of taxing and spending in order to promote growth and quality in American industry. See Cooke's Reports 115-205. He spoke of taxing and spending, because, as the man more interested than all of the other Framers in the power of Congress to regulate commerce, he certainly knew that Congress could not regulate manufacturing, or for that matter any other mode of production. **Under the intended meaning, therefore, if a domestic activity is not commerce as such, Congress cannot regulate it on any theory under the third clause of Article I, Section 8 of the United States Constitution.**

C. The errors in *Wickard v. Filburn*

In *Wickard v. Filburn*, 317 U. S. 111 (1942), this Court upheld an act of Congress which imposed a **penalty or civil fine** as a kind of sanction for producing more wheat for home consumption than the federal government allowed.

In so doing, Congress did not regulate marketing, buying, selling, or exchanging wheat, – in other words, "commerce" as the Framers understood the word. Instead Congress regulated production which,

though economic, was not commerce in legal contemplation. The production of the farmer sanctioned was trivial on the national market, but the decision sustaining the act of Congress was based on the conjecture that, if all other farmers across the country likewise exceeded statutory limits on production, the effect on commerce might be substantial. On this tenuous, hypothetical assumption, the statute was upheld as constitutional.

But *Wickard v. Filburn* in 317 U. S. was decided **contrary to the intended meaning of the United States Constitution** for two main reasons:

First, Congress cannot regulate something not commerce whenever Congress supposes that it "substantially affects" commerce. All things, even holy religion, divorce proceedings, domestic violence, and use of firearms can be said to have "substantial effects" on commerce, if the reasoning in *Wickard* be legitimate. For such an extrapolation effectively converts the power of Congress over commerce into power of general legislation, which is **exactly what the Philadelphia Convention intended not to grant Congress**. It was this sense of things which prompted the judicial course corrections by the majorities in *Lopez* and *Morrison,* but was unfortunately not understood or appreciated by the majority in *Raich*.

And, secondly, Congress is restrained no less from attempting such a regulation, because the third clause of Article I, Section 8 of the United States

Constitution was meant by the Framers to vest authority in Congress for the regulation of commerce, but not agriculture and manufacturing, the arts and sciences, consumption, or any other **activity not amounting to what the Framers properly called "commerce," –** i. e., marketing, buying, selling, barter, and exchange, including the avenues of trade.

CONCLUDING OBSERVATIONS

Now we quickly tie the errors in *Wickard v. Filburn* into this and related causes now pending before this Court:

If the penalty imposed by Section 1501 of the Patient Protection and Affordable Care Act were a tax, it would be a capitation tax, because assessed per capita, yet a nullity because not apportioned as required by the fourth section of Article I, Section 9 of the United States Constitution. Therefore, in keeping with the well-settled rule that a statute must be construed as far as possible in conformity with constitutional principle, as to which see, e. g., *National Labor Relations Board v. Jones & Laughlin Steel Corp*., 301 U. S. at 30, all talk about the Tax Anti-Injunction Act is spurious and out of place. In short, this penalty cannot be taken as a tax, because, if it were a tax, it would be patently unconstitutional. Hence the imposition must be construed as a civil fine. Such is our view on question 2 in this cause (No. 11-398).

Considered as a civil fine, however, it is a sanction against refusal or failure to buy health insurance offered by a private company, and as such a regulation of public health, very much like laws which require drivers not engaged in commerce to buy automobile insurance from a private company, – in any event, what Hamilton called "the regulation of the mere domestic police of a State," as such reserved by the 10th Amendment, and, on that account, beyond the intended scope of the power of Congress to regulate commerce. See the 17th Federalist, p. 118. The penalty cannot be saved by *Wickard v. Filburn* which, as shown, runs contrary to the **intended meaning of the United States Constitution**, was therefore wrongly decided, and should be overruled or disregarded in this cause.

Accordingly, we agree with the conclusion of the United States District Court for Northern Florida that the individual mandate ordained by Section 1501 of the Patient Protection and Affordable Care Act of 2010 is unconstitutional. Such is our view of question 1 in this cause (No. 11-398).

And, while we have not argued these points here, since we rely on others to carry the burden in related causes, we agree with the conclusion of Judge Roger Vinson that the rest of the Act, and the amending legislation, are not severable from the individual mandate (question 3 in No. 11-400, and No. 11-393). We also believe that the conditions imposed by Congress on grants to the States under this legislation are coercive and unconstitutional, hence we endorse

the argument of the attorneys general of twenty-six States on this point (question 1 in No. 11-400).

Respectfully submitted,

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