Appeal No. 11-11021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, *et al.*

Plaintiff-Appellee,

v.

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

Defendant-Appellant,

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS SUPPORTING APPELLEES

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State of Florida v. U.S. Dep't of Health & Human Services, No. 11-11021

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for the Center for Individual Rights believes that the Certificate of Interested Parties filed by appellee National Federation of Independent Businesses is accurate.

The Center for Individual Rights is a non-profit corporation. It has no parent or subsidiary corporations.

/s/ Michael E. Rosman
Michael E. Rosman

Table Of Contents

Table Of Authorities

Cases

Constitutional, Statutory, And Regulatory Provisions

Other Authority

Interest of Amicus Curiae

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated constitutional issues in the federal courts and has a special interest in questions of federalism, enumerated powers, and limited federal government. CIR represented Antonio Morrison throughout the litigation that led to *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 217 (2000).

All parties have consented to the filing of this brief.

Statement of Authorship And Funding

No counsel for a party authored this brief in whole or in part. No person other than amicus curiae (and no party or party's counsel) contributed any money intended to fund the preparation or submission of this brief.

Statement of Issue

1. Did Congress have the authority under Article I, Section 8 of the United States Constitution to pass Section 1501 of the Patient Protection and Affordable Care Act?

Summary of Argument

In recent cases, the Supreme Court has considered challenges to statutes under Article I, Section 8's Commerce Clause that were defended under the "substantially affecting" line of jurisprudence. That is, the statutes were defended

as regulations of activity that, although wholly intrastate, had a substantial effect on interstate commerce.

In those cases, the Court has considered only whether the statutes have been facially valid. That is, it has considered only whether the statute as a whole is within Congress's Commerce Clause (supplemented by the Necessary and Proper Clause) power and not whether the statute's reach to particular applications can be so justified. The Court refuses to excise a subcategory, or individual instances of, activity regulated under the statute to determine whether Congress can regulate that subcategory or individual instances. In short, the provisions being challenged as inconsistent with the Constitution must stand or fall as a whole.

Although this may appear at odds with Court doctrine suggesting that facial challenges are rare, and rarely successful, it makes a great deal of sense in this context. Under this branch of Commerce Clause jurisprudence, the Court has essentially refused to consider "as applied" challenges. If it also refused to consider "facial challenges" as well, or made them so difficult as to be impossible for all practical purposes, it would essentially make Congress's exercise of this particular enumerated power unreviewable.

In analyzing statutes under this branch of Commerce Clause jurisprudence, the Court has laid great emphasis on whether the statute regulates "economic" or

"commercial" activity. But, of course, categories of activity are not entirely "economic" or entirely "non-economic." Cooking meals is an activity that can be both commercial and not, depending on circumstances. What the Court has been driving at in its "substantial effects" jurisprudence is that regulated activities that have a substantial number of instances in which the activity is non-commercial or non-economic are outside of Congress's enumerated powers. In short, when the Court has found that the statute is unconstitutional, the category of activity that Congress chose to regulate is simply overbroad.

In this case, much of the argument centers on whether Congress is actually regulating an *activity* (as opposed to inactivity or a decision), what activity it is regulating, and whether it can do so. Amicus agrees with appellees that Congress has not regulated an activity with the statute at issue (and certainly not the activities now claimed by the Government), and that an interpretation of the Constitution that permits Congress to regulate inactivity or simple decisions would be a fatal (and improper) blow to the very notion of enumerated powers. This brief, however, further argues that even if Congress could regulate the decisions or inactivity that are at issue here, it has done so with a statute that is grossly overbroad in the sense that it regulates many decisions that are not economic or commercial in nature. For this reason as well, Section 1501 is outside of Congress's enumerated powers.

Argument

The United States Constitution permits Congress to regulate "commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., Art. I, § 8, clause 3. The Supreme Court has identified three general areas of regulation permissible under this provision (the third with the aid of the Necessary and Proper Clause): Congress can regulate (1) the "channels of interstate commerce," by for example prohibiting those channels from being used for immoral purposes, (2) the instrumentalities of interstate commerce, or things or persons in interstate commerce, and (3) activities having a "substantial relation" to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 1629-30 (1995).

In cases considering this last category of authority, the Court has focused on several features of the statute: *viz.*, whether the statute has a "jurisdictional element" tying it to interstate commerce, whether it regulates "economic" or "commercial" activity, whether Congress made findings that suggest the manner in which the activity relates to interstate commerce, and whether there is an attenuated causal relationship between the activity being regulated and interstate commerce. *United States v. Morrison*, 529 U.S. at 610-12, 120 S. Ct. at 1749-51. What the Court has *not* considered is whether a subcategory of the regulated activity is regulable under these criteria. *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S. Ct. 2195, 2205-06 (2005). Rather, it has insisted that if a statute regulates a class

of activities having a substantial relationship to interstate commerce, the *de minimus* character of the effect that individual instances of the activity regulated by the statute have on interstate commerce is of no consequence. *Id.* at 17, 125 S. Ct. at 2205-06.

Congress's power under the Court's third set of precedents – that is, its ability to reach purely local activities having a substantial effect on interstate commerce – results from the Commerce Clause combined with the Necessary and Proper Clause. *Raich*, 545 U.S. at 34 & n.1, 125 S. Ct. at 2216 & n.1 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause") (citing authorities).

I. THE COURT HAS FOUND CERTAIN STATUTES FACIALLY OVERBROAD UNDER THE THIRD BRANCH OF COMMERCE CLAUSE JURISPRUDENCE

The Court in *Lopez* and *Morrison* did not specifically identify the challenges there as "facial." *Cf.* Nicholas Quinn Rosencranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1273 (2010) ("[I]n neither *Lopez* nor *Morrison* does any opinion of any Justice describe the challenge as either 'facial' or 'as-applied.'"). In *Raich*, though, the Court made clear that those earlier cases involved a claim that the statute "fell outside Congress' commerce power in its

entirety." *Raich*, 545 U.S. at 23, 125 S. Ct. at 2209. That is, *Lopez* and *Morrison* involved facial challenges. *See also Lopez*, 514 U.S. at 552, 115 S. Ct. at 1626 (noting that the Fifth Circuit had concluded that the Gun Free School Zones Act was "'beyond the power of Congress under the Commerce Clause,'" *quoting Lopez v. United States*, 2 F.3d 1342, 1368 (5th Cir. 1993), and subsequently affirming that judgment).

Further, in applying the criteria set out earlier, the Court has given particular weight to whether the activity being regulated is "economic" or "commercial" in nature. The fourth criteria (the attenuated nature of the relationship to commerce) seems to follow from the characterization of the activity as commercial or not. (Or vice versa. An attenuated relationship to commerce suggests a non-commercial activity.) In any event, the two have gone hand in hand in the cases. And although the Court has said that it will consider legislative findings, it specifically rejected the findings in *Morrison* precisely because the non-economic nature of the activity being regulated meant that permitting Congress to regulate it would give Congress the equivalent of a police power. *Morrison*, 529 U.S. at 614-15, 120 S. Ct. at 1752-53. (The fourth criteria, the existence of a jurisdictional element insuring a relationship with commerce in the specific instance, has not been explicated and is, in any event, irrelevant here and in the leading cases.)

The Court has made clear that "commerical activity" or "economic activity" is not the same thing as activity with economic effects. In both *Morrison* and

Lopez, the Court considered and rejected evidence of economic effects that were broad and substantial. Thus, for example, the Court in *Morrison* considered Congressional findings that gender-based animus-motivated violence deterred people from traveling interstate and engaging in employment in interstate business. *Morrison*, 529 U.S. at 615, 120 S. Ct. at 1752 (*quoting* H.R. Conf. Rep. No. 103-711, at 385, U.S. Code Cong. & Admin. News 1994, pp. 1803, 18053). *Compare* Brief of Appellant United States ("U.S. Br.") 48 ("health care and health insurance also implicates mobility between jobs and among states"). It nonetheless found that the economic effects of such violence were insufficient to render the activity economic *activity* and within Congress's Commerce Clause authority.

Economic activity, in the sense that the Court generally has used it, refers to the free exchange of goods and services, and activities related to that free exchange. *See* Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 Lewis & Clark L. Rev. 879, 886-87 (2005) (discussing the original and evolving understandings of "commerce"). While some activities may be *inherently* commercial – buying a specific good or service – other activities are sufficiently broad that they may cover both economic and non-economic activity. *Id.* at 886 ("Indeed, the same activity might be 'commercial' or 'noncommercial' depending on why it was being performed. For example, growing fruit for sale would be 'commerce,' whereas growing fruit to

feed your family would not be.").

Very few generally-described activities are *never* economic. Alfonso Lopez possessed a gun on the day he was arrested because he was transporting it for money. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993) (Lopez intended to sell his gun for $40 for use in a gang war), *aff'd*, 514 U.S. 549 (1995). The Supreme Court nonetheless ignored Lopez's personal circumstances, and characterized the statute (prohibiting gun possession near a school) as "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 560, 115 S. Ct. at 1630-31.

Nonetheless, it is equally clear that a statute need not regulate *inherently* commercial activities like the purchase or sale of goods and services, in order to be within Congress's Article I power. *Raich* involved the federal Controlled Substances Act which, for purposes relevant in *Raich*, prohibited the manufacture, distribution, and use of certain drugs (including marijuana). *Raich*, 545 U.S. at 14, 126 S. Ct. at 2204. Although the plaintiffs there did not challenge Congress's power to pass the Controlled Substances Act (*id.* at 15, 125 S. Ct. at 2204), the Court nonetheless asserted that the activities being regulated by the statute were "quintessentially economic." *Id.* at 26, 125 S. Ct. at 2211. Whatever the Court might have meant by "quintessential" in this context, it is fairly clear that the manufacture, distribution, and use of drugs is not *inherently* commercial. One can

manufacture drugs for personal use or distribute them to friends, all without any money changing hands (just as one can make dinner for one's family without being paid to do so). But, *in the main*, the manufacture, distribution, and use of drugs is done as part of, or closely connected to, economic transactions.

Thus, the Court has generally applied a type of overbreadth analysis, albeit certainly without describing it as such, in the "substantially affecting" branch of its Commerce Clause jurisprudence. If the statute is not generally overbroad, as in *Raich*, the Court will not preclude Congress from reaching activities that, had there been a statute focused solely on them, might have been outside Congress's power. (The caveat, of course, being that the regulation of the local activity be needed for the larger regulation of economic activity that substantially affects interstate commerce. Brief of Appellees National Federation of Independent Businesses, *et al*. ("NFIB Br.") 17-18 (discussing how this requirement was met in *Raich*).) On the other hand, if Congress has regulated an activity that is primarily or substantially noncommercial, as in *Lopez*, the fact that the person challenging the lawsuit may indeed have been engaging in economic activity is of no consequence. It is the statute that is facially overbroad, not its specific application.

At first glance, this suggestion that the Court has been applying overbreadth analysis to certain kinds of Commerce Clause cases (involving the third branch of the Court's jurisprudence) might seem inconsistent with the Court's sometimes-

professed aversion to facial challenges and its characterization of overbreadth as an exception to the standing rules applicable only in the First Amendment context. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) (In a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").[1] And while it is true that the Court has not "recognized" an overbreadth doctrine in the Commerce Clause area, it is also true that (1) the Court has offered no consistent explanation about why certain activities (like possessing a gun) are not economic activities and why some (like using marijuana) might be and (2) the overbreadth analysis described above provides a reasonable explanation, and there have not been a lot of others. *Cf. Sabri v. United States*, 541 U.S. 600, 609-10, 124 S. Ct. 1941, 1948 (2004) (noting that the Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings,"

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[1] Each of the *Salerno* propositions is subject to debate. *See Janklow v . Planned Parenthood Sioux Falls Clinic*, 517 U.S. 1174, 1175, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., concurring in denial of petition for a writ of certiorari) (referring to *Salerno*'s "rigid and unwise dictum"); *id.* at 1178, 116 S. Ct. at 1584-85 (Scalia, J., dissenting from the denial of the petition) (quoting *Salerno*'s "clear principal," but noting an "overbreadth approach" in some abortion cases). *See also Sabri v. United States*, 541 U.S. 600, 609-10, 124 S. Ct. 1941, 1948 (2004) (noting overbreadth challenges in other areas); Michael Dorf, *Facial Challenges To State And Federal Laws*, 46 Stan. L. Rev. 235, 271-79 (1994) (noting that the Court has used overbreadth doctrine in other contexts and arguing that it is constitutionally required to do so).

but including the Court's assessment of Congress's affirmative power under Section 5 of the Fourteenth Amendment).

In any event, it is quite clear that the Court is assessing statutes under the "substantially affecting" branch of its jurisprudence facially. The Court simply does not permit "as applied" challenges. If Antonio Morrison was not allowed to argue that his own alleged conduct had little or no effect on interstate commerce, he simply had to challenge the statute facially. Cutting off facial challenges, either explicitly or practically, would render such "substantially affecting" statutes immune from *any* constitutional challenge whatsoever. It would thus give Congress the broad police power that the Court has on so many occasions said that the Constitution does not provide. *Morrison*, 529 U.S. at 607, 120 S. Ct. at 1748 ("'The powers of the legislature are defined and limited.'") (*quoting Marbury v. Madison*, 1 Cranch 137, 176, 2 L. Ed. 60 (1803)).

II. EVEN IF CONGRESS COULD REGULATE THE PRACTICE OF NOT BUYING INSURANCE, SECTION 1501 IS OVERBROAD

In its brief to this Court, the Government suggests that the individual mandate in the Affordable Care Act regulates the "activity" of procuring health services without insurance. Congress, in passing the law, suggested that it was regulating the "economic decision" not to buy insurance. These justifications are insufficient to bring the statute within the scope of Congress's Commerce Clause authority (as augmented by the Necessary and Proper Clause).

Insofar as the first justification is concerned, appellees correctly point out that it is not even an accurate description of the statute. The individual mandate does not require that anyone *pay* for health care services in any particular way. Those who have insurance may or may not use it to pay for medical services (just as those who have car insurance sometimes prefer to pay for claims out of their own pocket rather than assert coverage under their policies). The statute has nothing to say about that choice.

Of course, the statute's mandate that everyone buy insurance may provide an incentive to pay for medical services with insurance. But the Commerce Clause permits Congress to *regulate* interstate commerce. Requiring people to buy insurance does not regulate the purchase of medical services any more than various income tax provisions permitting deductions for dependents regulate the activity of having children. *Cf.* Brief of State Appellees-Cross-Appellants ("State Br.") 44-45 (explaining that "there are important differences between a regulation directly mandating certain conduct and a tax encouraging that conduct").

The Government also argues that the mandate governs the activity of obtaining medical services without paying for them (thus imposing costs on society). One could well question whether that activity is a commercial activity within Congress's Commerce Clause authority *at all* under the third branch of the Court's jurisprudence. (Could Congress regulate obtaining food from a soup

kitchen without paying for it?) Further, as with the broader activity of procuring health services without insurance, the statute does not regulate the activity. But even if that were not so, and even if the narrower activity were within Congress's Commerce Clause authority, it is plain that the statute does not relate *only* to that activity, or even predominantly to that activity. It regulates much that has nothing to do with that activity, including the simple refusal to buy insurance. Thus, even if there is something within the statute's purview that is "economic activity" – just as the Gun Free School Zones Act may have regulated the possession of a gun within 1000 feet of a school while in the act of selling it – the statute is grossly overbroad. NFIB Br. 6, 52-53; State Br. 31.

Considering the statute as one that regulates the "economic decision" not to buy health insurance, although it has the virtue of being a somewhat less misleading description of the law's actual effect, does not help matters. The Court has never suggested that Congress has the authority to regulate all decisions with some economic motivation to it. Indeed, such authority would conflict with much that the Court *has* said, since marriage, divorce, procreation, and various crimes (like theft) are all activities that are *sometimes* (or even frequently) motivated by economic circumstances. And if "economic decision" simply means decisions that have economic consequences, the Court already has rejected (as shown in Part I) the proposition that Congress's Article I authority extends to all activities that have substantial economic effects.

Further, even if Congress's authority did extend to all "decisions" that have an economic motivation, the statute nonetheless would be overbroad. No doubt some people do not buy insurance to save money. But others may have entirely different motivations, including the belief that insurance might cause them to engage in unnecessarily risky behavior or to overuse medical services, or to waste excessive time haggling over coverage. Among those eligible for Medicaid, for example, less than 62% actually have applied and receive benefits. Benjamin D. Sommers and Arnold M. Epstein, *Medical Expansion – The Soft Underbelly of Health Care*, 363 England Journal of Medicine 2085, 2085 (2010) (available at http://healthpolicyandreform.nejm.org/?p=13252) (national participation rate of 61.7%, with individual jurisdiction's rates ranging from 44% to 88%). The others have little *economic* reason not to obtain these benefits, and it seems likely that they are motivated by other reasons. That fact that a substantial number of decisions to not buy insurance are not economically motivated renders the statute overbroad.[2]

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[2] Amicus has little to add to appellees' arguments demonstrating that the individual mandate cannot be justified as an exercise of Congress's taxing authority. We do note, in passing, that the Government seems to rely on cases supporting the proposition that Congress need not identify the enumerated power on which it is relying. U.S. Br. 52. These authorities are irrelevant and/or not consistent with more recent authority. *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 642 n.7, 119 S. Ct. 2199, 2208 n.7 (1999) (refusing to consider the Just Compensation Clause as a possible basis for a federal statute because "[t]here is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth

(continued...)

Conclusion

For the foregoing reasons, the judgment of the court below, declaring Section 1501 outside of Congress's constitutional authority, should be affirmed.

Respectfully submitted,

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[2](...continued)
Amendment"; "Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the [statute]."); *Chavez v. Arte Publico Press*, 204 F.3d 601, 605 (5th Cir. 2000) (noting that "[e]arlier Supreme Court jurisprudence [before *Florida Prepaid*] was unsettled on this point"). Here, of course, as appellees' briefs set out, Congress was quite clear about which font of authority it believed authorized the statute. NFIB Br. 57-58; State Br. 45-46.

Certificate Of Service And Filing

I hereby certify that I served a copy of the foregoing Amicus Brief of the Center for Individual Rights by electronic mail on May 11, 2011 to the following individuals, pursuant to their agreement to accept such service pursuant to FRAP 25(c)(1)(D):

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Pursuant to Rules 25(a)(2)(B) and 25(d)(2) of the Federal Rules of Appellate Procedure, as well as Eleventh Circuit Rule 31-3, I also certify that, on May 11, 2011, I will file the foregoing Amicus Brief with this Court by causing a copy to be electronically uploaded and by causing the original and six paper

copies to be delivered by United States mail to the clerk of this Court.

/s/ Michael E. Rosman
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