[NOT YET SCHEDULED FOR ORAL ARGUMENT]

APPEAL NO. 11-5047

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

SUSAN SEVEN-SKY, *et al.*,

Plaintiffs-Appellants,

vs.

ERIC HOLDER, JR., *et al.*,

Defendants-Appellees.

_____

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANTS

_____

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

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CORPORATE DISCLOSURE STATEMENT

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, public interest organization that has no parent company and no publically-held corporation has a 10% or greater ownership interest in Judicial Watch.

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Parties, Intervenors and Amici:

The Parties, Intervenors and Amici appearing in the lower court and in this appeal are listed in the Brief for the Appellant.

Ruling Under Review:

The ruling under review in this appeal is the February 22, 2011 Order of The Honorable Gladys Kessler. The Memorandum Opinion accompanying this Order is reported at *Mead v. Holder*, 2011 U.S. Dist. LEXIS 18592 (D.D.C. Feb. 22, 2011).

Related Cases:

There are no other associated cases in this judicial circuit. There exist, however, numerous cases in other judicial circuits regarding the present issues here. Four of those cases have issued substantive rulings on the issue presented here, which include *Thomas More Law Center v. Obam*a, 720 F. Supp. 2d 882 (E.D. Mich. 2010), *appeal filed*, No. 10-2388 (6th Cir. Oct. 22, 2010); *Liberty Univ., Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. Nov. 30, 2010), *appeal filed*, No. 10-2347 (4th Cir. Dec. 1, 2010); *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *appeal filed*, No. 11-1057 (4th Cir. Jan. 18,

2011); and *State of Florida ex rel. Bondi v. United States Dep't of Health and Human Servs.*, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. 2011), *appeal filed*, No. 11-11021 (11th Cir. Mar. 8, 2011).

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*Authorities upon which we chiefly rely are marked with asterisks

Constitutions, Statutes, Rules and Regulations

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GLOSSARY

AAA	Agricultural Adjustment Act of 1938
CCPA	Consumer Credit Protection Act of 1968
CRA	Civil Rights Act of 1964
CSA	Controlled Substances Act of 1970
PPACA	The Patient Protection and Affordable Care Act of 2010
SMCRA	Surface Mining Control and Reclamation Act of 1977

INTEREST OF AMICUS CURIAE

Founded in 1994, Judicial Watch is a non-profit, non-partisan, public interest organization headquartered in Washington, D.C. that seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly monitors on-going litigation, files *amicus curiae* briefs, and prosecutes lawsuits on matters that it believes are of public importance. The case at issue raises important questions of constitutional interpretation and the proper balance of power between the several states and the federal government. Specifically, Judicial Watch has undertaken extensive research on whether an individual who simply does not purchase health insurance has performed an activity that Congress may properly regulate under its commerce power. Because it believes that this question alone resolves the matter before this Court, it is necessary for Judicial Watch to file its brief separately from other participating amici curiae.

All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Furthermore, no person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Under the Supreme Court's *Commerce Clause* jurisprudence, Congress may regulate activities that have a substantial relation to interstate commerce. Fundamentally at issue before this Court is whether Section 1501 of the Patient Protection and Affordable Care Act regulates an activity. Based on a review of United States Supreme Court precedent as well as the plain meaning of the term "activity", Congress exceeded its authority by regulating an individual who simply does not purchase health insurance.

ARGUMENT

I. Introduction

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (hereafter "PPACA"). Before day's end, lawsuits were filed in federal courts all across the United States challenging the constitutionality of the PPACA. By current count, more than 20 lawsuits have been filed by individuals, organizations and the Attorneys General or Governors of 26 states. Chief among the offending provisions is § 1501, entitled "Requirement to Maintain Minimum Essential Coverage." *See* PPACA § 1501 (adding 26 U.S.C. §

5000A) (hereafter "individual mandate").

Section 1501 requires individuals, with certain limited exceptions, "for each month beginning after 2013 [to] ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C. § 5000A(a). The law requires that individuals report on their federal individual income tax returns the months of the year in which they had such coverage. If an individual fails to obtain such minimum essential coverage, he or she must include with their annual federal tax payment a "shared responsibility payment," which is a fixed dollar amount penalty calculated under the PPACA. *Id.* at §§ 5000A(b), (c).

The various plaintiffs, including Appellants, argue that the individual mandate and penalty exceed Congress' authority under the *Commerce Clause* of the United States Constitution. U.S. Const. art I, § 8, cl. 3. Currently, two United States District Courts have declared that the provision is unconstitutional as *ultra vires* of Congress' *Commerce Clause* power.[1] Three other United States District

[1] *See Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *appeal filed*, No. 11-1057 (4th Cir. Jan. 18, 2011) and *State of Florida ex rel. Bondi v. United States Dep't of Health and Human Servs.*, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. 2011), *appeal filed*, No. 11-11021 (11th Cir. Mar. 8, 2011).

Courts, including the District Court below, have found the opposite.[2]

The *Commerce Clause* provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8, cl. 3. Relevant here is what is commonly referred to as the "*Interstate Commerce Clause*" portion of this grant of power: "To regulate Commerce . . . among the several States." The exact meaning of this clause has sparked wide debate and many different court interpretations within different federal circuits and the United States Supreme Court. The High Court has addressed this issue many times since the days of Chief Justice Marshall and many times it has expanded and contracted the meaning of this clause.

Distilling its earlier *Commerce Clause* jurisprudence into a workable rule of law, the Court in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) explained that Congress may regulate only three broad categories of activity under its commerce power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3)

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[2] *See Thomas More Law Center v. Obam*a, 720 F. Supp. 2d 882 (E.D. Mich. 2010), *appeal filed*, No. 10-2388 (6th Cir. Oct. 22, 2010); *Liberty Univ., Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. Nov. 30, 2010), *appeal filed*, No. 10-2347 (4th Cir. Dec. 1, 2010); and *Mead v. Holder*, 2011 U.S. Dist. LEXIS 18592 (D.D.C. Feb. 22, 2011).

"those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." (citations omitted); *see also Perez v. United States*, 402 U.S. 146, 150 (1971); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-277 (1981); and *United States v. Morrison*, 529 U.S. 598, 608-609 (2000). It is this third category that Appellees argue grants them the authority to require individuals to purchase health insurance or else pay a penalty. The question, thus, presented for this Court's determination, is whether an individual who does not purchase health insurance has performed an activity. *Lopez*, 514 U.S. at 558-59. Or, quite simply, is not purchasing health insurance an activity that Congress may regulate under its commerce power? A review of United States Supreme Court precedent where statutes regulating "activity" were held to be constitutional demonstrates that the answer is no.

II. The Supreme Court's Definition of "Activity"

In *Wickard v. Filburn*, 317 U.S. 111 (1942), Filburn, a farmer who actively engaged in the over-cultivation of wheat, was assessed a penalty for growing more than his allotted amount of wheat under the Agricultural Adjustment Act of 1938 (hereafter "AAA") (7 U.S.C. § 1281, *et seq.*). Filburn brought suit seeking a declaratory judgment that the wheat marketing quota provisions of the AAA were unconstitutional because, as he argued, Congress did not have the power to regulate

his excess wheat production that he used for home consumption and not for sale. Yet the Court found that, although Filburn's wheat consumption alone would only have a minimal impact on the market, when combined with others similarly situated, the impact would be substantial on interstate commerce. *Id.* at 127-28. As a result, the Court upheld the AAA as a constitutional exercise of Congress' commerce power. Most courts and commentators agree that the holding in *Wickard* is the Court's most expansive interpretation of the *Commerce Clause*. *See, e.g., Lopez*, 514 U.S. at 560 (*Wickard* is "perhaps the most far reaching example of *Commerce Clause* authority over intrastate activity."). It therefore can be seen as the outermost reach of the *Commerce Clause*.

In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), a corporate businessman who actively engaged in the discriminatory operation of a motel brought suit seeking a declaratory judgment that the prohibition of racial discrimination in places of public accommodation under Title II of the Civil Rights Act of 1964 (hereafter "CRA") (42 U.S.C § 2000a, *et seq.*) exceeded Congress' powers under the *Commerce Clause*. The Court examined Title II and its legislative history and determined that it was a constitutional exercise of Congress' commerce power because it was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people." 379 U.S. at 250,

257. Such enterprises that had an effect on interstate commerce were the discriminatory operations of hotels and motels. The Court concluded that the prohibitory provisions of Title II could constitutionally be applied to the hotel proprietor's discriminatory activities because the undisputed facts revealed that he solicited and received patronage from interstate travelers. *Id.* at 243, 249-50. His actions of discriminatorily operating the hotels and motels were the aim of the CRA.

Similarly, in *Katzenbach v. McClung*, 379 U.S. 294 (1964), several businesspersons who actively engaged in the discriminatory operation of a restaurant brought suit seeking a declaratory judgment that the prohibition of racial discrimination in places of public accommodation under Title II of the CRA exceeded Congress' powers under the *Commerce Clause*. Once again, the Court held that Title II was a constitutional exercise of Congress' commerce power because its application was limited to only a restaurant that "serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." *Id.* at 298, 304. The activity therefore in this instance was the discriminatory operation of restaurants. In sum, the prohibitory provisions of Title II could constitutionally be applied to the restaurant proprietors' discriminatory activities because the undisputed facts revealed that they purchased a substantial portion of their food and inventory from sources engaged in interstate commerce.

Id. at 296-97, 304. The restaurant proprietors, in other words, were active participants in interstate commerce as purchasers.

In *Perez*, 402 U.S. 146, Perez, an individual who actively engaged in loan-sharking, sought review of his conviction under Title II of the Consumer Credit Protection Act of 1968 (hereafter "CCPA") (18 U.S.C. § 891, *et seq.*). Perez argued that Congress lacked the authority to enact the provision under its commerce power because his alleged activities were entirely intrastate. The Court however held that it was a constitutional exercise of Congress' commerce power because Perez's activity of extortionate credit transactions, although purely intrastate, directly affected interstate and foreign commerce as a component of organized crime, an interstate enterprise. 402 U.S. at 154, 156. The Court, thus, upheld the petitioner's conviction as he was "clearly *a member of the class* which engages in 'extortionate credit transactions.'" *Id.* at 153.

In *Hodel*, 452 U.S. 264, several businesses, associations, and individuals who were actively engaged in surface coal mining operations filed suit seeking declaratory and injunctive relief against various provisions of the Surface Mining Control and Reclamation Act of 1977 (hereafter "SMCRA") (30 U.S.C. § 1201, *et seq.*). Specifically, the plaintiffs alleged that Congress lacked the authority to enact provisions of the SMCRA that regulated the use of private lands within the borders

of the specific states. After examining the SMCRA and its legislative history, the Court held that the SMCRA was a constitutional exercise of Congress' commerce power because surface coal mining directly affects interstate commerce. 452 U.S. at 280-81. Specifically, the Court rejected the plaintiffs'' argument that coal mining is a purely local activity with no effect on interstate commerce since coal, as a commodity, moves in interstate commerce and the Court has long held that it was within Congress' power to regulate the conditions under which goods shipped in interstate commerce are produced. *Id.* at 281.

Finally, in *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005), two individuals who actively cultivated and used physician-recommended marijuana brought suit seeking injunctive and declaratory relief prohibiting the enforcement of the Controlled Substances Act of 1970 (hereafter "CSA") (U.S.C. § 801, *et seq.*) to the extent that it prevented them from possessing, obtaining, or manufacturing marijuana for their personal medical use. The plaintiffs argued that Congress was without power under the *Commerce Clause* to regulate their conduct as the marijuana they cultivated, possessed, and used was entirely produced and consumed locally. Looking to precedent, the Court disagreed: "*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would

undercut the regulation of the interstate market in that commodity." 545 U.S. at 18. The Court therefore held that the CSA was a constitutional exercise of Congress' commerce power because the activity that was sought to be regulated – possessing, obtaining, or manufacturing marijuana – directly affects interstate commerce. *Id.* at 18-20.

III. There Exists No "Activity" Subject to the *Commerce Clause* in This Case.

The above cases clearly demonstrate that the Supreme Court requires something more than mere passivity for Congress to exercise its commerce power. Said another way, the Supreme Court's *Commerce Clause* jurisprudence requires that Congress regulate an activity, as opposed to not engaging in an activity. In *Wickard*, the plaintiff grew wheat; in *Heart of Atlanta Motel*, the plaintiff operated a hotel; in *McClung*, the plaintiffs operated a restaurant; in *Perez*, the plaintiff engaged in loan-sharking; in *Hodel*, the plaintiffs engaged in surface coal mining; and in *Raich*, the plaintiffs cultivated, possessed, and used marijuana. Indeed, in each of these instances and in every Supreme Court case decided thus far under the third category delineated in *Lopez*, the legislation regulated some form of activity.[3]

[3] In addition to the aforementioned cases, *see also, e.g.*, *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925) (prevented coal manufacturing and production); *Int'l Brotherhood of Teamsters v. United States*, 291 U.S. 293 (1934) (conspired to prevent the delivery of live poultry through violence and intimidation);

In this case, the District Court found that an individual who does not purchase health insurance performs an activity and, thus, may be regulated by Congress under the *Commerce Clause*. *Mead*, 2011 U.S. Dist. LEXIS 18592, at *55, 56. Yet, the District Court's position that an individual who does not purchase health insurance performs an activity is contradicted by the common meaning of "activity." The verb to be "active," the root word of "activity," is defined by Merriam-Webster's Dictionary of Law as "characterized or accomplished by action or effort."

Board of Trade v. Olsen, 262 U.S. 1 (1923) (traded futures in grain); *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342 (1914) (established railroad carrier rates); *Railroad Com. of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563 (1922) (established railroad carrier rates); *United States v. Louisiana*, 290 U.S. 70 (1933) (established railroad carrier rates); *Florida v. United States*, 292 U.S. 1 (1934) (established railroad carrier rates); *Southern R. Co. v. United States*, 222 U.S. 20 (1911) (operated a railroad); *Baltimore & O. R. Co. v. Interstate Commerce Com.*, 221 U.S. 612 (1911) (operated a railroad); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (manufactured iron and steel); *NLRB v. Fainblatt*, 306 U.S. 601 (1939) (operated a factory that processed garments); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (consolidated stock, property and franchise of competitor insolvent railroad); *Swift & Co. v. United States*, 196 U.S. 375 (1905) (bought, slaughtered, processed, and sold live stock); *United States v. Patten*, 226 U.S. 525 (1913) (purchased cotton for future delivery); *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255 (1940) (conspired to create a monopoly in the local bill posting business); *Fry v. United States*, 421 U.S. 542 (1975) (state employer instituted pay raises); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (produced and sold milk); *United States v. Darby*, 312 U.S. 100 (1941) (manufactured and shipped goods); *A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942) (produced and stored goods for commerce); and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (operated refineries who conspired to fix prices).

Merriam-Webster's Dictionary of Law (1996). Common sense alone compels the conclusion that an individual who does not purchase health insurance has not taken an action or exerted effort. The individual does not even need to take a "mental action." The individual does not need to make a decision not to purchase health insurance; the individual simply will not purchase health insurance. Since Congress has regulated this passivity, Congress has overstepped the *Commerce Clause's* boundaries in attempting to regulate Appellants. Indeed, it seems that Congress has put the cart before the horse. In an effort to regulate Appellants, Congress is attempting to compel them into action through the PPACA.

The drafters of the Constitution anticipated power grabs similar to the power grab accomplished by Congress when it passed the PPACA. Therefore, the drafters established "a Federal Government of limited powers.'" *New York v. United States*, 505 U.S. 144, 155 (1992) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). In this regard, James Madison, the father of the Constitution, once wrote:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961). Said more plainly, Congress must only exercise those powers expressly granted to it and no more. In this case, Congress has clearly overstepped the boundaries established by law.

A worthwhile analogy to consider is the concept of personal jurisdiction. Courts in a state can exercise jurisdiction over a party located outside the state only so long as the party has sufficient "minimum contacts" with the State seeking to exercise its jurisdiction. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). When an individual has no "minimum contacts" with a forum State, the Due Process Clause of the Fourteenth Amendment prohibits that State from acting against that individual. *Id.* Personal jurisdiction cannot be created by the unilateral activity of those who claim some relationship with a nonresident. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "The application of that rule will vary with the nature and quality of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Id.*

Likewise, the *Commerce Clause* requires that at a minimum there be some economic act by which an individual purposefully subjects himself or herself to regulation. As demonstrated, the *Commerce Clause* requires something more than

mere existing as a living, breathing human being. Nor is Congress' unilateral legislative act sufficient to grant it power over an individual who has not engaged in any activity. As stated before, Congress has put the cart before the horse. Under the guise of its *Commerce Clause* authority, Congress is requiring individuals to purchase health insurance at government approved prices and quantities.

Recognizing the weak underpinnings of its conclusion that those who do nothing are engaging in "activity," the District Court attempted to bolster its argument by reasoning that Congress may regulate all individuals today because someday in the future everyone will actively seek medical treatment, which will have an effect on interstate commerce. *Mead*, 2011 U.S. Dist. LEXIS 18592, at *56-61. More specifically, the District Court reasoned that: (1) everyone will get sick, (2) and seek out medical treatment, (3) and possibly require an extended stay in a health care facility (4) that they cannot afford (5) for which family members or other charitable organizations will not cover, (6) and health care providers will have to cover, (7) which will result in higher health care costs for everyone. *Id.* Despite the obvious factual problems with this argument, *i.e.*, some of the plaintiffs have sworn under oath that they will never seek medical treatment as it is adverse to their faith and/or nontraditional, homeopathic methods, the Supreme Court rejected in *Lopez* the argument that Congress may regulate activity based solely on the effect

that it may have on interstate commerce through a remote chain of inferences. 514 U.S. at 563-567 (Court rejected as too attenuated the Government's argument that firearm possession in school zones could result in violent crime which in turn could adversely affect the national economy.). The Court called it "pil[ing] inference upon inference." *Id.* at 567. The Court proclaimed that the Constitution does not tolerate reasoning that would "convert congressional authority under the *Commerce Clause* to a general police power of the sort retained by the States." *Id.* "[I]f we were to accept [such] arguments," the Court reasoned, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564; *see also Morrison*, 529 U.S. at 615-616 (Court again rejected government's remote chain of inferences to declare unconstitutional as exceeding Congress' commerce power § 40302 of the Violence Against Women Act of 1994).

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully advocates that the Court reverse the lower court's ruling and hold that The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), is unconstitutional.

Dated: May 23, 2011

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and Circuit Rule 32(a)(2). The brief, excluding exempted portions, contains 3,116 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May 2011, I filed via the CM/ECF system and by hand (eight copies of) the foregoing **Amicus Curiae Brief of Judicial Watch, Inc. in Support of Appellants** with the Court and served via the CM/ECF system and by First-Class U.S. Mail (two copies of) the foregoing **Amicus Curiae Brief of Judicial Watch, Inc. in Support of Appellants** to:

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