Amicus Curiae Brief

to the United States Supreme Court

regarding

the "Individual Mandate" clause of "Obamacare"

Counsel of Record is the Cato Institute.

Primary assertion: The Federal Government has no Constitutional power to coerce free citizens into purchasing a product from a private business (requiring them to buy medical insurance under the threat of punishment or penalty.) To make the case that regulating *inactivity* is permissible under the Commerce Clause is ludicrous.

Note: As documented on page 1 of the Brief, the "Amici individuals" participating in this brief are legislators from states that have <u>not</u> passed Health Care Freedom Acts. (This is the same bill I have filed in the House for 3 years that is designed to defeat Obamacare by guaranteeing legal protection to Kentucky citizens and directs the Attorney General to defend our citizens from Federal penalties or punishment for refusing to participate in Obamacare. The House Democratic leadership has refused to allow the bill to be considered.)

- Legislators from states that have enacted Health Care Freedom Acts have joined an Amicus Brief filed by the Goldwater Institute.

<u>Outline Highpoints from Amicus Brief</u>

- Although not every subsection is highlighted, letters and numbers below correspond to actual sections of the full Amicus Brief.

Summary – The Individual Mandate exceeds Congress' power to regulate interstate commerce under existing doctrine. Because it attempts to regulate *inactivity*, this law exceeds limits of the Constitution's Commerce Clause. Congress has no authority to compel someone to engage in commerce, even if it purports to do so as part of a broader regulatory scheme.

(Any attempt to compel free citizens to engage in an economic activity is inherently Unconstitutional.)

The purpose of Article 1 of the Constitution is to grant Congress certain enumerated powers and then strictly limit them. James Madison wrote, "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

I. The Individual Mandate exceeds the scope of the "Necessary and Proper Clause" as used to execute the power to regulate Interstate Commerce under the "Substantial Effects" Doctrine.

Non-economic activity (or in this case, non-activity) cannot be regulated merely because it affects interstate commerce through a "causal chain" or has "substantial effects on employment, production, transit, or consumption.

Regulating *non-ecomomic* activity (or *inactivity*) cannot be "necessary", regardless of its economic effects

B. Regulating Inactivity transcends the "Necessary and Proper Clause's limits on the Commerce Clause.

Congress can regulate or prohibit voluntary economic actions (like purchasing certain goods—whether beneficial or harmfully illegal), but cannot *force* people to undertake economic actions.

The "Necessary and Proper Clause" is broad, but is not a grant of potentially endless power.

The Individual Mandate does not accommodate state interests. (This assertion is validated by the fact that over half the states are suing the Federal Government to have Obamacare—"PPACA"—declared unconstitutional, and enacting legislation at the state level to challenge the individual mandate and give their citizens protection from Federal overreach. * Sadly, Kentucky is not one of those states.)

The Constitution does not authorize such power either directly or by implication.

II. Congress cannot regulate *inactivity.*

The Federal Government is asserting that Congress has the power to enact Obamacare and then repair its "gaps and fissures" through subsequent legislation, but the Constitution does not enumerate this power to Congress.

A. Inactivity by definition means *not* engaging in a literally infinite set of acts. To allow Congress the authority to impose compulsory economic mandates within this infinite set of *inactions* would amount to granting it unlimited police power of the sort the Constitution specifically withholds.

III. The Individual Mandate is not "proper" under the "Necessary and Proper Clause" because it constitutes an Unconstitutional commandeering of the People.

A. The Supreme Court has already ruled that Congress cannot mandate or "commandeer" state legislatures and executive officers. To do so would undermine our Federalist system and be inherently unconstitutional. Likewise, mandating participation in an economic transaction also usurps the Constitutional sovereignty of the People.

B. 1. Congress' ability to commandeer states and individual citizens is very narrowly defined by the Constitution.

Participating in the census, serving on a jury, and paying taxes is considered necessary and proper, but Congress cannot even mandate a duty to vote.

2. The Court has prohibited Congress from mandating laws and burdens on state legislature or officials, because they will "bear the brunt of public disapproval, while federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."

a. The Origination Clause requires that mandated wealth transfers (taxes, fees, etc) must be passed through the most politically accountable house of Congress.

The founders who were so outraged by "taxation without representation" took great pains to ensure that any taxation would be politically liable to the people's ability to respond (popular sovereignty).

C. The Individual Mandate's commandeering leaves no principled limits on Federal power and is thus not proper.

Congress is not the final arbiter of the limits of its own power.

If Congress is free to enact economic mandates, it would be free to require *anything* that it claims is part of a national regulatory plan and then hide those costs from political repercussions of the American public.

So doing would convert the Government from one of enumerated powers to one of general and unlimited authority.

** One Note of Caution: The brief does contain the following legal admission:

"Congress could have reformed the healthcare system in many ways—including even a Medicare-for-all "single payer" scheme—that would have been legally unassailable under existing doctrine."

While many of us would not like to see such a national Medicare scheme either, given the Constitutional arguments contained within this brief it would pass Constitutional muster—leaving people with the ability to register their discontent through the political process.

Respectfully Offered – February 7, 2012

Tim Moore
State Representative