Senate Judiciary Committee
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I appreciate this opportunity to testify concerning the unconstitutionality of the individual mandate for health insurance imposed by the Patient Protection and Affordable Care Act ("the Act").

Despite the vast expanse of federal regulation that exists today, and the array of cases upholding such regulations, the individual mandate is unprecedented. The mandate expands the federal government's reach beyond its traditional regulation of voluntary activities by instead punishing *inactivity* – the mere *failure* to purchase health insurance. Specifically, subject to a few exceptions, the mandate forces individual Americans to enter into a private commercial transaction for health insurance that they are unwilling to purchase, primarily in order to mitigate the costs that Congress has separately imposed on insurers by prohibiting them from denying coverage for pre-existing health conditions. In thus commandeering the people to reduce the burdensome effect of Congress's regulation of third parties, the mandate far exceeds Congress's limited and enumerated powers.

When it enacted the individual mandate, Congress opined that, particularly in light of the Act's new requirement that health insurers provide coverage to customers with pre-existing health conditions, the mandate was needed to "add millions of new consumers to the health insurance market" and "minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals"; thereby reducing the costs to insurers and their customers. Pub. L. No. 111-148, § 10106, 124 Stat. 119, 907 (2010). Thus, the mandate was justified by the "adverse selection" options created by the Act's pre-existing condition ban and the need to make

the "health insurance risk pools" less costly by forcing the inclusion of more "healthy individuals" not currently in need of expensive health care. This effort to mitigate the burdens imposed on insurers by the Act is not supported by Congress's power to "regulate Commerce … among the several States," or by its power to "make all Laws which shall be necessary and proper for carrying into Execution" its regulation of interstate commerce. U.S. CONST., art. I, § 8, cls. 3, 18. Nor can the mandate be saved by recharacterizing it, *post hoc*, as a mere revenue measure.

1. At the outset, we should all be able to agree that the individual mandate is not a direct regulation of interstate commerce pursuant to the Commerce Clause. Under the controlling formulation used by the Supreme Court, the Commerce Clause authorizes the federal government to "regulate the channels of interstate commerce," as well as to "regulate and protect the instrumentalities of interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995). But the individual mandate clearly does not regulate either the "channels" or "instrumentalities" of interstate commerce; indeed, in defending the individual mandate in court, the Justice Department has not even attempted to argue otherwise, nor has any court so held. This is not surprising, since no amount of lawyerly argument can convert a regulation that punishes the *absence* of commerce into a regulation of commerce. At the risk of belaboring the obvious, inactivity cannot be commerce or anything resembling commerce because it does not involve the transmission of goods or currency between people, or any activity which is in any way antecedent to such interactions.

The question, then, is whether Congress can regulate something that is plainly not commerce under the Commerce Clause. The Justice Department argues that they can do so under the Necessary and Proper Clause because the Court has upheld the regulation of activities that do not constitute interstate commerce on the grounds that, in the aggregate, the activities

"substantially affect interstate commerce." *Lopez*, 514 U.S. at 560. In particular, the "substantial effects" doctrine applies "[w]here [a] *class of activities* is regulated and that *class* is within the reach of federal power" under the Commerce Clause, because "the courts have no power to excise, as trivial, individual instances of the class" that do not affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971) (emphasis in *Perez*)). For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court upheld a federal restriction on the amount of wheat a farmer could produce, even though some of the wheat was never placed in interstate commerce, because Congress had sought to support the price of wheat in interstate commerce by imposing quotas on supply, and that regulation could not be accomplished if farmers were allowed to grow wheat for personal consumption outside the quotas. *See id.* at 125-29. Likewise, in *Raich*, the Court upheld Congress's ban on the production of marijuana as applied to marijuana grown for home use, because "the production of [a] commodity meant for home consumption … has a substantial effect on supply and demand in the national market for that commodity." 545 U.S. at 19.

This line of cases, however, plainly does not justify Congressional regulation of economic inactivity under the Necessary and Proper Clause (or the Commerce Clause). *First*, only "economic activities" that affect interstate commerce may be regulated under the Necessary and Proper Clause. The Court has squarely held that "noneconomic activity," such as possessing a gun or committing violence against women, cannot be regulated by Congress even if that activity has "substantial effects" on interstate commerce. *Lopez*, 514 U.S. at 560; *United States v. Morrison*, 529 U.S. 598 (2000). Imposing such a limit on Congress's power to regulate commerce was essential, the Court held, because an alternative rule would be "unworkable if we are to maintain the Constitution's enumeration of powers." *Morrison*, 529 U.S. at 615.

Since Congress is without power to reach activity if it is noneconomic, it necessarily follows that Congress cannot reach inactivity. Noneconomic activity, such as possessing guns, is far more analogous to commerce than refraining from any activity related to commerce. Moreover, authorizing this dramatic expansion of Congress's power would do far more to "create a completely centralized government" and "effectually obliterate the distinction between what is national and what is local" than would regulation of noneconomic activity. *Lopez*, 514 U.S. at 557. Virtually every decision not to engage in economic activity, in the aggregate, will have a substantial effect on interstate commerce. Decisions by citizens not to buy cars (but instead use public transportation), not to use credit cards (but instead pay for purchases out of savings), and not to take out mortgage loans (but instead rent their homes) would obviously have a substantial effect on the interstate markets in cars, consumer credit, and mortgage loans. But the notion that Congress could thus force citizens to buy cars, to make purchases with credit cards, or to take out a home mortgage is precisely the sort of unbounded interpretation of the Necessary and Proper Clause that the Supreme Court rejected in *Lopez* and *Morrison*.

Second, the individual mandate also cannot be defended on the theory that it is an "essential part" of a "larger regulation of economic activity." The Justice Department has argued that, because the Act prohibits health insurers from denying coverage on the basis of pre-existing health conditions, it is necessary to force individuals to buy insurance now in order to prevent them from taking advantage of insurance companies by waiting to purchase insurance until they get sick. But this doctrine provides no support for the individual mandate.

In the first place, the notion that Congress can regulate *anything* that is an "essential part" of "larger regulation" is not the law. Rather, this notion is based solely on one sentence of *dicta* in *Lopez* (541 U.S. at 561) and a concurring opinion in *Raich* (547 U.S. at 371 (Scalia, J.,

concurring in the judgment)), which seem irreconcilable with the Court's actual precedent. More important, assuming *arguendo* that this doctrine were the law, it would in no way justify regulating inactivity that poses no impediment to regulating interstate commerce. Even under this expansive view, the Necessary and Proper Clause allows regulation of purely intrastate activity because exempting such activity from the regulatory scheme would make it more difficult to "carry into Execution" the permissible regulation of interstate commerce. Mr. Filburn in *Wickard* and Ms. Raich in *Gonzales* were engaged in the same activity on the local level that Congress sought to regulate in the interstate market—raising wheat and marijuana. Obviously, such intrastate activity can impede the effective regulation of interstate commerce because it acts as a "potential obstacle" to regulating commerce or a "potential stimulant" to the commercial activity Congress seeks to suppress. *Raich*, 545 U.S. at 35 (Scalia, J., concurring). Since intrastate commerce resembles and affects interstate commerce, Congress may sweep such intrastate activity within its regulatory ambit, because that makes the regulation more effective than if Congress were forced to "excise, as trivial, individual instances of the class" of activities being regulated. *Raich*, 541 U.S. at 23 (majority opinion) (internal quotation marks omitted). Accordingly, under this doctrine, Congress need not make exemptions for intrastate commerce or for anything else that impedes the regulation of interstate commerce.

Those who choose not to purchase health insurance, however, are not in any way deterring or complicating Congress's permissible effort to "carry into Execution" its regulation of interstate commerce—*i.e.*, its requirement that insurance companies issue policies to those with pre-existing conditions. In stark contrast to Mr. Filburn and Ms. Raich, the persons Congress seek to regulate are not engaged in activity analogous to interstate commerce or, indeed, any activity or even inactivity that acts as an impediment to regulating interstate

commerce. Rather, the rationale for regulating those subject to the individual mandate is that compelling them to buy insurance offsets and mitigates the negative economic effects created by Congress's imposition of, *inter alia*, the pre-existing condition ban.

There is a fundamental, dispositive difference between regulating individuals because it "carr[ies] into Execution" desirable regulation of interstate commerce and regulating individuals to offset the negative consequences of an interstate commerce regulation already carried into execution. While *Wickard* and *Raich* upheld regulating citizens whose activities impeded the regulation of commerce, they certainly never suggested that Congress could regulate citizens in order to subsidize those harmed by Congress's regulation of commerce. While Congress may require Filburn to stop harvesting wheat, it may not require others to buy Filburn's non-wheat crops in order to offset the harm caused by the wheat ban.

Here, Congress has compelled insurance companies to enter into economically disadvantageous contracts with persons who are already suffering from the diseases to be "insured against," and seeks to mitigate the economic harm caused by this "guaranteed issue" requirement by forcing healthy individuals to contract before they become sick. Congress did not and could not suggest that the individual decision to refrain from purchasing insurance somehow affects the government's ability to force insurance companies to provide the "guaranteed issue." That requirement is "carried into Execution" simply by requiring that insurance contracts not penalize the consumer for pre-existing conditions.

Congress's ability to mandate such contractual terms is not impaired by the refusal to purchase insurance by *other*, non-contracting individuals, and so the individual mandate is not necessary to "carry into Execution" the guaranteed issue requirement. Indeed, the mandate *assumes* that the pre-existing condition ban has been successfully executed, which is why it is

necessary to mitigate the ban's harmful effects through the mandate. In short, the individual mandate does not remove an obstacle preventing Congress from "carrying into Execution" its desired regulation of insurance contracts, but merely forces Americans *to subsidize* the costs that Congress's executed regulation imposes on insurance companies.

Once again, allowing Congress to impose an "individual mandate" on Americans in order to offset the costs created by Congressional regulation would mean that the Necessary and Proper Clause eviscerates all limits on Congress's enumerated powers. Congressional regulation will often have costly effects on the regulated parties, and those effects could always be offset by conscripting third parties to bear some of the burden. For example, if Congress prohibits credit card companies from imposing high penalties on late-paying consumers, then those companies will lose money, but surely Congress could not offset that loss by requiring consumers with healthy savings accounts to purchase goods using credit cards rather than debit cards. Likewise, if Congress prohibits mortgage companies from turning away poor credit risks, then those companies might lose money, but surely Congress could not offset that loss by requiring affluent homebuyers to take out a mortgage.

2. Even if the individual mandate could somehow be deemed "necessary," it certainly is not "proper." As the Supreme Court made clear in *Printz v. United States*, 521 U.S. 898 (1997), Congress may not engage in regulation, no matter how "necessary," if the regulation is inconsistent with the Tenth Amendment and the basic premises underlying our federal system. In *Printz*, although Congress was directly carrying into execution certain provisions of the Brady Bill by forcing state officials to enforce them, the Court nevertheless held that such commandeering of state officials was inconsistent with the historical understanding of our federal system and the structure of the Constitution. *See id.* at 905-23. And, having so

concluded, it rejected the Government's reliance on "the Necessary and Proper Clause," which it characterized as "the last, best hope of those who defend ultra vires congressional action." *Id.* at 923. That Clause did not save congressional commandeering of state officials, because "[w]hen a 'La[w] … for carrying into Execution' the Commerce Clause violates [an implicit] principle … reflected in … constitutional provisions … [and historical understanding], it is not a 'La[w] … *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Id.* at 923-24; *see also McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 421 (1819) (Necessary and Proper Clause legislation must be "consist[ent] with the letter and spirit of the Constitution"). *Printz's* anti-commandeering principle applies at least as forcefully to citizens who exercise ultimate sovereignty over their government, particularly since the Tenth Amendment reserves non-delegated powers "to the states respectively, or to the *people*." U.S. CONST., amend. X.

Indeed, forcing citizens to enter into contracts they eschew, and which harm them, in order to subsidize others, is a particularly suspect and "improper" sort of government compulsion, devoid of historical precedent. As even the CBO acknowledged, "[t]he government has never [before] required people to buy any good or service as a condition of lawful residence in the United States." *See* Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994); *see also Virginia v. Sebelius*, No. 10 Civ. 188, at *24 (E.D. Va. Dec. 13, 2010) (noting that "[n]either the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to [allow the government to] compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market"). And for good reason. Anglo-American law reflects an ancient distinction between prohibitions of and conditions on conduct (on the one hand), which are considered normal incidents of

government, and affirmative requirements to act (on the other), which require special justification. As Blackstone put it in the famous first chapter of his *Commentaries*: "Let a man, therefore, be ever so abandoned in his principles, or vitious in his practice[;] provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws." St. George Tucker, 2 *Blackstone's Commentaries* *124 (photo. reprint 1996) (1803); *see also, e.g., Bailey v. Alabama*, 219 U.S. 219 (1911) (the Thirteenth Amendment proscribes criminalizing breach of a contract to work). To be sure, certain affirmative obligations *to the Government* are inherent in the constitutional scheme and the duties of citizenship. *See, e.g., Selective Draft Law Cases*, 245 U.S. 366, 386-88 (1918) (military draft); *Blair v. United States*, 250 U.S. 273, 281 (1919) (jury duty). But supporters of the individual mandate have not been able to identify a *single* historical example of an affirmative duty of citizens to enter into private contracts for the benefit of other private parties.

To the contrary, the Supreme Court has emphasized the serious constitutional concerns raised by governmental attempts to force citizens to convey their wealth for the benefit of third parties to whom they have no reasonable obligation. As far back as *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798), it has been recognized that "[i]t is against all reason and justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes property from A. and gives it to B." *Id.* at 388 (opinion of Chase, J.). More recently, the Court relied in part upon the *Calder* principle when invalidating a Congressional mandate that a former coal company had to pay for certain health benefits of former coal miners. *See Eastern Enter. v. Apfel*, 524 U.S. 498, 522-23, 529-37 (1998) (plurality opinion). There, Congress required wealthy coal companies to pay healthcare benefits to retired coal workers who had worked for the company, although the companies had never contracted to provide such benefits. The Court found that

requiring the companies to provide healthcare costs "unrelated to any commitment the employers made or to any injury they caused . . . implicates the fundamental principles of fairness underlying the Takings Clause," and therefore invalidated the law. *Id.* at 537; *see also id.* at 549-50 (Kennedy, J., concurring in the judgment) (similar, under Due Process Clause). Here, the Government seeks to force relatively under-funded individuals to provide money to wealthy insurance companies to compensate for rising healthcare costs "unrelated to any injury that [those subjected to the individual mandate] caused." Regardless of whether this mandate affirmatively violates the citizen's constitutional rights, *Eastern Enterprises* vividly demonstrates that it is the sort of compelled action that is plainly not "proper" because it is at odds with the "fundamental principles of fairness" and personal autonomy underlying the Takings, Due Process and Contract Clauses.

While the Government has broad authority to rewrite contracts voluntarily entered into, it would be wholly unprecedented to allow the federal government to force individuals into contracts against their will, particularly when the only reason to do so is to ensure the continued profitability of wealthy corporations in the face of a government mandate that harms those profits. Although it is permissible for the federal government to regulate the terms and conditions of contracts between employers and employees, by establishing minimum wages and maximum hours, it would be entirely different if the federal government sought to compel an individual to contract with an employer.

In short, because this drastic encroachment on the rights of Americans is both unprecedented under, and inconsistent with, the premises of our federal system, *Printz* forecloses any attempt to defend the individual mandate as "proper" under the Necessary and Proper clause.

3. As constitutional criticism of the individual mandate has mounted, lawyers in the Justice Department have come up with a new defense: because the mandate is enforced by a monetary penalty, the argument goes, it is not a mandate at all, but rather a "tax." This argument attempts to exploit the fact that, while Congress may regulate only within its enumerated powers, it can impose taxes on activities outside the reach of those other powers. *See United States v. Sanchez*, 340 U.S. 42, 44 (1950). The individual mandate is plainly not a tax, however, and allowing the government to relabel it as one would mean that there is literally no limit on Congress's regulatory powers.

The individual mandate is classic regulation; it requires an individual to do something upon pain of penalty. Specifically, every covered individual "shall for each month beginning after 2013 ensure that the individual . . . is covered under minimum essential coverage for such month," and "[i]f an applicable individual fails to meet th[is] requirement . . . there is hereby imposed a penalty." *See* Pub. L. No. 111-148, § 1501(b) (emphasis added). If Congress had enforced the mandate through a non-monetary penalty (imprisonment, for example), the mandate would of course not be a tax; imposing a monetary penalty does nothing to change the character of the law. For these reasons, Judge Vinson correctly held in the Florida litigation that "it is manifestly clear that Congress intended [the mandate] to be a penalty and not a tax." *See Florida v. Dept. of Health and Human Svcs*., No. 10 Civ. 00091, at *16 (N.D. Fla. Oct. 14, 2010).

The regulatory character of the mandate is particularly obvious because using the requirement to generate revenue would be utterly inconsistent with the logic of the health care law. As the Justice Department has vigorously argued when defending the mandate in court, Congress thought that compelling individuals to purchase insurance was essential to the success of the health care law. That is, Congress thought it was critical that everyone purchase health

coverage and that the government *not* collect revenue from the mandate's penalty provision. It is difficult to come up with a clearer example of a regulation being enforced by a monetary penalty, as opposed to a tax to secure revenue. Perhaps that is why the President has previously argued that the mandate is "absolutely not a tax" and that "[n]obody considers [it] a tax increase." *See, e.g.*, Obama: Requiring Health Insurance is Not a Tax Increase, CNN, Sept. 29, 2009, *available at*: http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html.

Nor can the mandate be saved by reliance on cases that take a deferential posture to excise taxes on disfavored transactions. *E.g.*, *Sanchez*, 340 U.S. at 44 (deferring to Congress's characterization of a tax on the transfer of marijuana). In such cases, the Court usually accepts Congress's word that, when it requires the payment of money to the government as an incident to some other transaction, the government is engaged in taxation. Here, however, there is simply no underlying transaction to be taxed. Instead, the monetary penalty at issue is triggered solely by the violation of a regulatory command ("buy insurance"). No case has ever upheld a tax on the absence of activity. The mandate is therefore nothing like a cigarette tax, which is triggered by a voluntary commercial transaction; instead, it is the equivalent of the government requiring every smoker to attend a smoking cessation program, subject to a monetary penalty. If such "taxes" are permissible, then the limits on Congress's enumerated powers mean nothing——Congress could require people to do anything, no matter how divorced from enumerated powers or how central to the State's police powers, simply by enforcing it through a monetary fine called a "tax." Congress could reenact the prohibitions at issue in *Lopez* and *Morrison*, or require anyone to purchase a car, take out a loan, or buy a home, so long as it enforced those mandates with a hefty "tax" rather than a "penalty."

The Founders surely did not contemplate such claims of federal power, and our Constitution requires that they be rejected.