

In The
Supreme Court of the 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**

—◆—
**BRIEF OF *AMICUS CURIAE*
STEPHEN M. TRATTNER IN
SUPPORT OF RESPONDENTS
(Minimum Coverage Provision)**

—◆—
STEPHEN M. TRATTNER
Counsel of Record
4626 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20016
(410) 353-0446
steve@trattnerlaw.com

Counsel for Amicus Curiae

QUESTION PRESENTED

The question presented is whether the minimum coverage provision is a valid exercise of Congress's powers under Article I of the Constitution.

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INTEREST OF *AMICUS CURIAE*¹

Stephen M. Trattner has practiced law for over forty years and is a student of the Constitution. He is a member of this Court's bar, and has filed briefs in this Court in the course of his representation of parties in litigation. Today, for the first time, he is submitting a brief on his own behalf as an *amicus*.

Over the last sixteen months, *amicus* has devoted a substantial amount of his professional practice to a study of the constitutional issues raised by the Individual Mandate, including the challenges based on the People prong of the Tenth Amendment. He has reviewed carefully the several decisions of the lower courts that have addressed the Individual Mandate's constitutionality, as well as the briefs of the parties and some *amici*.

From his study, he has concluded that this case presents the most important constitutional issue to be decided in his lifetime. In his view, the first and most important argument against the Individual Mandate is that it violates rights reserved to the

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and his counsel, made any monetary contribution toward the preparation or submission of this brief. On November 15, 16, and 22, 2011, all parties filed letters with the Clerk of Court giving their blanket consent to the filing of *amicus curiae* briefs.

People under the Tenth Amendment. He is filing this brief to advance this argument.



SUMMARY OF ARGUMENT

This Court has consistently recognized that the States enjoy sovereignty in their own sphere, which sovereignty Congress cannot compromise. Likewise, this Court has consistently recognized that the People are the “ultimate sovereigns” because all governmental powers are derived from them. Moreover, while the People have delegated through the Constitution sovereign powers to the States and to the Federal Government, the Tenth Amendment reveals that the People retain a core sovereignty not delegated to the States or to the Federal Government.

This Court has said of the Tenth Amendment that it “states but a truism that all is retained which has not been surrendered.” *New York v. United States*, 505 U.S. 144, 156 (1992) (citation omitted). This means, for example, that if Congress has a particular power under the Commerce Clause then that power was not reserved to the People or the States; conversely, “[i]f a power is . . . reserved by the Tenth Amendment [to the People or the States], it is necessarily a power the Constitution has not conferred on Congress.” *Id.*

However, in *New York* this Court held that proper analysis of a challenge under the Tenth Amendment cannot be done on the basis of the Article I half of

that “truism” alone; in other words, simply considering whether Congress has a power under the Commerce Clause to enact the challenged statute is insufficient to conclude that there is no basis for finding that the statute violates the Tenth Amendment. The reason, this Court explained, is that the Tenth Amendment “limits” the enumerated powers the People granted to the Federal Government in Article I of the Constitution and requires a distinctively different test to determine whether a particular exercise of power is precluded by the Tenth Amendment.

For example, in *New York*, this Court held that even though the Commerce Clause gave Congress power to regulate the interstate market at issue in that case, the Tenth Amendment prohibited Congress from regulating in the way it had chosen. In *Printz v. United States*, 521 U.S. 898, 905 (1997), the Court did not even consider Congress’s claim of power under the Commerce Clause and under the Commerce Clause as augmented by the Necessary and Proper Clause before holding, based on that distinctly different test, that Congress’s method of regulation in that case was unconstitutional under the Tenth Amendment. In *Reno v. Condon*, 528 U.S. 141, 149 (2000), the Court reaffirmed that under *Printz* and *New York* even if an initial Commerce Clause analysis suggests that a particular regulation falls within Congress’s powers under the Commerce Clause, a Tenth Amendment inquiry, which is distinctly different from Commerce Clause analysis, is still necessary.

Not only do this Court's opinions in *New York* and *Printz* demonstrate that an independent Tenth Amendment analysis is necessary when Congressional action arguably infringes on sovereignty under the Tenth Amendment, they also identify specific arguments that are irrelevant and unavailing in the Tenth Amendment context. Notably, every argument the Government has advanced here in support of a conclusion that Congress has power to impose the Individual Mandate under the Commerce Clause or under the Commerce Clause as augmented by the Necessary and Proper Clause was among those expressly rejected by this Court in either *Printz* or *New York* or both. Specifically, this Court in those cases expressly rejected the arguments raised again by the Government here that Congress's action is constitutional because it addresses an issue of national importance, that Congress's action is constitutional because it is needed to address a "unique" circumstance, and that Congress's action is constitutional because the challenged statutory provision is an integral part of a comprehensive legislative scheme.

Here, *Amicus* asserts that the Government's claimed Article I power to enact the Individual Mandate – a power that even the Government has acknowledged would allow Congress to impose a "command economy" – impermissibly encroaches on the residuary sovereignty of the People that is protected by the Tenth Amendment. An analysis based on the test that this Court required under *Printz* and *New York* supports this conclusion.

This Court in *New York* noted that the Tenth Amendment does not catalog the powers retained to the People and the States. Therefore, the answer to whether a particular congressional regulation infringes on sovereignty rights reserved under the Tenth Amendment must be sought through an examination of the historical understanding of those powers at the time the Constitution was ratified, the actions by Congress from ratification to the present, the structure of the Constitution, and the jurisprudence of this Court.

Application in this case of the *Printz* and *New York* test is straightforward and yields the same result as in those cases, where this Court held that the challenged congressional action was unconstitutional under the Tenth Amendment in each case. As in those cases, for over 200 years Congress never asserted that it had the power it now claims that it has. Nor is there any evidence here, as there was not in *New York* and *Printz*, to support a finding that the Framers thought that Congress would have the power it now seeks to wield. As in those cases, here the historical record supports the opposite finding.

Further, just as it was significant in *New York* and *Printz* that the Constitution contains several references outside the Tenth Amendment in support of a finding that it was understood that the Constitution was preserving the States' sovereignty, here it is significant that the Constitution contains several references outside the Tenth Amendment that directly preserve the People's sovereignty. Moreover,

this Court in *New York* explained that the Tenth Amendment not only requires the protection of the States' sovereignty for themselves, but also for the protection of the "liberties" of the People. 505 U.S. at 181.

Finally, as demonstrated by the foregoing analysis, the conclusion that Congress lacks the power to require the People to purchase goods or services from a private company is consistent with the Tenth Amendment jurisprudence of this Court in *Printz* and *New York*.

Thus, just as the Tenth Amendment inquiry in those cases led to the conclusion that Congress had infringed upon the sovereignty of the States thereby also on the "liberty interests" of the People, an examination in this case of historical understanding and practice, the structure of the Constitution, and the jurisprudence of this Court leads to the conclusion that the Individual Mandate is a direct infringement on the sovereignty retained in the People. This Court should so hold to protect the ultimate sovereignty of the People, which deserves at least as much protection as that afforded to State sovereignty in *Printz* and *New York*.

Finally, if this Court does here as it did in *Printz* and conducts the required Tenth Amendment analysis first (instead of waiting until after it analyzes Congress's Article I powers) and holds that the Individual Mandate violates rights reserved under the

Tenth Amendment, it will have no need to plow new Article I ground.

ARGUMENT

THE INDIVIDUAL MANDATE INFRINGES ON POWERS RETAINED BY THE PEOPLE UNDER THE TENTH AMENDMENT.

The Patient Protection and Affordable Care Act (the “Act”) mandates that each person in the United States purchase and maintain a specified minimum level of health insurance. 42 U.S.C. §§ 5000A(a)-(e), 18091(a)(1). Congress called this mandated purchase each person’s “personal responsibility.” *Id.* If any non-exempt person fails to purchase and maintain that minimum level of health insurance, they are subject to a penalty. *Id.* This portion of the Act has been referred to as the “Individual Mandate.”

“Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.” *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 781-82 (E.D. Va. 2010). Congress was well aware of that fact prior to passage of the Act, having been advised by the nonpartisan Congressional Budget Office (“CBO”) that “[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.” Congressional Budget Office, *The Budgetary Treatment of an*

Individual Mandate to Buy Health Insurance, at 1-2 (1994) (“CBO Analysis”).

Petitioners (the “Government”) admit that if the Individual Mandate is constitutional, then Congress could hereafter require the People, solely by virtue of their being alive, to also purchase other goods if it found that the public’s purchase of those goods would benefit the Nation’s economy. *Florida v. HHS*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011). Indeed, as the CBO affirms, if the Individual Mandate is constitutional, it could lead to “a *command economy*, in which the President and the Congress dictate[] how much each individual and family spen[d] on all goods and services.” CBO Analysis, at 7 (emphasis added). Moreover, the Government has also admitted that if the Individual Mandate is deemed constitutional, then Congress “could impose imprisonment or other criminal punishment on the People who do not have health insurance.” *Seven-Sky v. Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011).

The specter of Congress wielding a power to compel the People to purchase a particular good or service from a private company (and, as in this case, to never go without that good or service from birth until death) upon pain of criminal punishment for non-compliance is both breathtaking and alarming.

However, Congress does not have that power – not under the Commerce Clause standing alone, not under the Commerce Clause as augmented by the Necessary and Proper Clause, and not under the Taxing and Spending Clause. Rather, under the Tenth

Amendment the People retained to themselves the liberty interest in deciding whether it was in their own and their families' best interests to purchase particular goods and services. Because the Individual Mandate is a facial violation of the Tenth Amendment, the Court must strike it down.

A. The Tenth Amendment Protects Both State Sovereignty And The Sovereignty Retained In The People.

From its early decisions to the present, this Court consistently has held that under the Constitution, sovereignty originates, and ultimately remains, in the People. *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 471 (1793) (“[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each state. . . . [The People] are truly the sovereigns of the country. . . .”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 232-33 (1974) (“We tend to overlook the basic political and legal reality that the people, not the bureaucracy, are sovereign. . . . Executives, lawmakers, and members of the Judiciary are inferior in the sense that they are in the office only to carry out and execute the constitutional

regime.”); *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (stating that “all governmental powers are derived [from the People]”). The Court’s holdings are in accord with the Founders’ statement of the same principle in the Declaration of Independence; namely, that “[g]overnments . . . deriv[e] their just powers from the consent of the governed.” The Declaration of Independence para. 2 (U.S. 1776).

Through the Constitution, the People have delegated both to the States and to the Federal Government authority to exercise certain sovereign powers on their behalf. Through receipt of those delegated powers, the States and the Federal Government each are sovereign in their own respective spheres, “the States possess[ing] sovereignty concurrent with that of the Federal Government.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This “allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the People, from whom all governmental powers are derived.” *Bond*, 131 S. Ct. at 2364. Thus, this system of “federalism secures to citizens the [individual] liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted).

Significantly, however, the People’s liberties are not secured through federalism alone. Notwithstanding their delegation of certain powers to the States and to the Federal Government, the People retain a core sovereignty not delegated to any government.

See, e.g., U.S. Const. amend. I (powers of free speech, assembly, and religion retained in the People); U.S. Const. amend. V (power of self-incrimination retained in the People). The People’s rights to “life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights” are reserved to be beyond “the vicissitudes of political controversy” and “beyond the reach of . . . [government] officials.” *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

The Framers made explicit in the Tenth Amendment both the independent sovereignty of the States vis-à-vis the Federal Government and the truth that the People retain rights of sovereignty not delegated to any government. U.S. Const. amend. X. This is so even though the Tenth Amendment does not expressly catalog the rights that it protects. *New York*, 505 U.S. at 156 (“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself. . .”).

B. This Court’s Determination Of Whether The Individual Mandate Is Constitutional Requires An Independent Tenth Amendment Analysis That Is Distinct From An Analysis Based Solely On Article I Doctrines.

1. This Court Must Conduct An Independent Analysis Under The Tenth Amendment.

This Court’s determination of whether the Individual Mandate is constitutional requires an independent

Tenth Amendment analysis that is distinct from an analysis based solely on existing Article I doctrines. When Congress has enacted mandates that arguably infringe on the sovereignty granted the States under the Tenth Amendment, this Court has expressly rejected the Federal Government's argument that an analysis based solely on existing Article I doctrines is sufficient to answer the Tenth Amendment challenge. See *New York*, 505 U.S. at 156-57, 159-60. Accord *Printz v. United States*, 521 U.S. 898, 905 (1997); *Reno v. Condon*, 528 U.S. 141, 149 (2000). In *New York*, this Court explained why:

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States [or to the People]. *The Tenth Amendment thus directs us to [separately] determine . . . whether an incident of state [or popular] sovereignty is protected by a limitation on Article I power.*

505 U.S. at 156-57 (emphasis added).

In *New York*, the Court applied this principle to the issue of whether Congress could require States to take title to low-level radioactive waste produced by private parties. *Id.* at 174-76. Although the Court first concluded that “[r]egulation of the . . . interstate market in [low-level radioactive] waste disposal [was] . . . well within Congress’ authority under the Commerce Clause,” *id.* at 159-60, it held that conclusion insufficient to resolve the issue because “the Tenth Amendment limit[ed] the power of Congress to regulate in the way it ha[d] chosen,” *see id.* at 160, 174-76. The Court separately conducted a Tenth Amendment analysis of the “take title provision” and held that even though Congress had power to regulate the disposal of low-level radioactive waste, the Tenth Amendment prohibited it from requiring States to take title to the waste. *Id.* at 174-76.

In *Printz*, the Court addressed a Tenth Amendment challenge to a congressional statute that “purport[ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme” governing the distribution of firearms. 521 U.S. at 902, 904. Notably, unlike it did in *New York*, this Court in *Printz* did not engage in *any* Commerce Clause or Necessary and Proper Clause analysis. *Id.* at 904-35. Instead, it proceeded immediately to consider the Tenth Amendment challenge. In analyzing whether the statute violated the Tenth Amendment, the Court observed that because “no constitutional text sp[oke] to th[e] precise question” of whether

Congress can constitutionally “compel[] state officers to execute federal laws,” the answer to that question must “be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.” *Id.* at 905. Then, after reviewing the relevant historical understanding and practice, the structure of the Constitution, and the jurisprudence of the Court – and still without engaging in any Commerce Clause or Necessary and Proper Clause analysis – this Court concluded “categorically” that under the Tenth Amendment “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” *Id.* at 933 (citation omitted).

Finally, in *Condon*, the Court addressed a Tenth Amendment challenge to a federal statute that “regulate[d] the disclosure and resale of personal information contained in the records of state [motor vehicle departments].” 528 U.S. at 143. The Court first concluded that “[b]ecause drivers’ information [was] . . . an article of commerce, its sale or release into the interstate stream of business [was] sufficient to support congressional regulation” under the Commerce Clause. *Id.* at 148. Again, though, the Court did not end its analysis there. *Id.* at 148-51. It explained that “[i]n *New York and Printz*, [it had] held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.” *Id.* at 149. Thus, “the fact that drivers’ personal information [was], in

the context of [*Condon*], an article in interstate commerce [simply did] not conclusively resolve the constitutionality of the [act].” *Id.* at 148-49. Instead, this Court held that it must examine whether Congress’s Commerce Clause power was limited by the Tenth Amendment. *Id.* at 149-51.

2. The Required Tenth Amendment Analysis Is Distinctly Different From This Court’s Analysis Of The Federal Government’s Article I Powers.

This Court’s opinions in both *New York* and *Printz* demonstrate that “the answer to [whether an act of Congress violates one of the rights protected by, but not expressly enumerated in, the Tenth Amendment] must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court,” *Printz*, 521 U.S. at 905. *See id.* at 905-33; *New York*, 505 U.S. at 161-69.

Thus, in *New York* the Court looked to the history of the colonies, the problems with the Articles of Confederation, the plans submitted for consideration at the Constitutional Convention, the arguments for and against those plans, explanations in *The Federalist* (Clinton Rossiter ed. 1961), the statutes passed by Congress subsequent to ratification of the Constitution, the text of the Constitution itself, and relevant jurisprudence of the Court. 505 U.S. at 161-69, 177-79.

Similarly, in *Printz*, this Court examined The Federalists' responses to relevant anti-federalist concerns, congressional practice from the time of the founding of the Nation through the present, the constitutional structure as revealed by specific constitutional text, and relevant jurisprudence of the Court. 521 U.S. at 905-33.

Thus, this Court's Tenth Amendment analysis is fundamentally different from the Article I arguments advanced by the Government. *See generally* Brief for Petitioners (focusing nearly exclusively on Commerce Clause and Taxing and Spending Clause powers and doctrines). Nor is there any doubt that the Government's Article I arguments are unavailing in the face of a conclusion that under the Tenth Amendment Congress lacks power to regulate in the way it has chosen. Specifically, in *New York* this Court rejected the federal government's argument that the mandate at issue was an essential part of a comprehensive federal scheme that was necessary to address a national crisis. 505 U.S. at 146, 156, 159, 166, 170, 177. In so doing, this Court did not consider whether the factual claims of necessity and crisis were correct, but simply rejected the argument outright because even the need to address an important national issue does not permit Congress to pass a statute that violates a right preserved by the Tenth Amendment. *Id.* at 155-59, 177-78, 188.

Likewise, this Court in *Printz* rejected similar Commerce Clause and Necessary and Proper Clause arguments as not being availing to overcome a Tenth

Amendment conclusion that Congress lacked the power it had asserted. There the federal government argued that because of the “national importance” of the mandate this Court should “balance” the rights of the States under the Tenth Amendment with the powers of Congress under the Commerce Clause. 521 U.S. at 931-32. But this Court rejected that argument because the protection of rights reserved under the Tenth Amendment cannot be compromised, and it reaffirmed that if a federal statute violates rights reserved under the Tenth Amendment, the Court has no power under the Constitution to enforce it. *Id.* at 932. For the same reason, this Court rejected the federal government’s argument that the “unique” circumstances that Congress faced should alter its Tenth Amendment analysis or its holding based on that analysis. *Id.* at 963.

Finally, this Court summarily dismissed the federal government’s reliance on the Necessary and Proper Clause in *Printz*, precisely because if Congress did not have power to mandate the States, which power the Court had found Congress did not have, then the mandate could not possibly be “proper.” *Id.* at 923-24 (“When a ‘la[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in [other provisions of the Constitution, including the Tenth Amendment], it is not a ‘La[w] proper for carrying into execution the Commerce Clause.’” *Id.* (quoting U.S. Const. Art. I, § 8, cl. 18) (emphasis added); accord *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (stating that

even if a statute appears to be an exercise of power within the Commerce Clause it still must “not [be] prohibited” by the Constitution).

3. Neither The Government’s Brief Here, Nor Any Of Its Arguments In The Courts Below, Nor The Lower Court Opinions Themselves Analyze The Tenth Amendment Claim In This Case As Required In *Printz* And *New York*.

Although the Government’s merits brief filed in this Court makes no reference to the People prong of the Tenth Amendment, the Government successfully asserted below that the People prong of the Tenth Amendment does not prevent Congress’s imposition of the Individual Mandate. However, the Government’s Tenth Amendment arguments in the lower courts below, like the only argument in its Certiorari brief (Petitioners’ Cert. Brief at 12) (*Printz* only applies to States), was not accompanied by the Tenth Amendment analysis required by *Printz* and *New York*. Nor did the court opinions below that sided with the Government engage in the required Tenth Amendment analysis.

For example, while the dissenting opinion from the Eleventh Circuit acknowledges a Tenth Amendment challenge to the Individual Mandate, and even gives a nod to *New York* and *Printz*, it does not engage in an independent Tenth Amendment analysis of the Individual Mandate as required by the holdings in those cases. *Florida v. HHS*, 648 F.3d 1235,

1364-65 (11th Cir. 2011) (Marcus, J., dissenting). Rather, Judge Marcus simply identified the congressional mandates to States that were struck down on Tenth Amendment grounds in *New York* and *Printz*; distinguished them from the congressional mandate here on the ground that it imposes a mandate on the People; noted “the utter lack of Supreme Court (or any other court) precedent [on] the [Tenth Amendment’s ‘people’ prong]”; and then reverted back to traditional Commerce Clause doctrines as the sole basis for his dissent. *Id.* at 1365.

The D.C. Circuit’s majority opinion that sides with the Government is even more telling because it found that the regulation imposed by the Individual Mandate “certainly is an encroachment on individual liberty,” *Seven-Sky*, 661 F.3d at 16. Nevertheless, the D.C. Circuit held that “[t]he right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local – or seemingly passive – their individual origins.” *Seven-Sky*, 661 F.3d at 16. This amounts to an adoption of the same “national importance,” “uniqueness,” and “balancing” arguments that this Court expressly rejected in *New York* and *Printz*, and turning the holdings in those cases on their head because there this Court held that Article I powers granted to the Federal Government yield to the limitations of the Tenth Amendment.

Again, the Government, the dissent in the Eleventh Circuit, and the majority in the D.C. Circuit did

not engage in the Tenth Amendment inquiry required by *Printz* and *New York*. However, as shown below, the Tenth Amendment inquiry demonstrates that the Individual Mandate infringes on the sovereignty reserved by the People.

C. The Individual Mandate Is Unconstitutional Under An Independent Tenth Amendment Analysis Because It Is At Odds With Historical Practice, Historical Understanding, And The Structure Of The Constitution, And A Holding That It Is Unconstitutional Is Consistent With The Jurisprudence Of This Court.

As noted above, the answer to a Tenth Amendment challenge to Congressional action “must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.” *Printz*, 521 U.S. at 905. The Individual Mandate is unconstitutional under this Court’s required Tenth Amendment analysis because it is at odds with historical congressional practice, with historical understanding of congressional power when the Constitution was ratified, with the structure of the Constitution, and with the jurisprudence with this Court.

1. The Individual Mandate Is At Odds With Historical Congressional Practice.

This Court in *Printz* explained:

[E]arly congressional enactments provid[e] contemporaneous and weighty evidence of the Constitution’s meaning. Indeed, such contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions. Conversely *if . . . earlier Congresses avoided use of [a] highly attractive power, [the Court] would have reason to believe that the power was thought not to exist.*

521 U.S. at 905 (internal quotations and citations omitted; emphasis added).

Here, the CBO expressly advised Congress that “[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.” CBO Analysis, at 1-2. The Government does not dispute that this form of regulation – a mandate that the People purchase and maintain ownership from cradle to grave of a consumer product from a private company – is unprecedented. *See Seven-Sky*, 661 F.3d at 14 (“The Government concedes the novelty of the mandate. . . .”). There is simply no dispute that “[n]ever before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.” *Commonwealth of Va.*, 728 F. Supp. 2d at 781-82.

Nor can there be any doubt that the power to impose such a mandate is a “highly attractive” one. The Government admits that if this Individual Mandate is constitutional, then Congress could require the People to also purchase other goods, including broccoli or General Motors cars. *Florida*, 780 F. Supp. 2d at 1289. Surely the Federal Government would find highly attractive the power, as the CBO describes it, to impose “a *command economy*, in which the President and the Congress dictate[] how much each individual and family spen[d] on all goods and services.” CBO Analysis at 7 (emphasis added). The fact that Congress has never before attempted to wield such a power provides compelling reason to conclude that there was no understanding when the Constitution was ratified that Congress had any such power granted to it by the People in Article I of the Constitution. *See Printz*, 521 U.S. at 905.

Moreover, any argument that the current national health care crisis is “unique” and of sufficient “importance” to justify the recognition of Congressional power where none has previously existed is unavailing. As noted above, this Court has expressly rejected the argument that if “the federal interest is sufficiently important,” then the sovereign States must submit to Congress’s violation of rights reserved to them. *New York*, 505 U.S. at 177-78. To the contrary, “[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States [to submit to a violation of a right reserved to them by the Tenth

Amendment].” *Id.* at 178; *see also Printz*, 521 U.S. at 931-33 (rejecting the idea that a congressional statute that strikes at “the very *principle* of separate state sovereignty” could be upheld because it “serve[d] a very important purpose”).

2. The Individual Mandate Is At Odds With Historical Understanding Of Congress’s Power.

Not only is congressional exercise of the power inherent in the Individual Mandate unprecedented, but there is no evidence that the Framers understood that Congress was granted such power. In fact, the history points to an opposite conclusion.

Long before our Nation declared independence from England, the idea that government could command its people to purchase something was rejected by the people in England. King Charles I, faced with budget problems and political obstacles to raising funds through Parliament, used his Court of Star Chamber to “persuade” affluent subjects to purchase titles or pay a fine equivalent to the cost of the title. Stephen H, *The Causes of the English Civil War (1642-1651)*;² *Causes of the English Civil War*.³ His

² Available at <http://www.helium.com/items/302608-the-causes-of-the-english-civil-war-1642-1651> (last visited January 31, 2012).

³ Available at http://www.historylearningsite.co.uk/english_civil-war.htm (last visited January 31, 2012).

subjects found the practice offensive, and it contributed to the outbreak of the English civil war beginning in 1642 and ending with the public execution of the king. *Id.*

The People's aversion to a government that could mandate consumer purchases was evident immediately prior to the signing of the Declaration of Independence. As the district court below observed:

It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place.

Florida, 780 F. Supp. 2d at 1286.

In both *New York* and *Printz*, this Court looked to The Federalist for an indication of the Framers' understanding of congressional power granted by Article I. *New York*, 505 U.S. at 158; *Printz*, 521 U.S. at 910. The Federalist said nothing about the potential for Congress to mandate consumer purchases. In light of Publius' comprehensive identification and explanation of both real and perceived federal powers and checks on those powers under the new Constitution, the Federalist's loud silence on Congress's ability impose a "command economy" on the People can be understood only as reflective of a universal

understanding at the time that the Constitution did not give the Federal Government this power.

At the time the Declaration of Independence was signed, “the essence of liberty” was understood to be “the freedom to develop one’s talents, pursue opportunity, and generally take responsibility for one’s own life and well-being.” Mathew Spalding, *We Still Hold These Truths* 71-73 (ISI Books 2009); see also Friedrich August von Hayek, *The Constitution of Liberty* 133 (University of Chicago Free Press 1960) (explaining that “liberty” and “personal responsibility” are “inseparable,” that “[l]iberty not only means that the individual has both the opportunity and burden of choice” but also “that he must bear the responsibility of his actions”). And that original understanding was so ingrained at this Nation’s founding that over 200 years later it remains near universal today, as though passed through the People’s blood stream: recent polling data shows that over 80% of Americans still believe that the Federal Government should not have the power to require individuals to purchase health insurance. See Associated Press-National Constitution Center, *Poll of 1,000 Adults* (August 18-22, 2011).⁴ Because the idea that Congress has the power

⁴ <http://www.constitutioncenter.org/NewsWire.aspx?title=Poll%3A+Americans+Feel+Safe%2C+But+Congress+Shouldn't> (last visited November 9, 2011). Reported at <http://www.charlotteobserver.com/2011/10/07/2670209/obamacare-holding-back-the-economy.html> (last visited January 31, 2012). file:///C:/Corporate/Documents/obama%20care/80%20%25%20of%20public%20do%20not%20think%

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to mandate consumer purchases is antithetical to the understanding of the Founders, this Court should conclude that the People did not include that power within the Article I powers that they granted to the Federal Government.

3. The Individual Mandate Is At Odds With The Structure Of The Constitution.

“It is incontestible that the Constitution established a system of dual sovereignty. Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty.” *Printz*, 521 U.S. at 918-19 (internal quotations and citations omitted). In *Printz*, this Court demonstrated the reality of this “residuary and inviolable sovereignty” in the States in part by identifying textual evidences in the Constitution and examining their implications. *Id.* at 919. A similar examination of textual evidence reveals the existence and character of a residuary and inviolable sovereignty in the People as well.

For example, the Constitution’s text preserves the People’s right to maintain their homes and effects free from unreasonable seizure. U.S. Const. amend. IV. It preserves the People’s right not to open their homes for the quartering of soldiers, except in time of war. U.S. Const. amend. III. It preserves the People’s right

[20gov%20can%20require%20mandate.htm](#)(last visited January 31, 2012).

not to be in servitude one to another. U.S. Const. amend. XIII. And it preserves the People's right to hold private property unless "taken for public use," and then only for "just compensation." U.S. Const. amend. V. These expressly retained powers are of a character to evidence a residuary sovereignty in the People to make fundamental decisions about their property and commerce without mandate from the Federal Government. *Cf. Printz*, 521 U.S. at 918-19.

The character of the foregoing expressly reserved rights is in sharp contrast to that of the "limited set of personal mandates" that Congress has imposed on the People since the outset of the Nation. *Florida*, 648 F.3d at 1290. There are but four: the mandates to serve on juries, register for the draft, file tax returns, and respond to the census. *Id.* "These mandates are in the nature of duties owed to the government attendant to citizenship, and they contain clear foundations in the constitutional text." *Id.* (citing U.S. Const. art. I, § 2; U.S. Const. art. I, § 8, cl. 1; U.S. Const. art. I, § 8, cl. 12; U.S. Const. art. III, § 2, *Selective Draft Law Cases*, 245 U.S. 366, 378, 382-87 (1918)).

There is a distinct contrast between the expressly reserved rights of self-determination and autonomy and the obligations implicit to citizenship reflected in the Constitution's textual support for congressional mandates regarding jury duty, military service, taxes, and the census. This dichotomy suggests that while the Constitution gives Congress the right to issue mandates to the People to "directly interact[] with

the government” to fulfill obligations that are inherent in citizenship, it does not give Congress the power to compel “an individual to enter into a compulsory contract with a private company.” *Florida*, 648 F.3d at 1290. As Judge Sutton stated in his concurring opinion, any attempt to equate the power to require the People to purchase health insurance with the power to impose these other mandates “gives analogy a bad name.” *Thomas More Law Center v. Obama*, 651 F.3d 529, 541 (6th Cir. 2011). The structure of the Constitution, with all of its checks and balances on federal power, simply does not support the notion that the People carry with it a constitutional obligation to submit to a centrally dictated, command economy.

In *Coyle v. Smith*, 221 U.S. 559 (1911), Congress sought to impose on Oklahoma, as a condition to its entrance into the Union, an obligation that it not move its capital for five years or spend any money in anticipation of a later move of the state capital. *Id.* at 564. There this Court struck down as violative of State sovereignty Congress’s attempt to mandate where, when, and how any one State could “appropriate its own public funds.” *Id.* at 565. Similarly here, the Court should strike down as violative of the Tenth Amendment Congress’s current attempt to mandate where, when, and how the People appropriate their own private funds in deciding what goods or services they should buy in their own and families’ best interests.

4. A Holding That The Individual Mandate Is Unconstitutional Is Consistent With This Court's Existing Jurisprudence.

As demonstrated in part B above, when Congress has arguably infringed upon another sovereign's retained rights, this Court repeatedly has engaged in an independent Tenth Amendment inquiry to determine, based on historical practice, historical understanding, and constitutional structure, whether Congress has the power it seeks to wield. Hence, to do so here, where congressional infringement on the People's sovereignty is alleged, is required by this Court's existing jurisprudence.

Moreover, although the Individual Mandate is unprecedented, the Government's arguments in support of it are not. Specifically, the arguments that the national health care situation presents a unique problem, that a national solution to it is particularly important, and that the challenged provision is an integral part of a comprehensive economic scheme permeate the Government's brief. However, as explained in Part B.2 above, this Court has previously and expressly rejected each of those arguments in the face of Tenth Amendment analysis confirming that Congress's action infringes on a right left to the States.

A straightforward Tenth Amendment analysis like that conducted in *Printz* and *New York* but applied to the Individual Mandate plainly supports a holding that the Individual Mandate is an unconstitutional

exercise of congressional power. Specifically, just as in those cases, here Congress seeks to assert an unprecedented power. Likewise, just as with the congressional mandates in *New York* and *Printz*, there is nothing in the historical record leading up to ratification of the Constitution, including in *The Federalist*, that would support the congressional power the Government claims here. Rather, the record here leading up to ratification of the Constitution points decidedly to the opposite conclusion, as it did in *Printz* and *New York*.

Furthermore, just as the Constitution contains explicit evidence even outside the Tenth Amendment for State sovereignty, which evidence the Court considered in *Printz* and *New York*, here the Constitution also contains several evidences outside the Tenth Amendment for the People's residuary sovereignty, including also the Ninth Amendment, which makes clear that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," U.S. Const. amend. IX.

Finally, it is telling that just as Congress had for over 200 years never "compelled enlistment of state executive officers for the administration of federal programs," *Printz*, 521 U.S. at 905, for over 200 years Congress never compelled the People to make specific consumer purchases from a private company. Instead, each of Congress's previous four mandates to the People were all clearly grounded in constitutional

text and premised on the implicit obligations of citizenship.

In *New York* and *Printz* this Court acted under the State prong of the Tenth Amendment to preserve the sovereignty of the States from unprecedented assertions of federal power. Yet this Court's protection of State sovereignty in *Printz* and *New York* ultimately amounted, in a derivative way, to a protection of the People's "individual liberty secured by federalism." *Bond*, 131 S. Ct. at 2364. Here the Court is being asked to protect individual liberty directly under the People prong of the Tenth Amendment from an unprecedented assertion of federal power. In other words, it is being asked to preserve the ultimate sovereignty of the People by protecting rights that the People never delegated to the States or the Federal Government.

Although this Court has not previously "breathe[d] practical life into the Tenth Amendment's reservation of power [directly] to the [P]eople," *Florida*, 648 F.3d at 1365 (Marcus, J., dissenting), that is so *only* because never before has the Federal Government issued a mandate to the People that directly infringed on their residuary sovereignty as the Individual Mandate plainly does. This Court must now breathe practical life into the Tenth Amendment's People prong because the People's liberty interests that are at stake here under the People prong of the Tenth Amendment are no less important than the People's liberties that this Court acted to protect under the

State prong of the Tenth Amendment in *New York* and *Printz*. We the People deserve no less.



CONCLUSION

Thomas Jefferson described the Tenth Amendment as “the foundation of the Constitution” and said that “[t]o take a single step beyond the boundaries . . . specially drawn [by it] around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition.” *Thomas Jefferson’s Opinion on the Constitutionality of a National Bank (1791)*.⁵ The Individual Mandate is a step beyond the boundaries of the power the People granted to Congress under the Constitution.

Accordingly, this Court should affirm on Tenth Amendment grounds the Eleventh Circuit’s holding

⁵ Available on file at the Yale Avalon Project, http://avalon.law.yale.edu/18th_century/bank-tj.asp (last visited on January 31, 2012). The 12th Amendment referenced in that letter became the 10th Amendment, when two proposed amendments were deleted. See <http://www.u-s-history.com/pages/h389.html> (last visited on January 31, 2012.)

that the Individual Mandate is not a valid exercise of Congress's powers under Article I of the Constitution.

Respectfully submitted,

STEPHEN M. TRATTNER
LAW OFFICES OF STEPHEN TRATTNER
4626 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20016
(410) 353-0446
steve@trattnerlaw.com

Counsel for Amicus Curiae