



## Legal Alert: Opponents File Brief with Supreme Court Arguing Individual Mandate Provision of Health Care Reform Law is Unconstitutional

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**Executive Summary:** A group of 26 states has filed a response brief with the U.S. Supreme Court, arguing that Congress exceeded its authority under the Commerce Clause when it enacted the individual mandate provision of the 2010 Patient Protection and Affordable Care Act (PPACA).

In *United States Department of Health and Human Services v. State of Florida*, No. 11-398, the federal government challenged a decision by the Eleventh Circuit holding that Congress exceeded its Commerce Clause powers by enacting the individual mandate. The individual mandate requires that, beginning in 2014, everyone (with certain limited exceptions) must purchase federally-approved health insurance or pay a monetary penalty. The Eleventh Circuit also held that the individual mandate is severable from the remainder of the Act, thus the court did not invalidate the entire Act. For a discussion of the Eleventh Circuit's opinion, please see our August 18, 2011 Legal Alert, *Eleventh Circuit Finds Individual Mandate Provision of Health Care Reform Law Unconstitutional*, <http://www.fordharrison.com/shownews.aspx?show=7510>.

In response to the government's brief, the states argued that the individual mandate rests upon a claim of federal power that is both "unprecedented and unbounded" – the power to compel individuals to engage in commerce to more effectively regulate commerce. Additionally, the states argue that "if Congress really had this remarkable authority, it would not have waited 220 years to exercise it." According to the states, the extraordinary power the federal government claimed in enacting the individual mandate is incompatible with the concept of the federal government as one of limited and enumerated powers.

The states' argument essentially follows the ones made to the federal trial court and the Eleventh Circuit – the commerce clause gives Congress the power to regulate commerce, it does not give it the power to require individuals to enter into commerce. According to the states, the power to require individuals to enter into commerce is a police power that is expressly reserved to the states. This distinction is especially significant in light of the breadth of the modern conception of commerce. An individual can do very little to escape the "long arm of the federal government" other than refrain from entering into the commerce that Congress regulates. "If Congress not only can regulate individuals once they decide to enter into commerce, but

can compel them to enter commerce in the first place, then there is nothing left of the principle that Congress' powers 'are defined, and limited,' *Marbury v. Madison*, 5 U.S. 137, 176 (1803), as Congress could simply force within its regulatory reach all those who would remain outside it."

The states also argue that the individual mandate cannot be justified under the necessary and proper clause because it is not a law for carrying into execution the commerce power, it is a law for carrying into execution a power that Congress does not have: the power to compel individuals to enter into commerce.

A brief filed by private parties, including the National Federation of Independent Business (NFIB) and several individuals makes similar arguments.

The Court will hear five and one-half hours of oral arguments over March 26-28, 2012.

We will continue to keep you updated on the status of challenges to the PPACA. If you have any questions regarding this Alert or other benefits related issues, please contact Tiffany Downs, [tdowns@fordharrison.com](mailto:tdowns@fordharrison.com), any member of Ford & Harrison's Employee Benefits practice group, or the Ford & Harrison attorney with whom you usually work.