

No. 11-117

**In the
Supreme Court of the United States**

THOMAS MORE LAW CENTER, JANN DeMARS,
JOHN CECI, STEVEN HYDER, and SALINA HYDER,
Petitioners,

v.

BARACK HUSSEIN OBAMA, in his official
capacity as President of the United States, et al.,
Respondents.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit*

PETITIONERS' REPLY BRIEF

DAVID YERUSHALMI
LAW OFFICES OF DAVID
YERUSHALMI, P.C.
P.O. Box 6358
CHANDLER, AZ 85246
(646) 262-0500

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. Box 393
ANN ARBOR, MI 48106
(734) 827-2001
rmuise@thomasmore.org

Counsel for Petitioners

October 6, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT IN REPLY	1
ARGUMENT IN REPLY	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

*Florida v. United States Dep't of Health & Human
Servs.*,
No. 11-11021, WL 3519178 (11th Cir. Aug. 12,
2011), petition for cert. pending, No. 11-398
(filed Sept. 28, 2011) 1, 2, 3, 6

United States v. Salerno,
481 U.S. 739 (1987) 2, 3, 4

RULES

Sup. Ct. R. 10(c) 1

STATEMENT IN REPLY

Petitioners agree with Respondents that “[t]he question presented in this case is clearly important. . . .” Resp. at 15. In fact, it is critically important to literally millions of Americans, including Petitioners, who are gravely concerned about the ever increasing power of Congress—a power that is undermining our Nation’s founding commitment to a limited federal government. This concern transcends and, indeed, eclipses any concern about whether the Patient Protection and Affordable Care Act (“Act”) is good public policy. Thus, the question(s) raised by this petition go to the very form and structure of our national government. Is our federal government one of limited and enumerated powers such that meaningful limitations to Congress’ power to regulate exist? Or has our federal government outgrown its constitutional limitations such that Congress now possesses general police powers such as those once reserved for the States? Consequently, Petitioners agree that this case presents exceedingly important questions that should be decided by this Court. *See* Sup. Ct. R. 10(c) (providing that review is appropriate when “a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court”). Petitioners strongly disagree, however, with Respondents’ suggestion that “the Court should hold this petition pending a decision in *Florida*.” Resp. at 15 (referring to *Florida v. United States Dep’t of Health & Human Servs.*, No. 11-11021, WL 3519178 (11th Cir. Aug. 12, 2011), petition for cert. pending, No. 11-398 (filed Sept. 28, 2011)). Petitioners further disagree with Respondents’ claim that granting this petition “could complicate the briefing and presentation of the

arguments to the Court, without a sufficient corresponding benefit.” Resp. at 20. To the contrary, solely reviewing *Florida* leaves an important question unanswered and the matter unsettled, as discussed further below.

In order for the Court to fully address all of the issues presented by the constitutional challenges to the Act, the Court should grant this petition because it advances a challenge from the perspective of several individuals who are without healthcare insurance and who object to being compelled by Congress to engage in commerce that they either do not want or do not need. That is, Petitioners are asking this Court to decide whether the individual mandate provision of the Act is constitutional *as applied* to them.

In their brief, Respondents fail to address or even mention one of the critical questions presented by this petition—a question that is not raised in the *Florida* petition. And that question is this: “Is the individual mandate provision of the Act unconstitutional as applied to Petitioners who are without healthcare insurance?” Pet. at i. This direct and important question was side-stepped by Judge Sutton in his opinion, which applied the “no set of circumstances” test of *United States v. Salerno*, 481 U.S. 739, 745 (1987), *see* App. 52a, 72a, and it is side-stepped now by Respondents. In fact, Respondents omit this question from their brief—a question that was expressly set forth and discussed in the petition. Pet. at 24-28. Indeed, this was a question that the Sixth Circuit expressly asked the parties to address below. *See* App. 147a, 163a-165a.

In sum, Petitioners request that the Court grant this petition. Alternatively, Petitioners request that the Court grant the petition on the second question presented and consolidate it with the *Florida* petition. Petitioners could then focus their briefing and arguments on the as-applied question, which could also include addressing the issue of whether *Salerno* applies in the first instance. Consolidation would not complicate the briefing and presentation of the arguments to the Court. Rather, it would complement them and ensure that all issues were fully presented and addressed. If necessary and as Respondents suggest, Petitioners could also address the applicability of the Anti-Injunction Act. *See* Resp. at 20.

ARGUMENT IN REPLY

The question of whether the individual mandate is constitutional *as applied* to the individual Petitioners who do not have healthcare insurance (*i.e.*, Petitioners John Ceci, Steven Hyder, and Salina Hyder) and who object to being forced to purchase healthcare insurance under penalty of federal law should be addressed by the Court. These individuals (1) have *not* “already . . . purchased insurance voluntarily and . . . want to maintain coverage, but . . . will be required to obtain more insurance in order to comply with the minimum-essential-coverage requirement”; (2) have *not* “voluntarily obtained coverage but do not wish to be forced (at some indeterminate point in the future) to maintain it”; (3) do *not* “live in States that already require them to obtain insurance and who may have to obtain more coverage to comply with the mandate or abide by other requirements of the Affordable Care Act”; instead, Petitioners reside in Michigan, which,

unlike Massachusetts for example, does not have state-mandated healthcare insurance; and (4) are *not* “under 30” and thus “may satisfy the law by obtaining only catastrophic-care coverage.” App. 72a (Sutton, J.) (setting forth the circumstances under which he believed the individual mandate was constitutional so as to satisfy *Salerno*); *see also* Resp. at 12 (citing to Judge Sutton’s argument under *Salerno*).

Indeed, the very reason the Sixth Circuit upheld the constitutionality of the individual mandate per Judge Sutton’s opinion was because Judge Sutton believed that *Salerno* should apply, and that so long as he found *any* circumstance under which it might be constitutional, that was good enough. App. 74a. (Graham, J.) (dissenting) (observing that Judge Sutton held that Petitioners’ challenge was “undone” by *Salerno*). The problem with Judge Sutton’s analysis is that Congress did not cabin its regulatory power to reach only those circumstances that Judge Sutton relied upon. Rather, Congress expressly granted itself much broader power so as to specifically reach (and regulate) individuals such as Petitioners Ceci, Steven Hyder, and Salina Hyder, who are not by any measure engaged in the health insurance market. Indeed, Congress made it expressly clear that it was exercising a very broad power to regulate, stating that the individual mandate “will add millions of new consumers to the *health insurance market*, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.” App. 144a. (emphasis added). It is also important to pause here for a moment and recognize that despite Respondents’ contention, Congress was not seeking to regulate the “market for health care.” *See, e.g.*, Resp. at 2 (claiming that

Congress passed the Act “to address a profound and enduring crisis in the market for health care”). Rather, Congress was *compelling commerce* by forcing private citizens to purchase healthcare *insurance*. Thus, it is the “health insurance market” that Congress was regulating with the individual mandate, not the broader market for health care services that Respondents claim. Consequently, whatever measure of truth might exist to the argument that everyone at some point in time will require *health care services*, the same cannot be said of *health insurance*.

Furthermore, while Respondents point to criticism of Petitioners’ “activity/inactivity” distinction, Resp. at 12, 13, Petitioners’ arguments go beyond that. As Judge Sutton noted, “The [Petitioners] present a plausible limiting principle, claiming that a mandate to buy medical insurance crosses a line between regulating action and inaction, between *regulating those who have entered a market and those who have not*, one that the Court and Congress have never crossed before.” App. 50a (emphasis added). Thus, there is more to the individual mandate than regulating “inactivity,” which it does and is troubling on its own. The individual mandate *compels* commerce under penalty of federal law. Consequently, once Congress forces the private individual into the stream of commerce, there is virtually no limit to Congress’ authority to then regulate the person under extant Commerce Clause jurisprudence, as Judge Sutton’s opinion demonstrates. Therefore, at a minimum, the line must be drawn here: the individual mandate cannot be constitutional *as applied* to individuals who do not have health insurance, who do not want to purchase health insurance, who are thus not in the *health insurance market*, and who are not subject to

any state regulation requiring them to participate in the *health insurance market*, which is to say, Petitioners in this case.

In the final analysis, this petition presents an important question that is not squarely addressed by the *Florida* petition and that should be addressed by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted to address, at a minimum, the question of whether the individual mandate is constitutional as applied to Petitioners who are without healthcare insurance and not participants in the health insurance market.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
Tel: (734) 827-2001
Fax: (734) 930-7160
rmuise@thomasmore.org

DAVID YERUSHALMI
Law Offices of David Yerushalmi, P.C.
P.O. Box 6358
Chandler, AZ 85246
Tel: (646) 262-0500

Counsel for Petitioners