

SENATE JUDICIARY

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Montana Senate Judiciary Committee

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Dear Senators,

Thank you very much for the invitation to share my thoughts on whether Montana should join the Florida-led lawsuit challenging the constitutionality of the Patient Protection and Affordable Care Act (PPACA, commonly known as "Obamacare"). As you know, 20 states are already plaintiffs in that case (not counting Virginia, which is pursuing a separate lawsuit). Many others—particularly those with newly elected governors and attorneys general—are, like you, now considering joining. And there are over 20 other lawsuits by a variety of public interest organizations, business associations, and individual citizens, asserting a number of different claims.

In my capacity as a senior fellow in constitutional studies at the Cato Institute—a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government—I have been speaking and writing about these Obamacare lawsuits. I have also filed several *amicus curiae* ("friend of the court") briefs, and so am quite familiar with the litigation in Florida and elsewhere and the constitutional intricacies involved therein.

**As should by now be clear, the state lawsuits, among others, are serious challenges maintained by serious lawyers and public officials.** They question an unprecedented assertion of power—literally without legal precedent both in its regulatory scope and its expansion of federal authority—that, if left unchecked, would gravely alter the relationship of the federal government to the states and to the people. Nobody would ever again be able to claim plausibly that the Constitution limits federal power.

**The strongest legal argument attacks the constitutionality of the individual mandate to buy health insurance.** "The government has never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994). Nor has it ever said that every man and woman can be fined for declining to participate in the marketplace. And never before have courts had to consider such a breathtaking assertion of raw power under the Commerce Clause. Even at the height of the New Deal, in the infamous case of *Wickard v. Filburn*, 317 U.S. 11 (1942), the federal government claimed "merely" the power to regulate what farmers grew, not to *mandate* that people become farmers or require people to buy farm products.

But that should not be surprising, because ours is a government of delegated and enumerated powers and the Constitution does not grant Congress the power to force private commercial transactions. Even if the Supreme Court has broadened the scope of congressional authority under the Commerce Clause—it can now reach local activities

that have a substantial effect on interstate commerce—never before has it allowed people to face a civil penalty for not buying a particular product.

Stated another way, every exercise of Congress's power to regulate interstate commerce has involved some form of action or transaction engaged in by an individual or legal entity. **The government's theory—that the *decision* not to buy insurance is an economic one that affects interstate commerce in various ways—would, for the first time ever, permit laws commanding people to engage in economic activity.**

Under such a reading, which two judges in other Obamacare cases have alas accepted, Congress would be the sole arbiter of its own powers, the only checks on which would be political. The federal government would have plenary authority to compel activities ranging from eating spinach and joining gyms (in the health care realm) to buying GM cars (as part of an auto bailout). **Authority so novel and sweeping would be indistinguishable from a general "police power," which is irreconcilable with the established principle that Congress has only limited and enumerated powers.** As Judge Henry Hudson said in striking down the individual mandate in the Virginia case, "This broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence."

**But the individual mandate is only the highest-profile tip of an iceberg that, if not avoided, will sink our constitutional vessel.** For example, it should concern you, as state legislators, that Obamacare impermissibly coerces states by forcing them to accept a greatly expanded and fundamentally transformed Medicaid program. States such as Montana face an all-or-nothing proposition that is effectively a Hobson's Choice: either accept the new Medicaid regime and suffer devastating consequences to your already-strained budget, or forgo access to many billions of dollars annually which the federal government collects from all taxpayers and then returns only to those states that remain in Medicaid. Neither Obamacare nor any other existing federal statute provides a mechanism for states to withdraw from Medicaid, and no process exists to protect the health and welfare of the poorest residents of states that wish to transition away.

Thus, contrary to the suggestion of the lawyers defending the Florida-led case, **opting out of Medicaid is not a viable option by which states can avoid Obamacare's ruinous effects.** Accordingly, the legislation's impositions on states, including Montana, "pass the point at which, 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 395 U.S. 548, 590 (1937)).

In short, I urge you to seriously consider joining the Florida-led lawsuit. Should you need more information, I have found two websites to be invaluable resources regarding all of the Obamacare lawsuits: [healthcarelawsuits.org](http://healthcarelawsuits.org) and [acalitigationblog.blogspot.com](http://acalitigationblog.blogspot.com). I am also happy to answer any further questions you may have and can be reached at (202) 577-1134 or [ishapiro@cato.org](mailto:ishapiro@cato.org).

Cordially,  
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