APPEAL NOS. 11-11021 & 11-11067

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, by and through Attorney General Pam Bondi, et al.,

Plaintiffs-Appellees / Cross Appellants,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants / Cross Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE THE HERITAGE FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel of record certifies that the individuals named in the briefs already filed in this matter constitute a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party, along with the following additional individuals:

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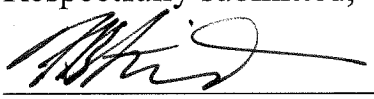
Date: May 11, 2011.

Respectfully submitted,



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CONSENT OF PARTIES AND RULE 29 STATEMENT

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all parties.

Pursuant to Fed. R. App. P. 29(c)(5)(A)-(C), The Heritage Foundation states that no party or parties' counsel authored any part of this brief or paid any costs associated with its preparation or submission, and no person other than *amicus curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief.

Frank B. Strickland

STATEMENT OF THE ISSUES

1. Whether Congress may, pursuant to its limited and enumerated authority "to regulate Commerce . . . among the several States," mandate that individuals who do not want to engage in commerce must enter into specified insurance contracts with third parties.

2. Whether unconstitutional provisions of the Patient Protection and Affordable Care Act are severable from the remainder of the Act.

INTEREST OF AMICUS CURIAE

The Heritage Foundation (Heritage) is a District of Columbia nonpartisan, nonprofit research institute that is recognized as exempt under section 501(c)(3) of the Internal Revenue Code, with the mission "to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."

Soon after its inception in 1973, Heritage's domestic policy scholars began analyzing, and educating policymakers and the public about, health policy issues and proposals for health policy reform. In several publications and statements over the last decade, Heritage health policy experts have opposed on purely policy grounds a government-enforced mandate that individuals or families buy health insurance. In its opening brief in this Court, the United States quotes a 21-year-old lecture by a Heritage policy expert supporting a government-enforced mandate. Because the United States has made an issue of Heritage's policy position and left a potentially misleading impression of its current position, Heritage has a strong interest in explaining to this Court why its health policy experts have concluded that an insurance mandate is unnecessary to expand health coverage significantly and, indeed, is highly undesirable.

Since the creation of its Center for Legal & Judicial Studies (Legal Center) in 2000, Heritage also has played a leading role analyzing the constitutionality and legal implications of various public policy proposals. In December 2009, Heritage's Legal Center published an 18-page Legal Memorandum examining the constitutionality of the "individual mandate" provision in the then-pending health care bill.[1] The Legal Memorandum suggested there were several constitutional means to increase health care coverage, but noted the costly implications of the individual mandate then being debated, and concluded that it would be unconstitutional as drafted. Several Members of Congress relied on Heritage's Legal Memorandum in debates over the constitutionality of the pending bill and entered it into the *Congressional Record*. Since that time, Heritage legal scholars have remained active in commenting on and educating the public about the unconstitutional nature of the individual mandate in the Patient Protection and Affordable Care Act, Pub. L. 111-148 (2010), as amended (PPACA).

[1] Randy Barnett, Nathaniel Stewart, and Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 49 (Dec. 9, 2009).

SUMMARY OF ARGUMENT

In its merits brief before this Court, the United States quotes a 21-year-old statement by a Heritage policy expert supporting the need for a household insurance mandate.[2] If citations to policy papers were subject to the same rules as legal citations, then the Heritage position quoted by the Department of Justice would have a red flag indicating it had been reversed. Not only was the policy statement taken somewhat out of context (the author in 1989 conditioned such a mandate on tax reform and tax savings provided to families to fully or partially offset the cost of the insurance), but Heritage has stopped supporting any insurance mandate.

Heritage policy experts never supported an unqualified mandate like that in the PPACA. Their prior support for a qualified mandate was limited to catastrophic coverage (true insurance that is precisely what the PPACA forbids), coupled with tax relief for all families and other reforms that are conspicuously absent from the PPACA. Since then, a growing body of research has provided a strong basis to conclude that any government insurance mandate is not only unnecessary, but is a bad policy option. Moreover, Heritage's legal scholars have been consistent in explaining that the type of mandate in the PPACA is

[2] *See* Brief for Appellants at 37, *quoting* Stuart M. Butler, *The Heritage Lectures 218: Assuring Affordable Health Care for All Americans*, HERITAGE FOUNDATION LECTURE NO. 218, at 6 (1989).

unconstitutional.[3] In short, The Heritage Foundation opposes the PPACA individual mandate as unwise policy and as unconstitutional legislation.

Although the government quotes lectures from 1989 as if the state of economic and policy research is static, that is never the case. The truth is always much more valuable and interesting. Empirical and other policy research in the past two decades—and relevant legal analysis—confirm what in fact was always the case: (1) health insurance individual mandates will fail and are bad public policy; and (2) the federal government's attempt to force private citizens to purchase health insurance in the PPACA is unconstitutional.

ARGUMENT AND CITATIONS OF AUTHORITY

It is difficult to understand why the United States would, in a brief putatively discussing the constitutionality of the insurance mandate, quote a 21-year-old policy statement which was abandoned and subsequently called a "serious mistake" by the institutional issuers of that statement,[4] and which, far from answering the question presented to this Court, did not in 1989 consider any

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[3] *See*, *e.g.*, Barnett, *supra*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 49; Todd Gaziano and Elizabeth Garvey, *The Expansion of National Power at the Expense of Individual Liberty*, AMERICAN GOVERNMENT, ABC-CLIO (2011).

[4] Nina Owcharenko and Robert E. Moffit, *The Massachusetts Health Plan: Lessons for the States*, HERITAGE FOUNDATION BACKGROUNDER NO. 1953, at 3 (July 18, 2006). *See also* Robert E. Moffit, *Choice and Consequences: Transparent Alternatives to The Individual Insurance Mandate*, 9 HARV. HEALTH POL'Y REV. 223, 226 (2008).

constitutional question. Whatever the government's purpose, Heritage thinks resorting to abandoned and empirically repudiated ideas from another era is a sign of desperation and highlights the impotence of Appellants' current policy argument.

I. Current Policy Research Demonstrates That An Insurance Mandate Carries Steep Costs, Is Unnecessary And Undesirable.

Heritage's health policy scholars relied on economic, behavioral, empirical, and philosophical grounds in rejecting an individual mandate.[5] Because the United States relies on a Heritage's policy lecture from more than two decades ago (and takes it out of context), the Court should benefit from understanding how Heritage's original position differed from the individual mandate in the PPACA, and more importantly, the compelling reasons that led Heritage policy experts to reject any type of individual mandate altogether.

In an effort to promote a stable and more affordable health care market, policymakers have long struggled to deal with competing market forces (including government-created distortions to the market). Two challenges to consumer-based reforms are: (a) adverse-selection effects, in which healthy individuals choose not to purchase insurance coverage, leading to increased premiums for others and

[5] The views of Heritage's policy experts on an insurance mandate were unrelated to any constitutional analysis until recently because they are not trained in the law and Heritage's Legal Center was not created until 2000 to provide complex legal analysis.

causing some of these others to leave the marketplace; and (b) the "free rider" problem, where those who do not purchase coverage can still obtain care at others' expense, including costly emergency room care based on legal obligations on participants in federal programs, *see, e.g.*, Hospital Survey and Construction Act, 42 U.S.C**.** § 291, et seq. (1946); Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1986).

Though extant before then, the idea of a health insurance mandate gained traction in the late 1980s when federal programs helped push health care costs sharply upward. *See, e.g.*, Julie Rovner, *Republicans Spurn Once-Favored Health Mandate*, NATIONAL PUBLIC RADIO, Feb.15, 2010, http://www.npr.org/templates/story/story.php?storyId=123670612 (quoting Mark Pauly on the group of "economists and health policy people" who helped promote the idea in the late 1980s); Randall R. Bovbjerg and William G. Kopit, *Coverage and Care for the Medically Indigent: Public and Private Options*, 19 IND. L. REV. 857, 909 (1986).

Although Heritage never supported a PPACA-style mandate, and has since changed its policy position to oppose all mandates, Heritage health care experts previously (albeit mistakenly) accepted the view that a limited insurance mandate might be necessary to address these market and government-created effects. Their proposals differed in at least two significant ways from the type of mandate

employed in the PPACA: (a) Heritage scholars always conditioned their support for an insurance mandate on fundamental tax reform that would provide direct tax relief to households to offset the cost of the insurance and on other reforms that are also conspicuously absent from the PPACA, and (b) their policy statements also make clear that such a mandate should only require coverage for "catastrophic" injuries or illnesses. Heritage argued that individuals should pay for routine care out of pocket. Not only does the PPACA not embrace these limits, it prohibits catastrophic-only policies, excepting only those programs which meet stringent grandfathering requirements.[6]

Heritage policy experts have been involved in the debate over mandates for many years, but its own research contributed to the growing consensus among market-based economists and health policy experts that such a mandate is not necessary to achieve a high level of coverage and will never produce the mythical "universal" coverage that its advocates desire.[7] In some prior years, Heritage scholars have occasionally used the term "soft mandate," or similar language, but

[6] See Pub. L. No. 111-148, §1302(c)(1) and 26 U.S.C. §5000(A)(f)(1)(D), *as amended by* Pub. L. No. 111-148, §1501(b).

[7] In contrast, the government's reliance on a 21-year-old policy lecture seems to suggest a belief that anyone who was interested in any form of insurance mandate in 1989 should love the PPACA mandate today. That is like arguing that any medical researcher who expressed qualified support for one therapy 21 years ago should naturally favor a broader application of that therapy today, even if his own and other research has disproven the assumptions that supported the original approach.

even a cursory reading of their articles reveals that they were not advocating a PPACA-style mandate, and most often were referring to proposals for automatic enrollment with an opt-out provision or tax credits to induce voluntary participation.[8]

But support for any mandate is unwarranted, even some that may be termed "soft mandates" by others. Recent policy research has increasingly confirmed that a government-enforced mandate to buy health insurance is not only philosophically troubling, but also bad policy for a number of reasons. First, breakthroughs in behavioral economics strengthened the argument for alternative approaches. For example, research on automatic enrollment for retirement savings provided important empirical evidence that a mandate was not necessary to significantly increase participation rates. A study of pension contributions at a major corporation utilizing automatic enrollment with opt-out procedures led to impressive results: automatic enrollment procedures resulted in an increase of participation from 61% to 86%, besting other attempts to increase participation, such as employer-provided financial education or even increasing the employer

[8] For example, in 2003, Stuart Butler testified before the U.S. Senate Special Committee on Aging and supported using a "soft mandate," which could include losing tax benefits, instead of a "hard mandate," which would make the failure to obtain coverage illegal. *In Critical Condition: America's Ailing Health Care System, Hearing Before the Senate Special Comm. on Aging*, 108th Cong. 68-81 (2003) (statement of Stuart M. Butler).

match. Brigitte C. Madrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, Nat'l Bureau of Econ. Research, Working Paper No. 7682 (2000).

Moreover, Madrian and Shea found that automatic enrollment greatly increased the participation of employees who otherwise were less likely to enroll in the pension program, including younger employees. *Id*. at 24. These and other studies led Heritage experts to conclude that "[w]ith modifications, a similar process [to automatic pensions enrollment], including enrollment in a 'default' health plan, could be replicated with health insurance, thus dramatically reducing the adverse selection that the individual mandate is designed to remedy." Robert E. Moffit, *Choice and Consequences: Transparent Alternatives to the Individual Insurance Mandate*, 9 HARV. HEALTH POL'Y REV. 223, 229 (2008).

Second, research on the experience with other mandates, including auto insurance, income tax filing, and draft registration, showed that they fall well short of achieving universal compliance. Accordingly, the individual mandate for health insurance was likely to fail, even if one accepted as desirable the goal of universal coverage. Heritage's Robert Moffit later explained in the *Harvard Health Policy Review* that the mandate's price in lost liberty would be too high, especially if it was no better at achieving universal coverage than other, more consumer-friendly means. "On philosophical grounds, policymakers should retain a bias for personal

liberty." Moffitt, *supra,* 9 HARV. HEALTH POL'Y REV. at 226. Moffit argued instead for practical alternatives based on personal responsibility that would produce high coverage rates and would interfere with the market and individual liberty less.

Third, mandates increase the expense of coverage for many of the uninsured that they are purported to help. For example, the PPACA requires not only the purchase of coverage, but expansive coverage, precluding lower-cost plans. The PPACA also requires insurers to compress the ratio of ratings between younger and older enrollees. This leads to higher premiums, particularly for the younger and healthier employees—the very people that mandates purport to be forcing into the insurance pool. *See* Robert E. Moffitt, *Obamacare and the Individual Mandate: Violating Personal Liberty and Federalism*, HERITAGE FOUNDATION WEBMEMO NO. 3103 (Jan. 18, 2011). And other major expense drivers for the cost of the provision of health care, like the widespread practice of defensive medicine (i.e., over-testing and over-treatment) in response to large non-economic damage awards in medical malpractice suits, are completely unaddressed by a mandate, or effectively, by anything else in PPACA.[9]

[9] *See, e.g.,* Bill G. Batchelder et al., *Tort Reform in the States: Protecting Consumers and Enhancing Economic Growth*, HERITAGE FOUNDATION LECTURE NO. 1152 (Sept. 18, 2009).

Fourth, these increased costs for insurance may worsen the adverse selection problem. Because insurance carriers are required under PPACA to provide coverage for individuals with pre-existing conditions, and because the penalty on individuals for failing to purchase coverage is relatively light compared to the increased premium costs, individuals will "have every incentive to pay the light penalty and sign up for insurance if they get sick and drop out of coverage when they get well. This will induce a severe case of adverse selection, as the less stable pools are disproportionately populated with older and sicker enrollees, resulting in a deadly cost spiral." *Id.* In an attempt to solve a comparatively mild adverse selection problem in the current market, a mandate, when coupled with other regulations that raise costs, such as those in the PPACA, actually increases the adverse selection problem to the point that it may threaten the viability of the health care market.

Fifth, mandates coupled with minimum benefits requirements, which restrict the availability of levels of coverage or types of insurance (for example, some high-deductible coverage or limited benefit plans) greatly reduce consumer choice. Some of the plans that are or likely are restricted under PPACA are among the most cost-effective and desirable for the uninsured. Consumer choice is an element of individual liberty to determine one's own health care plan. Mandates like the

one in PPACA limit choice, and do so in ways that are counterproductive to the goal of providing optimal insurance to consumers at competitive prices.

Based on this and other research, Heritage policy experts have actively challenged the notion that an individual insurance mandate is necessary to solve the adverse selection or free-rider problem, and have instead worked to show better ways to do so. Moreover, the policy research and analysis discussed in the preceding paragraphs strongly suggests that the mandate in the PPACA is not even conducive to those ends. Thus, while Heritage analysts once supported a limited and qualified insurance mandate, at no time did they advocate a PPACA-style mandate. More importantly, mandates are not necessary to provide broad-based insurance coverage; this goal can be met more effectively through other means which are market-based and do not infringe individual liberty. Thus, mandates—particularly inflexible mandates like the one found in the PPACA—are bad public policy.

II. Heritage Has Consistently Explained That A PPACA-Style Mandate Is Unconstitutional.

Although Heritage's first serious legal analysis of the PPACA was not published until late 2009, its view on the limits of Congress's Commerce power has been known for years. Heritage's Legal Center has consistently articulated the position that the Commerce Clause does not transform a national government of

limited and enumerated powers into one of limitless authority.[10] Moreover, Heritage legal fellows have applied this principle consistently, expressing constitutional doubts about provisions in several bills supported on policy grounds by many conservative constituencies.[11]

Soon after congressional sponsors articulated the plan for what became the insurance mandate in the PPACA—one in which Congress simply mandated individuals to purchase an insurance policy from third parties at inflated prices based on claims of power under article I, section 8 power to regulate interstate commerce and, some argue, its authority to levy certain taxes—Heritage legal

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[10] *See*, *e.g.*, Todd Gaziano and Elizabeth Garvey, *The Expansion of National Power at the Expense of Individual Liberty*, AMERICAN GOVERNMENT, ABC-CLIO (2011); Brian Walsh and Benjamin Keane, *Overcriminalization and the Constitution*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 64 (April 13, 2011) (raising constitutional concerns about various federal crime proposals); Hans A. von Spakovsky, *Congress Must Now Address Civil Justice Reform to Impact Health Care*, HEALTH REFORM REPORT (Jan. 20, 2011) (noting that Congress cannot establish medical malpractice caps directly even though that is a desirable state tort reform goal for providers in federal healthcare programs); Andrew Grossman, *The Enumerated Powers Act: A First Step Toward Constitutional Government*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 41 (June 23, 2009); Brian Walsh and Andrew Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 21 (Feb. 14, 2008) (voicing constitutional doubt about federal anti-prostitution proposals); Erica Little and Brian Walsh, *The Gang Abatement and Prevention Act: A Counterproductive and Unconstitutional Intrusion into State and Local Responsibilities*, HERITAGE FOUNDATION WEBMEMO NO.1619 (Sept. 17, 2007) (raising constitutional doubt about certain federal proposals to target gang violence).

[11] The papers discussed in the preceding footnote with parenthetical notes are good examples.

scholars expressed the unequivocal position that Congress had no power to impose such a mandate. In short, Heritage scholars explained that the mandate would be unconstitutional.

Heritage's first formal legal analysis of the individual mandate in the PPACA was an 18-page Legal Memorandum published in December 2009, and its title expresses its simple conclusion. *See* Randy Barnett, Nathaniel Stewart, and Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 49 (Dec. 9, 2009). The main purpose of this brief is not to re-argue the merits of the issue before this Court—that job is being ably performed by the States and the NFIB—but to refute the notion that Heritage or other faithful constitutional scholars could defend an individual mandate like that in the PPACA.

Unlike some in Congress who advocated passing the bill and then discovering what it contained, the authors of the Heritage Legal Memorandum carefully studied the bill's provisions and relevant legal authorities. The Heritage Legal Memorandum conceded that certain health care proposals which are abysmal public policies and which would do tremendous damage to core societal interests—most notably, a compulsory, single-payer system—may nonetheless pass constitutional muster in the courts. *Id*. at 12 ("[T]he courts may well allow Congress to use its taxing and spending powers to craft a general income tax

sufficient to pay for health care insurance for more Americans."). Accordingly, *how* the federal government implemented an individual mandate was integral to the authors' legal analysis.[12]

The principle that "the means matter" not only respects the Constitution's actual text (it is not merely a font of aspirations), but it is one endorsed time-and-again by the Supreme Court: Just because government may achieve a policy objective utilizing one means authorized by one enumerated power does not mean that it can accomplish the same object using any means. *See Printz v. United States*, 521 U.S. 898 (1997) (acknowledging the potential authority to condition funds on state and local officials performing specified functions, but rejecting congressional attempts to commandeer or mandate the same compliance).

Co-authored by prominent outside legal scholars and the Director of Heritage's Legal Center, the Legal Memorandum briefly noted the bad policy implications of the individual mandate. Its authors then concluded after carefully reviewing the constitutional text and court precedents that this unprecedented mandate on citizens (who wish to do nothing) to engage in a particular commercial transaction would bend the Commerce Clause to the point of breaking:

[12] The Legal Memorandum correctly noted that "[s]hould it adopt any of these constitutional taxing and spending measures, Congress would have to incur the political costs arising from increasing the income tax.…" *Id.* at 12.

> To uphold the insurance purchase mandate, the Supreme Court would have to concede that the Commerce Clause has no limits, a proposition that it has never affirmed, that it rejected in *Lopez* and *Morrison*, and from which it did not retreat in *Raich*. Although Congress may possibly regulate the operations of health care or health insurance companies directly, given that they are economic activities with a substantial effect on interstate commerce, it may not regulate the individual's decision not to purchase a service or enter into a contract. If Congress can mandate this, then it can mandate anything.

Id. at Executive Summary 2.

During the debate over the PPACA, Heritage's Legal Memorandum was entered into the Congressional Record twice in support of constitutional points of order raised by Senators Orrin Hatch (R-UT) and John Ensign (R-NV), 111 CONG. REC. S13015 (daily ed. Dec. 11, 2009) (statement of Sen. Orrin Hatch); 111 CONG. REC. S13723 (daily ed. Dec. 22, 2009) (statement of Sen. John Ensign), and was prominently discussed in support of Rep. Steve Scalise's amendment to repeal the individual mandate, 111 CONG. REC. D311 (daily ed. Mar. 20, 2010). Heritage's legal analysis was also reprinted or cited in leading national newspapers and in numerous other prominent, national publications.[13]

[13] The Wall Street Journal republished the entire Legal Memorandum on Dec. 23, 2009. *See also* Ben Pershing, *Some foes of health-care bill hope courts will stop legislation*, WASH. POST, Jan. 3, 2010; Randy Barnett, *Outlook: Is health-care reform unconstitutional?* WASH. POST, Mar. 22, 2010 (quoting portions of the Legal Memorandum); *No mandate for government health care*, WASH. TIMES, Dec.18, 2009.

Given the entry of its Legal Memorandum into the *Congressional Record* during the debates over the bill, and prominent citations in the popular press, it is reasonable to infer that the United States and others should be well aware of Heritage's position objecting to the specific insurance mandate in the PPACA—as both bad policy and as an unconstitutional exercise of government power. Yet the government's selective quote from a 21-year-old lecture may nevertheless lead to the incorrect inference regarding Heritage's current position and the state of policy research generally. Whatever else, it seems like a sign of desperation from a government with little policy or legal cover.

CONCLUSION

Heritage's empirical and other health policy research and its uniform constitutional analysis are mutually reinforcing and point in the same direction. The policy literature is clear: individual mandates are not necessary to provide broad-based coverage, and the individual mandate in the PPACA is unsound policy. It also violates the U.S. Constitution. For the reasons set forth above, Heritage respectfully requests this Court to take notice of its actual position opposing individual mandates—a position quite different from the one Appellants quote in their opening brief. Consistent with Heritage's actual views, the court should affirm the judgment of the district court in appeal No. 11-11021.

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief in typed in 14 point Times New Roman and complies with the type-volume limitation of the Rule, containing 4,041 words, excluding those sections of the brief that do not count toward that limitation, in accordance with Rule 32(a)(7)(B)(iii), as determined by the word processing system used to prepare the brief.

This 11th day of May, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the following counsel with a copy of the foregoing **BRIEF OF AMICUS CURIAE THE HERITAGE FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES** by electronic mail (as agreed by the parties) and U.S. mail as follows:

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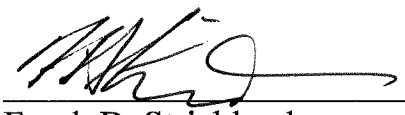
I further certify that on this same date, the foregoing **BRIEF OF AMICUS CURIAE THE HERITAGE FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES** was electronically uploaded to Eleventh Circuit Court of Appeals' Internet website at www.ca11.uscourts.gov.

This 11th day of May, 2011.



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