No. 11-398

IN THE
Supreme Court of the United States

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 FORMER U.S. DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

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QUESTION PRESENTED

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

BRIEF OF FORMER U.S. DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

INTEREST OF *AMICI CURIAE*[1]

Amici are former officials of the U.S. Department of Justice who believe that the minimum coverage provision of the Patient Protection and Affordable Care Act is an unprecedented and unconstitutional expansion of federal power under the Commerce Clause. Based on their decades of combined experience representing the United States, *amici* have concluded that the provision has no foundation in the text, history, or purpose of the Commerce Clause, and impermissibly intrudes on the right of individuals to decide for themselves whether to enter into a commercial transaction. *Amici* are:

John Ashcroft, Attorney General of the United States, 2001-2005.

William P. Barr, Attorney General of the United States, 1991-1993; Deputy Attorney General, 1990-1991; Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, 1989-1990.

Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel, U.S. Department of

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Justice, 1992-1993; Principal Deputy Assistant Attorney General, 1990-1992.

Edwin Meese III, Attorney General of the United States, 1985-1988.

Michael B. Mukasey, Attorney General of the United States, 2007-2009.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that the minimum coverage provision exceeds Congress's power under the Commerce Clause. The Commerce Clause gives Congress the authority to "*regulate* Commerce," U.S. Const. art. I, § 8, cl. 3 (emphasis added), not to compel Americans to engage in commercial transactions against their will.

At the time of the Framing, the most widely accepted definition of the verb "to regulate" was to formulate and adjust the rules governing *existing* entities and activities. This definition stood in sharp contrast to the definitions of "compel" and "mandate." Indeed, the Constitution itself uses the terms "regulate" and "compel" in a manner that reinforces the distinction between the two concepts: "Regulations" govern entities and activities already in existence, but they cannot "compel" something into existence or mandate an activity that otherwise would not occur. If the power to regulate encompassed the power to compel, a number of constitutional provisions would be superfluous.

The use of "regulate" in other Framing-era materials confirms this understanding of the term. Whether appearing in the Framers' correspondence, the records of the state ratification debates, the writings of Blackstone, or the pages of the most popular eighteenth-century newspaper, the word "regulate"

consistently referred to making or adjusting rules for an activity that was already taking place. Federalists and anti-Federalists alike—as well as this Court itself—used the word to that effect, and would all have recognized the incongruity of "regulating" commerce in health insurance by forcing unwilling Americans to purchase insurance.

This reading of the Commerce Clause is consistent with the provision's underlying history and purpose. The Commerce Clause was intended to remove barriers to *existing* trade among the States—not to authorize Congress to mandate the involuntary consumption of goods and services. In fact, until now, Congress has *never* attempted to force commerce on unwilling Americans. Nor has this Court ever suggested that the commerce power extends so far. A decision upholding this unprecedented expansion of Congress's authority under the Commerce Clause would disregard the text, history, and purpose of that provision, and eliminate any meaningful constraints on the reach of federal power.

ARGUMENT

The minimum coverage provision of the Patient Protection and Affordable Care Act requires all "applicable individual[s]," defined to include nearly all U.S. taxpayers, to purchase and maintain "minimum essential [health-insurance] coverage." 26 U.S.C. § 5000A(a) (2010). The provision further requires any "taxpayer" who "fails to meet the requirement" to pay a "penalty" known as a "[s]hared responsibility payment." *Id.* § 5000A(b)–(c). Although the minimum coverage provision allows for certain exemptions, there is no exemption for individuals who desire not to purchase health-insurance coverage for non-religious reasons. *Id.* § 5000A(d)–(e).

There is no question that, by requiring certain Americans to purchase health-insurance coverage against their will, the minimum coverage provision does more than merely regulate *preexisting* health-insurance transactions. Indeed, in enacting the minimum coverage provision, Congress specifically found that "[t]he requirement . . . will add millions of *new* consumers to the health insurance market." 42 U.S.C. § 18091(a)(2)(C) (emphasis added). And the United States concedes that the Act compels Americans into the health-insurance market who would prefer to "go without insurance based on what they think is a 'rational' choice." Pet. Br. 44; *see also id.* (noting that there are "uninsured non-elderly individuals [who] say they have 'no need for insurance'").

The question for this Court is whether this compulsion of *new* commerce falls within Congress's enumerated power to "regulate Commerce." U.S. Const. art. I, § 8, cl. 3. The text, history, and purpose of the Commerce Clause make clear that Congress lacks such far-reaching authority.

I. THE PLAIN LANGUAGE OF THE COMMERCE CLAUSE DOES NOT AFFORD CONGRESS THE POWER TO COMPEL COMMERCE.

A wide range of historical sources—including dictionaries, newspapers, and this Court's early opinions—make clear that, at the time the Constitution was ratified, the Framers and the public understood that Congress's power to "regulate" commerce authorized legislation governing existing commercial transactions, but did not extend to congressional measures compelling Americans to engage in commerce against their will.

A. At The Time Of The Framing, The Power To "Regulate" Was Not Ordinarily Defined To Encompass The Power To "Compel."

The Commerce Clause grants Congress the power to "*regulate* Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3 (emphasis added). As with any constitutional analysis, this Court must begin with the text of this provision. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("In assessing the breadth of [a constitutional] power, we begin with its text."). "In interpreting this text, [the Court is] guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (second alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

As understood at the time of the Framing, the power to "regulate" commerce did not encompass the authority to "compel" or "mandate" commerce that was not already taking place. Samuel Johnson's dictionary principally defined the verb "[t]o regulate" as "[t]o adjust by rule or method," and secondarily as "[t]o direct." 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). The verb "[t]o direct," in turn, had multiple meanings, but in the specific context of regulation (the third usage listed) it was similarly defined as "to adjust." 1 *id.*[2] "To adjust" was defined, in the context of regulation (the

[2] The fifth and final usage of the verb "to direct" is defined as "[t]o order; to command," but there is a special notation explaining that, when used in this context, "to *direct* is a softer term than to *command*." 1 *id.*

first usage listed), as "to put in order; to settle in the right form." 1 *id.*

Accordingly, the plain language of the Commerce Clause empowers Congress to "adjust" commerce "by rule or method," "put[ting] [commerce] in order" by "settl[ing] [it] in the right form." A Framing-era reader would have found it nonsensical to speak about "regulation" of commerce that was not already taking place. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001) ("The power to regulate is, in essence, the power to say, 'if you want to do something, here is how you must do it.'").

By contrast, the Framing-era definitions of "to compel" and "to mandate" differed sharply from the meaning of "to regulate." "To compel" meant "[t]o force to some act; to oblige; to constrain; to necessitate; to urge irresistibly." 1 Johnson, *supra*. And "to mandate" meant to "command." 2 *id.* Thus, unlike with "regulate," it would have made perfect sense to "compel" or "mandate" a person to engage in an activity that the person otherwise would not have undertaken. A "regulator" of baseball, for example, might decide how many strikes comprise an out, or how far the pitcher must stand from home plate, but he would not force children to play.

B. The Constitution Distinguishes Between "Regulate" And "Compel."

The Constitution itself uses the terms "regulate" and "compel" in distinct manners illustrative of their differing meanings: "Regulations" prescribe rules to govern something that already exists or an activity that is already taking place, whereas "compulsion" creates something that otherwise would not exist or results in an activity that otherwise would not occur.

Outside the Commerce Clause, the body of the Constitution uses the verb "regulate" one other time, giving Congress the power "To coin Money, [and] regulate the Value thereof." U.S. Const. art. I, § 8, cl. 5. As that provision makes clear, Congress can only "regulate" the value of money after the money has been "coined"—*i.e.*, after it has come into existence. *See* Andrew Jackson, *Bank Veto* (July 10, 1832), *in* The Addresses and Messages of the Presidents of the States, from Washington to Harrison 418, 427 (1841) ("Congress have established a mint to coin money and passed laws to regulate the value thereof."). In fact, if the power to "regulate" money encompassed the authority to create money in the first place, the separate power to "coin" money would be rendered mere surplusage. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("[I]t cannot be presumed that any clause in the constitution is intended to be without effect.").

The Constitution's use of the related terms "regulated" and "regulation" confirms that Congress may only regulate activity that is already taking place. For example, Congress has the power "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. But that power is separate and distinct from the power "To raise and support Armies" and the power "To provide and maintain a Navy." *Id.* § 8, cls. 12–13. If the power to regulate the land and naval forces encompassed the power to create those forces in the first instance, those separate provisions would be superfluous.

By comparison, the word "compel" also appears once each in the body of the Constitution and in the Bill of Rights. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House . . . may be authorized to compel the Attend-

ance of absent Members . . . ."); *id.* amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."). In both instances, the word describes forcing someone to take action he otherwise would not take, whether attending a session of Congress or testifying against himself.

The drafters of the Constitution knew how to "compel" something into existence, they knew how to "regulate" something already in existence, and they recognized the important distinction between the two. As this Court has emphasized, "text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) (alteration in original) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). With respect to commerce, the Framers chose to give Congress the power only to regulate—not the power to compel. "A pure regulation of commerce, then, is a set of rules that tells people, 'If you want to trade or exchange with others, here is how you must go about it.'" Barnett, *supra*, 68 U. Chi. L. Rev. at 139.

C. Contemporaneous Usage Confirms The Distinction Between "Regulation" And "Compulsion."

"[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824). Framing-era usage of the term "regulate"—both in discussing the scope of the Commerce Clause and in other contexts—compels the conclusion that, as understood by the Framers and their contemporaries, it was only possible to regulate activity that was already taking place.

Thomas Jefferson perhaps put it best when arguing against the formation of a national bank in 1791:

> To erect a bank, and to regulate commerce, are very different acts. He who erects a bank, *creates* a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons *regulates* commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling.

Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), *in* 6 The Works of Thomas Jefferson 197, 198–99 (Paul Leicester Ford ed., 1904) (emphasis added).

A decade later, Jefferson reiterated the point, writing that "the power to regulate commerce does not give a power to build piers, wharves, open ports, clear the beds of rivers, dig canals, build warehouses, build manufacturing machines, set up manufactories, [or] cultivate the earth." Thomas Jefferson, *To*

The Secretary of the Treasury (Oct. 13, 1802), *in* 9 The Works of Thomas Jefferson 398, 399. Indeed, the definition of "regulate" appears to be a rare area of agreement between Hamilton and Jefferson. *See The Federalist No. 78*, at 430 (Alexander Hamilton) (E.H. Scott ed., 1898) ("Periodical appointments, *however regulated, or by whomsoever made*, would, in some way or other, be fatal to their necessary independence.") (emphasis added). Even anti-federalists agreed. *See Federal Farmer No. 16* (Jan. 20, 1788), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s32.html ("The people by adopting the federal constitution, give congress general powers to *institute* a distinct and new judiciary, new courts, *and to regulate* all proceedings in them . . . .") (emphases added).

Blackstone's *Commentaries* are also replete with passages in which the term "regulate" refers to directing the course of activity that is already taking place, as opposed to compelling activity that would not otherwise occur. *See*, *e.g.*, 1 William Blackstone, *Commentaries* *156 (explaining that Parliament "can regulate or new model the succession to the crown; as was done in the reign of Henry VIII and William III"); *id.* at *120 ("[A]bsolute rights . . . were vested in [individuals] by the immutable laws of nature; but . . . the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals."); *see also* 2 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* app. at 21 (1803) ("[L]aws to regulate, must, according to the true interpretation of that word, impose rules, or regulations, not before imposed . . . .").

Analysis of the state ratification debates underscores this understanding of the power to "regulate." As one scholar concludes, "the term 'regulate' is used with stunning uniformity" in the state ratification debates. Barnett, *supra*, 68 U. Chi. L. Rev. at 142.

> The term "regulate" appears fifty-five times in all the records we have of the deliberations in the states. In every case where the context makes the meaning clear, the term connotes "subject to a rule" or "make regular" in the sense that "if you want to do something, here is how you should do it."

Id. (footnote omitted). Whether the debates used the term in the context of commerce (5 times), elections (18), jury trials (6), courts (5), trade (2), militias (2), contracts (1), taxes (1), treaties (1), or the deliberations of the Senate (1), the term "regulate" consistently referred to making or adjusting rules for something already in existence. *Id.* at 142 & n.197; *see also*, *e.g.*, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 137 (Jonathan Elliot ed., J.B. Lippincott Co. 1891) (statement of Patrick Henry) ("There are certain maxims by which every wise and enlightened people will regulate their conduct.").

Similarly, a thorough analysis of the *Pennsylvania Gazette* from 1728 and 1800—in which the words "regulate" and "regulation" appear 803 times—confirms that, to the eighteenth-century literate public, "the paradigm meaning of the term 'to regulate' was . . . 'to make regular.'" Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 863–65 (2003). In other words, "a pure regulation was a rule that says, 'If you

want to do X, here is how you must do it.'" *Id.* at 863.[3]

D. This Court's Early Decisions Use "Regulate" Only In Connection With Activity That Is Already Taking Place.

This Court's early case law—both in the Commerce Clause setting and elsewhere—provides further evidence that the power to "regulate" was understood at the Framing to mean only the power to prescribe rules for activity that was already taking place.

In *Gibbons v. Ogden*, for example, Chief Justice Marshall, writing for the Court, explained that "the power to regulate" is the power "to prescribe the rule by which commerce is to be governed." 22 U.S. (9 Wheat.) at 196. Justice Johnson's concurrence further elaborated on this definition, explaining that "[t]he 'power to regulate commerce,' here meant to be granted, was that power to regulate commerce which previously existed in the States[,] . . . [and] amounts to nothing more than a power to limit and restrain it

[3] As Professor Barnett explains, "The *Pennsylvania Gazette*, which from 1729 to 1766 was published by Benjamin Franklin, 'in its essential character, although not in its unusual longevity, . . . was representative of the great majority of the newspapers of the provincial period.'" *Id.* at 857 (alteration in original; footnotes omitted) (citing 2 Clarence S. Brigham, *History and Bibliography of American Newspapers, 1690–1820*, at 933–34 (1947); and quoting Charles E. Clark & Charles Wetherell, *The Measure of Maturity: The* Pennsylvania Gazette*, 1728–1765*, 46 Wm. & Mary Q. 279, 280 (1989)). Thus, "[w]ere the term ['regulate'] to have had a readily understood broad meaning, one would expect it to have made its appearance in this typical newspaper whose publication spanned the colonial and post-colonial period." *Id.*

at pleasure." *Id.* at 227 (Johnson, J., concurring). Twenty-six years later, this Court reaffirmed that interpretation of "regulation" in the Commerce Clause context, explaining that "the power to regulate commerce includes the regulation of navigation, . . . [which] is the power to prescribe rules in conformity with which navigation must be carried on." *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 315–16 (1852). Under each of these definitions, "regulation" refers to rules governing preexisting commerce, not the compulsion of new commercial activities.

This Court's early decisions used "regulate" to similar effect outside the Commerce Clause context. The Court stated, for example, that "[t]he right to regulate contracts" comprised only the right to "prescribe rules by which they shall be evidenced, [and] to prohibit such as may be deemed mischievous." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 347 (1827) (Marshall, C.J.). In fact, on multiple occasions, this Court explicitly differentiated between "regulating" something already in existence and creating or establishing something new. In interpreting a town charter, this Court stated that "[t]he power conferred is to make (meaning to establish) *and* regulate ferries." *Minturn v. Larue*, 64 U.S. (23 How.) 435, 438 (1860) (emphasis added). The Court also referred to Congress's power to "create *and* regulate" certain rights in *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 296 (1825) (emphasis added). And in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court analyzed a federal law granting the local government of Washington, D.C., the power "to regulate *and* establish markets" within the city, "to establish *and* regulate fire wards and fire companies, [and] to regulate *and* establish the size of bricks that

are to be made and used in the City." *Id.* at 272–73 (emphases added); *see also id*. at 275 (referring to the "power to establish *and* regulate the inspection of flour, tobacco, and salted provisions") (emphasis added).

* * *

The meaning of the term "regulate" in the Commerce Clause is plain and unambiguous. Framing-era dictionaries, other provisions of the Constitution, contemporary writings, and this Court's precedent all make clear that the power to "regulate" authorizes Congress to establish rules governing existing activity but does not extend to requiring persons to undertake activity in which they would not otherwise engage. The minimum coverage provision is not a "regulation" of commerce because it compels Americans who do not want to participate in the health-insurance market to purchase insurance against their will. The Commerce Clause does not countenance such congressional intrusion on individual liberties.

II. THE PURPOSE OF THE COMMERCE CLAUSE WAS TO REMOVE TRADE BARRIERS AMONG THE STATES, NOT TO EMPOWER CONGRESS TO SOLVE ALL NATIONAL PROBLEMS.

Consistent with the plain meaning of the Commerce Clause, the Framers' purpose in granting Congress the authority to "regulate Commerce . . . among the several States" was to authorize Congress to enact rules governing existing interstate commerce. In fact, the Framers had one specific, overriding purpose in mind when they drafted the Commerce Clause: removing the barriers to interstate trade that had "fettered, interrupted, and narrowed"

the flow of commerce under the Articles of Confederation. *The Federalist No. 11*, at 65 (Alexander Hamilton) (E.H. Scott ed., 1898). Contrary to the views of some lower courts, the Commerce Clause was not meant to be a grant of sweeping congressional authority "to forge national solutions to national problems" through any and all legislative means. *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir.), *petition for cert. filed*, No. 11-679 (2011); *see also id.* (upholding the minimum coverage provision).

A. Framing-Era Documents Recognize The Narrow Purpose Of The Commerce Clause.

Among the many "defect[s] of the former confederation" that the Constitution aimed to solve was "the regulation of the commerce between the several states, and the inconveniences resulting from it"—especially "the bur[d]ens which might be imposed by some of the states, on others, whose exports and imports must necessarily pass through them." 1 Tucker, *supra*, app. at 249. New York's delegate to the Constitutional Convention complained about "[t]he languishing situation of our commerce [that] has . . . been attributed to the impotence of Congress" under the Articles of Confederation. 2 *The Debates in the Several State Conventions*, *supra*, at 218 (statement of John Lansing). And, Alexander Hamilton explained that "[t]he want of a power to regulate commerce" was one of the "defects" that rendered the Articles of Confederation altogether "unfit for the administration of the affairs of the Union." *The Federalist No. 22*, at 117 (Alexander Hamilton) (E.H. Scott ed., 1898).

The Commerce Clause was designed to correct this imbalance of power by shifting the authority to

regulate existing interstate commerce from the States to the federal government—thereby eliminating the ability of individual States to hinder trade across their borders. As this Court recently described, this "aspect of the Commerce Clause" was particularly important to "the 'father of the Constitution,' James Madison." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994). "In one of his letters, Madison wrote that the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.'" *Id.* (quoting 3 *The Records of the Federal Convention of 1787*, at 478 (Max Farrand ed., 1911)). In Madison's words, "[a] very material object of this power [granted by the Commerce Clause] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter." *The Federalist No. 42*, at 235 (James Madison) (E.H. Scott ed., 1898). Madison therefore emphasized that the Commerce Clause would transfer, from the States to Congress, the power "to regulate *the* trade between State and State"—using the definite article to confirm that such commerce must preexist regulation. *Id*. (emphasis added).

The Framers anticipated that the Commerce Clause would foster growth in commerce, but that such growth would be the result of eliminating dissonant state regulation—not requiring Americans to engage in commerce against their will. Alexander Hamilton, for example, predicted that "[a]n unrestrained intercourse between the States themselves," made possible by the Commerce Clause, "will ad-

vance the trade of each, by an interchange of their respective productions." *The Federalist No. 11*, *supra*, at 65. The dramatic growth in trade that Hamilton foresaw, in which "[t]he veins of commerce in every part will be replenished, and will acquire additional motion and vigor," was, in his view, the inevitable byproduct of "a free circulation of the commodities of every part." *Id.* "[T]here is no evidence," however, "that the framers or ratifiers of the Constitution ever envisioned that the power to regulate interstate commerce could be used to force people to engage in commerce, interstate or otherwise." Ilya Somin, *Federalism & Separation of Powers: The Individual Health Insurance Mandate and the Constitutional Text*, Engage, Mar. 2010, at 49, 49. Indeed, "[i]f they had attributed such a meaning to the Clause, the Constitution would probably never have been ratified, since many state governments would have feared that Congress could force their residents to purchase the products of other states, thus creating monopolies over important markets." *Id.*

B. This Court's Early Decisions Confirm The Narrow Purpose Of The Commerce Clause.

This Court's early decisions similarly recognize that the overriding purpose of the Commerce Clause—indeed, one of the principal justifications for the Constitution as a whole—was eliminating barriers to existing trade among the States. "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons*, 22 U.S. (9 Wheat.) at 231 (Johnson, J., concurring). As Justice Johnson emphasized, the Framers' concerns about the facili-

tation of interstate commerce were the direct outgrowth of the failed regime that preceded it:

> For a century the States had submitted, with murmurs, to the commercial restrictions imposed by [England]; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle . . . began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.
>
> This was the immediate cause, that led to the forming of a convention.

Id. at 224 (Johnson, J., concurring); *see also Cooley*, 53 U.S. (12 How.) at 316–17 (discussing "the general subject of commerce with foreign nations and among the several states, over which it was one main object of the Constitution to create a national control"); *id.* ("Conflicts between the laws of neighboring States, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by State laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from State interference, which those who formed the Constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly.").

The power to establish and adjust the rules of interstate commerce—ensuring that trade flows freely among the States and creating a regulatory environment that allows voluntary commercial transac-

tions to flourish—is far different from compelling Americans to purchase health insurance against their will. The historical record makes clear that neither the Framers themselves—nor the public who ratified the Constitution—ever intended the Commerce Clause to be used for such a radical purpose.

III. THIS COURT HAS NEVER INTERPRETED THE COMMERCE CLAUSE AS AUTHORIZING CONGRESS TO COMPEL INVOLUNTARY COMMERCE.

This Court has always adhered to the original understanding of the term "regulate" in the Commerce Clause and has never suggested that Congress may invoke that provision to compel involuntary commercial activity. The limitless interpretation of the Commerce Clause urged by the United States finds no support in this Court's precedent.

A. Even Under This Court's "Substantial Effects" Test, Congress May Regulate Only Preexisting Economic Activity.

Over the past century, this Court has developed a somewhat flexible approach to interpreting the phrase "Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Even under the Court's modern Commerce Clause jurisprudence, however, allowing Congress to "regulate" the health-insurance market by compelling Americans to purchase health insurance against their will would represent an unprecedented expansion of federal power.

In the midst of the New Deal, this Court's Commerce Clause jurisprudence began to focus on whether the statute in question regulates "'economic activity [that] substantially affects interstate commerce,'" and no longer required that the measure

regulate interstate commerce directly. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (quoting *United States v. Morrison*, 529 U.S. 598, 610 (2000)); *see also United States v. Darby*, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states."). The principal question for this Court became whether the congressional enactment at issue involved regulation of "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby*, 312 U.S. at 118; *see also Raich*, 545 U.S. at 17 ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").[4]

Under this approach, the Court has affirmed Congress's power to regulate economic activities through measures that do not directly regulate inter-

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[4] When the Court first announced the "substantial effects" test in *Darby*, it cited the analysis of the Necessary and Proper Clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). *See Darby*, 312 U.S. at 118–19. Various commentators have therefore noted that "the substantial effects doctrine is not a pure application of the Commerce Clause, but is actually an assertion of the Necessary and Proper Clause to reach activity that is neither interstate nor commerce." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 604 (2010); *see also Raich*, 545 U.S. at 34 (Scalia, J., concurring in judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . derives from the Necessary and Proper Clause.").

state commerce. *See*, *e.g.*, *Raich*, 545 U.S. at 17; *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942); *Darby*, 312 U.S. at 114; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). And it has struck down statutes attempting to regulate non-economic activities that do not have a substantial effect on interstate commerce. *See Morrison*, 529 U.S. at 613; *United States v. Lopez*, 514 U.S. 549, 567 (1995). But the Court has never expanded the meaning of the word "regulate." *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (the Commerce Clause provides "congressional power to *regulate transactions* of a commercial nature") (emphasis added).

In all of these "substantial effects" cases, the object of Congress's enactment has been a preexisting activity in which an individual has freely engaged. *See Morrison*, 529 U.S. at 601–02 (perpetrating violence against women); *Lopez*, 514 U.S. at 551 (possessing a gun); *McClung*, 379 U.S. at 296 (operating a restaurant); *Heart of Atlanta Motel*, 379 U.S. at 243 (operating a hotel); *Darby*, 312 U.S. at 111 (manufacturing lumber); *NLRB*, 301 U.S. at 26 (manufacturing steel). "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity"—namely, the growing of wheat. *Lopez*, 514 U.S. at 560; *see also Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010) ("Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some sort of action, transac-

tion, or deed placed in motion by an individual or legal entity.").[5]

The opinions upholding the application of the Controlled Substances Act in *Raich* are consistent with this long line of precedent. That case also involved voluntary activity—growing and consuming marijuana. *Raich*, 545 U.S. at 7. And, as Justice Scalia explained in his concurrence, there are "two general circumstances" in which "the regulation of intrastate *activities* may be necessary to and proper for the regulation of interstate commerce." *Id.* at 35 (emphasis added). Both circumstances presuppose the existence of some *activity* to be regulated: either (1) "activities ha[ving] a substantial effect on interstate commerce" or (2) "an intrastate activity . . . essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce." *Id.* at 35, 37. Neither Justice Scalia nor any other Member of the Court in *Raich* even hinted that Con-

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[5] In the D.C. Circuit's decision upholding the minimum coverage provision, the court suggested that "*Wickard* . . . comes very close to authorizing a mandate similar to" the minimum coverage provision because the Agricultural Adjustment Act "'force[d] some farmers into the market to buy what they could provide for themselves.'" *Seven-Sky*, 661 F.3d at 17 (second alteration in original) (quoting *Wickard*, 317 U.S. at 129). But the Agricultural Adjustment Act did not require any farmer to purchase wheat (or any other crop) on the open market; a farmer who had reached his statutorily prescribed limit on wheat production could simply decide not to purchase additional wheat without penalty. In contrast, an uninsured person who decides not to purchase health insurance is subject to a penalty under the Patient Protection and Affordable Care Act and is therefore compelled to purchase insurance to avoid that penalty.

gress has the power to "regulate" commerce by compelling *new* economic activity.

B. Authorizing Congress To Compel Involuntary Commercial Activity Would Eliminate Virtually All Remaining Limitations On The Commerce Power.

Upholding the minimum coverage provision would require this Court to break new constitutional ground by concluding for the first time that Congress has the power to compel involuntary economic activity under the guise of "regulating" commerce. The result would be another drastic expansion of Congress's authority under the Commerce Clause—at the expense of individual freedom and state sovereignty.

As the Congressional Budget Office recognized during prior legislative health-care debates, "[t]he 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). In an attempt to fit such unprecedented legislation within this Court's existing Commerce Clause jurisprudence, Congress purported to make a "finding" that the minimum coverage provision "regulates activity that is commercial and economic in nature." 42 U.S.C. § 18091(a)(2)(A). According to Congress, the "activity" in question is "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased," including a "decision to forego health insurance coverage" altogether. *Id*.

Such a congressional "finding" on a purely legal issue is entitled to no weight. *See Morrison*, 529 U.S.

at 614 ("'[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'") (quoting *Lopez*, 514 U.S. at 557 n.2). For that reason, this Court gave no deference to similar congressional "findings" in *Lopez* or *Morrison*. *See* H.R. Rep. No. 103-711, at 385 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (finding that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce"); *Lopez*, 514 U.S. at 557 n.2 ("'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'") (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)); *Morrison*, 529 U.S. at 614 (quoting same language from *Lopez*).

Moreover, Congress's definition of "activity" makes a farce of this Court's Commerce Clause jurisprudence, delivering a final and fatal blow to the remaining limits on the commerce power. Under Congress's expansive reasoning, any economic or financial decision—even a decision *not* to engage in commerce—is itself an activity that can be regulated. *See Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010) ("While plaintiffs describe the Commerce Clause power as reaching economic *activity*, the government's characterization of the Commerce Clause reaching economic *decisions* is more accurate."). Under such limitless logic, Congress could "regulate" an individual's decision *not* to buy a car by compelling every American to buy a Ford, to aid the ailing U.S. automotive industry.

Congress could compel all Americans to subscribe to home delivery of a daily newspaper to forestall the decline of print journalism. Or it could mandate that households' uninvested savings be used to purchase equity in domestic corporations, to bolster the share price and fiscal soundness of the Nation's businesses.

Congress may very well determine all of these seemingly preposterous obligations to be plausible "national solutions to national problems." *Seven-Sky*, 661 F.3d at 20. That should not mean—and, in fact, under this Court's jurisprudence, has never meant—that the Commerce Clause authorizes Congress to compel these involuntary commercial transactions. *See Kansas v. Colorado*, 206 U.S. 46, 89 (1907) ("[T]he proposition that there are legislative powers affecting the Nation as a whole which belong to [Congress], although not expressed in the grant of powers, is in direct conflict with the doctrine . . . of enumerated powers."). "[O]ur Commerce Clause's boundaries simply cannot be defined as being commensurate with the national needs or self-consciously intended to let the Federal Government defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Such a formulation of federal power is no test at all: It is a blank check." *Lopez*, 514 U.S. at 602 (Thomas, J., concurring) (alteration in original; internal quotation marks omitted); *see also Raich*, 545 U.S. at 45 (O'Connor, J., dissenting) ("[A]llowing Congress to set the terms of the constitutional debate in this way . . . is tantamount to removing meaningful limits on the Commerce Clause.").

The Commerce Clause is not a blank check. It is a specific and circumscribed grant of power that allows Congress to "regulate" ongoing commercial activity. The minimum coverage provision falls well

outside the bounds of that congressional authority because it compels Americans to engage in commerce against their will. Nothing in the Commerce Clause—or any other provision of the Constitution—authorizes such a startling federal intrusion on individual rights and state prerogatives.[6]

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[6] The minimum coverage provision cannot be severed from the remainder of the Patient Protection and Affordable Care Act. Indeed, the United States concedes that "[t]he minimum coverage provision is integral to the Affordable Care Act's insurance reforms." Pet. Br. 24; *see also id.* at 29 ("[T]he minimum coverage provision is indispensable to the viability of the Act's guaranteed-issue and community-rating reforms . . . ."). Accordingly, the Act must be struck down in its entirety. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (when part of a statute is invalid, it cannot be severed from the remainder of the statute unless "what is left is fully operative as a law") (internal quotation marks omitted).

CONCLUSION

This Court should invalidate the minimum coverage provision and strike down the Patient Protection and Affordable Care Act in its entirety.

Respectfully submitted.

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