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 LAW PROFESSORS BARRY FRIEDMAN, MATTHEW ADLER, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL ON THE MINIMUM-COVERAGE PROVISION ISSUE

BARRY FRIEDMAN
40 Washington Square South, Room 317
New York, NY 10012
(212) 998-6293

MIMI M.D. MARZIANI
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(646) 292-8327

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MARTIN V. TOTARO
LUCAS M. WALKER
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
(202) 536-2010
jlamken@verizon.net

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

The minimum-coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, provides that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance for themselves or their dependents will owe a penalty, calculated in part on the basis of the taxpayer's household income and reported on the taxpayer's federal income tax return, for each month in which coverage is not maintained in the taxable year. 26 U.S.C. § 5000A.

The question presented is whether the minimum-coverage provision is a valid exercise of Congress's power to "regulate Commerce * * * among the several States," U.S. Const. art. I, § 8, cl. 3, or of Congress's power to enact such laws as are "necessary and proper" for carrying out its enumerated powers, *id.* art. I, § 8, cl. 18.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

NO. 11-398

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 LAW PROFESSORS BARRY FRIEDMAN, MATTHEW ADLER, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL ON THE MINIMUM-COVERAGE PROVISION ISSUE

INTEREST OF *AMICI CURIAE*

Amici are law professors (listed in Appendix A) who have taught, studied, written about, and have expertise in the Constitution, constitutional history, and the structure and requisites of American federalism.[1]

---

[1] Pursuant to this Court's Rule 37.3(a), *amici* certify that all parties consented to the filing of this brief. Copies of the letters granting

Amici take no position on the wisdom of the Patient Protection and Affordable Care Act (the "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), a question on which their views diverge. Nonetheless, they have a strong interest in and expertise on the legal issue this Court is asked to decide—whether the Act is within Congress's powers. On that question they are of one mind: The Act is constitutional.

SUMMARY OF ARGUMENT

Plaintiffs do not challenge the vast majority of the Act's provisions. For example, they do not argue that Congress exceeded its powers by prohibiting health insurers from denying coverage of preexisting conditions, or from denying eligibility based on health status. 42 U.S.C §§ 300gg-3(a), 300gg-4(a). No such challenge could prevail: This Court has squarely held that Congress's commerce powers extend to regulation of insurance markets. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944).

Plaintiffs instead challenge the Act's minimum-coverage requirement—the so-called "individual mandate." That provision requires Americans who otherwise lack health insurance to effectively pay for healthcare in advance by obtaining a minimal level of coverage, instead of purchasing healthcare on the spot market (or obtaining healthcare without paying for it) later. See 26 U.S.C. § 5000A.

---

consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* certify that no party's counsel authored this brief in whole or in part, that no such counsel or party contributed money intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

Under the time-tested principles this Court employs when determining the scope of congressional power, the minimum-coverage requirement should be upheld. It is a straightforward exercise of Congress's power to "regulate Commerce * * * among the several States," U.S. Const. art. I, §8, cl. 3, and of Congress's power to enact laws "necessary and proper" for carrying out its enumerated powers, *id.* art. I, §8, cl. 18.

I. Since the Constitution's framing, Congress has been understood to possess broad power to act in the economic sphere. Having experienced the inadequacy of the Articles of Confederation, the Framers understood that the national government needed authority "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 2 *Records of the Federal Convention* 21 (Farrand ed., 1911).

The federal government has thus long addressed national economic problems that the States acting alone could not solve or, worse, would exacerbate. As the Nation's economy has become more integrated, Congress's exercise of its commerce power naturally has expanded as well. Today, it is beyond argument that the Commerce Clause permits Congress to regulate not merely interstate commerce but also commerce within States that has significant interstate effects.

II. Under established precedent, the minimum-coverage requirement is within Congress's Commerce Clause power. The decisions of millions of Americans to purchase health insurance now, or take a wait-and-see approach, profoundly affect interstate healthcare and health-insurance markets.

The regulation of national healthcare and insurance markets is unquestionably economic legislation aimed at a problem of national concern. The primary object of regulation—health insurance—comprises a significant portion of the Nation's economy. And the healthcare crisis is widely viewed as a major contributor to the country's economic woes. There is no evidence that the States can or will resolve the problem independently.

Plaintiffs' objection to the minimum-coverage requirement goes not to whether Congress *can* regulate the health-insurance market, but to *how* it chose to do so. Since *Gibbons* v. *Ogden*, 22 U.S. 1 (1824), however, this Court has recognized the breadth of the means Congress may employ to regulate commerce. This Court's precedents have long held that Congress has power to regulate the national economy when the States are incompetent to act effectively, while leaving to the States matters that are truly local and non-economic.

In the last half-century, challenges to Congress's exercise of its commerce power typically assert that Congress has stretched that authority to non-economic goals. This Court has responded by inquiring whether the matter being regulated truly implicates national issues of commerce or is better characterized as a purely local concern—a federalism question.

Plaintiffs' claim, however, is of a different nature. Plaintiffs argue, in effect, that the commerce power contains an inherent (but unwritten) limitation that Congress may regulate "activity" affecting the market but cannot regulate "inactivity"—that is, Congress cannot compel activity—no matter how profound the effect on interstate commerce. But that activity/inactivity distinction betrays the true nature of their challenge: While offered as a challenge to Congress's commerce power,

their claim is really about individual liberty, reflecting an instinct about how far *any* government, state or federal, may go in ordering the affairs of its people. Plaintiffs effectively ask this Court to import a substantive due process limitation into the Commerce Clause. Plaintiffs would define means of financing healthcare as beyond "Commerce," not because those means lack the requisite connection to commerce—they *are* decisions about commerce—but because plaintiffs believe the choice to buy or not to buy health insurance is a *personal* economic decision the government cannot regulate.

Properly understood as a challenge only to Congress's means of regulating what is unequivocally interstate commerce, plaintiffs' theory crumbles. The minimum-coverage provision does not implicate federalism concerns. Neither theory nor precedent supplies any basis for distinguishing between prohibiting and requiring behavior as a limitation on Congress's Commerce Clause authority. The minimum-coverage provision, moreover, does not implicate any recognized individual-rights concerns. Absent such concerns, this Court should defer to the means chosen by Congress to regulate commerce.

Congress's power nonetheless remains bounded. Commerce Clause regulations must truly be directed at national economic circumstances. And Congress must have a rational basis for believing the regulation will achieve its intended end. Neither limitation is toothless.

III. The minimum-coverage requirement is independently supported by the Necessary and Proper Clause. A central purpose of the Act is to make insurance more readily available by imposing certain uniform terms on health-insurance contracts sold across the Nation. No one disputes that such direct regulation of health-insurance markets is within Congress's commerce power.

Absent the minimum-coverage requirement, however, many of those regulatory efforts would be futile or counterproductive. A system requiring insurers to cover preexisting conditions cannot endure if individuals do not have to maintain insurance when they are healthy: Experience shows that insurance markets would become dominated by high-cost, high-risk purchasers, with fewer healthy insureds offsetting the costs. Premiums would skyrocket, and cost pressures could drive insurers from the market altogether.

Congress thus recognized that the minimum-coverage requirement is "essential" to key portions of its regulation of insurance markets. 42 U.S.C. §18091(a)(2)(I). The Necessary and Proper Clause has consistently been interpreted to grant Congress broad authority to enact legislation appropriate or beneficial to the exercise of its enumerated powers. The minimum-coverage requirement satisfies even the narrowest interpretations of Congress's necessary-and-proper authority. It is the indispensable buttress that prevents much of the Act's indisputably valid regulatory edifice from collapsing.

ARGUMENT

Plaintiffs do not challenge the vast majority of the Patient Protection and Affordable Care Act. Provisions regularizing health-insurance contracts and restricting terms like preexisting-condition exclusions and discriminatory pricing are unquestionably within Congress's commerce power. Yet those provisions would be ineffective absent the minimum-coverage requirement that plaintiffs challenge. The Necessary and Proper Clause exists to permit Congress to enact precisely such provisions that it reasonably deems appropriate to effectuating its enumerated powers. The minimum-coverage

requirement, moreover, is a permissible regulation of commerce in its own right.

I. THE COMMERCE CLAUSE WAS DESIGNED AND HAS BEEN UNDERSTOOD TO EMPOWER CONGRESS TO ADDRESS PROBLEMS REQUIRING NATIONAL SOLUTIONS

Having learned firsthand the disastrous consequences of denying the national government authority to address issues of common interest, the Framers drafted a Constitution that empowers Congress to legislate for the general interests of the Nation, where the individual States are incompetent to act, and where individual state legislation might disrupt national harmony. Plaintiffs' position harkens not to the original understanding of the Constitution (or to this Court's cases interpreting it), but to the discredited Articles of Confederation.

A. The Commerce Clause Was Designed To Afford Congress Broad Power Over National Economic Problems

Under the Articles of Confederation, the United States were adrift in a sea of competing and conflicting state laws, the central government unable to maintain order. George Washington lamented, "I do not conceive we can exist long as a nation, without having lodged some where a power, which will pervade the whole Union in as energetic a manner as the authority of the State governments extends over the several States." Washington, *Letters and Addresses* 287 (Viles ed., 1909). James Madison observed that the Articles had failed because of "[w]ant of concert in matters where common interest requires it." 1 *Letters and Other Writings of James Madison* 321 (1865). Without a central government capable of establishing uniform commercial regulations, States enacted protectionist laws not merely "expensive

and vexatious in themselves" but also "destructive of the general harmony." *Ibid.*

The absence of a uniform economic policy exacted a heavy toll. As Alexander Hamilton observed, often "it would be beneficial to all the States to encourage, or suppress[,] a particular branch of trade, while it would be detrimental * * * to attempt it without the concurrence of the rest." 7 *The Papers of Alexander Hamilton* 78 (Syrett ed., 1962). The risk of non-cooperation meant "the experiment would probably be left untried" by any State "for fear of a want of that concurrence." *Ibid.*; see also Levy, *Federalism and Collective Action*, 45 U. Kan. L. Rev. 1241, 1258-1259 (1997).

For example, when States "needed to enact legislation prohibiting British ships from entering American harbors" to give the young Nation leverage in trade negotiations, Massachusetts passed a navigation act restricting foreign vessels' use of its ports. LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 San Diego L. Rev. 555, 595-596 (1994). But "most states did nothing," preferring to take for themselves the "significant amount of trade" Massachusetts's law diverted from its shores. *Ibid.* Massachusetts consequently repealed its legislation. *Ibid.*

Based on that and other experiences, the Framers understood "the necessity of some general and permanent system, which should at once embrace all interests, and, by placing the states upon firm and united ground, enable them effectually to assert their commercial rights." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 254 (Elliot ed., 2d ed. 1836) (Charles Pinckney). The Constitutional Convention thus resolved that Congress should have power "to legislate in all cases for the general interests of

the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 2 Farrand, *supra*, at 21; see also 1 *id.* at 21 (Resolution VI of Virginia Plan).

The Committee of Detail then prepared the draft Constitution. James Wilson—a Committee member and later the first Supreme Court Justice—observed that the Convention delegates agreed that federal power must reach "whatever object of government extends in its operation or effects beyond the bounds of a particular state." 2 Elliot, *supra*, at 399. But there was concern that the "application" of that "sound and satisfactory" principle "to particular cases would be accompanied with much difficulty, because * * * room must be allowed for great discretionary latitude of construction of the principle." *Ibid.* "In order to lessen or remove th[at] difficulty," Wilson explained, "an enumeration of particular instances[ ] in which the application of the principle ought to take place, has been attempted with much industry and care." *Ibid.* The Committee thus produced a draft Constitution with enumerated powers, including authority to "regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. But "the purpose of enumeration was not to *displace* the principle" that federal power reaches all matters with "operation or effects beyond the bounds of a particular state"; the purpose instead was "to *enact* it." Balkin, *Commerce*, 109 Mich. L. Rev. 1, 11 (2010).

Scholars of all stripes thus agree that the commerce power must be "understood in light of the collective action problems that the nation faced under the Articles of Confederation." Cooter & Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63

Stan. L. Rev. 115, 165 (2010); see Calabresi & Terrell, *The Number of States and the Economics of American Federalism*, 63 Fla. L. Rev. 1, 6 (2011) ("The most compelling argument in American history for empowering our national government has been the need to overcome collective action problems."); Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 178 (1996); Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 Mich. L. Rev. 554 (1995); Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 (1934).

Some urge that certain members of the founding generation understood the Constitution to draw clear lines—such as between commerce and manufacturing—that sharply limited Congress's power. See, *e.g.*, Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001). There may have been no clear consensus among the Constitution's Framers and ratifiers concerning the precise scope of the Commerce Clause. But this case involves direct regulation of commercial transactions in a nationwide market, not manufacturing. And many among the founding generation shared Chief Justice Marshall's understanding that Congress's power over such commerce was broad indeed. See *Gibbons* v. *Ogden*, 22 U.S. 1, 189-198 (1824).

B. Longstanding Practice And Precedent Confirm Congress's Broad Regulatory Authority Under The Commerce Clause

This Court has long held that the Commerce Clause empowers Congress to address national economic problems where action by the individual States is ineffective or deleterious, or where concerted action is otherwise appropriate. That power has proved "'broad enough to

allow for the expansion of the Federal Government's role,'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1965 (2010), in view of the Nation's increasingly interdependent economy.

1. In *Gibbons*, this Court ruled that Congress could regulate steamboat navigation on the Hudson River. Establishing a broad principle that echoed the Constitutional Convention's resolutions, see pp. 8-9, *supra*, Chief Justice Marshall explained that the commerce power extends "to all the external concerns of the nation, and to those internal concerns which affect the States generally," excluding *only* those concerns "completely within a particular State," and "which do not affect other States," 22 U.S. at 195. As to matters within federal jurisdiction, he continued, Congress's power "acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196.

While *Gibbons* established federal authority over the "deep streams which penetrate our country in every direction," 22 U.S. at 195, railways soon replaced rivers as the dominant means of interstate transportation. But "the requirements of the various state statutes were conflicting and difficult for the railroads to implement." McDonald, *100 Years of Safer Railroads* 1, 6-7 (1993). "[S]tate governments as well as some segments of the railroad industry began to urge Federal legislation to provide a workable set of standards." *Id.* at 7. When railroads balked at federal regulation of intrastate rates, this Court rebuffed their challenges. See *The Shreveport Rate Case*, 234 U.S. 342 (1914). Even if intrastate shipping was not itself under Congress's power, Congress "unquestionably" could "prevent the intrastate operations of [railroads] from being made a means of injury to" its regulation of interstate commerce. *Id.* at 351. Con-

gress was entitled to "take all measures necessary or appropriate to that end." *Id.* at 353.

2. This Court's path has not been unbroken. The Court at times barred Congress from addressing commercial problems the States themselves could not. *Hammer* v. *Dagenhart*, for example, invalidated Congress's prohibition on interstate movement of goods produced using child labor, even though state efforts to prohibit child labor were undermined by competition from States with laxer standards. 247 U.S. 251, 273 (1918); see also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 307-310 (1936). But this Court has since come to recognize that, in our interdependent national economy, those "earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 556 (1995); see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36 (1937). Accordingly, in *United States* v. *Darby*, 312 U.S. 100 (1941), the Court repudiated *Hammer*, holding that Congress could regulate manufacturing to ensure that interstate commerce would not "be made the instrument of [unfair and disruptive] competition" among the States "in the distribution of goods produced under substandard labor conditions." *Id.* at 115, 117.

Time and again, this Court has upheld federal intervention where States face collective-action barriers to addressing widespread economic problems. See, *e.g.*, *Charles C. Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 588 (1937) (sustaining unemployment-benefits legislation under Congress's taxing power given States' unwillingness to enact similar legislation "lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors"); *Helvering* v. *Davis*, 301 U.S. 619,

644 (1937) (because "[t]he existence of * * * a system [of old-age benefits] is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose[,] [o]nly a power that is national can serve the interests of all").[2] That logic echoed President Roosevelt's observation that, "[i]f forty states go along with adequate legislation and eight do not * * *, we get nowhere." Letter from Franklin D. Roosevelt to David Grey (June 17, 1935), quoted in Friedman, *The Will of the People* 208 (2009).

This Court's decisions upholding New Deal labor laws similarly recognized Congress's authority to regulate matters *affecting* interstate commerce, reaffirming Chief Justice Marshall's observation that Congress's commerce power extends "to those internal concerns which affect the States generally" and excludes only matters "completely within a particular State" that "do not affect other States." *Gibbons*, 22 U.S. at 195. "Although activities may be intrastate in character when separately considered," the Court held, "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Jones & Laughlin Steel*, 301 U.S. at 37.

Then-Solicitor General (later Justice) Stanley Reed explained how increasingly interconnected markets required an expanded exercise of federal commerce power: "In a simpler time, when life ordinarily was limited to

---

[2] Indeed, in *Steward Machine*, the Court noted that Massachusetts's then-existing unemployment-benefits act would "not become operative unless the federal bill became a law, or unless eleven of [21 listed] states should impose on their employers burdens substantially equivalent." 301 U.S. at 588 n.9.

community activities, or at most to the boundaries of a single State, the powers granted to the national government were rarely utilized in such manner as to affect the daily existence of the citizen." Reed, *The Constitution and the Problems of Today*, 47 Proc. Va. St. Bar Ass'n 277, 277 (1936). But "[w]ith our social and economic development, with improvements in transportation and communication, with broadening boundaries and increasing population, with industrialization and multiplying world contacts, problems believed to require further exercise of national powers appeared." *Ibid.* Everyone, Reed concluded, "must recognize the desirability of Federal and State legislation of a new type to meet the exigencies of this modern world." *Id.* at 300.

That explanation echoed the understanding that pervaded the Nation. As President Roosevelt observed, "[t]he prosperity of the farmer does have an effect today on the manufacturer in Pittsburgh. The prosperity of the clothing worker in the City of New York has an effect on the prosperity of the farmer in Wisconsin, and so it goes." *Rendezvous with Destiny: Addresses and Opinions of Franklin Delano Roosevelt* 295 (Hardman ed., 1944). This Court correspondingly recognized that, in an integrated economy, even small choices—such as a farmer's otherwise "trivial" consumption of homegrown wheat—can cumulatively have sufficient repercussions throughout national markets to justify federal regulation. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942); see Cooter & Siegel, *supra*, at 160.

The need for national solutions has also grown as the Nation has increased from 13 to 50 States. Cooter & Siegel, *supra*, at 143; Balkin, *supra*, at 12 n.37. "[A]s the number of members of a federation increases, the amount of regulation of interstate commerce and the

scope of the federal government's power over interstate commerce * * * increase[s] as well." Calabresi & Terrell, *supra*, at 16. And this Court has continued to uphold Congress's power to protect, promote, and regulate interstate commerce. Congress may prohibit discrimination in public accommodations, for example, because such discrimination restricts interstate travelers' choices and impedes the free flow of commerce. See *Katzenbach* v. *McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-253 (1964). The exercise of federal commerce power has thus expanded along with the economy's growing interconnectedness and the concomitant need for national solutions to national problems that would be left unaddressed by individual States—a need the Framers well understood.

Far from rejecting that understanding, this Court's recent decisions enforcing limits on Congress's commerce powers embrace it. In striking down federal laws addressing gun possession near schools and violence against women, the Court explained that those provisions bore only the most "attenuated" connection to anything resembling commerce, *United States* v. *Morrison*, 529 U.S. 598, 612 (2000), and implicated no barriers to effective individual state action, *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). Those decisions nowhere denigrate Congress's commerce authority where the object of regulation itself is commerce, directly implicates economic decisions, and regulates a matter of national concern.

II. THE MINIMUM-COVERAGE PROVISION IS CONSISTENT WITH TRADITIONAL UNDERSTANDINGS OF CONGRESS'S COMMERCE POWERS

A. The Act Directly Regulates Interstate Commerce To Regularize, Promote, And Protect It

In *South-Eastern Underwriters*, this Court held that Congress's commerce power "include[s] a business such as insurance." 322 U.S. at 539; see 42 U.S.C. §18091(a)(3). Health insurance is no exception. Its interstate and commercial nature is inescapable. "Health insurance and health care services" constitute over one-sixth of the U.S. economy. 42 U.S.C. §18091(a)(2)(B). And "[p]rivate health insurance spending * * * pays for medical supplies, drugs, and equipment that are shipped in interstate commerce." *Ibid.* "[M]ost health insurance is sold by national or regional health insurance companies"; "health insurance is sold in interstate commerce"; and "claims payments flow through interstate commerce." *Ibid.*

There is thus no serious debate that virtually all the Act's provisions addressing the terms of health-insurance contracts fall squarely within Congress's commerce power. Those provisions not only address matters that "substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). They *directly regulate* commercial transactions in a nationwide marketplace by regularizing the terms on which health insurance is offered, "prescribing rules for carrying on that intercourse." *Gibbons*, 22 U.S. at 190.

The Act also regulates in an area where the States face collective-action barriers. For instance, many States allow insurance companies to deny "coverage, charge higher premiums, and/or refuse to cover" preexisting medical conditions. Dep't of Health & Human Servs., *Coverage Denied* 1 (2009). As a result, many individuals

cannot obtain insurance. *Ibid.* Yet pioneering States seeking to guarantee coverage for preexisting conditions confront a grave risk of failure. Individuals who cannot obtain coverage elsewhere are drawn to States with more protective laws, driving premiums up. Cf. Glied *et al.*, *Consider It Done? The Likely Efficacy of Mandates for Health Insurance*, 26 Health Aff. 1612, 1613 (2007). Insurers may flee those States, leaving residents with fewer choices and less competition.

Unsurprisingly, "the seven states that had enacted guaranteed issue reforms without minimum coverage provisions suffered detrimental effects to their insurance markets, such as escalating costs and insurance companies exiting the market." *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 547 (6th Cir. 2011). In Kentucky, all but two insurers (one State-run) abandoned the State. See Kirk, *Riding the Bull*, 25 J. Health Pol. Pol'y & L. 133 (2000). Only one State that has attempted to ban preexisting-condition exclusions, Massachusetts, has had anything approaching success; it imposed a mandatory minimum-coverage requirement. See Chandra, *et al.*, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 New Eng. J. Med. 293, 295 (2011).

The Act, moreover, prevents the "interrupt[ion]" of "the harmony of the United States" and impediments to interstate commerce that balkanized state regulation might cause. 2 Farrand, *supra*, at 21. Individuals with preexisting medical conditions, for example, often cannot pursue opportunities in States that permit insurers to deny coverage for those conditions. Congress has sought to redress similarly unnecessary and detrimental barriers to interstate migration and commerce in the past. See, *e.g.*, Health Insurance Portability and Accountability

Act of 1996, Pub. L. No. 104-191, tit. I, 110 Stat. 1936, 1939; *id.* § 195(a)(1), 110 Stat. at 1991; cf. *Katzenbach*, 379 U.S. at 300; *Heart of Atlanta Motel*, 379 U.S. at 252-253. Those facts alone are a sufficient basis to sustain the Act.

B. The Minimum-Coverage Requirement Addresses Economic Conduct With A Profound Effect On Interstate Commerce

"No matter how you slice the relevant market—as obtaining health care, as paying for health care, as insuring for health care—all of these activities affect interstate commerce, in a substantial way." *Thomas More*, 651 F.3d at 556 (Sutton, J., concurring). As petitioners explain (at 2-3), Americans necessarily must choose how to finance their healthcare: They can pre-pay for it by purchasing insurance, or risk trying to pay for it on an as-needed basis.

Cumulatively, those individual choices have an enormous impact on interstate commerce. In 2008 alone, the "cost of providing uncompensated care to the uninsured" totaled $43 billion. 42 U.S.C. § 18091(a)(2)(F). "[H]ealth care providers pass on th[at] cost to private insurers, which pass on the cost" by charging families higher premiums, "by on average over $1,000 a year." *Ibid.* Other effects abound: Doctors "curtail unprofitable services and shorten hours of service." Pagán & Pauly, *Community-Level Uninsurance and the Unmet Medical Needs of Insured and Uninsured Adults*, 41 Health Servs. Research 788, 791 (2006). And "lower revenue streams" could force some hospitals to cease operating. *Id.* at 789. Thus, as with the unchallenged provisions of the Act, "Congress had a rational basis for concluding that leaving [healthcare-financing decisions] outside federal control would similarly affect price and market conditions." *Raich*, 545 U.S. at 19.

Since at least *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court has recognized that Congress can regulate individual economic decisions where their effect, "taken together with that of many others similarly situated, is far from trivial." *Id.* at 128. Thus, in *Wickard*, this Court upheld a regulation imposing a penalty on farmers for growing wheat in excess of a quota—even for purely personal consumption—because of the effect on demand for wheat sold in the market. *Id.* at 119, 127-129. The cumulative impact of individual healthcare-financing choices on interstate commerce dwarfs the impact of growing wheat for self-consumption at issue in *Wickard*—and by orders of magnitude.

C. Plaintiffs' Activity/Inactivity Distinction Is Irrelevant To Congress's Commerce Power

1. Plaintiffs ask this Court to ignore those direct and undisputable economic effects, urging that the Commerce Clause power extends only to regulation of "activity," not "inactivity" such as an individual's decision to *forgo* health insurance. See Private Respondents' Cert. Br. 14. But "the relevant text of the Constitution does not contain such a limitation." *Thomas More*, 651 F.3d at 560 (Sutton, J., concurring); see *Seven-Sky* v. *Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011) (consulting Founding-era dictionaries to conclude that "regulate" as used in the Commerce Clause encompasses power to "require action"). Regulations that *compel* certain purchases—commercial transactions—regulate and affect commerce no less than those that proscribe purchases.

Nor does plaintiffs' purported limitation draw support from this Court's precedents. This Court has long held that formalistic line-drawing has no place when analyzing whether an effect on interstate commerce is sufficient to sustain federal intervention. As *Wickard* explained,

"recognition of the relevance of the economic effects in the application of the Commerce Clause * * * has made the mechanical application of legal formulas no longer feasible." 317 U.S. at 123-124. Rather, "interstate commerce itself is a practical conception," and "interferences with that commerce must be appraised by a judgment that does not ignore actual experience." *Jones & Laughlin Steel*, 301 U.S. at 41-42. A regulated matter, "'whatever its nature,'" can "'be reached by Congress if it exerts a substantial economic effect on interstate commerce.'" *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125). "Economists accept * * * that some forms of 'inactivity' affect economic health as much as activity does." Mariner & Annas, *Health Insurance Politics in Federal Court*, 363 New Eng. J. Med. 1300, 1301 (2010); see p. 18, *supra*. The purported activity/inactivity distinction thus lacks any foundation when looking at the *impact* on interstate commerce.

Indeed, *Wickard* comes "very close to authorizing" the law challenged here. *Seven-Sky*, 661 F.3d at 17. Farmers like Roscoe Filburn had only two serious options—grow the wheat they required, or purchase it on the open market. By restricting farmers' ability to grow wheat, the law upheld in *Wickard* effectively required market purchases. This Court recognized that reality, holding that Congress could validly restrict "the extent * * * to which one may *forestall resort to the market* by producing [wheat] to meet his own needs," even if it "*forc[ed] some farmers into the market* to buy what they could provide for themselves." 317 U.S. at 127, 129 (emphasis added). "If Congress can regulate a noncommercial activity that causes commercial activity that in turn affects commerce in th[at] relatively minor way, then surely it can directly regulate a commercial inactivity," like failure to purchase insurance, "that affects commerce in" a

"major" way. Elhauge, *The Irrelevance of the Broccoli Argument Against the Insurance Mandate*, 366 New Eng. J. Med. e1, e1(1)-(2) (2012). As a "practical conception," *Jones & Laughlin Steel*, 301 U.S. at 41-42, the two are virtually indistinguishable. Both necessitate the purchase of products—whether wheat or health insurance—in the marketplace. The minimum-coverage requirement simply makes that consequence explicit.

It misses the mark to say that Filburn's economic "mandate" was precipitated by his farming "activity," whereas the minimum-coverage requirement applies automatically. That argument assumes that, had Filburn chosen not to engage in wheat production, he could have avoided all governmental mandates. But the notion that one could shrink from the world and avoid regulatory mandates by abstaining from regulated "activity" was an agrarian fantasy by the early 1900s—and is all the more so today. Americans must engage in "activity" to earn a livelihood, and in doing so are regularly required to comply with countless "mandates" to be licensed, bonded, insured, and so on. Congress also directly regulates countless activities that affect the likelihood that one may require healthcare, from car safety, 49 U.S.C. §30101 *et seq.*, to food content, 21 U.S.C. §301 *et seq.* Congress would not be said to regulate "inactivity" if it required everyone who engages in such health-related activities—*e.g.*, driving a car, buying certain foods, and so on—to obtain health insurance, even though that would cover virtually every American. The minimum-coverage requirement achieves the same result through less convoluted means.

2. Even if the activity/inactivity divide presented a principled limitation—and it does not—the minimum-coverage requirement would fall on the "activity" side.

"No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk. Each requires affirmative choices; one is no less active than the other; and both affect commerce." *Thomas More*, 651 F.3d at 561 (Sutton, J., concurring). "Far from being passive and noneconomic, the uninsured consume" billions of dollars in uncompensated care, "the costs of which are passed through health care institutions to insured Americans." Rosenbaum & Gruber, *Buying Health Care, the Individual Mandate, and the Constitution*, 363 New Eng. J. Med. 401, 402 (2010). The requirement that Americans pre-pay by insuring themselves now thus regulates present "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased"—whether to pay for healthcare now by buying insurance or to defer payment by attempting to self-insure. 42 U.S.C. §18091(a)(2)(A).

The requirement likewise regulates the inevitable *future* activity of obtaining healthcare, requiring advance arrangements that ensure an ability to pay for it. Plaintiffs do not dispute that Congress could require uninsured persons to purchase insurance at the moment they seek treatment in healthcare markets. See Pet. App. 118a. Congress surely could also require payment of all back premiums at that time as well. The minimum-coverage requirement does the same thing, without waiting for an individual's (virtually certain) use of the healthcare system.[3]

---

[3] By requiring payment before an individual needs healthcare, moreover, the minimum-coverage requirement is arguably less "coercive" than the alternative plaintiffs would allow: "An individual in need of acute medical care, but without the resources to pay for it, is not apt

Given that most everyone requires healthcare at some point, plaintiffs' argument reduces to the claim that, because some minuscule (perhaps imaginary) number of people (1) refuse to buy health insurance and (2) will never burden the market by seeking healthcare, the entire law is invalid. Even if some individuals might be able to live so remotely as to preclude any resort to the healthcare system, however, Congress is not required "to legislate with scientific exactitude." *Raich*, 545 U.S. at 17. It may, "'[w]hen it is necessary in order to prevent an evil[,] * * * make the law embrace more than the precise thing to be prevented.'" *Perez* v. *United States*, 402 U.S. 146, 154 (1971). "When Congress decides that the '"total incidence"' of a practice poses a threat to a national market, it may regulate the entire class." *Raich*, 545 U.S. at 17. In the aggregate, uninsured individuals seeking healthcare impose an enormous burden on the healthcare system that "affect[s] price and market conditions" of health insurance generally. *Id.* at 19; 42 U.S.C. § 18091(a)(2)(F); see p. 18, *supra*. As a result, "a 'rational basis' exists" for concluding that uninsured individuals "substantially affect interstate commerce." *Raich*, 545 U.S. at 22.

D. Plaintiffs' Claim Is About Substantive Due Process, Not Federalism

1. Plaintiffs' argument is not really a Commerce Clause argument but a substantive due process argument in disguise—as their purported activity/inactivity distinction makes clear. What disturbs plaintiffs is not that Congress has allegedly strayed beyond the regulation of commerce. Buying insurance (whether voluntarily or by mandate) is plainly "Commerce." What bothers

---

to refuse to buy future medical insurance in order to obtain present care * * * ." *Thomas More*, 651 F.3d at 563 (Sutton, J., concurring).

plaintiffs is that they are being *compelled* to obtain health insurance. But the compulsion that offends them does not make the action, or the regulation, any less connected to the "Commerce" Congress can regulate.

To be sure, like other structural aspects of the Constitution, federalism and the enumeration of powers serve to protect individual liberty. See *Bond* v. *United States*, 131 S. Ct. 2355, 2364-2365 (2011). But this Court enforces those protections by ensuring that Congress respects "the constitutional balance between the National Government and the States," *id.* at 2364, not by engrafting substantive due-process limits (like a ban on compelling purchases) onto the Commerce Clause, see *Comstock*, 130 S. Ct. at 1956. Plaintiffs' activity/inactivity distinction is irrelevant to the limits federalism places on Congress's commerce power: "[W]hether a statute regulates an active or passive matter * * * tells us nothing about whether the matter ought to be regulated at the national or instead at the state level"—much less whether it implicates commerce. Smith, *Federalism,* Lochner*, and the Individual Mandate*, 91 B.U. L. Rev. 1723, 1737 (2011). Likewise, Congress's choice to mandate rather than merely "encourage" economic behavior, Pet. App. 107a, has nothing to do with whether a regulation transgresses the line "between what is truly national and what is truly local," *Lopez*, 514 U.S. at 567-568. Categorically prohibiting regulations like the minimum-coverage requirement would improperly deny Congress power to address economic problems that individual States are "separately incompetent" to address. Smith, *supra*, at 1738-1740; see generally Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 Law & Contemp. Probs. (forthcoming 2012); pp. 7-10, *supra*.

Plaintiffs urge that, just as this Court has held that the Commerce Clause prohibits Congress from "commandeer[ing]" *States* by compelling them to administer federal programs, it also bars Congress from "commandeer[ing]" *individuals* by imposing economic mandates. Private Respondents' Cert. Br. 4 (citing *Printz* v. *United States*, 521 U.S. 898, 925 (1997)). But that is upside down. Congress may not commandeer state governments precisely *because* "'the Framers explicitly chose a Constitution that confers upon Congress the power to regulate *individuals*, not States.'" *Printz*, 521 U.S. at 920 (quoting *New York* v. *United States*, 505 U.S. 144, 166 (1992)) (emphasis added). The very reason Congress cannot invoke the Commerce Clause to "compel the States" to act is *because* Congress has the power "to pass laws requiring or prohibiting certain acts" by *individuals*. *New York*, 505 U.S. at 166; see *id.* at 165 (Congress's power of "'legal coercion singles out the * * * individual'" (quoting Oliver Ellsworth)).

2. Plaintiffs' real complaint is that, in their view, the minimum-coverage provision impermissibly interferes with individuals' liberty by "compel[ling] Americans to purchase an expensive health insurance product they have elected not to buy." Pet. App. 187a. But this Court allowed a far more invasive mandate in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 12, 39 (1905), upholding a law requiring individuals to be vaccinated against smallpox—*i.e.*, to submit to bodily invasion—or pay a penalty. As Professor Charles Fried advised Congress, the "requirement that one must purchase health insurance if one can afford it" is, by contrast, a "much less intrusive and less intimate imposition." *Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (Feb. 2, 2011), http://www.judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf. It requires

submission only to contract terms, not pathogens. And this Court has held that, of all the liberties substantive due process may protect, the "freedom of contract in particular" must yield to "the interests of the community." *W. Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 391-392 (1937).

The minimum-coverage provision is no more damaging to individual liberty than other, uncontested means of guaranteeing health coverage. No one disputes, for instance, that Congress could tax all Americans and spend those dollars buying insurance for each American "in aid of the 'general welfare.'" Cf. *Helvering*, 301 U.S. at 640-642. Yet the imposition on personal liberty would be no different: Individuals would still pay money and be required to accept insurance. If anything, the minimum-coverage requirement is less intrusive; it removes the government as purchaser and allows individuals, not bureaucrats, to choose their insurer.

E. Plaintiffs' Slippery Slope Arguments Fail

Ultimately, plaintiffs argue that the minimum-coverage requirement is unprecedented and, if upheld, will trigger increasingly invasive uses of federal power. But "[e]very new proposal is in some way unprecedented before it is tried." Pet. App. 222a (Marcus, J., dissenting). And this Court has repeatedly rejected similar claims that an assertion of Congress's commerce power was unprecedented:

- In *Gibbons*, the defendant urged that affording Congress power to regulate commerce on interstate waterways would "mak[e] a wreck of State legislation, leaving only a few standing ruins, that mark the extent of the desolation." 22 U.S. at 102 (argument of appellant).

- In *Darby*, it was protested that the "individual and cumulative effect" of the Fair Labor Standards Act represented an "unprecedented scope of * * * regulation." Br. for Appellee 82, 312 U.S. 100 (No. 82), 1940 WL 47093.
- In *Katzenbach* v. *McClung*, it was urged that the Civil Rights Act's public-accommodation regulations lacked any "statutory precedent." Supp. Br. for Appellees 36, 379 U.S. 294 (No. 543), 1964 WL 81104.

Yet, in each of those cases, this Court looked past the rhetoric to uphold then-novel—but wholly proper—exercises of the commerce power.

This litigation, moreover, does not require this Court to determine the outer limits of the Commerce Clause. Congress acted here on commerce itself—commerce that is interstate and has interstate effects. Limits on the commerce power remain. Congress's ultimate regulatory objective must be economic in nature; a tangential or circuitous relationship to commerce is not enough. The issue regulated must affect more than one State. And the means Congress chooses must bear a rational relationship to those ends.

Those requirements are not toothless. *Lopez* struck down the Gun Free School Zones Act because the regulated activity there did not "arise out of" and was not "connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561. This Court made clear that attenuated inferences about cause and effect cannot establish the necessary connection between Congress's regulatory choices and lawful goals. See *id.* at 563–564 (refusing to "pile inference upon inference"). The requirement of a logical link between Congress's means

and ends—while necessarily deferential—limits Congress's authority and gives substance to constitutional text. Moreover, this Court need not defer to "wholly unsubstantiated assumptions" presented as the sole justification for an assertion of federal power. *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534-535 (1973).

The Act here, however, survives scrutiny for precisely the same reasons. It does not just regulate conduct that affects commerce. It directly regulates commerce. And it does so to regularize and protect a part of interstate commerce central to our national economy.

III. THE MINIMUM-COVERAGE REQUIREMENT IS NECESSARY AND PROPER

The minimum-coverage requirement is also independently supported by the Necessary and Proper Clause. That Clause at the very least allows Congress, when regulating within its enumerated powers, to enact *additional* provisions that are essential to the effective exercise of those powers. That is precisely how the minimum-coverage requirement operates. Congress unquestionably has authority under the Commerce Clause to prohibit, for example, discriminatory pricing and preexisting-condition exclusions. The minimum-coverage provision prevents those wholly proper regulations from collapsing. If a provision critical to protecting Congress's exercise of Commerce Clause authority from self-destruction is not "necessary and proper," it is hard to imagine what could be.

A. The Necessary And Proper Clause Grants Congress Broad Powers To Effectuate Its Enumerated Powers

Article I, Section 8 of the Constitution "grants Congress broad authority," *Comstock*, 130 S. Ct. at 1956, to "make all Laws which shall be necessary and proper for

carrying into Execution" its enumerated powers, U.S. Const. art. I, §8, cl. 18. Congress legitimately exercises that power "when the means chosen, although not themselves within the granted power, [a]re nevertheless deemed appropriate aids" rationally related "to the accomplishment of some purpose within an admitted power of the national government." *Darby*, 312 U.S. at 121.

Because the Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation," necessary-and-proper legislation in aid of Congress's commerce power need not itself "regulate economic activities that substantially affect interstate commerce." *Raich*, 545 U.S. at 37, 39 (Scalia, J., concurring in judgment). It is sufficient that such provisions advance an otherwise permissible exercise of the commerce power.

That has been true for centuries. In *McCulloch* v. *Maryland*, this Court recognized that "a government, entrusted with" enumerated powers, "must also be entrusted with ample means for their execution." 17 U.S. 316, 408 (1819). "[N]ecessary," Chief Justice Marshall explained, does not mean "absolutely necessary." *Id.* at 414-415; see 3 Story, *Commentaries on the Constitution of the United States* §1243, at 118 (1833); *id.* §1240, at 116. Instead, "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 413, 418). The Necessary and Proper Clause sweeps broadly because the Constitution is "intended to endure for ages to come,

and, consequently, [is] to be adapted to the various *crises* of human affairs." *McCulloch*, 17 U.S. at 415.

McCulloch was not written on a blank slate. Hamilton and Madison had sparred over the meaning of the Necessary and Proper Clause. To Hamilton, the proper focus was on "the *end* to which the measure relates as a *mean*." *Legislative and Documentary History of the Bank of the United States* 99 (Clarke & Hall eds., 1832). "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority." *Ibid.* Madison took a narrower view, that the Clause endows Congress with power only to provide a "direct and incidental means" to support the exercise of an enumerated power. *Id.* at 42. In the end, Hamilton prevailed: "'The interpretation given by Mr. Hamilton was substantially followed by Chief Justice Marshall, in *McCulloch* * * *.'" *The Legal Tender Cases*, 79 U.S. 457, 642 (1870) (Field, J., dissenting). But the minimum-coverage provision survives even under Madison's more limited interpretation.

B. The Minimum-Coverage Requirement Falls Comfortably Within Congress's Necessary-and-Proper Authority

To be valid under the Necessary and Proper Clause, a statute need only "constitut[e] a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. "'If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination

alone.'" *Id.* at 1957. The minimum-coverage requirement fits comfortably within that authority.

1. Plaintiffs do not challenge the validity of the vast majority of the Act's provisions. They do not argue that Congress exceeded its powers by:

- Prohibiting insurers from denying coverage of preexisting conditions, 42 U.S.C § 300gg-3(a);
- Banning insurers from discriminating or denying eligibility based on health status, *id.* § 300gg-4(a);
- Prohibiting rescission of insurance contracts, *id.* § 300gg-12; or
- Requiring insurers to pay for certain preventive care, *id.* § 300gg-13(a).

Any challenge to those provisions would be futile: This Court has squarely held that Congress's commerce powers extend to insurance-market regulation. *South-Eastern Underwriters*, 322 U.S. at 539.

The minimum-coverage requirement's constitutionality follows ineluctably: The minimum-coverage requirement is necessary and proper to ensuring that the unchallenged provisions do not collapse under the weight of a massive adverse-selection problem. Absent the minimum-coverage requirement, the prohibition on exclusions for preexisting conditions would encourage individuals *not* to buy insurance until they have a condition needing coverage. "[I]f there were no requirement" that individuals maintain insurance, Congress observed, "many individuals"—particularly healthy individuals—"would wait to purchase health insurance until they needed care," 42 U.S.C. § 18091(a)(2)(I), secure in the knowledge that coverage could not be denied. Insurance markets would become dominated by high-cost, high-risk individuals in need of immediate care. Premi-

ums would skyrocket, defeating the objectives Congress sought to achieve—making insurance more widely and readily available to the American public.

Congress concluded that the appropriate means of preventing that adverse-selection problem, and protecting the Act's guarantee of coverage for preexisting conditions and similar provisions, was to require all qualified individuals (healthy and unhealthy alike) to participate by obtaining insurance. 42 U.S.C. §18091(a)(2)(I). The minimum-coverage requirement, Congress thus found, is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." *Ibid.*

That "'judgment of Congress,'" *Comstock*, 130 S. Ct. at 1957, is not merely entitled to judicial respect. It is based on unassailable economics. Experience proves that, absent a minimum-coverage requirement, adverse selection drives up premiums: The States attempting healthcare reform without a minimum-coverage requirement are now among those with the most expensive health insurance. By contrast, when Massachusetts coupled its limit on preexisting-condition exclusions with a minimum-coverage requirement, the adverse-selection problem was somewhat ameliorated. See p. 17, *supra*. To be necessary and proper, a provision need only "constitut[e] a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. Here, the minimum-coverage requirement is not merely "rationally related" to Congress's regulation of the terms of insurance under its Commerce Clause authority. It is critical to Congress's exercise of that authority.

2. The argument that the Necessary and Proper Clause does not allow Congress to enact any provision that would otherwise be beyond its enumerated powers must fail. Cf. Pet. App. 346a. The Necessary and Proper Clause allows Congress to "enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in judgment); see *Comstock*, 130 S. Ct. at 1957-1958; *Darby*, 312 U.S. at 121. Under *McCulloch*, a provision need only be "convenient, or useful" or "conducive" to Congress's exercise of an enumerated power, 17 U.S. at 413, 418, a standard the minimum-coverage requirement comfortably meets. Indeed, the requirement satisfies any conceivable interpretation of the Necessary and Proper Clause. The requirement survives review whether one requires "a tangible link to commerce," *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in judgment), an "'appropriate' link between a power conferred by the Constitution and the law enacted by Congress," *id.* at 1970 (Alito, J., concurring in judgment), an "'"obvious, simple, and direct relation"' to an exercise of Congress' enumerated powers," *id.* at 1975 n.7 (Thomas, J., dissenting), or, as Madison thought, a "direct and incidental" connection to a constitutional end, Clarke & Hall, *supra*, at 42. Quite simply, the minimum-coverage requirement is directly necessary to the efficacy of a comprehensive regulatory scheme otherwise within Congress's Commerce Clause authority. See *Lopez*, 514 U.S. at 561.

While this Court has *rejected* the claim that "Necessary and Proper" legislation "can be no more than one step removed from a specifically enumerated power," *Comstock*, 130 S. Ct. at 1963; see also *id.* at 1965-1966 (Kennedy, J., concurring in judgment), the minimum-coverage requirement would meet even that test. It is

only one step removed because, without it, many of the Act's direct regulations of insurance terms in interstate commerce would collapse. No inference-piling is needed. See pp. 27-28, *supra*; *Comstock*, 130 S. Ct. at 1963; *Raich*, 545 U.S. at 36 (Scalia, J., concurring in judgment). Experience has shown that the non-discrimination requirements and the prohibition against preexisting-condition exclusions—both proper exercises of core Commerce Clause powers—could not function effectively absent a requirement that everyone (healthy and unhealthy alike) be insured. It is not "merely possible for a court to think of a rational basis on which Congress might have perceived" a linkage between the minimum-coverage provision and otherwise permissible regulations of insurance under the Act. *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring in judgment). The "substantial link to Congress' constitutional powers" is readily apparent. *Ibid.*

3. The Necessary and Proper Clause also obviates any activity/inactivity distinction. "[W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses *every power* needed to make that regulation effective.'" *Raich*, 545 U.S. at 36 (Scalia, J., concurring in judgment) (emphasis added). Even if plaintiffs' activity/inactivity distinction had any merit in the Commerce Clause context—and it does not—there is no room in the Necessary and Proper Clause for artificial distinctions between compelling and prohibiting conduct.

History makes clear that individual mandates can be "necessary and proper" means of effectuating enumerated powers. In the Republic's earliest days, Congress discharged its authority to "provide for organizing, arming, and disciplining, the Militia," U.S. Const. art. I, §8, cl. 16, by compelling activity: It mandated militiamen to obtain particular arms and supplies. See Act of May 8,

1792, ch. 33, §1, 1 Stat. 271, 271-272 (persons liable for service must provide "a good musket or firelock, a sufficient bayonet and belt, two spare flints," and ammunition); *id.* §4, 1 Stat. at 272-273 (horses and uniforms). Congress has also prohibited inactivity by requiring people to respond to the census, 13 U.S.C. §221(a)-(b), report for jury duty, 28 U.S.C. §1866(g), and register for selective service, 50 App. U.S.C. §453. Congress thus has a long history of compelling conduct in service of other enumerated powers. The Commerce Clause—one of Congress's broadest powers—should not be viewed any differently. Cf. *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) (citing *Stewart* v. *Kahn*, 78 U.S. 493, 507 (1870)).

CONCLUSION

The minimum-coverage provision should be upheld.

Respectfully submitted.

BARRY FRIEDMAN
40 Washington Square South, Room 317
New York, NY 10012
(212) 998-6293

MIMI M.D. MARZIANI
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(646) 292-8327

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MARTIN V. TOTARO
LUCAS M. WALKER
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 536-2010 (facsimile)
jlamken@verizon.net

Counsel for Amici Curiae

JANUARY 2012

APPENDIX A
LIST OF *AMICI CURIAE*[1]

Matthew Adler
Leon Meltzer Professor of Law
University of Pennsylvania Law School

Rebecca L. Brown
Newton Professor of Constitutional Law
University of Southern California Gould School of Law

Jesse H. Choper
Earl Warren Professor of Public Law
University of California, Berkeley, School of Law

Thomas B. Colby
Professor of Law
The George Washington University Law School

Neal Devins
Goodrich Professor of Law
William & Mary School of Law

Michael C. Dorf
Robert S. Stevens Professor of Law
Cornell University Law School

Daniel Farber
Sho Sato Professor of Law
University of California, Berkeley, School of Law

[1] Institutional affiliations are listed for identification purposes only.

Barry Friedman
Jacob D. Fuchsberg Professor of Law
New York University School of Law

Michael Gerhardt
Samuel Ashe Distinguished Professor
in Constitutional Law
Director, Center for Law and Government
University of North Carolina School of Law

William P. Marshall
Kenan Professor of Law
University of North Carolina School of Law

Gene Nichol
Professor of Law
Director, Center on Poverty, Work & Opportunity
University of North Carolina School of Law

William J. Novak
Professor of Law
The University of Michigan Law School

Richard A. Primus
Professor of Law
The University of Michigan Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Theodore W. Ruger
Professor of Law
University of Pennsylvania Law School

David L. Shapiro
William Nelson Cromwell Professor, Emeritus
Harvard Law School

Suzanna Sherry
Herman O. Loewenstein Professor of Law
Vanderbilt University Law School

Neil S. Siegel
Professor of Law and Political Science
Co-Director, Program in Public Law
Duke University School of Law

Peter J. Smith
Professor of Law
George Washington University Law School

Adam Winkler
Professor of Law
UCLA School of Law