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 JUDICIAL WATCH, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION

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QUESTION PRESENTED

The question presented is whether the Minimum Coverage Provision of the Affordable Care Act exceeds Congress' powers under Article I of the Constitution.

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INTEREST OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. is a non-partisan, educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

Amicus is concerned about the important questions of constitutional interpretation and the proper balance of power between the several states and the federal government. This case also raises important questions about the consistency and transparency of the federal government's position on whether an act passed by Congress constitutes a tax. Specifically, Judicial Watch has undertaken research on whether Congress may mandate that an individual who does not purchase health insurance do so. Judicial Watch has also examined whether the federal government has been transparent and accountable in its positions on taxes in the Patient Protection and Affordable Care Act.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

SUMMARY OF ARGUMENT

Petitioners argue that the Minimum Coverage Provision in the Patient Protection and Affordable Care Act of 2010, which requires nearly all Americans to purchase health insurance, is a tax that the Court may uphold under Congress' broad taxing powers. However, Congress drafted and passed the Minimum Coverage Provision as a mandate with a penalty for failure to comply, not as a tax. Petitioner's argument that the Minimum Coverage Provision is a tax therefore fails.

To uphold the law, Petitioners must show that Congress had authority to pass the Minimum Coverage Provision under its Commerce Clause power, but if the Court allows Congress to do so, it must be willing to hold that Congress' powers under the Commerce clause are plenary and unlimited, for there remains no principled way to limit Congress' power if it is stretched as far as Petitioners ask.

ARGUMENT

Petitioners are trying to defend a provision in an act passed by Congress that exceeds its enumerated powers. Though Congress enacted this provision under the Commerce Clause, Congress' power under the clause is not broad enough to compel Americans to engage in commerce by purchasing a particular product. Though Petitioners try to rescue the provision by arguing that it is valid under Congress' taxing power even if it is invalid under Congress' commerce power, a provision of an act that is not a

tax may not be construed as a tax merely to save it from being declared unconstitutional.

I. Petitioners Must Look to the Commerce Clause for Authority to Pass the Minimum Coverage Provision Because They Cannot Retroactively Declare a Penalty to be a Tax.

According to Petitioners, the same provision that can be classified as a penalty when there is a political price to pay for raising taxes can take on the classification of a tax when needed to survive a court challenge. The federal government now argues that the Minimum Coverage Provision of the Patient Protection and Affordable Care Act (the "PPACA") is a tax because it operates in the same way as a tax and produces revenue like a tax. Petitioners encourage the Court to ignore the text of the law, which calls the Minimum Coverage Provision a "penalty," not a tax, when it is convenient for Petitioners.

At the same time, Petitioners take the position that the Court has jurisdiction to decide the constitutionality of the Minimum Coverage Provision now, although that position implies that the Minimum Coverage Provision is not a tax. If the Minimum Coverage Provision were a tax, the Anti-Injunction Act ("AIA") would bar the Court from either striking down or upholding the provision before it takes effect, which in this case would be in the year 2015. *See* 26 U.S.C. § 7421(a). Petitioners claim in their brief:

> [t]he AIA applies to suits to restrain the assessment or collection of "any tax." The payment under the Affordable Care Act's minimum coverage provision is, however, termed a "penalty" rather than a "tax," and it is not within the category of tax penalties that trigger the AIA's jurisdictional bar.

(Petitioner's Anti-Injunction Act Brief at 6). Petitioners, along with Respondents, want to see the Court rule on the constitutionality of the Minimum Coverage Provision now rather than in three years. Petitioners therefore argue, in this context, that the Minimum Coverage Provision does not meet the definition of "any tax." But in arguing the issue of the constitutionality of the Minimum Coverage Provision itself, Petitioners claim that it is a tax after all because it is a "revenue-raising provision bearing so many indicia of taxation." (Petitioner's Minimum Coverage Provision Brief at 53). Petitioners may not have it both ways.

During the charged political atmosphere prior to the law's passage, both chambers of Congress and the President wanted to avoid raising taxes on most Americans in order to pay for changes to the health care system. Only the year before, during the presidential campaign, then candidate Obama had made a firm promise not to do so. For instance, on September 12, 2008, at a rally in New Hampshire, Mr. Obama stated: "and I can make a firm pledge. Under my plan, no family making less than $250,000 a year will see any form of tax increase. Not your

income tax, not your payroll tax, not your capital gains taxes, not any of your taxes." *Barack Obama, Remarks in Dover, New Hampshire, (September 12, 2008)*, at http://www.presidency.ucsb.edu. Raising taxes on such families as part of the health care reform bill also was something congressional supporters of the health care bill wanted to avoid.

President Obama himself proclaimed emphatically that an insurance mandate is not a tax. In an interview with ABC News, This Week with George Stephanopoulos, on September 20, 2009, President Obama responded to George Stephanopoulos' assertion that the Minimum Coverage Provision was a tax increase by stating:

> No. That's not true, George. The -- for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase. What it's saying is, is that we're not going to have other people carrying your burdens for you anymore than the fact that right now everybody in America, just about, has to get auto insurance. Nobody considers that a tax increase. People say to themselves, that is a fair way to make sure that if you hit my car, that I'm not covering all the costs.

News Transcript: *ABC News, This Week with President Barack Obama* (September 20, 2009), at http://abcnews.go.com. When Stephanopoulos then said, "you reject that it's a tax increase?" President

Obama answered: "I absolutely reject that notion." *Id.*

As the President described the Minimum Coverage Provision, it is not a tax, but a punishment on those who do not carry health insurance. Such people are, by this calculation, doing something wrong in attempting to shift their own costs to other people. The punishment is not a severe one, being only a monetary penalty rather than a deprivation of any other rights or privileges, but a punishment is still a punishment even if it is a relatively light one.

With these positions taken so publicly, it is no surprise that the language of the Minimum Coverage Provision explicitly described the provision as a penalty, a "regulation," not a tax, grounded in Congress' commerce powers, not its tax powers. The congressional findings accompanying the Minimum Coverage Provision declare that the requirement "substantially affects interstate commerce." 42 U.S.C. § 18091(1). The PPACA also states that "the requirement regulates activity that is commercial and economic in nature." *Id.* at § 18091(2)(A). Failure to obtain the mandated health insurance coverage required by the Minimum Coverage Provision results in the "payment of a penalty." 26 U.S.C. § 5000A(b)(3). The choice of the word "penalty" rather than the word "tax" was a deliberate choice; earlier versions of the bill in the House of Representatives and in the Senate used the word "tax." *See* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009); Affordable Health Care for America Act, H.R. 3962,

111th Cong. (2009); and America's Healthy Future Act, S. 1796, 111th Cong. (2009). The change was clearly deliberate.

The concept of regulatory penalties as distinct from taxes is not in itself a departure from recognized precedent. As the Court stated in *U.S. v. La Franca*:

> A tax is an enforced contribution to provide for the support of government; a penalty … is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.

282 U.S. 568, 572 (1931). Thus, the publicly stated purpose of the Minimum Coverage Provision very appropriately comports with the traditional definition of a penalty. Contrary to Petitioners' arguments, the Minimum Coverage Provision operates as a penalty; it does not "operate as a tax law." (Petitioner's Minimum Coverage Provision Brief at 52). What is unprecedented about the penalty is that, generally when Congress penalizes American citizens, the punishment is for an action that Congress disapproves, not simply for a lack of action.

The Court should not ignore the actual text of the law, which defines the Minimum Coverage Provision as a penalty, to classify the provision as a tax. Congress clearly demonstrated the intent not to pass a tax when it drafted and passed the bill that became the PPACA. Congress voted on and enacted a penalty, not a tax. The bill ultimately passed the Senate without a single vote to spare, suggesting that Congress needed to structure the Minimum Coverage Provision as a penalty. That Congress' taxing power may be broader than its Commerce Clause power cannot change Congress' intent as reflected in the plain language of the statute. Principles of statutory construction do not allow Petitioners to recharacterize that intent after the fact. As can be seen from their brief on the Anti-Injunction Act Issue, even Petitioners agree with this analysis, when their legal position allows them to do so without adverse consequence.

Once the PPACA was enacted, the proponents of the new law changed tactics. Before passage, the fate of the PPACA depended on politics, not law. At that time, the Minimum Coverage Position was emphatically not a tax. In court, the status of the Minimum Coverage Provision has become more complicated: it is a penalty for the purposes of the Anti-Injunction Act, but a tax for the purposes of Congress' taxing power.

The provision's "sometimes" status as a tax dates to the time when the PPACA was first challenged in the district courts. Petitioners, who were the defendants in cases filed in many

jurisdictions, began to adopt as its litigation stance the argument that the Minimum Coverage Provision was a tax after all. For instance, in its memorandum in support of Defendant's Motion for Summary Judgment in the Eastern District of Virginia, Petitioners took the position that, because the Minimum Coverage Provision raises revenue, it is an exercise of Congress' independent power under the General Welfare Clause: "[i]ndependent of its Commerce Clause authority, Congress is vested with the 'Power to lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.'" (Defendant's Motion for Summary Judgment at 39, *Commonwealth ex rel. Cuccinelli v. Sebelius*, Case No. 3:10CV188 (E.D. Va. 2010)). For purposes of their brief before this Court on the Minimum Coverage Provision, Petitioners continue to take this position despite its uneasy coexistence with their position that the Anti-Injunction Act does not apply to the Minimum Coverage Provision.

The Minimum Coverage Provision was drafted to regulate the choices of Americans directly rather than to affect their choices by offering tax incentives. Although Petitioners point out that the Minimum Coverage Provision has the effect of raising revenue, the purpose of the provision was explicitly not to raise revenue, but to force Americans to buy insurance. Thus, wanting to compel Americans to buy health insurance, Congress passed a law that made it illegal not to do so. Congress also appeared to have no doubts about its power to enact such a mandate at the time of passage. On October 22,

2009, the then Speaker of the House of Representatives, Nancy Pelosi, was asked in a press conference by a CNSNews reporter: "Madam Speaker, where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?" In response, Speaker Pelosi asked the question: "Are you serious? Are you serious?" Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi says 'Are You Serious*?,' CNSNews (October 22, 2009), at http://cnsnews.com. Petitioner's alternate argument, however, is also fatally flawed.

II. The Commerce Clause Cannot Provide Authority to Pass the Minimum Coverage Provision Because To Allow Such Authority Would Transform the Federal Government Into One of Unlimited Powers.

Petitioners have taken the position that the Minimum Coverage Provision is a tax because they understand that, if it is not, this Court can only uphold the provision if it is willing to do now what it has never been willing to do before, which is declare "Congress' regulatory authority" to be "without effective bounds." *U.S. v. Morrison*, 529 U.S. 598, 608 (2000). Congress grounded its constitutional authority to pass the Minimum Coverage Provision in the interstate commerce clause of Article III of the Constitution, which states: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Petitioners argue that the

Minimum Coverage Provision is a valid exercise of Congress' Commerce power because it is an "integral part of a comprehensive scheme of economic regulation" that "regulates economic conduct with a substantial effect on interstate commerce." (Petitioner's Minimum Coverage Provision Brief at 24 and 33.) However, the Commerce power cannot be broad enough to encompass the authority to force Americans who have engaged in no activities that affect interstate commerce to purchase a product from another private party. Americans who have engaged in no activity at all cannot be said to have engaged in an activity that affects interstate commerce. Such a decree exceeds Congress' authority even if the requirement to purchase that product is part of a scheme of economic regulation, and the purchases once made have a substantial effect on interstate commerce. If the Court accepted such an argument it would not only have to extend the power of the Commerce Clause farther than it has ever been extended before but it would have no principled basis to provide any limitation on the authority of the commerce clause at all. Under present precedent, that the Court may not do.

"The federal government is acknowledged by all to be one of enumerated power . . . the enumeration presupposes something not enumerated." *U.S. v. Lopez*, 514 U.S. 549, 566 (1995) (citations omitted). The Tenth Amendment also makes clear that the federal government does not exercise plenary power, neither over the states nor the people, when it states: "the powers not delegated to the United States by the Constitution, nor prohibited by it to

the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. If all power had been delegated to the United States through the Commerce Clause, reserving powers to the states just would not make sense. The Constitution lays out these principles by inference, but they are not less powerful for that reason: "It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications." *Printz v. Mack*, 521 U.S. 898, 924, n.13 (1997).

The reach of the federal government under the scope of the enumerated power to regulate commerce among the states extends much farther today than it did originally. When the Constitution was written, "commerce referred predominately to exchange or trade as distinct from the agricultural or manufacturing production of those things that are subsequently traded." Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 114. (2001). The evidence suggests that the Commerce Clause was meant to allow the federal government to regulate trade between the states rather than to control all aspects of the national economy. *Id*. However, starting in 1937, the Court significantly expanded the latitude allowed to Congress under the Commerce Clause. In *NLRB v. Jones and Laughlin Steel Corp*., the Court found that Congress could regulate intrastate activities as long as they could be said to have a substantial effect on interstate commerce: "[a]lthough activities may be intrastate in character when separately considered, 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." 301 U.S. 1, 37 (1937).

Then, in 1942, with the case of *Wickard v. Filburn,* the scope of the Commerce Clause expanded even further. 317 U.S. 111 (1942). In *Wickard*, the Court held that Congress may penalize a farmer for growing too much wheat on his farm, even for his own intrastate consumption. *Id*. at 118. The Court stated that the farmer's activity could be reached by Congress as long as that activity, even if trivial on its own, could "exert a substantial economic effect" if "taken together with that of many others." *Id*. at 125, 127-128. This principle allows Congress to regulate even seemingly trivial and insignificant activities as having a "substantial effect" on commerce. The scope extended so far that it seemed to allow Congress to regulate any activity engaged in by Americans, so long as that activity could be tied, however indirectly, to the national economy. No activity could be too small and no activity could be too local. (*See*, *e.g*., *Heart of Atlanta Motel, Inc. v. U.S*., 379 U.S. 241, 258 (1964) ("[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (citation omitted)). The reach of the interstate Commerce Clause extended so far it seemed for a long time that nothing could be out of Congress' grasp. Several decades after this expansion of the commerce clause, however, with the *Lopez* and *Morrison* cases, the Court showed that, for all the

deference the Court was willing to show to Congress since the New Deal era, it is still the Court's duty to preserve some limits on federal power. The question is how to apply a limiting principle.

The Minimum Coverage Provision gives the Court its last best chance to provide a limiting principle. By refusing to uphold the mandate, the Court can defend liberty and federalism while distinguishing the cases of *Wickard* and its progeny, which allowed Congress to regulate and restrict activity, but never to mandate it. It is true that "the Court as an institution and the legal system as a whole" have "a stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Lopez,* 514 U.S. at 574 (Kennedy, J., concurring). This case would allow the Court to finally delineate a limit to Congress' powers under the Commerce Clause while preserving the entire doctrine as it has evolved to this point. The Minimum Coverage Provision is the first time that Congress has not only prohibited, restricted or regulated the activity of American citizens under the commerce power, as part of its power to regulate the national economy, but has actually gone so far as to order entirely passive Americans to enter into a national market. Congress has reached beyond its previous power to prevent virtually any activity it chooses, so long as it can be argued that that activity would have a substantial effect on national economic activity, and adopts the position that it has the power to also require virtually any activity it chooses so long as that activity could have a substantial effect on national economic activity. After more than

two hundred years of functioning without the power to order Americans into commerce, Congress has made a policy choice to now do so. But, having found a new power, what Congress could do with this power is limitless.

Petitioners spend many pages pointing out reasons why the health care market is unique, in an attempt to reassure the Court that to uphold the mandate would not be to allow Congress a new power with no limits. Petitioners argue that virtually everyone needs health care at some point. Petitioners point out that health care "involves needs that cannot reasonably be anticipated and budgeted for" and that "costs can mount rapidly." (Petitioner's Minimum Coverage Provision Brief at 35, 36.) Petitioners note that Congress has enacted laws requiring all hospitals to stabilize patients who arrive with an emergency condition whether they can pay or not. (*Id.* at 40). These laws allow Americans who do not insure themselves to shift costs to American society at large, and the Minimum Coverage Provision stops Americans from exploiting such laws in their favor. The Minimum Coverage Provision is not a stand-alone provision, but part of a "comprehensive scheme" of economic regulation. However, for all the many arguments Petitioners make about the differences between health care and everything that is not health care, nothing Petitioners say provides a limiting principle that this Court could apply to future cases. Can Congress exceed the bounds of its powers under the Constitution merely because it is dealing with a pressing national issue? Can Congress expand its

constitutional powers by writing laws which create problems which cannot be solved within previous constitutional limitations, such as laws requiring hospitals to subsidize costs of the indigent?

Yet while the health care market has features that make it unique, so could any market have features that make it unique. Suppose Congress decided to require that every American purchase a Chevy Volt. Such a mandate might seem extreme and politically infeasible, but what if Congress made the argument that without the mandated purchase of the Chevy Volt, given all the regulations applicable to American car manufacturers, without a mandate the American automotive industry would fall apart completely? Sooner or later, every American ends up needing transportation or at least benefits from the transportation of others, so can Americans as a whole really said to be not engaging in commerce when they choose not to buy a car? Although the mandated purchase of a Chevy Volt may sound like an extreme imposition on the liberty of American citizens, on what grounds could the Court protect that liberty if such a purchase were designed as an integral part of a comprehensive scheme of economic regulation, perhaps a desire to create a viable national economy in electric cars within a nation that finds electric cars undesirable. This hypothetical illustrates that, as much as the interpretation of the commerce power since *Wickard* allows Congress great latitude in interfering with the liberty of Americans, this expansion of the commerce power would allow Congress infinitely more. There are an infinite number of activities,

which, if Congress required Americans to engage in them, would also address national economic problems and substantially affect interstate commerce.

Allowing the Minimum Coverage Provision to stand would pave the way to a profound change in the relationship between Americans and the federal government, a change every bit as profound as the change ushered in by *Wickard*. This change would also take place in the absence of constitutional authority. No limiting principle is possible if the Petitioners' arguments are accepted. This logical implication has even been accepted by courts below that were willing to thus extend the Commerce Clause's power. "We acknowledge some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce." *Seven-Sky v. Holder,* 661 F.3d 1, 18 (D.C. Cir. 2011).

It is true that, as regards the Commerce Clause, the federal government has already been operating far outside the constraints of its original meaning. In light of the fact that "interstate commerce" has departed so far from original intent, it may seem to be a daunting task to prune it back. But this case offers a simple way to start, as it provides a bright line rule and does not require any previous precedent to be overruled. Petitioners argue that an "unprecedented limitation on the commerce power" should be rejected and that there is no "textual support in the Commerce clause for [the] 'inactivity'

limitation." But if the power grasped by Congress is unprecedented, any limitations on that power would also be unprecedented. And there is no textual support to allow the expansion of the commerce clause even as far as previous case law allows, much less expanding its scope even further. Even if the structure that developed by commerce clause case law allows Congress more powers than the original meaning intended, preserving some limits to Congress' power is closer to the text of the Constitution than preserving none would be.

Petitioners are wrong to assert that the Minimum Coverage Provision is "a policy choice the Constitution entrusts the democratically accountable Branches to make, and the Court should respect it." (Petitioner's Minimum Coverage Provision Brief at 24). The Court has taken the position since *Marbury v. Madison*, 5 U.S. 137 (1803), that it should not respect the political branches of government when they violate the Constitution and violate the constitutional liberties of Americans. If the Court declines to protect liberty here, in the service of the structure of the Constitution itself, designed to protect the individual liberties of Americans through a balance between federal and state power, why should the Court protect American liberties in any judicial review context? Why should the Court assiduously protect perceived liberties considerably less tethered to any written clause in the constitutional text in the due process context, but give up entirely on one of the core concerns of the Constitution, limited federal government? The "federal balance is too essential a part of our

constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). With the Minimum Coverage Position, the federal government has tipped the scales too far and the Court must act.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the Eleventh Circuit's decision and hold that the Minimum Coverage Provision of the PPACA is unconstitutional.

Respectfully submitted,

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