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Florida v. HHS - Amicus Brief of Law Professors

Barry Friedman

Nos. 11-11021 & 11-11067

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, BY AND THROUGH ATTORNEY GENERAL PAM BONDI, *ET AL.*,
Plaintiffs-Appellees / Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *ET AL.*,
Defendants-Appellants / Cross-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF LAW PROFESSORS BARRY FRIEDMAN, MATTHEW ADLER, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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**U.S. COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

State of Florida, et al.,

v.

U.S. Dep't of Health & Human Servs., et al.

Nos. 11-11021 & 11-11067

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, in addition to the persons and entities listed in the Brief for Appellants, the following persons and entities may have an interest in the outcome of this case, and that, to the best of his knowledge, the list of persons and entities in the Brief for Appellants is otherwise complete:

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April 8, 2011

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INTEREST OF *AMICI CURIAE*

Amici are law professors (listed in Addendum A) who have taught, studied, written about, and have expertise in the Constitution, constitutional history, and the structure and requisites of American federalism.[1] They 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) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.), a question on which their views diverge. Nonetheless, they have a profound interest in and expertise on the legal issue this Court is called upon to decide—whether the Act is within Congress's powers. On that question they are of one mind: The provision is plainly constitutional.

STATEMENT OF ISSUES

Whether the minimum-coverage provision of the Patient Protection and Affordable Care Act is a valid exercise of Congress's powers under the Commerce Clause or the Necessary and Proper Clause.

SUMMARY OF ARGUMENT

Having experienced the inadequacy of the Articles of Confederation, the Constitution's Framers understood that the national government needed authority

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[1] Pursuant to F.R.A.P. 29(c)(5), *amici* certify that no counsel for any party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, its members, and its counsel made such a monetary contribution. The parties have consented to the filing of this brief.

sufficient "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). To that end, the Constitution granted the national government broad powers—most important here, the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, and to enact laws "necessary and proper" to the effective exercise of that power, *id.* art. I, § 8, cl. 18.

The federal government has long addressed national economic problems that state legislation could not solve or, worse, would exacerbate. As the Nation's economy has become increasingly integrated, moreover, Congress's exercise of its commerce power has naturally expanded as well. Today, it is beyond argument that the Commerce Clause permits Congress to regulate not merely trade between States but also commerce within States that, on the whole, has sufficient interstate effects.

Perhaps for that reason, the plaintiffs here do not challenge, and the district court did not dispute, the validity of 99% of the Act's provisions. The court thus nowhere held that Congress exceeded its powers by enacting provisions that:

- Prohibit insurers from denying coverage of preexisting conditions. 42 U.S.C § 300gg-3(a).

- Ban insurers from discriminating or denying eligibility based on health status. *Id.* § 300gg-4(a).
- Bar insurers from establishing "lifetime limits" or "unreasonable annual limits" on benefits and claims. *Id.* § 300gg-11(a)(1)-(2).
- Prohibit rescission of insurance contracts. *Id.* § 300gg-12.
- Require insurers to provide a simple coverage summary. *Id.* § 300gg-15(b).
- Require insurers to pay for preventive care. *Id.* § 300gg-13.
- Require insurers to cover dependents to age 26. *Id.* § 300gg-14(a).

Any challenge to those provisions would be futile: The Supreme Court has squarely held that Congress's commerce powers include regulation of insurance markets. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944).

Largely ignoring those indisputably constitutional provisions, the district court below isolated the minimum-coverage requirement—the so-called "individual mandate"—for analysis. Under that provision, most Americans who otherwise lack health insurance must, in effect, pay for healthcare in advance by obtaining some minimal level of health coverage, as opposed to seeking to purchase healthcare on the spot market (or to obtain healthcare without paying for it) later. *See* 26 U.S.C. § 5000A. The decisions of millions of Americans to purchase health insurance now, or instead take a wait-and-see approach, so

profoundly affect interstate healthcare and health-insurance markets that Congress's authority to regulate under the Commerce Clause should be beyond doubt.

The minimum-coverage requirement, moreover, is independently supported by the Necessary and Proper Clause. A central purpose of the Act is to regulate interstate commerce—to impose certain terms on health-insurance contracts sold across the country to make them more readily available. No one disputes that such direct regulation of health-insurance markets is within Congress's commerce power. But many of those efforts would, absent the minimum-coverage requirement, be futile or counterproductive. A system requiring insurers to cover preexisting conditions, for example, cannot endure if individuals do not have to maintain insurance when they are healthy: Too many healthy individuals would wait to buy insurance until they become sick, assured that coverage cannot then be denied. Insurance markets thus would become dominated by high-cost, high-risk purchasers, with fewer healthy insureds to offset the costs. Premiums would skyrocket, and cost pressures would drive insurers from the market altogether.

Congress therefore 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). From *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), to *United States v. Comstock*, 130 S. Ct. 1949 (2010), 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 that clause. It is the keystone that prevents much of the Act's indisputably valid edifice of insurance regulation from collapsing.

ARGUMENT

The Patient Protection and Affordable Care Act directly regulates commerce by regularizing health-insurance contracts and restricting terms like preexisting-condition exclusions and discriminatory pricing. Those regulations, unquestionably within Congress's Commerce Clause authority, would be ineffective absent the minimum-coverage requirement. The Necessary and Proper Clause exists precisely to permit such provisions where Congress reasonably deems them necessary and 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 founding generation 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. The

decision below harkens not to the original understanding of the Constitution (or to the Supreme Court's cases interpreting it), but to the Articles of Confederation the Constitution replaced.

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

The Articles of Confederation had left the new Nation adrift in a motley sea of competing and conflicting state laws, its central government unable to maintain order. 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). 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 restrictions on "commercial intercourse with other States," which in turn "beg[a]t retaliating regulations" not merely "expensive and vexatious in themselves" but also "destructive of the general harmony." *Id.*

The absence of a uniform economic policy exacted a heavy toll. As 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 [any] 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." *Id.*; *see also* Levy, *Federalism and Collective Action*, 45 U. Kan. L. Rev. 1241, 1258-59 (1997). That fear was well founded. For example, when States "needed to enact legislation prohibiting British ships from entering American harbors" to give the 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, 595-96 (1994). But "most states did nothing," preferring to take for themselves the "significant amount of trade" Massachusetts's law diverted from its shores. *Id.* Massachusetts consequently repealed its legislation. *Id.*

Based on those experiences, the Framers profoundly 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) (statement of Charles Pinckney). The Constitutional Convention 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 expanded that principle into a draft Constitution with enumerated powers, including most notably authority to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3.

As James Wilson—a Committee of Detail member and later the first Justice appointed to the Supreme Court—explained, all agreed that federal power extended to "whatever object of government extends in its operation or effects beyond the bounds of a particular state." 2 Elliot, *supra*, at 399. While that principle was "sound and satisfactory," "its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle." *Id.* "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." *Id.* Put another way, "the purpose of enumeration was not to *displace* the principle but to *enact* it." Balkin, *Commerce*, 109 Mich. L. Rev. 1, 11 (2010).

Scholars of all stripes thus agree that the commerce power is "best 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, 555 (1995); Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 (1934).

B. Longstanding Practice and Precedent Confirm Congress's Broad Regulatory Authority Under the Commerce Clause

Consistent with that history, the Supreme 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,'" *Comstock*, 130 S. Ct. at 1965, in view of the Nation's increasingly interdependent economy.

1. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall echoed the Constitutional Convention's resolutions to articulate the controlling principle. Upholding Congress's power to regulate steamboat navigation on the Hudson River, he 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." *Id.* at 195.

While *Gibbons* established federal authority over the "deep streams which penetrate our country in every direction," 22 U.S. at 195, railways eventually overtook 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 nonetheless balked at federal regulation of intrastate rates, the Supreme Court rebuffed their challenges. *See The Shreveport Rate Case*, 234 U.S. 342, 350 (1914). Even if intrastate shipping was not by itself under Congress's power, Congress "unquestionably" could "prevent the intrastate operations of [the railroads] from being made a means of injury to" its regulation of interstate commerce. *Id.* at 351. In doing so, Congress was entitled to "take *all* measures necessary or appropriate to that end." *Id.* at 353 (emphasis added).

2. The Supreme Court's path has not been unbroken. It has at times barred Congress from addressing commercial problems the States could not handle themselves. In *Hammer v. Dagenhart*, for example, the Court invalidated a federal

prohibition on the interstate movement of goods produced by 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, 307-10 (1936).

But the Court has since recognized that, in our increasingly interdependent national economy, those "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). For example, in *United States v. Darby*, 312 U.S. 100 (1941), the Court repudiated *Hammer* and held that Congress could regulate production 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 115-17; *see* Balkin, *supra*, at 32.

Many decisions of that era rest on similar rationales. In upholding federal unemployment-benefits legislation under Congress's taxing power, for example, the Supreme Court noted the 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."

Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937).[2] A State's beneficent actions could also unduly drain its coffers, 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. Only a power that is national can serve the interests of all." *Helvering v. Davis*, 301 U.S. 619, 644 (1937).

The Court similarly recognized the profound impact of intrastate activity on interstate commerce, reaffirming that federal 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 thus explained how increasingly interconnected markets had led to expanded exercises of federal

[2] The Court noted that Massachusetts's unemployment-benefits act by its terms 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." *Steward Mach.*, 301 U.S. at 588 n.9.

commerce power: "In a simpler time, when life ordinarily was limited to 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." *Id.* Everyone "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 had come to pervade the Nation. *See, e.g.*, *Rendezvous with Destiny: Addresses and Opinions of Franklin Delano Roosevelt* 295 (Hardman ed., 1944) ("The 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. We are interdependent—we are tied together."). The Court likewise came to recognize that, in an integrated economy, even small choices—such as a farmer's "trivial" consumption of homegrown wheat—can cumulatively have sufficient repercussions throughout national markets to justify federal regulation. *Wickard v. Filburn*, 317 U.S. 111, 127-28

(1942); *see* Cooter & Siegel, *supra*, at 160 (state efforts to combat wheat overproduction "faced insuperable difficulties" because "holdout" States refused to restrict producers).

3. The Supreme Court has continued to uphold Congress's power to protect, promote, and regulate interstate commerce. For example, Congress may prohibit discrimination in public accommodations, 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, 252-53 (1964). And Congress may enact environmental measures that States, deterred by the prospect of disadvantaging in-state businesses, might not implement themselves. *See Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281-82 (1981).

As the Nation has grown from 13 to 50 States, the need for national solutions has grown. 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. The exercise of federal commerce power has thus expanded not merely with our interconnected economy but also with the need for national solutions to problems

that would otherwise be left unaddressed by individual States—a need the Framers well understood.

Far from rejecting that understanding, recent Supreme Court decisions emphasizing the limits of Congress's commerce powers embrace it. In striking down a federal prohibition on gun possession near schools, and federal laws addressing violence against women, the Supreme Court has carefully 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 are thus fully consistent with the broad commerce power the Court has recognized for two centuries.

II. The Act Falls Within the Historical Understanding of Congress's Commerce Powers

A. The Act Directly Regulates Interstate Commerce

In *South-Eastern Underwriters*, the Supreme Court upheld Congress's regulation of insurance, holding that "the word 'commerce' as used in the Commerce Clause . . . 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. To the contrary, its interstate nature is inescapable. "Health insurance and health care services" now 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." *Id.* "[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." *Id.*

There is thus no serious debate that almost all the Act's provisions addressing health-insurance contract terms fall squarely within Congress's commerce power. Those provisions do not merely 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. Regulations governing the "practical aspects of the insurance companies' methods of doing business" affect the "[i]nterrelationship, interdependence, and integration of activities in all the states in which they operate," the "continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts." *South-Eastern Underwriters*, 322 U.S. at 541. The Act permissibly "prescrib[es] rules for carrying on that intercourse." *Gibbons*, 22 U.S. at 190.

The Act also regulates in an area where the States often cannot. Today, most States allow insurance companies to deny "coverage, charge higher premi-

ums, and/or refuse to cover" preexisting medical conditions. Dep't of Health & Human Servs., *Coverage Denied* 1 (2009). As a result, many individuals—including those who most need healthcare—cannot obtain insurance. *Id.* Yet pioneering States seeking to compel coverage for preexisting conditions confront a grave risk of systemic failure. Individuals whose health conditions make it impossible to obtain coverage in other States will be drawn to States with more protective laws. That, in turn, can drive premiums up. Healthier individuals may flee. And insurers may abandon the State, leaving residents with fewer choices and less competition. Indeed, after Kentucky enacted reform, all but two insurers (one State-run) abandoned the State. *See* Kirk, *Riding the Bull*, 25 J. Health. Pol. Pol'y & L. 133 (2000); Balkin, *supra*, at 46. States seeking to resolve the problem of preexisting conditions thus face overwhelming difficulties if other States do not follow suit. Only a handful of States have attempted to ban preexisting-condition exclusions, and only one, Massachusetts, has had anything approaching success. *See* p. 28, *infra*.

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, cannot pursue new opportunities in States that permit insurers to deny them coverage. Such unnecessary and nationally

detrimental barriers to interstate migration and commerce are precisely what Congress has taken steps to redress 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 252-53.

B. The Minimum-Coverage Requirement Falls Within Congress's Commerce Power

The minimum-coverage requirement regulates commerce. As the United States has explained, Americans have a choice about how to finance their healthcare: They can pay for it in advance by purchasing insurance, or they can risk trying to pay for it on an as-needed basis. Cumulatively, those individual choices have an enormous impact on interstate commerce that dwarfs the decision to grow wheat for personal consumption at issue in *Wickard*. In 2008, for example, 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." *Id.* 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 Serv. Res. 788, 791 (2006). And "lower revenue streams . . . could even force [providers and hospitals] to relocate or cease" operating

altogether. *Id.* at 789. Thus, as with the other, unchallenged provisions of the Act, "Congress had a rational basis for concluding that leaving [healthcare-financing decisions by the uninsured] outside federal control would similarly affect price and market conditions." *Raich*, 545 U.S. at 19.

The district court, however, concluded that "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity"—*i.e.*, a citizen's choice *not* to purchase health insurance. Slip op. at 42. That conclusion has no pedigree in Supreme Court precedent, and harkens to the formalisms the Court has long rejected. 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 123-24. Rather, "interstate commerce itself is a practical conception," and so "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." *Wickard*, 317 U.S. at 125.

The purported activity/inactivity distinction also makes little sense. "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). The Supreme Court recognized that basic

economic principle in *Wickard*, 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). "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 minimum-coverage requirement, moreover, falls on the "activity" side of any activity/inactivity divide. *Cf.* slip op. at 44-56. There is virtually no such thing as "inactivity" in the healthcare market. One cannot opt out of illness, disability, and death. The requirement 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) (emphasis added). It likewise regulates the inevitable *future* activity of obtaining healthcare, by requiring advance arrangements that ensure an ability to pay for it. Congress could certainly enact a statute requiring any individual who obtained healthcare without payment in 2010 to purchase insurance for 2011 or pay a

penalty. The requirement here simply does that without waiting for an instance of non-payment.[3]

In its order granting a conditional stay, the district court invoked the rhetoric of personal liberty. Mar. 3, 2011 Dkt. Entry, at 4-5 n.2. But the question here is not whether "other provisions of the Constitution—such as the Due Process Clause"—would preclude the regulation; the question is the scope of Congress's commerce power. *Comstock*, 130 S. Ct. at 1956. Structural aspects of the Constitution often protect individual liberty. *See Clinton v. City of New York*, 524 U.S. 417, 450-51 (1998) (Kennedy, J., concurring). But the Court enforces those structural aspects by ensuring that Congress is acting within its enumerated powers, not by importing substantive due process concerns into the Commerce Clause analysis. The district court did not frame its analysis in terms of substantive due process, a highly dubious theory that would put healthcare reform beyond

[3] Congress already directly regulates countless activities that increase the risk of requiring 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 chooses to engage in those activities—*e.g.*, driving a car or buying certain foods—to obtain insurance, even though that would cover virtually every American. The minimum-coverage requirement achieves the same result through less convoluted means.

even state authority.[4] Yet invalidating the provision would have the same practical effect, given most States' inability to address the problem alone.

No one disputes that Congress could have chosen not to enact reform but rather to tax all Americans and spend those dollars buying insurance for each American "in aid of the 'general welfare.'" *Cf. Helvering*, 301 U.S. at 640-42. The minimum-coverage requirement surely is no more damaging to individual liberty. To the contrary, it removes the government as purchaser and allows individuals, not bureaucrats, to choose their policies. Even if a few individuals might have been able to self-insure reliably, or to live so remotely as to preclude any resort to the healthcare system, 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 (emphasis added). When uninsured individuals seek healthcare, they in the aggregate impose an enor-

[4] The minimum-coverage requirement no more violates substantive due process than far more invasive regulations like compulsory vaccination laws. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (Feb. 2, 2011) (statement of Professor Charles Fried), http://judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf.

mous 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* pp. 18-20, *supra*. As a result, "a 'rational basis' exists" for concluding that uninsured individuals "substantially affect interstate commerce." *Raich*, 545 U.S. at 22.

III. The Minimum-Coverage Requirement Is Necessary and Proper To Effectuate Congress's Regulation of Health Insurance

While the district court dismissed the Necessary and Proper Clause as "not really" embodying "a separate inquiry," slip op. at 13 n.7, that clause has substance. The Necessary and Proper Clause at the very least allows Congress to enact additional provisions that are essential to the effective exercise of its enumerated powers. That is precisely what the minimum-coverage requirement does. There is no dispute that Congress has authority under the Commerce Clause to prohibit, for example, discrimination and preexisting-condition exclusions. The minimum-coverage provision prevents the adverse selection that would otherwise cause those prohibitions to collapse. If a provision needed to protect Congress's exercise of Commerce Clause authority from self-destruction is not "necessary and proper," it is hard to imagine what is.

A. The Necessary and Proper Clause Grants Congress Broad Powers To Choose Means That Are Rationally Related to the Implementation of Its Legitimately Exercised 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 themselves not 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 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).

That broad authority reaches back centuries. In *McCulloch*, the Supreme Court recognized that "a government, entrusted with" enumerated powers, "must also be entrusted with ample means for their execution." 17 U.S. at 408. "[N]ecessary," Chief Justice Marshall explained, does not mean "absolutely necessary." *Id.* at 414-15; *see also* 3 Story, *Commentaries on the Constitution of the United States* § 1243, at 118 (1833); *id.* § 1240, at 116. "Accordingly, 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; *see id.* at 421.

McCulloch was not written on a blank slate. Hamilton and Madison had sparred over the meaning of the Necessary and Proper Clause as they debated the constitutionality of the Bank of the United States. 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 (Clark & 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." *Id.* Madison took a narrower view, interpreting the clause as endowing Congress with power only to provide a "direct and incidental means" to attain the object 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) (Chase, C.J., dissenting). But the minimum-coverage provision survives even under Madison's more limited interpretation.

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

To be valid under the Necessary and Proper Clause, a statute need only "constitute[] a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. The Constitution entrusts the choice of means "'primarily . . . to the judgment of Congress.'" *Id.* at 1957. "'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.* (emphasis added). The minimum-coverage requirement fits comfortably within the Necessary and Proper Clause.

1. There is no dispute that Congress legitimately exercised its Commerce Clause authority when it enacted provisions preventing insurers from imposing preexisting-condition exclusions, 42 U.S.C. §300gg-3(a), or health-status restrictions, *id.* §300gg-4(a). *See* p. 16, *supra*. The minimum-coverage requirement is a necessary and proper means of effectuating those regulations. Absent the minimum-coverage keystone, those provisions would collapse under the weight of a massive adverse-selection problem. "[I]f there were no requirement," Congress observed, "many individuals would wait to purchase health insurance until they needed care." 42 U.S.C. §18091(a)(2)(I). Insurance markets would become domi-

nated by high-cost, high-risk individuals in need of immediate care. The impact of that adverse-selection problem is obvious: Premiums would skyrocket, defeating the very 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 prohibitions on preexisting-condition exclusions and similar requirements, was to require all qualified individuals (healthy and unhealthy alike) to participate. 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." *Id.*

That "'judgment of Congress,'" *Comstock*, 130 S. Ct. at 1957, is not merely entitled to judicial respect. It is based on unassailable economics. Absent a mandate, adverse selection drives up premiums. *See* Glied *et al.*, *Consider It Done? The Likely Efficacy of Mandates for Health Insurance*, 26 Health Aff. 1612, 1613 (2007). Indeed, "[f]ive states have tried to undertake reforms . . . without enacting an individual mandate; those five states are now among the eight states with the most expensive nongroup health insurance." Rosenbaum & Gruber, *supra*, at 403. In Washington and Kentucky, insurers fled the market. Kirk, *supra*,

at 139, 152. By contrast, when Massachusetts coupled its limit on preexisting-condition exclusions with an individual mandate, it substantially ameliorated the adverse-selection problem. Chandra, *et al.*, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 New Eng. J. Med. 293, 295 (2011). To be necessary and proper, a provision need only "constitute[] 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 exercise of its Commerce Clause authority. It is critical to many of the Act's provisions.

2. Rather than addressing whether the minimum-coverage requirement is rationally related to Congress's exercise of its commerce powers, the district court held that the requirement could not be sustained under the Necessary and Proper Clause because that provision should not allow Congress to legislate beyond an enumerated power. *See* slip op. at 62-63. That view cannot be reconciled with the Supreme Court's recognition that the clause *does* allow 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 1957-58; *Darby*, 312 U.S. at 121. It is also contrary to centuries of precedent. 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 assuredly meets. Indeed, the requirement satisfies any conceivable interpretation of the Necessary and Proper Clause. The requirement easily 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, Clark & 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.

Indeed, while the Supreme 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 (emphasis added); *see also id.* at 1965-66 (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 crater. *See* pp. 26-28, *supra*. While courts should not "'pile inference upon inference'" to sustain congressional action under the Necessary and Proper Clause,

Comstock, 130 S. Ct. at 1963; *see also Raich*, 545 U.S. at 36 (Scalia, J., concurring in judgment), no inference-piling is needed here. Experience has shown that the non-discrimination requirements and prohibition against preexisting-condition exclusions—both proper exercises of core Commerce Clause powers—could not function effectively absent the minimum-coverage requirement. In short, it is not "merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the [Act's health-insurance regulations] and the challenged [minimum-coverage] provision." *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring in judgment). The "substantial link to Congress' constitutional powers" is readily apparent. *Id.*

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). There is no room in that standard for a distinction between compelling and prohibiting conduct.

Historical practice makes clear, moreover, that "individual mandates" are an accepted, "necessary and proper" means of effectuating Congress's express powers. In the earliest days of the Republic, 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, e.g.*, Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (requiring each person liable for service to "provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints," and ammunition); *id.* § 4, 1 Stat. at 272-73 (horses and uniforms). Congress has also prohibited inactivity by requiring people to respond truthfully 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's history of compelling conduct under a variety of enumerated powers forecloses any claim that the regulation of purported inactivity here is not a "proper" adjunct of its commerce power.

CONCLUSION

The district court's judgment should be reversed.

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