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Nos. 11-11021 & 11-11067

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA,
Plaintiffs-Appellees / Cross-Appellants,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF OF SENATE MAJORITY LEADER HARRY REID, HOUSE DEMOCRATIC LEADER NANCY PELOSI, AND CONGRESSIONAL LEADERS AND LEADERS OF COMMITTEES OF RELEVANT JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, the undersigned certifies that *amici curiae* filing this brief are not a publicly held corporation. In accordance with 11th Circuit Rule 26.1-1, the undersigned further certifies that the list of persons or entities that have an interest in the outcome of this case is adequately set forth in the Appellants' opening brief and the briefs of other *amici* case, except for the following additions:

Amici Curiae

Harry Reid
(Senate Majority Leader)

Sen. Dick Durbin
(Assistant Majority Leader)

Sen. Charles Schumer
(Conference Vice Chair)

Sen. Patty Murray
(Conference Secretary)

Sen. Max Baucus
(Chair, Committee on Finance)

Sen. Tom Harkin
(Chair, Committee on Health, Education, Labor, and Pensions)

Sen. Patrick Leahy
(Chair, Committee on the Judiciary)

Nancy Pelosi
(House Democratic Leader)

Rep. Steny H. Hoyer
(House Democratic Whip)

Rep. James E. Clyburn
(Democratic Assistant Leader)

Rep. John B. Larson
(Chair of Democratic Caucus)

Rep. Xavier Becerra
(Vice Chair of Democratic Caucus)

Rep. John D. Dingell
(Sponsor of House Health Care reform legislation)

Rep. Henry A. Waxman
(Ranking Member, Committee on Energy and Commerce)

Sen. Barbara Mikulski
(Chair, HELP Subcommittee on Retirement and Aging)

Rep. Frank Pallone, Jr.
(Ranking Member, Commerce Subcommittee on Health)

Sen. John D. Rockefeller IV
(Chair, Committee on Commerce)

Rep. Sander M. Levin
(Ranking Member, Committee on Ways and Means)

Rep. Fortney Pete Stark
(Ranking Member, Ways and Means Subcommittee on Health)

Rep. George Miller
(Ranking Member, Education and the Workforce Committee)

Rep. Robert E. Andrews
(Ranking Member, Education and Workforce Subcommittee on Health)

Rep. John Conyers, Jr.
(Ranking Member, Committee on the Judiciary)

Rep. Jerrold Nadler
(Ranking Member, Subcommittee on Constitution)

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INTERESTS OF *AMICI CURIAE*

Amici are Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and the following congressional leaders and leaders of the relevant committees of jurisdiction:

Sen. Dick Durbin
(Assistant Majority Leader)

Sen. Charles Schumer
(Conference Vice Chair)

Sen. Patty Murray
(Conference Secretary)

Sen. Max Baucus
(Chair, Committee on Finance)

Sen. Tom Harkin
(Chair, Committee on Health, Education, Labor, and Pensions)

Sen. Patrick Leahy
(Chair, Committee on the Judiciary)

Sen. Barbara Mikulski
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Sen. John D. Rockefeller IV
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Rep. Steny H. Hoyer
(House Democratic Whip)

Rep. James E. Clyburn
(Democratic Assistant Leader)

Rep. John B. Larson
(Chair of Democratic Caucus)

Rep. Xavier Becerra
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(Ranking Member, Education and Workforce Subcommittee on Health)

Rep. John Conyers, Jr.
(Ranking Member, Committee on the Judiciary)

Rep. Jerrold Nadler
(Ranking Member, Subcommittee on Constitution)

Amici file this brief for two reasons.[1] First, as elected Members of Congress, *amici* have a duty to support the Constitution, and in exercise of that duty they write to defend the constitutionality of the Patient Protection and Affordable Care Act. The Act, closely debated in Congress and around the country for well over a year, is a landmark accomplishment of the national Legislature, which brings to fruition a decades-long effort to guarantee comprehensive, affordable, and secure health care insurance for all Americans. *Amici* paid careful attention to Supreme Court precedents defining the proper bounds of Congress's constitutional authority, and relied upon these established rules in formulating, debating, and voting on the Act. They wish to put before the Court their views on why the Act is a valid exercise of Congress's Article I powers.

[1] Pursuant to Fed. R. App. P. 29(a), *amici* state that all parties consent to the filing of this brief.

Second, *amici* believe that Appellees' legal theories, if embraced by the courts, would seriously undermine Congress's constitutional authority and its practical ability to address pressing national problems. Congress regularly relies on its enumerated powers to protect American consumers and workers, keep families safe, and ensure civil rights. *Amici* take seriously their oath to "support and defend the Constitution of the United States," and write in their constitutional role as Members of a coequal branch of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central and dispositive fact in this case is that the Patient Protection and Affordable Care Act ("the Act" or "ACA"), including the provision that individuals maintain minimum health insurance coverage, is a congressional regulation of the interstate health insurance market. The effective regulation of health insurance, moreover, is critical to the effective functioning of the enormously important national health care market. The assertion that Congress lacks the legislative authority to regulate these national, commercial markets is an astonishing proposition. Its acceptance would mean that the Commerce Clause falls short of authorizing the full and effective regulation of interstate commerce. That novel claim is inconsistent with the Constitution and contrary to longstanding Supreme Court precedent. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (the commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution … in plain terms").

The ACA includes a minimum coverage requirement ("MCR") as part of its comprehensive regulatory plan designed to ensure that affordable health insurance coverage is widely available. The MCR is accompanied by a penalty provision applicable to most taxpayers that encourages individuals who lack adequate health insurance to obtain coverage that meets minimum standards. Congress determined after exhaustive hearings that without this financial incentive for individuals to maintain adequate coverage, it would not be financially practicable to prohibit insurance companies from denying coverage to those with pre-existing conditions or otherwise to regulate effectively the national markets in health insurance and health care.

Appellees, however, urge this Court to carve out an unprecedented exception to Congress's plenary authority to regulate interstate commerce. They contend that even matters vital to the national economy may not be regulated if they fall within an artificial category that Appellees call "inactivity." This is descriptively inaccurate, because (1) the penalty for failing to maintain minimum coverage applies only to those who participate in the economy by earning sufficient taxable income that they are otherwise required to file federal income tax returns and (2) virtually everyone subject to the penalty participates in some way in the health care market in any given year even if they choose not to purchase health insurance. Moreover, the Supreme Court long ago rejected using arbitrary characterizations to constrain Congress's power to regulate the national economy. *See, e.g., United States v. Lopez*, 514 U.S. 549, 556 (1995).

There is nothing unprecedented about Congress imposing requirements on citizens who would prefer to be left alone, when those regulations are necessary to accomplish an objective wholly within the powers delegated to Congress. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942). The provision is no more intrusive than Social Security or Medicare. The Social Security Act requires individuals to make payments to provide for their retirement. Medicare requires individuals to make payments to provide for their health coverage after they are 65 years of age or if they meet other criteria. The ACA requires individuals to obtain health coverage before they are 65. Under Medicare, there is one predominant payer, the government, and individuals choose between privately insured plans or a government-administered plan that relies on private providers. Under the ACA, individuals are given an option to choose among insurers in the private market. Neither Social Security nor Medicare nor the ACA is such a novel intrusion into liberty that judges would be justified in overriding the considered judgment of the elected branches that adopted those laws.

As members of Congress, we are mindful of the Supreme Court's concern, stated in cases such as *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), that Congress not use the commerce power to regulate matters that are local and non-economic. Those cases involved the attempt to regulate local crime (guns near schools and violence against women) because of a presumed ultimate effect on interstate commerce. The MCR, in contrast, is itself a regulation of an interstate commercial matter– health insurance. The effective functioning of that major commercial activity is critical to the national health care market in which virtually every American participates. This case tests no limits and approaches no slippery slope. Notwithstanding the improbable hypotheticals mooted before the District Court, Congress never has required Americans to exercise or eat certain foods – and in our view it never would. Were Congress ever to enact laws of that kind infringing on personal autonomy, the judiciary would have ample tools under the liberty clause of the Fifth Amendment to identify and enforce constitutional limits. *See Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990). What the ACA regulates is not personal autonomy, but commercial transactions.

Suggestions that sustaining the MCR would mean that Congress could mandate the purchase of cars or comparable items are also disingenuous. The provision requiring minimum health insurance cannot be viewed in isolation. In this case, Congress has regulated a unique market, insurance that provides a means of paying for health care services. A decision to rely on "on one's savings, or the backstop of free or reduced-cost emergency room services" to pay for services in the health care market is as surely an economic decision as the purchase of health insurance – and both are equally subject to Commerce Clause regulation. *Liberty University, Inc. v. Geithner*, 2010 WL 4860299, at *15 (W.D. Va. Nov. 30, 2010).

The MCR regulates participation in these singular markets, which play a central role in the nation's commerce. And were there any doubt that the MCR is a valid exercise of Congress's commerce power, the Necessary and Proper Clause provides a reinforcing and independent basis for the provision's constitutionality. The minimum coverage provision is a valid means to the full and effective exercise of Congress's regulation of interstate commerce in the larger Act.

Appellees' disagreement with the manner Congress has chosen to regulate two related and important national markets is an occasion for political debate, not a matter for judicial imposition. *Amici* stand by the wisdom of the Act, which expands quality, affordable insurance to millions of Americans while limiting costs and reducing the deficit. But, as Justice Benjamin Cardozo wrote for the Supreme Court nearly 75 years ago:

> Whether wisdom or unwisdom resides in the scheme of [the statute in question], it is not for us to say. The answer to such inquiries must come from Congress, not the courts.

Helvering v. Davis, 301 U.S. 619 (1937) (rejecting a constitutional challenge to the Social Security Act of 1935).

ARGUMENT

I. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, INCLUDING ITS MINIMUM COVERAGE REQUIREMENT, IS A VALID EXERCISE OF CONGRESS'S ENUMERATED CONSTITUTIONAL POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES.

A. Congress Has Plenary Authority To Regulate Interstate Markets, Including Matters Affecting The Prices Of Commodities Traded In Interstate Commerce.

The Constitution provides that "Congress shall have Power … To regulate Commerce … among the several States." Art. I, § 8, cl. 3. In decisions reaching back to the early years of the Republic, the Supreme Court has recognized that this crucial provision grants Congress plenary power to regulate the nation's commercial affairs. For, as the Supreme Court recently observed, "The Commerce Clause emerged as the Framers' response to the central problem giving rise to the

Constitution itself: the absence of any federal commerce power under the Articles of Confederation." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005).

Almost two hundred years ago, the Supreme Court stated that Congress's regulatory authority under the Commerce Clause "is plenary as to [its] objects" and "co-extensive with the subject itself." *Gibbons*, 22 U.S. at 197. Numerous decisions establish that when Congress regulates an interstate market it acts within the core of the Commerce Clause – and that "the power to regulate commerce … extends" not just to the literal commercial transactions of the relevant market but also to behavior or acts "which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce" in that market. *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838); *see also Gibbons*, 22 U.S. at 189-90. Thus, "Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient." *Second Employers' Liab. Cases*, 223 U.S. 1, 48 (1912). Congress's commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." *Gibbons*, 22 U.S. at 196 (quoted in *Hodel v. Va. Surface Mining Ass'n*, 452 U.S. 264, 276 (1981)).

It has long been settled, therefore, that "Congress plainly has power to regulate the price" of products "distributed through the medium of interstate commerce [and] possesses every power needed to make that regulation effective." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942). In doing so, Congress may decide "to give protection to sellers or purchasers or both." *Currin v. Wallace*, 306 U.S. 1, 11 (1939). "It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power…. Congress may consider and weigh relative situations and needs." *Id.* at 14. The Court's modern cases reaffirm that the commerce power authorizes the regulation of any matter that "affects the price structure and federal regulation of" an interstate market. *Perez v. United States*, 402 U.S. 146, 151 (1971).

In two recent cases, *Lopez* and *Morrison*, the Court held that Congress cannot use an attenuated connection to interstate commerce to enact laws governing purely local, non-commercial matters. Those cases involved provisions governing criminal behavior – possessing guns near a school and gender-motivated violence – with no immediate connection to any interstate market. The Court cautioned against reasoning that would permit congressional regulation of matters unrelated to the national economy by "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. In order to maintain the constitutional principle that Congress is a legislature of limited and enumerated powers, *Lopez* and *Morrison* identified a limiting principle to the instrumental use of the commerce power to regulate non-commercial matters: the gap between some local, non-economic matter that Congress wishes to regulate and interstate commerce cannot be bridged by pointing to a remote causal relationship. *See Morrison*, 529 U.S. at 617-18.

The Court has made clear that the limitation applied in *Lopez* and *Morrison* does not detract from Congress's plenary authority to regulate interstate commerce itself. In *Raich*, the Court reaffirmed that where "the [act under review] is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality." 545 U.S. at 26. Indeed, the "case law firmly establishes Congress' power to regulate purely local activities" as part of interstate commerce regulation. *Id.* at 17; *see also Lopez*, 514 U.S. at 557 (confirming Congress's unquestioned regulatory authority "where a general regulatory statute bears a substantial relation to commerce" (emphasis omitted)). As Justice Kennedy explained, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

B. The Act, Of Which The Minimum Coverage Requirement Is An Integral Part, Is A Constitutional Regulation Of Interstate Commerce.

1. The Commerce Clause authorizes the minimum coverage requirement as congressional regulation of the national health insurance market.

The Supreme Court recognized long ago that the Commerce Clause authorizes Congress to regulate "the business of insurance": "[t]hat power … is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary." *United States v. South-Eastern Underwriters*, 322 U.S. 533, 552-53 (1944).

In the Act, Congress set forth findings about the central role of health insurance in the U.S. economy. In 2009, the U.S. spent more than 17% of its gross domestic product on health care. ACA § 10106(a). Despite that expense, some 45 million Americans lacked health insurance for at least part of the year before enactment of the ACA. One reason so many Americans lacked health insurance is that prior to the ACA, insurers designed practices to exclude those most in need of medical care, often by avoiding coverage of people with pre-existing conditions. Given that as many as 129 million Americans under 65 have some pre-existing condition, Dept. of Health & Human Svcs., *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans* (2011), http://www.healthcare.gov/center/reports/

preexisting.html, these practices placed numerous families at risk for loss of health insurance.

Uninsured Americans experience injury, sickness, and the need for medical services. According to recent reports, 94% of the long-term uninsured have received some medical care. June E. O'Neill & Dave M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics, and their Health* 20-22 (2009). When Americans lack health insurance, they often resort to treatment in emergency rooms: according to one study, in 2007, 62.6% of the uninsured at a given point in time had made at least one visit to a doctor or emergency room within the previous year. Center for Health Statistics, *Health, United States*, 2009, at 318.

America is a charitable and caring nation, and the uninsured are, in many instances, provided basic health care with the cost passed on to other participants in the market. A federal statute requires as much. *See* Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd. The cost of medical care for the uninsured is shifted through the interstate market. In 2008, such cost-shifting amounted to $43 billion, *see* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 114 (Dec. 2008), creating a hidden burden passed along to other market participants through increased fees and premiums and to taxpayers through burdens on the public fisc. Congress, in passing the Act, understood that barriers to full coverage in the health insurance market have substantial economic effects extending beyond the health care sector. *See*, *e.g.*, ACA § 10106 (medical expenses contribute to 62% of personal bankruptcies).

The Act regulates the health insurance market to protect the American people by barring insurers from refusing or rescinding coverage based on pre-existing conditions, establishing new insurance markets, and promoting access to affordable insurance. It also requires individuals, with certain specified exceptions, to maintain minimum levels of health care coverage or (in some cases) pay a tax penalty. The Act as a whole is thus a core exercise of Congress's Commerce Clause power to regulate the interstate health insurance industry.

The challenged component of the Act, the MCR, fits within Congress's enumerated Commerce Clause authority because (1) on its own it regulates this interstate market, and (2) it is an integral part of Congress's broader regulatory scheme of assuring affordable health insurance coverage for all Americans.

First, the MCR directly addresses the affordability of health insurance and therefore (in light of the basic principle that insurance rests on the pooling of risks) its availability in the private market. As Congress explained, the MCR "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." ACA § 1501(a)(2)(A). Congress acted for the purposes of "giv[ing] protection to sellers [and] purchasers" and stabilizing "the price structure" of the health care insurance market – regulatory purposes the Supreme Court has long recognized as within the core of the commerce power. *See Currin*, 306 U.S. at 11; *Perez*, 402 U.S. at 151. As with the law in *Raich*, the MCR regulates commerce by addressing "supply and demand in the national market" for health insurance. *See Raich*, 545 U.S. at 19.

As a matter of economic fact, whether an individual purchases health insurance, self-insures, or ignores the issue altogether is one element in the mass of decisions (and failures to decide) that determine the cost, and thus availability, of health insurance in the market. Each of these choices is "economic" in a straightforward business sense: health insurance, unlike carrying guns near schools, is a product which people buy and sell. The Court employs a "practical conception of commercial regulation." *Raich*, 545 U.S. at 25 n.35 (quoting *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring)). It is "well established" that the commerce power "includes the power to regulate the prices at which commodities in that commerce are dealt in." *Wickard*, 317 U.S. at 128. The failure to obtain health insurance affects the cost of health insurance for others and, in the future, for oneself.

Second, Congress expressly found that the MCR "is an essential part of this larger regulation of economic activity," the absence of which "would undercut Federal regulation of the health insurance market." ACA § 10106. Congress found that the MCR is "essential" for a simple reason: otherwise, the new regulations would encourage individuals to delay or forgo insurance, knowing that they could not be excluded later for pre-existing conditions. That would cause higher insurance prices and greater cost-shifting. The MCR, however, will "significantly reduce[] the uninsured" and "together with the [Act's] other provisions … lower health insurance premiums." *Id.*

When Congress creates a "comprehensive regulatory regime," it may regulate a particular matter if the "failure to regulate ... would leave a gaping hole in the" statutory regime. *Raich*, 545 U.S. at 22. Without the MCR, the objective of the Act's regulation of interstate commerce would be far more difficult, if not impossible, to attain. "Leaving [individuals who do not purchase health care insurance although financially able to do so] outside the regulatory scheme would have a substantial influence on price and market conditions," *id.* at 19, and so undermine Congress's objectives. As the Court explained in *Raich*, in such circumstances the judiciary will "refuse to excise individual components of th[e] larger scheme." *Id.* at 22. The same rule holds here.

Viewed through the lens of recent cases, the Act and its MCR exercise the core of Congress's Commerce Clause authority. *See Lopez*, 514 U.S. at 558 (commerce power encompasses "the channels of interstate commerce ... the instrumentalities of interstate commerce, or persons or things in interstate commerce ... [and] activities affecting commerce"). The Act regulates the channels of interstate commerce, which permit the existence of insurance markets. It also regulates "things in interstate commerce" – insurance contracts and transactions. *See South-Eastern Underwriters*, 322 U.S. at 550 (insurance "involve[s] the transmission of great quantities of money, documents, and communications across dozens of state lines"). Finally, health insurance makes up a substantial interstate market itself and provides a means of payment for participants in the unique national health care market, and so the MCR regulates matters "substantially affecting interstate commerce."

2. The minimum coverage requirement is fully consistent with limits on the Commerce Clause described in recent Supreme Court decisions

The MCR, as a regulation of an economic market, also complies with the limits on Congress's authority articulated in *Lopez* and *Morrison*. The Act regulates interstate commerce, not in order to reach some further, non-commercial behavior but precisely in order to regulate a commercial market to achieve national purposes.

There is thus no gap between the regulation and interstate commerce. As the Supreme Court concluded in *Raich*, where Congress's clear purpose is to regulate an interstate market, the limiting principle of *Lopez* and *Morrison* is irrelevant. *See Raich*, 545 U.S. at 26. We are sensitive to the Court's concern that Congress not overstep its authority by using its national commercial powers to regulate truly local or non-economic matters that do not sufficiently affect commerce. But that is simply not this case. No chain of inferences is necessary to relate the MCR to the regulation of interstate commerce; instead, Congress is regulating a national market – the very subject matter and purpose of the Commerce Clause.

The relevant limitation to the MCR is that expressed by the terms of the Commerce Clause itself, and the MCR's constitutionality rests on the fact that what it regulates is interstate commerce. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) ("The only limitation [the Clause] places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make Congressional regulation necessary or appropriate"). Upholding a regulation of interstate commerce itself poses no danger of transforming the Commerce Clause into a federal police power.

C. There Is No Constitutional Basis For Carving Out A Novel Exception To Congress's Recognized Power To Regulate Interstate Commerce.

1. Whether the minimum coverage requirement should be categorized as activity or inactivity is an artificial distinction irrelevant to the question of the Act's constitutionality.

Appellees repeatedly proclaim a constitutional rule limiting the Commerce Clause to regulations affecting economic "activities." Appellees have manufactured this supposed "rule" out of whole cloth. Their claim is simply wordplay with the terminology found in some judicial opinions, none of which concern a difference between action and inaction. Appellees' claim rests on the happenstance that some opinions have used that language.[2] Neither in those opinions nor in any other modern case has the Supreme Court suggested the existence of any per se limitation on the commerce power based on such conceptual categories. "[S]uch formulas are not provided by the great concepts of the Constitution." *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring) (internal quotation marks omitted). It is implausible that without saying so, and contrary to its long-standing acknowledgment that the

[2] The Court uses other terms elsewhere. *See, e.g.*, *Bd. of Trade v. Olsen*, 262 U.S. 1, 37 (1923) (commerce power authorizes regulation of "'[w]hatever amounts to more or less constant practice and threatens to obstruct or unduly to burden'" interstate commerce) (quoting with approval *Stafford v. Wallace*, 258 U. S. 495, 521 (1922)). Appellants' theory is as futile as it would be to argue that the Court's use in *Olsen* and *Stafford* of the word "practice" limited the commerce power to "practices" as opposed to "non-practices."

commerce power is plenary, the Court's choice of wording established a new category of matters related to commerce but beyond congressional regulation because someone might not label them an "activity." *See Raich*, 545 U.S. at 22.

Moreover, the distinction between "activity" and "inactivity" proposed by Appellees is an artificial one. Because, as discussed above, the vast majority of uninsured Americans do seek and receive often expensive emergency medical care, the choice to opt out of paying for health insurance is not the same as opting out of the health care market. To the contrary, rather than choosing "inactivity" in the health care market, the decision not to buy insurance merely shifts the costs of providing health care to people who do have health insurance in the form of higher premiums, with a significant effect on the nationwide health insurance market.

The Court long ago concluded that "artificial" categories and "abstract distinction[s]" provide no proper basis for constraining the scope of the commerce power. *See Lopez*, 514 U. S. at 556 (pre-1937 distinction between "direct" and indirect" effects abandoned because it "artificially had constrained the authority of Congress to regulate interstate commerce"); *id.* at 572-73 (Kennedy, J., concurring) (approving Court's rejection of "the abandoned abstract distinction between direct and indirect effects on interstate commerce"). Appellees' argument is a novel version of the same discarded mistake.

2. Appellees' proposed distinction between activity and inactivity rests on a discredited substantive due process theory of economic liberty that is not cognizable in a legal action challenging a federal statute on Article I grounds.

Appellees' attempt to divide economic behavior into "activities" that Congress can regulate and "inactivity" that it cannot is of course reminiscent of the theory of economic substantive due process associated with the famous decision in *Lochner v. United States*, 198 U.S. 45 (1905), and indeed the Appellees included a substantive due process claim in their complaint. In its October 14, 2010 order, the District Court correctly dismissed this claim, but Appellees continue to press its substance under the guise of their supposed "inactivity" limitation on the scope of the Commerce Clause. The argument is just as fallacious when refashioned as a challenge to Congress's Article I powers. The substantive powers enumerated in Article I authorize Congress to impose obligations and duties on individuals. In the absence of a violation of one of the Constitution's prohibitions on legislative power, Appellees' claims are *political* arguments that can only receive a political remedy.

In any event, the claim that there is anything novel about the MCR because it obligates citizens to take action or denies them the "right" to be left alone is wrong.[3]

[3] The MCR is not a novelty in the debate over health care. Legislation requiring Americans to purchase health insurance was first introduced by Republican Senators in 1993. *See* Health Equity and Access Reform Today Act of 1993, S. 1770, 103rd Cong. In 2006, a Democratic legislature and Republican

Every time the federal government requires someone to move in order to build an interstate highway, Congress is exercising the commerce power to require action by individuals who might prefer inactivity to compensation for the taking. Congress has put obligations on individuals at least since the Militia Act of 1792. In *Wickard v. Filburn*, 317 U.S. 111, 129 (1942), the Court upheld Commerce Clause legislation despite the objection that the law "forc[ed] some farmers into the market to buy what they could provide for themselves." In parallel fashion, the MCR forces some taxpayers who benefit from the Act's health care protections "into the market" to purchase health insurance despite claims they "could provide [it] for themselves" by self-insurance. Neither in *Wickard* nor in the present case do these observations suggest a constitutional infirmity.

Medicare, the validity of which is beyond question, also involves a congressionally-imposed obligation with respect to health insurance: individual taxpayers must pay for health insurance they will need in old age. The difference is that the MCR allows individual taxpayers to choose to purchase insurance in the market or pay a penalty, while under Medicare taxpayers must pay into the program. The MCR is thus arguably a *less* intrusive approach than Medicare employs to

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governor in Massachusetts adopted a health reform law with an individual mandate. And while Congress was formulating the Act in 2009, a plan released by former Senate Majority Leaders Howard Baker, Tom Daschle, and Bob Dole through the Bipartisan Policy Center also advocated an individual mandate.

achieve Congress's purpose of guaranteeing that individuals will be able to afford health care: the MCR therefore cannot be an unconstitutional deprivation a liberty to remain "inactive." *See, e.g.*, *Rumsfeld v. FAIR*, 547 U.S. 47, 59-60 (2006) (holding that where Congress could directly impose a requirement it cannot be unconstitutional for Congress to permit private choices and impose financial consequences). Moreover, the MCR does not require that people receive particular medical care and, in fact, explicitly exempts those with a religious objection to modern medicine. ACA § 10106(b)(1).

As these examples demonstrate, there is nothing unconstitutional or unusual about legislation that requires individuals to bear some obligation to achieve a broader public goal. In the present case, moreover, the MCR is simply "a coordination mechanism to ensure that everyone participates in a well-functioning private insurance market. By discouraging any one of us from free-riding, the mandate allows each of us greater protection and more affordable coverage," – just like Social Security and Medicare. *See* Rahul Rajkumar & Harold Pollack, *An Essential Mandate*, L.A. Times (Jan. 7, 2011). The Constitution presupposes the legitimacy of legislative authority when exercised within its express limitations. "There is no absolute freedom to do as one wills or to contract as one chooses ... the Constitution does not recognize an absolute and uncontrollable liberty." *W. Coast*

Hotel v. Parrish, 300 U.S. 379, 392 (1937) (quotation omitted). When, as here, Congress executes its enumerated powers, "the United States possesses the power ... to regulate the conduct of the citizen [and thus] abridge his liberty or affect his property." *Nebbia v. New York*, 291 U.S. 502, 524-25 (1934).

The Commerce Clause empowers Congress to enact legislation that places obligations on individuals and imposes penalties for violating those obligations. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401 (1940). Liberty under our Constitution is liberty in a system authorizing the exercise of the governmental authority the Constitution delegates to Congress. If they disagree with elements of the Act, Appellees may address them in the proper, democratic forum.

3. Upholding the Act and the minimum coverage requirement would not render Congress's Commerce Clause authority without limits.

The District Court opined that if the MCR is valid, "Congress could require that people buy and consume broccoli at regular intervals" or "require that everyone above a certain income threshold buy a General Motors automobile." Op. at 46. Consideration of the grave question of whether this Court must invalidate a landmark act of Congress is not advanced by speculation about implausible hypotheticals. In any event, it is erroneous to suggest that there is no principled stopping point between recognizing the validity of a mandate related to an interstate insurance market, and imagined laws that would impinge on an individual's bodily autonomy. The Supreme Court long ago recognized a constitutionally protected liberty interest in decisions about an individual's bodily integrity. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Cruzan*, 497 U.S. at 278-79. In the unlikely event a Congress someday attempted to invade such a personal liberty as the interest in refusing to eat a certain food, a significant constitutional issue would be posed.

The judiciary possesses authority and doctrinal tools to address laws that interfere oppressively with an individual's physical integrity. It is quite unnecessary to return to *Lochner* or deny Congress the authority to regulate an interstate market in order to prevent an Orwellian state. There is a familiar and principled distinction between personal freedoms that the courts protect by searching analysis of legislation restricting them, and "'liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, 405 U.S. 605, 651 (1972) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). Freedoms related to the individual's physical integrity come to the courts "'with a momentum for respect lacking when appeal is made to'" economic liberty. *Id.*

The District Court's concern that a decision upholding the MCR would license Congress "to require that individuals buy … virtually any good or service," is equally unwarranted. Two factors make the health insurance market unique. *First*, as the Supreme Court has observed, insurance is uniquely and by definition "'an arrangement for transferring and distributing risk.'" *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) (citation omitted). As a consequence, a "fundamental object" of insurance "is to distribute … loss over as wide an area as possible." *Id.* at 212 (citation omitted). The power effectively to regulate the pricing structure of an insurance market necessarily involves the power to regulate the area over which the risks are spread – a characteristic of insurance that can be said of no other market. *Second*, health care is distinctive in that almost every individual will, at some point, require health care and yet (unlike food and housing, for example) the timing and costs of those needs are unpredictable: health insurance is, as a consequence, the only practicable way in which health care can be financed. And existing state and federal laws, which embody a basic and permanent commitment of the American people, already require that the costs of health care for the uninsured are transferred to other market participants, thus creating an inefficient and inequitable public substitute for private insurance.

The MCR merely regulates the unavoidable impact that individuals have on this singular market in order to make its financing more efficient and eliminate its current inequities. Whatever constitutional concerns might be posed by recognizing that Congress has a general power to require the purchase of goods or services are quite inapposite to the evaluation of Congress's regulation of the health insurance market with its unique characteristics.

II. CONGRESS ALSO HAS POWER UNDER THE NECESSARY AND PROPER CLAUSE TO ADOPT THE MINIMUM COVERAGE REQUIREMENT AS A MEANS CONGRESS DEEMS APPROPRIATE AND CONDUCIVE TO ACCOMPLISH THE ENDS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT.

The Constitution grants Congress certain enumerated powers, and also authority to "make all Laws which shall be necessary and proper for carrying into Execution th[os]e foregoing Powers." Art. I, § 8, cl. 9. Because the MCR is a direct regulation of interstate commerce, we think it unnecessary to consider Congress's additional powers under the Necessary and Proper Clause. Were there any doubt that the MCR is a valid exercise of Congress's commerce power, however, the provision is a valid means to the full and effective execution of the Act.[4]

[4] The District Court, in its October 14, 2010 order, concluded that the Act and the MCR could not be viewed as exercises of Congress's powers "To lay and collect Taxes, Duties, Imposts and Excises, [and] to … provide for the … general Welfare of the United States[.]" U.S. Const. art. I, § 8, cl. 1. *Amici* disagree with the District Court but do not address this point in detail.

We note, nonetheless, that Congress's General Welfare Clause power is "extensive," *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867), and the MCR fits well within this authority. The Act requires individuals to obtain coverage or pay a penalty through the tax system. ACA § 1501(b). The tax penalty is codified in the Internal Revenue Code; it applies only to taxpayers otherwise required to file

A. The Necessary And Proper Clause Empowers Congress To Choose The Means Best Suited In Its Judgment To Execute Its Express Powers, As Long As The Means Are Conducive To A Constitutionally Legitimate Legislative End.

Since *McCulloch v. Maryland*, it has been settled law that the Necessary and Proper Clause empowers Congress to choose those means that *Congress* deems necessary to the effective exercise of its enumerated powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). As the Supreme Court held in *McCulloch*, the Clause does not limit Congress to choose only those means that are necessary in some strictly logical sense, a rule that would render the federal government unworkable. *Id*. at 415-16, 420-21. Rather, the Clause permits Congress to adopt *any* means "appropriate" to the achievement of *any* legitimate congressional purpose:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

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income tax returns; it is calculated with reference to an individual's income; it is assessed and collected like other tax penalties; and it is enforced by the Internal Revenue Service. Congress expected the provision to raise revenue for the federal government. In part because of the MCR, the Act is projected to reduce the budget deficit by $143 billion over ten years. CBO Letter to Nancy Pelosi (Mar. 20, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf.

Id. at 421. The Court recently reaffirmed the breadth of the Clause in *United States v. Comstock*, where it recognized that the concern expressed in *Lopez* about "pil[ing] inference on inference" has no place in analyzing a provision that is a Necessary and Proper means to executing an enumerated power. 130 S. Ct. 1949, 1963 (2010) (quoting *Lopez*, 514 U.S. at 567).

B. The Minimum Coverage Requirement Is An Appropriate Means Of Executing The Act's Regulation Of The Interstate Health Care Insurance Market, Is Plainly Adapted To The End Of Assuring Affordable Health Care For All Americans, And Violates No Constitutional Prohibition.

The Act's purpose, to make affordable health insurance available to all Americans, is a constitutionally legitimate end. *See South-Eastern Underwriters*, 322 U.S. at 552-53. As described above, Congress carefully explained why the MCR is essential to the Act's broader goal. Appellees present no plausible claim that the MCR violates any express constitutional prohibition; their suggestion that the Necessary and Proper Clause itself imposes such a prohibition is contrary to both principle and precedent.[5] Since the MCR is "plainly adapted" to Congress's

[5] In *Comstock*, the Court repeatedly stressed the difference between the Necessary and Proper Clause issue and any individual liberty claims in that case. 130 S. Ct. at 1954, 1956, 1957, 1965. The Necessary and Proper Clause cannot be used to repackage an individual-liberty argument, such as a Fifth Amendment economic due process claim, into a claim about Congress's Article I powers.

legitimate regulatory end, the provision is, plainly, valid under the Necessary and Proper Clause.

The Supreme Court has maintained ever since *McCulloch* that Congress may choose any means "conducive to the complete accomplishment of [its] object" – that is, appropriate to render its legislation completely effective. *See McCulloch*, 17 U.S. at 424. The Necessary and Proper Clause does not invite courts to overturn Congress's choices because litigants may prefer that Congress seek its goals through different measures. In *McCulloch*, the Court explained that even if the constitutional "necessity" of a national bank were "less apparent" than the Court believed, "none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place" – that is, Congress. 17 U.S. at 423. Modern cases state this principle using the rational basis test: the Clause requires only that "a federal statute represent a rational means for implementing a constitutional grant of legislative authority." *Comstock*, 130 S. Ct. at 1962. The issue in this case is therefore not whether this Court concludes that the MCR is in fact necessary to "the complete accomplishment" of Congress's goals "but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22; *see also Comstock*, 130 S. Ct. at 1956.

Congress, through the Act, has used its constitutional powers to ensure that all Americans have access to quality, affordable health care, while significantly reducing long-term health care costs. Although Appellees may not agree with these goals, they are well within Congress's constitutional bounds.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a), the undersigned certifies that the accompanying brief has been prepared using 14-point typeface, proportionally spaced, with serifs. According to the word processing system used to prepare the brief, Microsoft Office Word 2003, the brief contains 6,853 words, exclusive of the table of contents, table of authorities, attorney identification, and certificates of service and compliance.

Dated: April 9, 2011

s/Walter Dellinger
Walter Dellinger

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was deposited with FedEx, a third-party commercial carrier, for delivery within three business days on this 9th day of April, 2011, to the following counsel of record:

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