No. 11-11021

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,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA (NO. 3:10-91 (RV))

BRIEF FOR PRIVATE PLAINTIFFS-APPELLEES NATIONAL FEDERATION OF INDEPENDENT BUSINESS, KAJ AHLBURG, AND MARY BROWN

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that Plaintiffs-Appellees Kaj Ahlburg and Mary Brown are individual, non-corporate parties and that Plaintiff-Appellee National Federation of Independent Business ("NFIB") is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grown their small businesses across the fifty States and the District of Columbia. NFIB is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly-held corporation with more than a 10% ownership stake in NFIB.

Undersigned counsel further certifies that, in addition to the persons and entities listed in the Brief for Appellants, the following persons, firms, and associations 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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STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled this case for oral argument before a three-judge panel on June 8, 2011, in Atlanta, Georgia.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Private Plaintiffs-Appellees adopt by reference the statements and arguments made in the following sections of the Opening/Response Brief of Appellee/Cross-Appellant States: (1) the Statement of the Case; (2) the Statement of Facts; (3) Part I of the Argument (unconstitutionality of the individual mandate); and (4) Part III.A of the Argument (non-severability of the mandate).

RESTATEMENT OF FACTS

The Government describes selected aspects of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "Act" or "ACA"); however, it omits many facts that, while not critical to analyzing the individual mandate's constitutionality, are essential to understanding its full purpose and effect.

1. Contrary to the ACA's stated purpose of making healthcare "affordable," the Act's provisions regulating insurers substantially *increase* their costs. Congress required "guaranteed-issue" coverage—*i.e.*, coverage for those with pre-existing health conditions. 42 U.S.C. §§ 300gg-1(a), 300gg-3(a). It required "community-rated" premiums—*i.e.*, premiums reflecting only average healthcare costs, but (with limited exceptions) not individual characteristics better reflecting actuarial risk. *Id.* § 300gg. And it also banned other restrictions on the scope (and thus expense) of insurance—*e.g.*, monetary coverage limits, *id.* § 300gg-11, and exclusions for certain services, *id.* § 300gg-13. Congress thus effectively required insurance to be offered at average rates for any individual, no matter how sick, and to cover limitless amounts of healthcare. Unsurprisingly, those requirements will raise insurance costs in the individual market by *27 to 30*

percent.[1]

2. To counteract that inflation, Congress heeded the insurance industry's lobbying to impose an individual insurance mandate.[2] With limited exceptions, the mandate requires that every American obtain "minimum essential coverage," with compliance enforced through a monthly monetary penalty. 26 U.S.C. § 5000A. This mandate subsidizes insurers for two related reasons.

First, it generally subsidizes insurers for the avowed purpose of enabling them to lower premiums for their voluntary customers. The mandate forces "millions of new customers [in]to the health insurance market," 42 U.S.C. § 18091(a)(2)(C), which increases the quantity of the insurer's customers and its revenue base. More importantly, the individuals forced to purchase insurance are profitable customers, because they are primarily "*healthy* individuals" (*id.* § 18091(a)(2)(I) (emphasis added)) who have sensibly decided that insurance is not financially worthwhile. The mandate is neither needed nor designed to capture sick or poor people. Unhealthy individuals will voluntarily purchase insurance

[1] CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, 6 (Nov. 30, 2009) ("CBO, *Premiums*"), *available at* http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf.

[2] *E.g.*, *Addressing Insurance Reform: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 111th Cong. 4 (2009) (submission of Ronald A. Williams, Chairman & CEO, Aetna, Inc.) ("Since 2005, we at Aetna have been speaking out in support of an individual coverage requirement….").

under the Act's guaranteed-issue and community-rating provisions.[3] Likewise, impoverished individuals will be covered by the Act's expansion of Medicaid eligibility for people below 133% of the poverty-line (covering 16-17 million uninsured),[4] and by its subsidized participation in state health-insurance exchanges for people between 133% and 400% of the poverty-line (covering 19 million uninsured).[5] U.S. Br. 14. Moreover, the mandate's penalty is inapplicable if an individual's insurance costs would exceed 8% of income or otherwise be deemed a "hardship." 26 U.S.C. § 5000A(e). Accordingly, the mandate targets healthy individuals who can afford insurance but believe that its cost is not financially worthwhile given their infrequent healthcare needs.[6]

Conscripting *these* customers will greatly increase the premiums collected by insurers relative to the payouts required. That is why the mandate *lowers* prices

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[3] CBO, *Premiums*, 19 ("[I]n the absence of [the mandate], people who are older and more likely to use medical care would be more likely to enroll in nongroup plans" than "people who are younger and expect to use less medical care.").

[4] CBO, *Analysis of the Major Health Care Legislation Enacted in March 2010*, 18 (March 30, 2011) ("CBO, *Analysis*"), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-HealthCareLegislation.pdf.

[5] CBO, *Analysis*, 14, 19.

[6] CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance*, 2 (June 16, 2010) ("CBO, *Effects*"), *available at*, http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf ("[T]he elimination of the mandate would reduce insurance coverage among healthier people to a greater degree than it would reduce coverage among less healthy people."); AARP *Amicus* Br. 28 ("Without the minimum coverage provision … young healthy individuals would opt out of coverage.").

for voluntary customers, inverting the normal economic axiom that increased demand drives prices up. AARP *Amicus* Br. 27-28 (Because "[p]rivate health coverage products 'pool' the risk of high health care costs across a large number of people, … [the] risk-spreading function [of compelled participation by healthy individuals] helps make the cost of health care reasonably affordable for most people."). Specifically, the mandate will lower premiums by *15-20%*, eliminating two-thirds of the increase caused by the Act's provisions regulating insurers.[7] This is a subsidy of between $28 billion and $39 billion in 2016 alone.[8]

Second, the mandate specifically counteracts the costs to insurers from the guaranteed-issue and community-rating requirements. 42 U.S.C. § 18091(a)(2)(I). Having forced insurers to contract disadvantageously with individuals who are sick, Congress prevented "free-riders" from "taking advantage" of that entitlement—*i.e.*, from waiting to purchase insurance until sick—by preemptively compelling them to contract disadvantageously with insurers while still healthy. U.S. Br. 17-18, 28-29.

Remarkably, neither Congress nor any federal agency appears to have estimated the frequency or cost of such "free-riding." Instead, the Government

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[7] CBO, *Effects*, 2.

[8] The average premium in the individual market will be $5,800 after the 15-20% reduction, which means the mandate will have lowered premiums by $1,024 to $1,450 for each of the 27 million voluntary participants, or $28 to $39 billion. CBO, *Premiums*, 6; CBO, *Effects*, 2.

observes that uncompensated healthcare is generally a significant concern, without identifying the amount that *those affected by the mandate* contribute to "cost-shifting," much less the extent to which the ACA's insurance provisions (or other federal laws) *exacerbate* that problem. *Id.* 1-2, 10-11, 26-27. But the Government's own evidence confirms the mandate is targeted toward individuals who *rarely* obtain healthcare and *mostly pay* when they do.

On the threshold question whether the uninsured even receive healthcare, the Government emphasizes that "80% of those without insurance at some point during a 12-month period visited a doctor or emergency room at least once." *Id.* 10-11. But the vast majority of those visits occur when the individual is *insured*, and only 57% of the full-year uninsured visit the doctor or emergency room.[9]

Moreover, obtaining healthcare while uninsured only "cost-shifts" if the care is *uncompensated*. Yet even the mandate's proponents acknowledge that the uninsured on average obtain *no* uncompensated care from non-emergency providers and pay *more* than the insured for non-emergency services.[10] As for emergency care, less than 20% of the full-year uninsured visit emergency rooms, which is the only place where federal law requires that the indigent receive

[9] Kaiser Commission, *Covering the Uninsured in 2008*, 11 (Aug. 2008), *available at* http://kff.org/uninsured/upload/7809.pdf; CDC, *Health, United States, 2009*, 318 (2010) ("CDC, *Health*"), *available at* http://www.cdc.gov/nchs/data/hus/hus09.pdf.

[10] Jonathan Gruber & David Rodriquez, *How Much Uncompensated Care Do Doctors Provide?*, 26 J. Health Econ. 1151, 1159-61 (2007).

(limited, "stabilizing") care.[11]

Furthermore, the pre-Act levels of uncompensated healthcare reveal virtually nothing about the amount of such care that would have been received by the individuals *affected by the mandate*. The sick and poor uninsured who received the overwhelming majority of pre-Act uncompensated care will no longer be uninsured post-Act. *See supra* at 2-3. This is why only 8 million of the 52 million now uninsured will be affected by the mandate.[12]

In short, the Government's conflation of the uninsured affected by the mandate with the uninsured receiving uncompensated care ignores the critical fact that the mandate affects uninsured individuals who are highly unlikely to obtain significant uncompensated care in a given year, let alone in every month for which the mandate penalizes them. The mandate thus targets a subclass of the uninsured representing a small fraction of the trumpeted $43 billion in uncompensated care. U.S. Br. 1-2. Moreover, since roughly 4 million of the 8 million uninsured affected by the mandate will likely pay the penalty rather than purchase insurance,[13] the risk of "free-riding" will substantially persist regardless.

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[11] CDC, *Health*, 337; 42 U.S.C. § 1395dd.

[12] CBO, *Payments of Penalties for Being Uninsured Under the Patient Protection and Afforable Care Act*, 1 (April 30, 2010) ("CBO, *Payments*"), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/Individual_Mandate_Penalties-04-30.pdf; CBO, *Analysis*, 18.

[13] CBO, *Payments*, 1.

SUMMARY OF ARGUMENT

The ACA imposes an extraordinary duty on Americans to enter into costly and unwanted health-insurance contracts. That mandate lacks any foundation in constitutional text or precedent. By conscripting citizens to subsidize voluntary participants in the insurance industry, it exemplifies the threat to individual liberty when Congress exceeds its enumerated powers and attempts to wield a plenary police power.

The mandate's command to uninsured individuals who are engaging in *no commercial activity* cannot be justified as permissible Commerce Clause regulation. Compelling the uninsured to participate in the commerce of health insurance does not regulate that commerce. Likewise, the status of being uninsured is not a class of economic activities that may be regulated due to its "substantial effect" on commerce. Any argument that the uninsured "affect" the insurance market through their *non-participation* is foreclosed by precedent and would eliminate all limits on Congressional power.

Nor can the mandate be sustained under the Necessary and Proper Clause as an appropriate incidental means of "carrying into execution" the Act's regulation of insurers. It is not "necessary" because, rather than serving the legitimate end of *eliminating barriers to the execution* of the ACA's regulation—*i.e.*, ensuring complete compliance with that regulation—the mandate at best furthers the

illegitimate end of *counteracting the negative effects* on insurers after the regulation is *fully executed*. Accepting that goal as a legitimate end would eliminate all constraints on Congress. Moreover, the mandate is not "proper" given its unprecedented and oppressive nature—*i.e.*, forcing economically disadvantageous contracts on unwilling individuals to subsidize third parties in traditional areas of state regulation.

The Government's principal argument attempts to recharacterize the mandate as a regulation of the economic activity of obtaining healthcare while uninsured. But the mandate does not regulate that commercial practice. Rather, it regulates the *status of being uninsured*, regardless of whether healthcare is obtained, let alone obtained without compensation. It is legally irrelevant that some sub-class of the uninsured will receive uncompensated care, for Congress cannot bootstrap from that proscribable practice to the substantially broader class of uninsured individuals who do not engage in it.

The Government also attempts to recharacterize the mandate as a "tax." But the ACA's text and longstanding precedent make clear that fining the uninsured for violating a statutory duty to be insured is not a tax, but a regulatory command enforced by a penalty. Moreover, Congress unambiguously disavowed its taxing power when enacting the mandate.

Finally, the mandate's unconstitutionality requires invalidating the entire

ACA. The Act is a sprawling and complex legislative bargain, and at the heart of that compromise is the mandate and related insurance regulations that even the Government concedes cannot survive without it. Congress would never have enacted the ACA without these core provisions.

ARGUMENT

As the CBO noted, the ACA's "mandate requiring all individuals to purchase health insurance [is] an unprecedented form of federal action." RE 2039. It is thus hardly surprising that no judicial precedent supports the federal imposition of a freestanding duty on citizens to purchase unwanted commercial products. As the district court correctly held, "[n]ever before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States," and such an exercise of sovereign power "is without logical limitation and far exceeds the existing legal boundaries established by Supreme Court precedent." *Id.* 2039, 2057. Accordingly, the Government bears a heavy burden to explain why existing precedent delimiting Congress' power to regulate commerce should be expanded to uphold Congress' decision, for the first time in our Nation's history, to compel individuals who are not participating in commercial activity to purchase a costly product they neither need nor want.

The Government fails to meet that burden, and hardly even tries. Instead, its

principal argument is that the mandate regulates the commercial *activity* of *obtaining healthcare* without insurance. But the Government defends a hypothetical statute; in fact, the mandate regulates the *status* of being *uninsured*, whether or not an individual obtains healthcare, let alone "free-rides" by obtaining *uncompensated* care that gives rise to "cost-shifting."

Thus, as we demonstrate below, the Act's actual mandate that virtually all Americans must purchase health insurance is contrary to first principles and controlling precedent, and this fundamental constitutional infirmity cannot be cured by mischaracterizing the mandate as a regulation of the practice of obtaining healthcare while uninsured.

I. THE CONSTITUTION ESTABLISHES A FEDERAL GOVERNMENT WITH LIMITED AND ENUMERATED POWERS TO PROTECT INDIVIDUAL LIBERTY

"The powers delegated by the … Constitution to the federal government are few and defined," whereas "[t]hose which … remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552 (1995). The Commerce Clause, for example, "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994). Similarly, the Necessary and Proper Clause was "not itself a grant of power, but a *caveat* that the Congress possesses

all the means necessary to carry out [its] specifically granted … powers." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). To be sure, "the great changes that ha[ve] occurred in the way business [is] carried on" have "greatly expanded the … authority of Congress" under these Clauses. *Lopez*, 514 U.S. at 556. But appeals to "our complex society" can never be allowed to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government," *id.* at 557, because "the Founders denied the National Government" a "plenary police power" and instead "reposed [it] in the States," *United States v. Morrison*, 529 U.S. 598, 618 (2000).

Preserving "our Government's federal structure" is essential, "not [to] protect the sovereignty of [the] States … as abstract political entities," but "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power," *id.*, because "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front," *Lopez*, 514 U.S. at 552. "[T]he Constitution … divides power among sovereigns … precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz v. United States*, 521 U.S. 898, 933 (1997).

Such threats to individual liberty are especially acute when centralized

federal regulation elides the "deeply rooted" "difference … between 'misfeasance' and 'nonfeasance'—[*i.e.*,] between [an individual's] active misconduct working positive injury to others and [his] passive inaction or … failure to take steps to protect them from harm." *Prosser & Keeton on the Law of Torts* § 56, 373 (5th ed. 1984). Mandates directly "forcing men to help one another" more tightly circumscribe their "freedom" of "choice" than do regulations merely restricting "the commission of affirmative acts of harm." *Id.*; RE 2039. Such mandates threaten a fundamental principle of Anglo-American jurisprudence: "[l]et a man … be ever so abandoned in his principles, or vitious in his practice[;] provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws." St. George Tucker, 2 *Blackstone's Commentaries*, 124 (1803). Accordingly, the only free-standing federal mandates ever imposed on individuals have been *expressly* grounded in the Constitution's text and have constituted *traditional* duties of citizenship. *E.g.*, *Selective Draft Law Cases*, 245 U.S. 366, 377, 386-90 (1918) (upholding the military draft as a "supreme and noble duty" sanctioned by Congress' power "[t]o raise … armies" and by historical practice).

Even more suspect are mandates that "take[] property from A. and give[] it to B." *Calder v. Bull*, 3 U.S. (Dall.) 386, 388 (1798) (opinion of Chase, J.). In the Framers' generation, the Supreme Court thought it "against all reason and justice"

to "presume[]" that the "people [have] entrust[ed] [the] Legislature" to force such private subsidization, *id.*, and further described such mandates not only as "contrary both to the letter and spirit of the Constitution," but as "monster[s] in legislation [that] shock all mankind," *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795). That extreme judicial skepticism persists to this day. *E.g.*, *E. Enterprises v. Apfel*, 524 U.S. 498 (1998).

Yet here, the ACA's mandate invades the States' traditional protection of their citizens' health and welfare, compelling unwilling individuals to enter into economically disadvantageous contracts to subsidize the insurance industry and its voluntary customers. The Constitution does not authorize this intrusive and onerous exercise of a plenary police power.

II. FORCING INDIVIDUALS TO PURCHASE HEALTH INSURANCE IS NOT A REGULATION OF INTERSTATE COMMERCE

Congress may "regulate Commerce … among the several States." U.S. Const., art. I, § 8, cl. 3. Under controlling precedent, there are "three broad categories of activity that Congress may regulate under its commerce power": (1) "the use of the channels of interstate commerce"; (2) the operation of "the instrumentalities of interstate commerce"; and (3) "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *accord Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). But none of those "categories of activity" encompasses the *inactivity* regulated by the mandate—*i.e.*, the non-

purchase of health insurance.[14]

A. The Mandate Does Not Regulate Commerce Itself, In Either Its Interstate Or Intrastate Channels Or Instrumentalities

The interstate "commerce" that Congress may regulate is "commercial intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824); *see also* Samuel Johnson, *A Dictionary of the English Language* (7th ed. 1783) ("Johnson") (defining "commerce" as "[e]xchange of one thing for another; trade; traffick," or "intercourse"). That "include[s] … businesses in which persons b[uy] and s[ell], [or] bargain[] and contract[]," such as "insurance." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 539 (1944). And Congress "regulate[s]" that "commercial intercourse" by "prescribing rules for carrying [it] on." *Gibbons*, 22 U.S. at 189-90. Congress thus may regulate the "channels" and "instrumentalities" of interstate commerce, "since they are the ingredients of interstate commerce itself." *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment). Specifically, Congress "may regulate the use of the channels of interstate commerce," such as by "keep[ing] th[ose] channels … free from immoral and injurious uses," and it may regulate the operation of the "persons or things" that are "the instrumentalities of interstate commerce," such as by establishing safety standards on railroads used

[14] Although the "substantial effects" category is best understood as "deriv[ing] from the Necessary and Proper Clause," *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment); *see infra* at 16-17, 32, the proper derivation is immaterial here, because the mandate falls outside the category regardless.

in interstate commerce. *Lopez*, 514 U.S. at 558. In short, the Commerce Clause empowers Congress to set the rules for those who engage in the activity of commercial intercourse.

But the non-purchase of health insurance is not "commerce," and the mandate is not "regulating" commerce. An individual's decision not to "bargain[] and contract[]" for insurance (*Se. Underwriters Ass'n*, 322 U.S. at 539) is not "commercial intercourse." That inactivity is the *absence* of intercourse. Likewise, the mandate does not "regulate" the ingredients of the commerce in insurance by "prescrib[ing] the rule by which [they are] to be governed." *Lopez*, 514 U.S. at 553. It regulates neither the terms of insurance contracts nor the parties to such contracts. Rather, it commandeers individuals who are not participating in that commerce and forces them to enter into such contracts for the benefit of existing commercial participants.

Compelling commerce—*i.e.*, punishing individuals for their commercial *inactivity*—is not *regulating* commerce. Although Congress may, for example, regulate the terms of voluntary contracts between General Motors and its customers, it may not compel individuals to enter into purchase contracts with GM, because there is no pre-existing "commerce" to regulate. Otherwise, Congress could force individuals to purchase literally *any* product, from GM cars to Citibank mortgages to broccoli. Any factual uniqueness in the health-insurance market

would be irrelevant if compelling commerce qualified as regulating commerce, since Congress, "[w]hatever [its] motive and purpose," has "plenary power" over "regulations of commerce." *United States v. Darby*, 312 U.S. 100, 115 (1941). Unsurprisingly, then, not even the Government contends that the non-purchase of insurance is "commerce" "regulated" by the mandate.

B. The Mandate Does Not Regulate A Class Of Economic Activities That Substantially Affects Interstate Commerce

The Government does suggest that merely being uninsured "substantially affects" interstate commerce and thus falls within Congress' commerce power. U.S. Br. 16, 24. That suggestion is at war with the Constitution's plain language, the Supreme Court's "substantial effects" precedent, and the entire concept of enumerated powers.

1. The Scope and Limits of the "Substantial Effects" Doctrine

It is important to understand *why* Congress may "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17. Congress' enumerated power to regulate "interstate commerce" does not confer power to regulate "things affecting interstate commerce" as such, because the class of "things affecting interstate commerce" is distinct from (and exponentially broader than) "interstate commerce" itself. Rather, Congress may regulate intrastate activities affecting interstate commerce *solely* to effectuate the execution of its enumerated power to

regulate interstate commerce. *Darby*, 312 U.S. at 118-20 & n.3 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). Congress thus can "adopt measures … [that] foster, protect, control, [or] restrain" interstate commerce, by removing intrastate "burdens and obstructions" on *desirable* interstate commerce and by restricting intrastate "activities" that promote *undesirable* interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937); *accord Raich*, 545 U.S. at 35 (Scalia, J., concurring in the judgment) ("[T]he commerce power permits Congress … to facilitate interstate commerce by eliminating potential obstructions[] and to restrict it by eliminating potential stimulants.").

A common barrier to Congress' goals for interstate commerce occurs where the aggregate effect of a product's local use adversely "influence[s] [the] price and market conditions" desired by Congress. *E.g.*, *Raich*, 545 U.S. at 17-19, 25-28; *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942). For "interstate commerce … to be effectively controlled" (*Darby*, 312 U.S. at 121), Congress must regulate goods at the intrastate level, because that local commerce is "commingled with" (*id.*), or otherwise "in competition with" (*Wrightwood Dairy*, 315 U.S. at 120), interstate commerce, and because of the "enforcement difficulties that attend distinguishing between [a good] [produced] locally [versus] elsewhere," *Raich*, 545 U.S. at 22. Relatedly, Congress need not "excise, as trivial, individual instances" of local

activity that are each of "*de minimis* character," but substantial when aggregated. *Id.* at 17, 23. Thus, because local and national products are fungible, the "substantial effects" doctrine essentially eliminates the distinction between intrastate and interstate commerce, allowing regulation of the former to avoid impeding regulation of the latter.

Wickard and *Raich* demonstrate this point. In *Wickard*, Congress, while attempting to increase wheat prices in interstate commerce, restricted the amount of wheat that farmers could grow, even if only for personal consumption. 317 U.S. at 113-15, 127-29. The Court upheld that restriction, reasoning that local wheat production would obstruct Congress' goal of raising interstate prices, because local production would *reduce prices*, both by increasing the supply of wheat that potentially could be sold interstate and by decreasing the demand for purchasing wheat interstate. *Id.* at 127-29. Likewise, in *Raich*, Congress' attempt to eliminate the interstate market for marijuana was obstructed by the intrastate manufacture and possession of state-law-authorized "medical" marijuana, which still could be diverted into the proscribed interstate market and which also created difficulties in enforcing the interstate prohibition. 545 U.S. at 17-22, 25-32; *accord United States v. Maxwell*, 446 F.3d 1210, 1216-18 (11th Cir. 2006) (possession of child pornography).

Countless "substantial effects" cases involve the same commercial

dynamic—*i.e.*, local instances of the commercial activity regulated at the interstate level, where the aggregate local effect undermines Congress' preferred interstate market conditions.[15] Other "substantial effects" cases involve burdens on interstate commerce of a different type—*i.e.*, local activity impeding the free interstate flow of products desired by Congress.[16] Critically, however, *no* "substantial effects" case has upheld regulation of individuals who neither participate in commerce nor pose barriers to commerce.

To the contrary, in *Lopez* and *Morrison*, the Court clarified that even some *barriers* to commerce may *not* be regulated under the "substantial effects" doctrine. Specifically, *Lopez* invalidated a law banning gun possession near schools, and *Morrison* invalidated a law providing civil remedies for violence against women, even though those activities undoubtedly had substantial deleterious effects on the Nation's commercial productivity. *Lopez*, 514 U.S. at 551, 563-64; *Morrison*, 529 U.S. at 601-02, 614-15. Nevertheless, the Court invalidated the laws attacking those barriers to commerce, because the regulated individuals had not brought themselves within Congress' regulatory ambit. *Lopez*,

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[15] *E.g.*, *Shreveport Rate Cases*, 234 U.S. 342, 353-54 (1914) (local railroad rates); *Wrightwood Dairy*, 315 U.S. at 118-21 (local milk prices); *Maryland v. Wirtz*, 392 U.S. 183, 188-90 (1968) (local wages).

[16] *E.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-58 (1964) (racial discrimination by certain public accommodations); *Perez v. United States*, 402 U.S. 146, 154-56 (1971) (loan sharking).

514 U.S. at 566-68; *Morrison*, 529 U.S. at 617-19. Specifically, they had not engaged in any "economic activity" resembling the type of "commerce" that Congress could regulate at the interstate level—*i.e.*, the "sort of economic endeavor" (*Morrison*, 529 U.S. at 611) that "arise[s] out of or [is] connected with a commercial transaction" (*Lopez*, 514 U.S. at 561).

The Court explained that "the implication[] of" allowing Congress to regulate *noneconomic* activities based on their aggregate commercial effects would make it "difficult to perceive any limitation on federal power," because virtually "any activity by an individual" could be "related to … economic productivity." *Id.* at 563-64, 567-68. Yet Congress' commerce power could not be permitted to "effectually obliterate the distinction between what is national and what is local," *id.* at 557, for "the Founders denied the National Government … a plenary police power," *Morrison*, 529 U.S. at 618.

Accordingly, there are three related reasons why the "substantial effects" doctrine does not authorize Congress to force Americans to buy health insurance: *first*, the "substantial effect" of not participating in commerce is not a barrier to commerce; *second*, such non-participation is not "economic activity"; and *third*, expanding the doctrine to encompass the non-purchase of insurance would create plenary federal power.

2. Non-Participation In The Commerce Of Health Insurance Is Not An Activity Obstructing Or Burdening That Commerce

In contrast to the regulated entities in the "substantial effects" cases—*i.e.*, persons whose intrastate economic activities adversely affected Congress' preferred market conditions for interstate commerce by imposing "burdens and obstructions" (*Jones & Laughlin*, 301 U.S. at 336) or by creating "potential stimulants" (*Raich*, 545 U.S. at 35 (Scalia, J., concurring in the judgment))—the uninsured are *strangers* to the health-insurance market who in no way stimulate or obstruct its operation. Far from "affecting" that commerce, the uninsured have avoided it completely, leaving Congress entirely free to impose its desired regulations on willing buyers and sellers.

Because market non-participants impose no barriers to establishing and enforcing the "rule[s] by which [interstate] commerce is to be governed" (*Lopez*, 514 U.S. at 553), regulating them cannot be justified as a prophylactic execution of Congress' commerce power. Unlike participants in *intrastate* commerce who interfere with Congress' goals for *interstate* commerce, the uninsured's defining characteristic is that they do not participate in the commerce of insurance *at all*, and so they impede neither market participants from contracting for insurance nor Congress from regulating that voluntary commerce. Thus, the "substantial effects" doctrine cannot reach the uninsured: while it effectively eliminates the distinction

between national and local commerce, it does not eliminate the distinction between commerce and non-commerce, or between regulating and compelling commerce.

Wickard illustrates this fundamental point. Although the "substantial effects" doctrine authorized restricting Filburn's intrastate wheat production, Congress did not impose, and the Court did not approve, a mandate that Filburn and his neighbors *buy* or *produce* wheat. *See* 317 U.S. at 113-15, 127-29. More colorfully, whereas the "substantial effects" doctrine would allow Congress to regulate local bootleggers because of their aggregate effect on the interstate liquor market, the uninsured "affect" the health-insurance market only as a teetotaler affects the liquor market, and the power to regulate bootleggers does not imply the power to conscript teetotalers.

That *inactivity* falls outside the doctrine is no mere "formalistic" "distinction[]," but the essence of "economic practicality." *Lopez*, 514 U.S. at 569, 571 (Kennedy, J., concurring). Given that Congress *indisputably* cannot compel unwilling consumers to engage in commercial purchases by claiming to regulate the "ingredients" of commerce, *see supra* Part II.A, Congress cannot be permitted to compel such commerce by semantically recharacterizing its claim as eliminating the "effect" of such non-purchases.

That is particularly true here, because the mandated insurance is economically disadvantageous for the compelled purchasers. Surely Congress

could not force urban pedestrians to purchase car insurance on the theory that their refusal to do so had a burdensome effect on the car-insurance market because they were "adversely selecting" out of that "risk pool." That would be as absurd as saying that voters "burden" political participation by refusing to make campaign contributions (or to pay candidates' government-imposed filing fees). *Cf. Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("refusal" of government "to subsidize" an activity does not "interfere with [it]"). Indeed, if Congress reduced insurance premiums by requiring that the uninsured simply *donate* $5000 to insurers, it could not possibly argue that their prior "failure" to donate was negatively "affecting" commerce. But there is no economic difference between compelled $5000 donations to insurers and compelled insurance contracts that cost $5000 more than the insured's actuarial risk in self-financing his healthcare. It thus is the Government that evades substantive constitutional principles through formalism.

Moreover, it is irrelevant for "substantial effects" purposes that insurers want subsidies to offset losses stemming from the ACA's requirements to insure sick individuals. Market non-participants do not negatively "affect" commerce simply because sellers' woes are attributable to costly government regulation rather than normal free-market conditions. The non-participants are not *harming* the insurance *market*; they simply are not *ameliorating* the government's own market *interference*.

Thus, when Congress found that "[t]he individual [mandate]" will "substantially affect[] interstate commerce," 42 U.S.C. § 18091(a)(1), it reversed the relevant inquiry. The question is not whether *Congress' regulation* positively affects interstate commerce—that answer is pre-ordained, because Congress has "plenary power" over such commerce, and courts cannot second-guess its "conception of public policy." *Darby*, 312 U.S. at 115. Rather, the question is whether the *regulated individuals* are negatively affecting commerce, such that there is a legitimate predicate justifying "the exertion of the power of Congress over [them]." *Wrightwood Dairy*, 315 U.S. at 119.

Lopez and *Morrison* underscore this point. The federal laws there affected commerce by banning local activities that harmed commerce, but the laws were still invalid because the local activities were not "economic activities" resembling the "commerce" that could be directly regulated at the interstate level. *See supra* at 19-20. It inexorably follows that the mandate's presumptively beneficial commercial effect is insufficient to regulate the uninsured's inactivity, which concededly is not "commerce" reachable at the interstate level and which does not even "affect" market participants or Congress' regulation of those participants.

Indeed, the Government concedes that the regulated individuals do not engage in commerce when declining to purchase insurance, even though the purchasing mandated by the Act is commerce. But by the same token, the

regulated individuals do not affect commerce when declining to purchase insurance, even though the purchasing mandated by the Act affects commerce.

3. Inactivity In The Commerce Of Health Insurance Is "Noneconomic"

Inactivity in the health-insurance market also falls outside the "substantial effects" doctrine because it is "noneconomic." The *non-purchase* of insurance is not "the production, distribution, [or] consumption of commodities" or services, which is the Court's definition of "[e]conomics." *Raich*, 545 U.S. at 25-26. More fundamentally, being uninsured, like all other *inactivity*, is not an "economic endeavor" (*Morrison*, 529 U.S. at 611), or an "activit[y] that arise[s] out of or [is] connected with a commercial transaction" (*Lopez*, 514 U.S. at 561).

Indeed, the non-purchase of insurance is less "connected with a commercial transaction" than was the gun possession in *Lopez*. After all, "commodities" like guns can be possessed only after being "produc[ed], distribut[ed], and [acquired]" through commercial transactions. *Raich*, 545 U.S. at 25. Notably, Lopez himself was a *paid gun courier*. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). As his "possession of a gun in a local school zone" was nevertheless deemed "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," *Lopez*, 514 U.S. at 567, the same conclusion necessarily follows for the uninsured's inactivity, which *continues their estrangement* from the insurance market and thus leaves them even

more "remote" from commerce than was Lopez, *id.* at 557.

Although Congress characterized that inactivity as an "economic … decision" *not* to purchase, 42 U.S.C. § 18091(a)(2)(A), the Government has abandoned its defense below (RE 2053-57) of this semantic gamesmanship. Re-labeling "inactivity" as a "decision" to be inactive cannot change the fact that no "economic activity" has occurred. To be sure, consumers' aggregated "economic decisions" not to purchase a product—whether wheat, liquor, GM cars, Citibank mortgages, or health insurance—*always* "substantially affect" that product-market *relative to* the contrary "economic decisions" *compelled* by Congress. But, again, the proper inquiry is whether the *regulated individuals*' decision not to purchase affects commerce in the first place. Otherwise, Congress could mandate *any* decision—about activity or inactivity, economic or noneconomic—because that compelled decision would always be deemed to have a beneficial commercial effect compared to the regulated entity's preferred decision. For example, Congress could mandate that all local high-schools provide advanced science classes, by finding that the contrary curricular decision is an "economic decision" not to purchase the necessary laboratory equipment. *But see Lopez*, 514 U.S. at 564. In short, as the district court correctly held, "[t]he problem with this legal rationale … is it would essentially have unlimited application," because "[t]here is quite literally *no* decision that, in the natural course of events, does not have an

[aggregate] economic impact of some sort." RE 2054.

Nor can the "economic decision" not to purchase health insurance be legally or factually distinguished as "unique" because of the "cost-shifting" that occurs when some uninsured individuals subsequently obtain healthcare without paying. U.S. Br. 34-37. Most fundamentally, if "economic decisions" not to purchase a product were deemed "economic activity" under the "substantial effects" doctrine, then Congress would have "plenary power" over *all* such decisions, whether or not they involved "unique" "cost-shifting." *Darby*, 312 U.S. at 115; *Lopez*, 514 U.S. at 559-60. Thus, once the "economic decision" rationale is sanctioned, courts will be unable to cabin it to the facts presented here.

In any event, the fact of financial cross-subsidization is ubiquitous in the modern welfare state. Most relevantly, since insured individuals who "decide" to lead relatively unhealthy lifestyles shift part of their higher healthcare costs onto their co-insureds—"cost-shifting" now *required* by the ACA's community-rating requirement—Congress could mandate the "economic decision" to purchase all manner of healthy products, from broccoli to gym-memberships. RE 2047-48, 2132-33. Furthermore, Congress could mandate purchasing "any and all forms of insurance," because lack of insurance inevitably leads to some "cost-shifting": individuals who "self-insure and try to meet their obligations out-of-pocket" always have "the benefit of 'backstops' provided by law, including bankruptcy

protection and other government-funded financial assistance and services." *Id.* 2055. Indeed, even "the costs of violent crime" are "spread throughout the population" "through the mechanism of insurance," but *Lopez* recognized that "the implication[]" of allowing Congress to invoke such "cost-shifting" would be to obliterate "any limitation on federal power." 514 U.S. at 564. Moreover, "cost-shifting" is not limited to insurance. For example, because many debtor-protection laws expose GM and Citibank to potential "cost-shifting" whenever they sell cars and mortgages to individuals who could default, Congress could force relatively wealthy consumers to purchase those products, thereby (1) reducing "cost-shifting" risks from any later purchase "decision" when they were less wealthy and thus more likely to default, and (2) offsetting "cost-shifting" from similar "decisions" by poorer third parties.

4. The "Substantial Effects" Doctrine Cannot Be Expanded To Cover Non-Participation In The Health-Insurance Market Without Creating A Federal Police Power

Finally, expanding the "substantial effects" doctrine to uphold the mandate would establish the plenary regulatory power "the Founders denied the National Government." *Morrison*, 529 U.S. at 618. As discussed, because *all* inactivity will be deemed to substantially affect interstate commerce relative to government-compelled activity, Congress would be empowered to require *any* purchasing decision—from transportation to housing to education—even if Congress were

somehow limited to regulating "economic decisions" that "uniquely" facilitate "cost-shifting." Thus, one is "hard pressed to posit any [in]activity by an individual that Congress [would be] without power to regulate," "even in areas … where States historically have been sovereign." *Lopez*, 514 U.S. at 564. Indeed, the CBO itself recognized that the mandate could lead to "a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services."[17]

Needless to say, allowing Congress to use its commerce power to "create a completely centralized government" (*id.* at 557) is impermissible regardless of how well the States are performing their traditional, police-power functions. *Id.* at 581-83 (Kennedy, J., concurring). Thus, the Government's assertion that the States are purportedly incapable of "effectively solv[ing] the problems besetting our national health care system" (U.S. Br. 46-49) is beside the point. For example, in *Morrison*, a "voluminous congressional record" demonstrated that the States were *exacerbating* the obstructions to commerce caused by gender-motivated violence, by "perpetuating an array of erroneous stereotypes and assumptions" that "result[ed] in insufficient investigation and prosecution." 529 U.S. at 615, 620. Congress nevertheless could not step into the breach, for fear that it "might use the

[17] CBO, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (Aug. 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf.

Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615.[18]

III. FORCING INDIVIDUALS TO PURCHASE HEALTH INSURANCE IS NEITHER NECESSARY NOR PROPER FOR CARRYING INTO EXECUTION A REGULATION OF INTERSTATE COMMERCE

Congress may "make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers." U.S. Const., art. I, § 8, cl.18. The Necessary and Proper Clause confirms that Congress has the "incidental power[]" to further the "legitimate" "end" of executing its enumerated powers through "appropriate" "means" that are "plainly adapted" and "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. But the mandate is neither "necessary" nor "proper," because it serves an *illegitimate* "end" by *inappropriate* "means." Thus, the Government's "resort[] to … the Necessary and Proper Clause" is nothing more than "the last, best hope of those who defend ultra vires congressional action." *Printz*, 521 U.S. at 923.

A. The Mandate Is Not Necessary To Serve The Legitimate End Of Carrying Into Execution The ACA's Commercial Regulations

The Government contends that "Congress's power extends to regulation of even 'noneconomic local activity' otherwise beyond the reach of the commerce

[18] Moreover, the Government's disparaging assertion concerning the States' capabilities is undermined by its own emphasis that "Massachusetts [has] avoided th[e] perils" that Congress was attacking. U.S. Br. 31-32 (citing 42 U.S.C. § 18091(a)(2)(D)).

power" where "needed to make [a] regulation [of interstate commerce] effective"; that power supposedly justifies the mandate because "failure to regulate [the uninsured] would undercut the [ACA's] regulation of the [insurance] market." U.S. Br. 18, 28, 33. This "effective regulation" argument suffers from the same fundamental defect as the Government's "substantial effects" argument, which is unsurprising since both doctrines derive from, and are limited by, the Necessary and Proper Clause. Under that Clause, Congress may regulate only activities that obstruct it from "*carrying into Execution*" an effective regulation of interstate commerce. Yet the uninsured do not undercut effective regulation of participants in insurance markets; they in no way *interfere* with the complete execution of the ACA's provisions regulating insurers, but merely fail *to offset* the costs that those *fully executed* regulations impose on insurers. By ignoring this textual limitation on the Clause, the Government would eviscerate all constraints on Congress.

1. At the Founding, "to carry" meant "to bring forward" or "to effect," and "execution" meant "performance" or "practice." *See* Johnson, *supra*. Thus, laws that "carry into execution" commercial regulations are those facilitating the complete performance of the enacted regulations. "[I]n its most basic sense," this "means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth." Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation*

of the Sweeping Clause, 43 Duke L.J. 267, 331 (1993) ("Lawson & Granger").

Moreover, because "effective execution" is "a legitimate end," Congress may also employ "appropriate means" to attack "those intrastate activities which in a substantial way interfere with or obstruct the exercise of" its commercial regulations. *Wrightwood Dairy*, 315 U.S. at 119 (quoting *McCulloch*, 17 U.S. at 421). As Justice Scalia's *Raich* concurrence observed, this power to eliminate intrastate barriers undergirds the "substantial effects" doctrine, which "cannot come from the Commerce Clause alone," because intrastate activities "are not themselves part of interstate commerce," even though their regulation is "necessary to make [the] regulation of interstate commerce effective." 545 U.S. at 34-35. Rather, the "substantial effects" doctrine is simply a specific application of Congress's general Necessary and Proper power "to make … regulation effective" by eliminating "obstruct[ions]" to an interstate "regulatory scheme." *Id.* at 36-37.

In *Raich*, Justice Scalia viewed locally produced and possessed marijuana as an obstacle to "effective regulation" for the same reason the majority held that such marijuana had a negative "substantial effect" on commerce: "[a]s the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market" and is a "fungible commodit[y]," *id.* at 40-41; thus, exempting it from Congress' ban on interstate marijuana distribution "would leave a gaping hole" due to "enforcement difficulties," *id.* at

22 (majority opinion); *accord Maxwell*, 446 F.3d at 1218 (possession of child pornography). The only difference between the *Raich* majority and Justice Scalia was that he asserted that marijuana possession was "noneconomic" and thus excluded from the "substantial effects" doctrine under *Lopez*; but he then opined that it was nevertheless reachable under Congress' more general Necessary and Proper power to ensure the "effective regulation of interstate commerce," because that possession was a barrier to "compliance with [an interstate] regulatory scheme." 545 U.S. at 36-41; *see also Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1271, 1275-77 (11th Cir. 2007) (upholding protection of commercially valueless endangered species because its extinction might negate protection of commercially valuable endangered species, given "the unforeseeable … chain of life on this planet").

The "effective regulation" doctrine discussed in Justice Scalia's *Raich* concurrence thus lends no support to the mandate. Under that doctrine, Congress may regulate "economic" and "noneconomic activity," but *only if* doing so is "a necessary part of a more general regulation of interstate commerce" because the activity "interfere[s] with," "obstruct[s]," or "undercut[s]" "the regulatory scheme." *Raich*, 545 U.S. at 36-37. The uninsured's inactivity, however, does not negatively affect Congressional regulation of the interstate health-insurance market for the same reason it does not affect the market itself: the uninsured in no way

impede or frustrate regulation of market participants.

2. The Government responds with Congress' finding that eliminating the uninsured is "essential" to curing the "adverse selection" problem caused by the ACA's guaranteed-issue and community-rating requirements—namely, insurers would lose money due to individuals who "postpone purchasing insurance until an acute need arose." U.S. Br. 28-32; 42 U.S.C. § 18091(a)(2)(I). The uninsured, however, are not "interfer[ing] with," "obstruct[ing]," or "undercut[ting]" Congress' efforts to "carry into execution" those regulations of insurers. *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment). Even without the mandate, insurers are prohibited from considering pre-existing conditions, and the existence of uninsured individuals will not create any "enforcement difficulties" in guaranteeing compliance. *Id.* at 22 (majority opinion). To the contrary, the premise of "free-riding"—*i.e.*, delayed insurance purchases by sick individuals—*presumes compliance* with the ban.

The mandate thus does not "carry into execution" Congress' insurance regulation, but solely *counteracts* the negative effects of that *fully executed* regulation. Having compelled insurers to contract disadvantageously with unhealthy people whose healthcare expenses will immediately exceed their premiums, the mandate offsets those costs by preemptively compelling healthy people to contract disadvantageously with insurers charging premiums that will

exceed any reasonably foreseeable healthcare expenses.

But under the Necessary and Proper Clause, Congress possesses only the "incidental power[]" to use "appropriate" "*means*" to the "legitimate" "*end*" of "carr[ying] into execution" its enumerated powers. *McCulloch*, 17 U.S. at 421 (emphases added). The Clause does not authorize Congress to pursue "ends" outside its legitimate, enumerated powers. Yet critically, it is an illegitimate end to offset a regulatory scheme's costs for market participants by mandating participation by third parties who are strangers to the scheme, rather than barriers to its effective execution. After all, mandating that non-participants engage in commerce to subsidize participants burdened only by the *normal costs* of an *unregulated* market is indisputably an illegitimate end under the Clause—since there is no "regulation" being made "effective" (or "commerce" being "regulated")—and Congress' powers should hardly be *enhanced* because *it created* the costs that assertedly need offsetting. That would be particularly pernicious here because, wholly independent of the ACA's preexisting-condition regulations, the mandate's avowed purpose and predominant cost-saving effect is the illegitimate subsidization achieved from forcing healthy individuals into insurers' risk pools. *See supra* at 2-6.

Venerable precedent confirms that the Necessary and Proper Clause does not authorize Congress to reduce a regulatory scheme's costs for market participants

by regulating strangers to that scheme.

In *United States v. DeWitt*, 76 U.S. 41 (1869), the Government defended a federal ban on the intrastate sale of certain "illuminating oils" by claiming that the ban "was in aid and support of the internal revenue tax imposed on other illuminating oils," because eliminating competition from the banned oils would "increas[e] the production and sale of [the taxed] oils and, consequently, the revenue derived from them." *Id.* at 44. Thus, as here, the regulation of certain individuals was defended on the theory that it would "aid and support" other individuals burdened by the government's regulation and thereby make the regulatory scheme more "effective" (by increasing tax revenues). Yet the Court unanimously ruled the ban was not "an appropriate and plainly adopted means for carrying into execution the power of laying and collecting taxes." *Id.*

Likewise, when later explaining his *McCulloch* opinion, Chief Justice Marshall emphasized that Congress may not increase its ability to collect taxes by preempting state taxes that diminish the funds of its taxpayer-base:

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, *or any means whatever*, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or conducive to[,]" the end.

"A Friend to the Union," *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphasis added); *see also* Lawson

& Granger, *supra*, at 331 ("To carry a law or power in execution … does not mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.").

3. A contrary conclusion would impermissibly convert the Necessary and Proper Clause into a vehicle for Congress to pursue "ends" beyond its enumerated powers. If the mandate is not a means to accomplishing the end of regulating the commerce in insurance, but is imposed to counteract the costs imposed by the ACA on insurers, then the source and justification of the mandate is not a power enumerated in the Constitution, but the Act itself. Congress' powers, however, are derived from the Constitution, not its own statutes. While Congress may broadly regulate interstate commerce under the Necessary and Proper Clause, it cannot use such regulation *to bootstrap* additional regulatory powers otherwise beyond Congress' reach.

Moreover, as the district court noted, if the Clause could justify regulation designed "to avoid the adverse consequences of the Act itself," that would "have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or 'necessary' the statutory fix would be." RE 2061. This Orwellian power, quite "[u]nlike the power … to enact laws enabling effective regulation" that Justice Scalia's *Raich* concurrence described, would

"threaten[] to obliterate the line between 'what is truly national and what is truly local.'" 545 U.S. at 38 (quoting *Lopez*, 514 U.S. at 567-68); *see also United States v. Comstock*, 130 S. Ct. 1949, 1966 (2010) (Kennedy, J., concurring in the judgment) ("warn[ing]" against constructions of the Necessary and Proper Clause under which "congressional powers become completely unbounded").

For example, Congress could use an "offsetting" power to: (1) compel individuals to buy healthy foods like broccoli, because the ACA's community-rating requirement enables free-riding on the healthy lifestyles of one's co-insureds, RE 2047-48, 2132-33; (2) force Filburn and his neighbors to purchase wheat, if federal price manipulation caused wheat sellers to make fewer sales, *cf. Wickard*, 317 U.S. at 113-15, 127-29; (3) require consumers to dine out, because federally mandated racial integration caused restaurants to "lose a substantial amount of business," *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964); and (4) impose criminal remedies for victims of gender-motivated violence and educational curriculums for local schools, if the ACA's substantial Medicaid costs drain the States' resources to perform those traditional functions, *but see Morrison*, 529 U.S. at 615-16, 620; *Lopez*, 514 U.S. at 564-66.

The Government is mistaken if it thinks this parade of horribles can be distinguished simply by emphasizing the alleged "unique conditions of the interstate health care market" that enable some uninsured to "shift their costs to

others." U.S. Br. 34-37.

Most fundamentally, if Congress could compel activity to offset the costs its own regulatory scheme imposed on voluntary participants, there would be no legitimate basis for permitting Congress to do so *only* where "essential" to avoid "free-riding" in "unique" markets. As the Government itself emphasizes, the Necessary and Proper Clause confers "broad power to enact laws that are 'convenient, or useful' or 'conducive' to the [enumerated] authority's 'beneficial exercise.'" *Id.* 25 (quoting *Comstock*, 130 S. Ct. at 1956). Consequently, Congress could conscript non-participants to offset federally imposed costs on regulated participants in *any* market (not just "unique" ones), for *any* reason (not just to avoid "free-riding"), if doing so was *convenient* (not just "essential").

And regardless, the federally facilitated free-riding in healthcare is not unique because, as explained above, innumerable federal laws enable individuals to "cost-shift." Again, this is vividly illustrated by the ACA's community-rating requirement, which—*even with the mandate*—forces individuals with healthy lifestyles to subsidize individuals with harmful lifestyles, by prohibiting insurers from adopting pricing that reflects material differences between these two classes. Under the Government's logic, then, Congress could make community-rating "work better" by requiring that *all* individuals purchase healthy products, from broccoli to gym-memberships, as well as quit dangerous activities, from mountain-

climbing to kick-boxing. Furthermore, even if there were insufficient "unique conditions" to justify a desired mandate, Congress could, as here, *manufacture* those conditions. Thus, the only meaningful way to prevent the "limitation of congressional authority" from becoming "solely a matter of legislative grace" (*Morrison*, 529 U.S. at 616) is to preserve the "effective regulation" doctrine's inherent textual limitation to laws that eliminate enforcement barriers.

4. If the critical distinction between eliminating barriers to enforcement of regulations and counteracting the undesired effects of executed regulations nevertheless "appear[s] 'formalistic' in [this] case to partisans of the measure at issue," that is because such "measures deviating from th[e] form" "of our government"

> are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions … so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Printz, 521 U.S. at 933.

That said, the uninsured do not disrupt even the general policy underlying the ACA's preexisting-condition regulations. The Act's policy judgment is that insurers unfairly "scrutinize applicants' medical condition and history" as part of "underwriting practices" that, by accounting for individual actuarial risk, "deny coverage or charge unaffordable premiums to millions." U.S. Br. 2, 12. Yet according to the Government, when uninsured individuals who are sick invoke the

ACA's "nondiscrimination" policy against such underwriting, they are transformed from victims warranting government intervention into "free-riders" warranting government condemnation. If Congress believes such future victims are undeserving of protection, then it can deny such protection to those failing to purchase insurance by a certain date or age. Conversely, if Congress believes the ACA's restrictions are good policy, then there is no reason to exclude future victims from protection. Moreover, Congress also can require that society as a whole bear the costs of its charitable policy, by using general tax revenues to subsidize burdened insurers. But, for the reasons explained, Congress cannot conscript all healthy individuals merely because some fraction of them will someday benefit from a regulatory policy that Congress itself adopted.

B. The Mandate Is Not A Proper Means Of Carrying Into Execution The ACA's Commercial Regulations

In any event, the mandate is not a "proper" means of reducing insurance costs. Laws are "proper" only if they employ "means which are … plainly adapted to [the legitimate] end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. There are three critical aspects to *McCulloch*'s general standard: a "proper" law is (1) an ordinary method of execution that respects (2) the States' sovereignty and (3) the People's liberty. The mandate flunks all three factors, since it is an extraordinary regulation that reaches into the heart of traditional areas of state regulation and compels citizens to

enter into economically disadvantageous contracts that subsidize legal strangers.

1. Regulations are "plainly adapted" if they invoke "the ordinary means of execution." *Id.* at 409. The Necessary and Proper Clause merely confirms the existence of "incidental or implied powers" to execute Congress' enumerated authority, and the powers most readily "deduced from the nature of the objects themselves" are the "ordinary means of execution." *Id.* at 406-09, 420-21. Indeed, that the "customary way of exercising the principal power" "could be deduced" as an intended "[i]ncidental power[]" was well established in the Founding-era "doctrine of principal and incidents." Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause* 84, 119, *in* Gary Lawson et al., *The Origins of the Necessary and Proper Clause* (2010).

Accordingly, *McCulloch* upheld the Second National Bank because "a corporation" was a "usual" "means for carrying into execution the great powers vested in government," and "a bank" was the obvious corporation "required for … fiscal operations." 17 U.S. at 422. Likewise, *Raich* observed that possession bans are "commonly utilized[] means of regulating commerce in [a] product." 545 U.S. at 26 & n.36. And *Comstock*, in upholding a civil-commitment statute for certain sexually dangerous federal prisoners set to be released, emphasized that the provision was "a modest addition" to, and "reasonabl[e] exten[sion]" of, the "longstanding civil-commitment system" governing "federal prisoners." 130 S. Ct.

at 1958-61.

Conversely, when invalidating a federal law commandeering state officials to enforce federal gun regulations, *Printz* observed that the "compelled enlistment of state executive officers for the administration of federal programs [was], until very recent years at least, unprecedented." 521 U.S. at 905. It concluded that "almost two centuries of apparent congressional avoidance of the practice" "tends to negate the existence of the congressional power asserted," because the fact that "earlier Congresses avoided use of this highly attractive power" was good "reason to believe that the power was thought not to exist." *Id.* at 905, 917.

Here, far from being "incidental," "implied," "ordinary," "customary," "usual," "common," "longstanding," or otherwise "plainly adapted," the mandate "plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal … legislation." *Lopez*, 514 U.S. at 563. And there is good reason why "[this] mandate requiring all individuals to purchase health insurance [is] an unprecedented form of federal action." RE 2039. Previously, the Federal Government had only ever imposed traditional duties of citizenship on individuals, otherwise respecting the fundamental distinction in Anglo-American jurisprudence between free-standing mandates to act and restrictions or conditions on voluntary conduct. *See supra* at 12. Even staunch nationalists like Alexander Hamilton could not conceive of the possibility of commercial mandates: his *Report on the*

Subject of Manufactures (1791) listed *eleven* different ways by which Congress might encourage domestic manufacturing, but did not include compelling Americans to purchase such goods. *Reprinted in* 10 *Papers of Alexander Hamilton* 296-311 (Harold C. Syrett et al. eds., 1966). Indeed, not even the New Deal Congress thought of supporting wheat prices by mandating that Americans *buy* wheat. *See Wickard*, 317 U.S. at 113-15, 127-29. In sum, the fact that "earlier Congresses avoided use of this highly attractive power" to compel individuals to contract with third parties is strong "reason to believe that the power was thought not to exist." *Printz*, 521 U.S. at 905.

2. The degree to which "the statute properly accounts for state interests" is another important factor. *Comstock*, 130 S. Ct. at 1962; *see also id.* at 1967-68 (Kennedy, J., concurring in the judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause."). That accords with Founding-era legal usage, which "suggests that a 'proper' law is one that is within the peculiar jurisdiction or responsibility of the relevant governmental actor." Lawson & Granger, *supra*, at 267, 291 (advancing this "jurisdictional interpretation" of the Clause).

Thus, *Comstock* praised the civil-detention statute for "requir[ing] *accommodation* of state interests," as a State retained its "right, at any time, to

assert its authority over the individual, which [would] prompt the individual's immediate transfer to State custody." 130 S. Ct. at 1962. By contrast, *Printz* condemned the statute commandeering state authorities to enforce federal gun regulations because, where "a 'Law … for carrying into Execution' the Commerce Clause violates the principle of state sovereignty …, it is not a "Law … *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of the Federalist, 'merely an act of usurpation' which 'deserves to be treated as such.'" 521 U.S. at 923-24 (citing Lawson & Granger, *supra*, at 297-326, 330-33). Notably, that was so even though the commandeering of state officials directly enforced federal law and no express constitutional provision barred the practice. *Id.* at 903-05, 918-19.

Here, the mandate evinces an especial lack of "account[] for state interests," *Comstock*, 130 S. Ct. at 1962, by "foreclos[ing] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise," *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Specifically, the mandate invades traditional areas of state regulation, whether framed narrowly as "the business of [health] insurance," *FMC Corp. v. Holliday*, 498 U.S. 52, 62-63 (1990); *see also* RE 2024, or broadly as citizens' "health and safety," *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997); *see also Gibbons*, 22 U.S. at 203. Yet, far from "requir[ing]

accommodation of state interests," *Comstock*, 130 S. Ct. at 1962, the mandate contravenes (at least) the *26 State Plaintiffs*' views concerning "wise policy," *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). Accordingly, it "is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and "the precepts of federalism" strongly suggest it was not "properly exercise[d] by the National Government," *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring).

3. Just as Congressional solicitude of state sovereignty is an important factor in whether regulations are "consist[ent] with the letter and spirit of the constitution" (*McCulloch*, 17 U.S. at 421), so too is the degree to which they infringe the liberties of individuals. After all, "the critical postulate" of our federalist system is that "sovereignty is vested in the people" and that *all* governmental "powers are granted by them[] and are to be exercised … for their benefit." *US Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794, 821 (1995). That fundamental precept is reflected in the Tenth Amendment's admonition that the non-enumerated powers "are reserved to the States respectively, *or to the people*." U.S. Const., amend. X (emphasis added). "[F]ederalism" and "[s]tate sovereignty" thus are "not just an end in [themselves]," but rather a means of "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *Lopez*,

514 U.S. at 576 (Kennedy, J., concurring). Thus, under the "jurisdictional interpretation" of the Necessary and Proper Clause invoked in *Printz* (*see supra* at 44-45), "laws that are peculiarly within the jurisdiction or competence of Congress … do not tread on the retained rights of individuals or states." Lawson & Granger, *supra*, at 272.

Among the most longstanding and fundamental rights of Americans is their freedom from being forced to give their property to, or contract with, other private parties. During the Founding era, for example, *Calder v. Bull* warned against "presum[ing]" that the "people [have] entrust[ed] a Legislature" with the power to "take[] property from A. and give[] it to B," 3 U.S. at 388 (opinion of Chase, J.), because, even "*independently of the constitution of the United States*," such laws contravene "the nature of republican and free governments," 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1393, 268 (1833) (emphasis added). "Such an act" of conscription is "contrary both to the letter and spirit of the Constitution" even when solving "public exigencies," because it "lay[s] a burden upon an individual, which ought to be sustained by the society at large." *Vanhorne's Lessee*, 2 U.S. at 310; *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, Congress should not be presumed to have the power to force "a new contract" on a party "without [his] assent," for "the assent of all the parties to be bound by a contract be of its essence." *Cf. Trustees of Dartmouth*

College v. Woodward, 17 U.S. (4 Wheat.) 518, 662-63 (1819) (opinion of Washington, J.). Indeed, "creat[ing] a contract" is "within the same mischief, and equally unjust[] and ruinous," as unconstitutionally "impair[ing] or destroy[ing] one." 3 Story, *supra*, § 1392, 267.

These ancient principles endure. Not long ago, the Supreme Court invalidated a state law mandating that certain large employers fund novel pension obligations, reasoning that the law violated the Contracts Clause by "impos[ing] a completely unexpected liability in potentially disabling amounts" on a narrow class of employers. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 238-39, 247 (1978). More recently still, the Court invalidated a federal mandate that coal companies pay for certain health benefits of their retired former workers. *E. Enterprises*, 524 U.S. at 522-23, 529-37 (plurality opinion). The plurality concluded that compelling the companies to cover healthcare costs "unrelated to any commitment that the employers made or to any injury they caused" contravened the "fundamental principles of fairness underlying the Takings Clause," *id.* at 537, and Justice Kennedy's concurrence reached the same conclusion under the Due Process Clause, *id.* at 549-50. In sum, compelling even wealthy employers to effectively enter into contracts they have eschewed, for the benefit of their employees or the general public, certainly implicates and potentially violates the "fundamental principles of fairness" and personal

autonomy underlying the Takings, Contracts, and Due Process Clauses.

A fortiori, those interests are gravely threatened by the ACA's mandate, which forces individuals to contract on disadvantageous terms with wealthier insurers to reduce insurance costs "unrelated to … any injury … caused" by those individuals. *Id.* at 537 (plurality opinion). That is hardly an "incidental or implied power[]." *McCulloch*, 17 U.S. at 406. Not only would the limited "power of the Federal Government … be augmented immeasurably if it were able to impress [individuals] into its service … at no cost to itself," *see Printz*, 521 U.S. at 919-22, but "tread[ing] on the retained rights of individuals" (Lawson & Granger, *supra*, at 272) is not "properly within the reach" of "the Necessary and Proper Clause," for doing so is far from "consistent with the letter and spirit of the constitution," *see Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment). In short, Congress' attempt to "accumulat[e] … excessive power" has predictably increased "the risk of tyranny and abuse" for "the liberties" of "citizens." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).

IV. FORCING INDIVIDUALS TO PURCHASE HEALTH INSURANCE IS NOT A PERMISSIBLE MEANS OF REGULATING THOSE UNINSURED INDIVIDUALS WHO WILL FAIL TO PAY FOR HEALTHCARE THEY RECEIVE

Recognizing the mandate cannot be defended as written, the Government instead defends a hypothetical law that Congress never enacted. Although acknowledging below that the mandate regulates the free-standing "decision[]" not

to buy *insurance*, RE 1007-09, 2053-57, the Government now claims the mandate "regulates *the practice of obtaining health care services without insurance*," U.S. Br. 25-28, 38-44 (emphasis added).

The dispositive response to this eleventh-hour shift is that Congress did not regulate that commercial practice, whether or not it could have. The mandate does not regulate how individuals pay for *healthcare*, but only their failure to buy health *insurance*. It imposes monthly penalties on individuals who have not purchased insurance, even if they have not obtained healthcare during that month, let alone failed to pay for any care obtained. And it does not impose monthly penalties on individuals who have purchased insurance, even if they have obtained healthcare during that month without their insurance, and even if they have not paid for it.

Thus, the Act does not regulate or restrict any commerce between healthcare providers and patients, but only contracts between insurers and customers. This is hardly a technical distinction. A federal law prohibiting access to healthcare that the patient will pay for, simply because the patient is uninsured, is a far more controversial and direct burden on healthcare access than any regulation concerning insurance contracts. Unsurprisingly, there is no hint in the ACA's text or legislative history that people *who fully pay for their healthcare* without insurance are a problem to be prohibited, which vividly demonstrates that Congress never would have enacted the hypothetical prohibition on *cash-paying*

patients. Conversely, the hypothetical prohibition does not achieve the principal goal of the real mandate—*i.e.*, the subsidization of insurers from the compelled premiums of healthy, non-"free-riding" individuals.

The Government, however, deems it legally irrelevant that the mandate regulates only the status of being uninsured rather than the activity of procuring healthcare without insurance. It asserts that many uninsured individuals will not fully pay for healthcare that they receive and thus will "cost-shift." *Id.* 10-11, 26-27; *but see supra* at 4-6 (describing the Government's exaggerations). And thus it reasons that Congress may stop this *sub-class* of uninsured individuals from engaging in the *economic activity* of "free-riding" by banning uninsured *status* for *all* individuals, under the principle that "[w]here Congress decides that the total incidence of a practice … poses a threat to a national market, it may regulate the entire class." U.S. Br. 27-28, 40-42 (internal quotation marks omitted).

But here, the only "practice" that even arguably "poses a threat to a national market" is the economic activity of uninsured individuals who *obtain uncompensated healthcare*, and so *that* is the "entire class" that may be regulated to eliminate its "total incidence." The Government's argument that it can regulate the *broader* "class" of uninsured individuals merely because some *sub-class* will engage in activity that may be regulated is plainly wrong and again would eviscerate all constraints on Congress.

The Supreme Court has recognized that, if a "class of activities … is within the reach of federal power"—*i.e.*, if the "total incidence" of the economic "practice" that defines "*the entire class*" "poses a threat to a national market"—then Congress need not "excise, as trivial, individual instances[] of the class," *Raich*, 545 U.S. at 17, 23 (emphasis added), because "the *de minimis* character of individual instances" of that *validly defined class* "is of no consequence," *Lopez*, 514 U.S. at 558. This principle has been applied in myriad contexts, such as a racially discriminatory restaurant's individual contribution to the aggregate decrease in the interstate food market, *McClung*, 379 U.S. at 298, 300-01, and the individual contribution of an endangered species with little direct commercial value to the aggregate value of all endangered species, due to unforeseeable ecological relationships, *Alabama-Tombigbee*, 477 F.3d at 1274-77.

But no case suggests that Congress may regulate a "class" that is *outside* "the reach of federal power" simply because a *sub-class* engages in a "practice" that may be regulated. *Raich*, 545 U.S. at 17, 23. To the contrary, that proposition is foreclosed by abundant precedent. It is squarely refuted by *Lopez*, which invalidated the blanket federal ban on gun possession near schools, even though: (1) most guns have crossed state lines; (2) Congress *could have* regulated that sizeable sub-class of activity (as it did post-*Lopez*); and (3) Lopez himself was a *paid* gun courier. 514 U.S. at 561-62; 18 U.S.C. § 922(q); *Lopez*, 2 F.3d at 1345.

Likewise, in *Morrison*, Justice Breyer's dissent *unsuccessfully* contended that the civil remedy for gender-motivated violence should be upheld because Congress could "reenact the present law in the form of 'An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce.'" 529 U.S. at 659. Similarly, the Supreme Court has distinguished between an unconstitutional federal civil-rights law that applied to *all* public accommodations and a constitutional one that was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people," even though *many* of the businesses covered by the former law undoubtedly had the requisite relation. *Heart of Atlanta*, 379 U.S. at 250. Indeed, under the Government's theory, Congress would *never* need to use a "jurisdictional element [to] ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce" (*Lopez*, 514 U.S. at 561), because the Government could always identify in litigation some smaller sub-class that *could* have been validly regulated.

In sum, while Congress could have regulated all individuals engaged in the commerce that is problematic—here, obtaining uncompensated healthcare—without exempting those whose participation in the practice is relatively minor, Congress cannot regulate individuals who are *not* engaged in that problematic commerce simply because some subset of them may do so at some point in the

future. There truly would be no "real limits" on federal authority (*id.* at 565) if Congress could bootstrap its powers in this way. At an absolute minimum, for all the reasons explained above, Congress cannot purport to regulate "free-riders" by instead (1) regulating a vast "class" consisting of nearly every American, (2) before they have engaged in any commerce at all, (3) by imposing an unprecedented duty to purchase a commercial product, (4) that is economically disadvantageous and designed to subsidize third parties, (5) in an area of traditional state regulation. A contrary holding would unleash an entirely novel and unbounded federal police power.

V. FORCING INDIVIDUALS TO PURCHASE HEALTH INSURANCE EXCEEDS CONGRESS' POWER TO TAX

Congress may "lay and collect Taxes." U.S. Const. art. I, § 8, cl. 1. The Government half-heartedly invokes this power, U.S. Br. 50-54, contrary to statutory text, unanimous judicial consensus (*Mead v. Holder*, No. 10-950, 2011 WL 611139, at *22-23 (D.D.C. Feb. 22, 2011) (citing cases)), and the President's repeated assurances that the mandate is "absolutely not a tax" (RE 390). Ultimately, "there comes a time in the extension of the penalizing features of [a] so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Dep't of Rev. v. Kurth Ranch*, 511 U.S. 767, 779 (1994). That is the case for the mandate, which likely explains why not even Congress called it a "tax."

A. The mandate is not a "tax," because it is a classic regulatory requirement ("buy insurance") enforced by a *penalty* for noncompliance. "[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). In adopting that definition, the Court reaffirmed the distinction from *United States v. La Franca*, 282 U.S. 568 (1931), between a "tax," as "an enforced contribution to provide for the support of government," and a "penalty," as "an exaction imposed by statute as punishment for an unlawful act." *Id*. at 572.

The leading precedents that considered whether monetary exactions were "taxes" for constitutional purposes applied this distinction. In *United States v. Sanchez*, 340 U.S. 42 (1950), which upheld an excise on marijuana transfers, the Court emphasized that the transfers were "not made an unlawful act under the statute." *Id*. at 45. And in *Sonzinsky v. United States*, 300 U.S. 506 (1937), the Court upheld a statute that taxed dealing in firearms, because it lacked any "regulatory provisions" indicating that the tax was really "a penalty resorted to as a means of enforcing [such] regulations." *Id*. at 513-14. By contrast, in the *Child Labor Tax Case*, on which *Sonzinsky* relied, the Court rejected Congress' effort "to enact a detailed measure of complete regulation" of activities that met "the criteria of wrongdoing," but to "enforce it by a so-called tax upon departures." 259 U.S. 20, 38 (1922); *see also United States v. Kahriger*, 345 U.S. 22, 31 (1953).

Under this longstanding law, the mandate is not a tax. The Act prescribes that covered individuals "shall … ensure" they have insurance. 26 U.S.C. § 5000A(a). And it makes anyone who "fails to meet" this "requirement" subject to "a penalty with respect to such failure." *Id.* § 5000A(b)(1). This is the language and structure of regulation that defines and punishes an unlawful omission.

The Government makes no effort to confront this settled precedent. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941)—the Government's chief authority (U.S. Br. viii, 50)—did not address whether an asserted tax was in fact one, but rather involved the permissible scope of state use taxes. *Nelson*, 312 U.S. at 363-66. And while the Government cites *Sonzinsky* for the proposition that forced payments to the government are "taxes" so long as they produce "some revenue," U.S. Br. 50-51, *Sonzinsky* hardly established revenue generation as a *sufficient* criteria for "tax" classification, which would be absurd since "[c]riminal fines, civil penalties, civil forfeitures, and taxes" *all* "generate government revenue," *Kurth Ranch*, 511 U.S. at 778.

Finally, the Government's argument would again render federal power unlimited. The mandate does not require payment of a "tax" incident to some transaction (such as selling cigarettes or procuring healthcare), because it is triggered by the *inactive status* of being uninsured. If that were a "tax," Congress could mandate *any* desired conduct so long as it labeled the noncompliance penalty

"a so-called tax upon departures from [the mandate]." *Child Labor Tax Case*, 259 U.S. at 38. It is unsurprising that there is no precedent for such a "tax." RE 400.

B. There is a further reason why the mandate is not a tax: the Congress that enacted the ACA, like the President who signed it, *expressly* and *unambiguously* disavowed the taxing power.

The leading cases all involved statutes claiming to enact a "tax." *Id.* 400-02; *Sanchez*, 340 U.S. at 43-44; *Child Labor Tax Case*, 259 U.S. at 37. Moreover, the Court has emphasized the importance of considering a purported tax statute "on its face," both as to the label used and whether other text overcomes that label. RE 401 (discussing *Sonzinsky*); *see also Child Labor Tax Case*, 259 U.S. at 36-39; *cf. United States v. Sotelo*, 436 U.S. 268, 273-75 (1978) (holding that monetary liabilities were "unquestionably 'taxes'" under the Internal Revenue Code at "th[e] time period that … [was] relevant" for bankruptcy purposes). Thus, as the district court held, a purported tax "cannot be regarded as one if it 'clearly appears' that Congress did not intend it to be." RE 390.

The mandate fails this standard. Most decisively, § 1501(b) of the Act—which imposes the insurance-coverage requirement, sets the noncompliance punishment, and specifies the enforcement mechanism—repeatedly and exclusively refers to the exaction as a "penalty." 26 U.S.C. § 5000A(a)-(c), (e), (g). And the Act's preceding subsection, § 1501(a), grounds the mandate *only* in

the commerce power. 42 U.S.C. § 18091. (Although the mandate resides in the Internal Revenue Code, the Code itself makes that placement legally irrelevant. 26 U.S.C. § 7806(b); *see Reorganized CF&I Fabricators*, 518 U.S. at 222.) Moreover, the ACA labeled other exactions as taxes and listed seventeen "Revenue Offset Provisions," without including the mandate. RE 392, 397. Finally, statutory context confirms that Congress wanted the "penalty" to produce *no revenue*, because Congress wanted *everyone* eligible to purchase insurance and thereby *avoid* the penalty.

The Government attacks a straw man when complaining that Congress is not required "expressly to invoke its taxing power in the Act itself." U.S. Br. 52. Although Congress *need not* specify its constitutional basis, when it *does* so and *unambiguously* indicates that an exaction *should not* be considered a "tax," courts should take Congress at its word. RE 390, 393-94, 396, 400. Here, Congress "clearly" indicated in "the plain words of the statute" that it "did not intend to impose a tax when it imposed the penalty." *Id.* 400. Indeed, the Government all but concedes this by selectively emphasizing legislative history rather than enacted text. U.S. Br. 53-54; *see also* RE 391, 398-400; *Mead*, 2011 WL 611139, at *23.

C. Finally, the Government completely ignores that the mandate's penalty would be unconstitutional even as a "tax." It is a *direct* exaction, rather than an excise "upon a use of property, a privilege, an activity, or a transaction,"

yet it is impermissibly *unapportioned*. *Murphy v. IRS*, 493 F.3d 170, 184 (D.C. Cir. 2007); *see* RE 214-17, 435-36.

VI. THE MANDATE AND THE CONCEDEDLY NON-SEVERABLE INSURANCE REGULATIONS CANNOT COLLECTIVELY BE SEVERED FROM THE ACA

Finally, the Government insists the district court erred by holding the Act non-severable. U.S. Br. 55. Although the Government admitted below that "*some limited set* of provisions"—including those regulating insurers—"cannot survive if the minimum coverage provision is stricken," RE 1765, it maintains that *some* others can. Its imprecision in describing which provisions of the 2700-page Act can be severed illustrates the propriety of the decision below: the mandate and related insurance regulations are the heart of a sprawling and complex legislative compromise, and there is no chance the Act—in anything resembling its current form—would have been enacted in their absence.

The standard for non-severability is well established. After a court strikes a statute's unconstitutional provisions, the "remaining provisions" must be invalidated where "it is evident that the Legislature would not have enacted those provisions … independently of that which is invalid," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010), because it "would not have been satisfied with what remains," *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929). In other words, considering "the scheme … as a whole," *Pollock*

v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895), courts must ask whether a severed statute would "function in a *manner* consistent with … the original legislative bargain," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). To do otherwise "would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." *Pollock*, 158 U.S. at 636. Accordingly, even where statutes functionally could have operated without their unconstitutional parts, the Supreme Court has held them non-severable where the invalid provisions were important elements of the overall statutory scheme. *E.g.*, *id.* at 637 (invalidating taxation scheme because, "[b]eing invalid as to the greater part," Congress would not have enacted its lesser portions); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalidating pension system because unconstitutional features "so affect[ed] the dominant aim of the whole statute as to carry it down with them").

Under these principles, the mandate cannot reasonably be severed. Looking at the scheme "as a whole," *Pollock*, 158 U.S. at 637, the mandate "so affect[s] the dominant aim of the statute" that it is inconceivable that Congress would have enacted this law without it, *Alton*, 295 U.S. at 362. The mandate is *indisputably* "essential" to the ACA's goal of providing affordable coverage to nearly all Americans, 42 U.S.C. § 18091(a)(2)(I); U.S. Br. 28, because it counteracts the massive costs imposed by the Act's other insurance provisions. The mandate and

these other insurance provisions—which the Government conceded below must "stand or fall" together, RE 1765— truly are the heart of the Act, and no law can survive without its heart.

Moreover, not only are these insurance-related provisions the ACA's linchpin, but they interact in myriad ways with its other provisions. *See, e.g.*, Chamber of Commerce *Amicus* Br. 17-25. And reinforcing the Act's "package deal" nature, Congress *removed* a severability clause from an earlier House version. U.S. Br. 59 n.10. Although that removal by itself is not dispositive, "it does suggest that Congress intended to have the various components of the [healthcare] package operate together or not at all." *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1267 (9th Cir. 1988).

The Government's own analysis confirms this point. Although "recogni[zing]" the mandate is "integral" to the ACA's regulation of insurance, the Government contends that certain *other* provisions are not so "integrally related." U.S. Br. 59. But its (non-comprehensive) attempt to list them produces such a miscellaneous hodge-podge—*e.g.*, employer-provided rooms for nursing mothers; nondiscrimination protection for providers refusing to furnish assisted-suicide services; and Medicare reimbursements for bone-marrow density tests, *id.* 56-57—that the Government cannot seriously claim that Congress would "have been satisfied" with this menagerie of tag-along provisions. *Williams*, 278 U.S. at 242.

Ultimately, courts must either recognize the mandate and the concededly intertwined insurance provisions as a central feature of the ACA, without which the rest cannot survive, or proceed through several *hundred* sections and evaluate each provision's relationship to one another and the whole. But the latter is impractical and far beyond the judicial role—even a severability clause (absent here) "does not permit [courts] to rewrite the statute," *Alton*, 295 U.S. at 388. Thus, because the ACA is unconstitutional at its core, Congress must start over if it still desires to regulate in this field.

CONCLUSION

Accordingly, this Court should affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, as counted using the word-count function on Microsoft Word 2007 software. I further certify that the brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5), (a)(6), because it has been prepared in proportionally spaced typeface using Times New Roman, font size 14 (other than the signature block, which is in font size 12).

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CERTIFICATE OF SERVICE

I hereby certify that, on May 4, 2011, I filed the foregoing Brief for Private Plaintiffs-Appellees with this Court, by causing a copy to be electronically uploaded and by causing the original and six paper copies to be delivered by UPS. I further certify that, by agreement among counsel, I caused the brief to be served on May 4, 2011, upon the following counsel by electronic mail, and by hard-copy via UPS on the counsel denoted with asterisks:

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