No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS (Minimum Coverage Provision)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Constitution and statutes—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 11-398

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

As the government demonstrated in its opening brief, the minimum coverage provision of the Patient Protection and Affordable Care Act,[1] and the comprehensive market reforms to which it is essential, are core exercises of Congress's Article I powers. They address longstanding economic distortions that have resulted in massive cost-shifting (in a national market that constitutes 17% of the Nation's gross domestic product) and have denied millions of Americans access to affordable health care.

In attacking the minimum coverage provision, and with it the entire Act, respondents seek to elevate a policy dispute over the means Congress chose to accom-

[1] Pub. L. No. 111-148, 124 Stat. 119, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

plish its concededly valid objectives—a means advocated for decades in national policy debates as a responsible free-market approach to meeting those objectives—into an issue of constitutional dimension. But respondents have identified no principle of constitutional law nor any precedent that would justify the grave step of overturning the judgments of the democratically accountable Branches of government about what means would best address the Nation's health-care crisis. Instead, respondents invite this Court to impose novel limits on Congress's Article I authority based on an intrusive and largely standardless approach to reviewing economic legislation that would mark a sharp departure from the approach this Court has historically followed. The Court should decline that invitation and uphold the Act.

I. THE MINIMUM COVERAGE PROVISION IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER

A. The Minimum Coverage Provision Regulates Economic Activity That Substantially Affects Interstate Commerce

Respondents' argument that the minimum coverage provision exceeds Congress's commerce power rests on the erroneous premise that it should be treated as an effort to create commerce out of thin air by compelling the purchase of a particular product (health insurance). States Br. 15; NFIB Br. 7. That characterization is not faithful to what Congress actually did in the Affordable Care Act. The minimum coverage provision addresses economic effects that already exist in the health-care market because the uninsured as a class routinely consume health care they cannot afford. That is the activity Congress is regulating. It is ongoing economic activity that, in the aggregate, results in at least $43 billion worth of uncompensated health care annually—the cost

of which is now distributed through an unfair patchwork of hidden cost-shifting that adds approximately $1000 annually to the price of a family health insurance policy. 42 U.S.C.A. 18091(a)(2)(F). Because the provision regulates the timing and method of financing health-care services that members of the regulated class consume—and does so to address existing substantial economic effects in an area of pervasive federal involvement (Gov't Br. 3-7)—it is well within the recognized boundaries of the commerce power. *United States* v. *Lopez*, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").[2] And the provi-

[2] For this reason, respondents' discussion of the meaning of "regulate" is beside the point. In all events, respondents do not refute the D.C. Circuit's analysis based on founding-era dictionaries, *Seven-Sky* v. *Holder*, 661 F.3d 1, 16 (2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011), and they ignore this Court's decisions making clear that Congress has the power to enact legislation to "promote [commerce's] growth," "foster" it, and achieve its "advancement." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (internal citations omitted). Respondents' emphasis on the meaning of "regulate" also fails for the reasons Judge Sutton identified in rejecting their previously asserted "inactivity" theory. *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 560-564 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011).

Respondents' argument likewise is impossible to square with *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which rejected the contention that Congress could not create a bank because "[t]he power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress." *Id.* at 409. Respondents' amici (Former DOJ Officials Br. 9) similarly err in invoking Secretary of State Jefferson's argument against the constitutionality of the Bank of the United States. President Washington rejected that argument and instead agreed with Treasury Secretary Hamilton. *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 The Papers of Alexander Hamilton 126-127 (Harold C. Syrett ed.,

sion's necessary role in making effective the Act's guaranteed-issue and community-rating regulations further establishes its constitutionality. See pp. 13-15, *infra*; Gov't Br. 24-32.

1. Respondents concede that Congress has the constitutional authority to regulate the interstate health-care and health-insurance markets. They acknowledge Congress's power to prescribe guaranteed issue and community rating. And they do not question Congress's power to regulate how individuals pay for health care, or dispute that participation in the health-care market is virtually universal and that the risk of participation is unavoidable. They do not even challenge Congress's power to impose monetary penalties or other consequences (such as denial of health care) on those who lack health insurance, or to require that insurance be used to purchase health care. They dispute only the point in time at which Congress may employ the concededly valid means of a minimum coverage provision. *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 563 (6th Cir. 2011) (Sutton, J.), petition for cert. pending, No. 11-117 (filed July 26, 2011).

Respondents' attempt, based on a mere matter of timing, to invalidate Congress's choice of means to accomplish its concededly valid goals ignores two centuries of constitutional history. Although the national government is one of enumerated powers, "'a government, entrusted with such' powers 'must also be entrusted with ample means for their execution.'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 408

1965). Chief Justice Marshall "substantially followed" Hamilton's opinion in *McCulloch*, see *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 642 (1871) (Field, J., dissenting).

(1819); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937). Thus, review of Congress's choice of means is particularly deferential. *Gonzales* v. *Raich*, 545 U.S. 1, 22 (2005). There is no principled constitutional basis for concluding that Congress may enact the kinds of provisions respondents concede are valid, but not the minimum coverage provision Congress did enact. As Judge Sutton recognized: "Requiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind." *Thomas More*, 651 U.S. at 563. Just as the Constitution regards a prescription of the "Times, Places and Manner of holding Elections" as a "Regulation[]" of elections, Art. I, § 4, Cl. 1, the minimum coverage provision, governing the time, place, and manner of financing health care, is a proper means to "regulate Commerce," Art. I, § 8, Cl. 3.

Nor is there merit to respondents' argument that the Act does not actually regulate how individuals finance health care because it imposes a tax penalty on those without insurance, rather than requiring "individuals to actually *pay* for health-care services with * * * insurance." States Br. 25. Congress could reasonably conclude that applying the minimum coverage provision before actual consumption of health care would be more effective in extending coverage, removing barriers to care, and reducing cost-shifting than respondents' alternative. Congress also could reasonably assume that individuals with health insurance would act rationally and use it to pay their health-care bills. And even if some insured persons inexplicably did choose to pay out of pocket, the Act would still achieve Congress's objectives because their care would be paid for without any cost-shifting.

A correct understanding of the minimum coverage provision also answers respondents' hyperbolic claims that upholding it would vastly expand congressional power. *E.g.*, States Br. 24. A requirement that consumers purchase a commodity like broccoli or a car could not be justified on the same grounds that justify the minimum coverage provision. In markets for those goods, there is no pre-existing economic activity analogous to the uncompensated consumption of health care, and thus no substantial economic effect like the massive risk-shifting and cost-shifting that occurs in the health-care and health-insurance markets. See pp. 18-20, *infra*. "No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk," *Thomas More*, 651 F.3d at 561 (Sutton, J.), and those who "self-insure" often find themselves unable to pay unexpected medical bills, see Gov't Br. 44 (discussing respondent Mary Brown). Thus, recognizing Congress's power to regulate in this way to address the substantial economic effects of uncompensated care would not justify congressional action to simply create commerce. This is a regulation of existing commerce.

The minimum coverage provision is, of course, consistent with the commerce power limits this Court articulated in *Lopez* and *United States* v. *Morrison*, 529 U.S. 598 (2000). The provision regulates economic activity in a commercial sphere (health-care financing) that has long been subject to pervasive federal involvement under ERISA, the Internal Revenue Code, Medicare, Medicaid, and other laws. Gov't Br. 3-7; Health Care Policy History Scholars Amicus Br. 7-21. Contrary to state respondents' passing suggestion (Br. 38), it does not invade any sector (such as family law, education, or

general criminal law) traditionally reserved to the States.

2. Respondents devote the bulk of their briefs to arguing that the minimum coverage provision is neither necessary nor proper, reflecting their view that when Congress regulates activity that substantially affects interstate commerce, it is acting only pursuant to its necessary-and-proper power. But cf. *Raich*, 545 U.S. at 16-17. However framed, respondents' arguments are misconceived.

The Necessary and Proper Clause—"an additional power, not a restriction on those already granted"—grants Congress "ample means for the[] execution" of its other enumerated powers. *McCulloch*, 17 U.S. (4 Wheat.) at 408, 420. The Clause was not written "to clog and embarrass" Congress's "execution" of its enumerated powers "by withholding the most appropriate means." *Id.* at 408; see *Comstock*, 130 S. Ct. at 1956; *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 535-542 (1871). "[T]hose who contend that * * * one particular mode of effecting [Congress's] object is excepted * * * take upon themselves the burden of establishing that exception." *McCulloch*, 17 U.S. (4 Wheat.) at 410. Respondents cannot carry that burden.[3]

---

[3] In contending that the Necessary and Proper Clause should be reinterpreted to impose stringent new limits on Congress, private respondents rely heavily on a law review article, Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267 (1993) (Lawson). *E.g.*, NFIB Br. 42, 44, 58, 60. That revisionist account is hotly contested, see, *e.g.*, J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, and, more importantly, is irreconcilable with this Court's precedents, see Lawson 331-332 (contending *Wickard* v. *Filburn*, 317 U.S. 111 (1942), was wrongly decided, and stating *McCulloch* presents "a hard case" that

A minimum coverage provision that applies in advance rather than at the point of medical need is both necessary and proper. A law is "necessary" if it is "convenient, or useful, or essential" to the execution of an enumerated power. *McCulloch*, 17 U.S. (4 Wheat.) at 413. Once that standard is satisfied, further inquiry "into the degree of its necessity * * * would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 423. Private respondents nonetheless spend nearly half their brief demanding the very type of judicial second-guessing the Court has eschewed since *McCulloch*. NFIB Br. 28-56. They cite no decision from this Court invalidating a law on the ground that Congress erred in finding the legislation "necessary" to achieve its legitimate ends. Under the long-settled standard of review, *McCulloch*, 17 U.S. (4 Wheat.) at 413, the minimum coverage provision is plainly constitutional. Gov't Br. 27-37.[4]

---

was likely incorrect); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 350 n.92 (2002) ("We never claimed that our interpretation of the Sweeping Clause was consistent with precedent.").

[4] Private respondents contend that the minimum coverage provision is not "necessary" because (despite Congress's contrary judgment) it will not significantly reduce uncompensated care. NFIB Br. 5, 55-56; NFIB Severability Br. 16-17. They rely on the court of appeals' empirical analysis, *ibid.*, which relied exclusively on an amicus brief by economists supporting respondents, Pet. App. 127a-128a. Those economists have now acknowledged that their analysis suffered from serious methodological errors. Economists Amicus Br. 15 n.10, 23a n.1; see Gov't Severability Br. 53-54; Economic Scholars Amicus Br. 28-33. Independent economic modeling shows that repealing the minimum coverage provision "would mean $20 billion more in uncompensated care provided to the uninsured." Matthew Buettgens & Caitlin Carroll, *Eliminating the Individual Mandate: Effects on Premiums, Coverage, and Uncompensated Care* 5 (2012).

3. a. For similar reasons, respondents fail to demonstrate that the minimum coverage provision is not "proper." Respondents invoke *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), but their reliance on those decisions underscores the misconceived nature of their argument. In both cases, this Court emphasized that Congress may not commandeer States or their officers (and thereby infringe state sovereignty), but that the Constitution provides Congress "ample power" to exercise authority "*directly upon the citizens*." *New York*, 505 U.S. at 162 (citation omitted); see *Printz*, 521 U.S. at 919-921; *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In the Affordable Care Act, Congress used its "substantial powers to govern the Nation directly," *New York*, 505 U.S. at 162, by "acting directly on the people," *McCulloch*, 17 U.S. (4 Wheat.) at 404, in conformity with the constitutional structure. It is therefore baffling that respondents contend that the Act compromises the constitutional value of accountability recognized in *New York* and *Printz*. There is no doubt that "it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168.

b. More generally, *Printz* and *New York* do not support interpreting the word "proper" as a roving judicial commission to nullify economic legislation as contrary to amorphous notions of "*individual* autonomy." NFIB Br. 60-62. Such a standardless power would be irreconcilable with the proper role of the Judiciary under our Constitution. Having abandoned their substantive due process claim, Pet. App. 112a n.93, respondents cannot now smuggle it back into the case as an even more elastic not-"proper" claim. *Legal Tender Cases*, 79 U.S. at

547, 549-551 (rejecting claim that legal tender acts violated the "spirit of the Constitution because they indirectly impair[ed] the obligation of contracts," and were thus not necessary and proper).

This would be an especially poor setting in which to invoke such generalized liberty-based notions, given that respondents assert a freedom of contract, NFIB Br. 61-62; cf. *United States* v. *Darby*, 312 U.S. 100, 125 (1941), in a context in which the uninsured are already engaged in the economic activity for which the minimum coverage provision governs the manner of payment. And respondents' preferred alternative (penalizing the uninsured at the time of medical need) would hardly "preserve spheres in which citizens remain free from federal superintendence." NFIB Br. 53. It would instead be *more* "coercive" because "[a]n individual in need of acute medical care, but without the resources to pay for it, is not apt to refuse to buy future medical insurance in order to obtain present care," *Thomas More*, 651 F.3d at 563 (Sutton, J.).

To support their plea for exacting review of economic legislation, respondents insist that the minimum coverage provision is suspect because it compels "healthy individuals" to enter into "disadvantageous contracts" to subsidize others. NFIB Br. 7, 41. Wholly apart from the facts that only a fraction of the uninsured actually think health insurance is "disadvantageous" (Gov't Br. 44) and that the government will subsidize much of the cost (*id.* at 10-11), an insurance contract is not "disadvantageous" merely because a person may pay more in premiums than he receives in benefits in a particular year. It is a sad but ineluctable fact of human existence that health is not immutable, and "healthy individuals" are not a static class. Insurance exists because "more-

healthy people" become "less-healthy people" (NFIB Br. 41), often as a result of a bolt-from-the-blue event like a heart attack or cancer diagnosis. No one is "more than an instant from" needing health care. *Raich*, 545 U.S. at 40 (Scalia, J., concurring in the judgment). To the extent "more-healthy" individuals will pay more for insurance than they would without guaranteed issue or community rating, they will pay less when they are older and at greater risk of needing expensive care.

Respondents' effort to imbue their subsidy argument with constitutional significance ignores this Court's precedents and consistent legislative practice. By their logic, a minimum-wage law impermissibly forces employers into "disadvantageous contracts." See *Adkins* v. *Children's Hosp.*, 261 U.S. 525, 544-562 (1923) (invaliding minimum-wage law because "[t]o the extent that the [wage] exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person"), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 397-398 (1937). As the Court held in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), "[t]he conflicts of economic interest between the regulated and those who advantage by [regulation] are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process." *Id.* at 129; see *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 572 (1939).[5]

---

[5] The commerce power has routinely been invoked to enact measures that could be characterized as forced subsidies. *E.g.*, *Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 405-408 (5th Cir. 1999) (federal communications regulation historically "involve[d] the manipulation of rates for some customers to subsidize more affordable rates for others"); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-121

c. Nor is there force to respondents' contention that the minimum coverage provision fails to "invoke 'the ordinary means of execution.'" NFIB Br. 57 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 409, 421). Insurance is the "ordinary" means of paying for health care, and insurance requirements are an "ordinary" means of market regulation where individuals' lack of insurance shifts risks and costs to others. Gov't Br. 3-7, 35-37. Respondents ignore the principle that "[t]he authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *Darby*, 312 U.S. at 116 (citation omitted). Accordingly, to achieve its legitimate ends, Congress was free to adopt regulatory means similar to those Massachusetts successfully employed. Gov't Severability Br. 50-51.

d. The Act is not unconstitutional on the ground that it fails to "account[] for state interests," NFIB Br. 58 (quoting *Comstock*, 130 S. Ct. at 1962). There is no such requirement when Congress regulates individuals directly. Gov't Medicaid Br. 43. In any event, the Act provides States considerable flexibility. Maryland Amicus Br. 29-36. For example, beginning in 2017, States may opt out of the minimum coverage provision if they establish an alternative means of affordably providing comprehensive coverage to a comparable number of residents. 42 U.S.C.A. 18052.

(1942) (upholding milk price-support law, under which milk consumers subsidize milk producers).

B. The Minimum Coverage Provision Is Necessary And Proper To Carry Out The Act's Insurance Reforms

As the government demonstrated in its opening brief, the minimum coverage provision is also a valid exercise of Congress's Article I powers because it is necessary and proper "to make * * * effective" (*United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-120 (1942)) the Act's guaranteed-issue and community-rating insurance market reforms. Gov't Br. 24-32; Gov't Severability Br. 44-54.

Agreeing with the government (but not private respondents, see NFIB Br. 46-47), state respondents recognize that, without a minimum coverage provision, many people would exploit the guaranteed-issue and community-rating reforms by delaying insurance purchases until they needed care. States Br. 34; see 42 U.S.C.A. 18091(a)(2)(I); Economic Scholars Amicus Br. 23-26; America's Health Ins. Plans Severability Amicus Br. 18-26. State respondents nonetheless contend that the minimum coverage provision is invalid because, far from being "ineffective," the reforms "would work far too well" without the minimum coverage provision, due to this gamesmanship. States Br. 34. That contention rests on a crabbed view of what it means to make a regulation effective.

This is not a situation in which Congress is using its necessary and proper authority to solve a problem of its own creation. Congress adopted the Act's insurance reforms to address the existing economic effects of discriminatory industry practices, and expressly found that the minimum coverage provision is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can

be sold." 42 U.S.C.A. 18091(a)(2)(I). The experience in States that enacted such reforms without a minimum coverage provision (and suffered serious adverse selection as a result) confirms that judgment. Gov't Br. 29-30; Gov't Severability Br. 44-54; see *Jones & Laughlin Steel Corp.*, 301 U.S. at 42 ("[I]nterferences with [interstate] commerce must be appraised by a judgment that does not ignore actual experience."). A regulation cannot be "effective" (*Wrightwood Dairy*, 315 U.S. at 118-120) without another regulation if, when implemented alone, it would lead to severely negative economic consequences that would be the opposite of what Congress intended.

State respondents contend that Congress's power to enact measures to make its regulation effective can defeat "challenges only to 'individual applications of a concededly valid statutory scheme,'" not facial challenges to a statute as a whole. States Br. 40 (quoting *Raich*, 545 U.S. at 23). That is incorrect. See *FERC* v. *Mississippi*, 456 U.S. 742, 754, 757 n.22 (1982) (rejecting facial challenge because "challenged provisions [were] an integral part of the regulatory program and * * * the regulatory scheme when considered as a whole satisfies [the] test" of constitutionality) (citation omitted); *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981) (same); *Darby*, 312 U.S. at 125. *Lopez*, which involved a facial challenge, emphasized that the statute at issue was *not* "an essential part of a larger regulation of economic activity," 514 U.S. at 561, a distinction that would have been unnecessary if that principle were irrelevant to facial challenges.

Respondents wrongly assert that upholding the minimum coverage provision as necessary and proper for the Act's insurance reforms would confer a limitless power

on Congress. First, they disregard the tight connection between the concededly valid market reforms (guaranteed issue and community rating) and the regulation necessary to make them effective (minimum coverage). These provisions both confer economic benefits and impose economic obligations on the previously uninsured, who will now be able to obtain affordable coverage regardless of their medical condition or history. "In economic terms, [the guaranteed-issue and community-rating] provisions create the equivalent of a contractual option to buy health insurance at market rates from any insurer at any future time, regardless of one's health status." 104 Health Law Professors Amicus Br. 27. "That option has real economic value." *Ibid.* Moreover, this Court has made clear that Congress may act to address increased risks, attributable to the regulatory scheme itself, that the regulated class will engage in economic activity that undercuts the scheme—here, delaying the purchase of insurance until it is needed. *Raich*, 545 U.S. at 18-19; *id.* at 37 & n.2 (Scalia, J., concurring in the judgment) (citing *Wickard*, 317 U.S. at 127-129); *Lopez*, 514 U.S. at 555-556, 558. Upholding the Act on the basis of that settled principle would not authorize Congress to treat the mere failure to purchase a commodity as activity undermining a larger scheme.

C. Respondents' Contentions Regarding Novelty And Hypothetical Mandates Are Misplaced

1. Respondents contend (*e.g.*, States Br. 21-24) that the supposed novelty of the minimum coverage provision should count against it. But federal statutes compelling individuals to take affirmative steps are commonplace (despite arguments that they interfere with individual autonomy). See *Thomas More*, 651 F.3d at 561 (Sutton,

J.) (referencing federal child-support and sex-offender-registration statutes); *Seven-Sky* v. *Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011) (observing that *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258-259 (1964), upheld regulation of "seemingly passive" conduct); see generally Corey Rayburn Yung, *The Incredible Ordinariness of Federal Penalties for Inactivity* (Jan. 30, 2012). Moreover, the "novelty" about which respondents complain results from Congress's choice of a regulatory means that is more protective of individual choice, market efficiency, and state prerogatives than traditional approaches like Medicare. See Gov't Br. 14-15. "Courts naturally should be very careful before interfering with the elected Branches' determination to update how the National Government provides [government] assistance." *Seven-Sky*, 661 F.3d at 53 (Kavanaugh, J., dissenting).

In reviewing statutes that interfere with the Constitution's structural protections, such as statutes that commandeer state officials or alter States' sovereign immunity, the Court has said that the "[l]ack of historical precedent can indicate a constitutional infirmity." *Virginia Office for Protection & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1641-1642 (2011); see *Printz*, 521 U.S. at 907-908. But the modern Court has never applied that principle in evaluating Congress's exercise of its commerce power to regulate individuals directly. Nor would it be sensible to do so. *North American Co.* v. *SEC*, 327 U.S. 686, 705 (1946) ("Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities.") (citation omitted).

"With negligible exceptions, Congress did not exercise its power to regulate commerce prior to its enactment in 1887 of the Interstate Commerce Act." *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944). "Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress 'ushered in a new era of federal regulation under the commerce power.'" *Raich*, 545 U.S. at 16 (quoting *Lopez*, 514 U.S. at 554). For that reason, nearly all exercises of the commerce power could have been condemned as impermissibly "novel" under respondents' argument. Indeed, "in almost every instance of the exercise of the [commerce] power" during the modern era, "differences [were] asserted from previous exercises of it and made a ground of attack." *Hoke & Economides* v. *United States*, 227 U.S. 308, 320 (1913).[6] But the Court has not invalidated laws simply because Congress chose to address a worsening national economic problem with new regulatory tools that Congress concluded were well adapted to addressing it.

2. Respondents imagine various "mandates" and contend that upholding the minimum coverage provision would validate such measures. But "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive

---

[6] See, *e.g.*, Pet. Br. at 5, *Perez* v. *United States*, 402 U.S. 146 (1971) (No. 70-600) ("unprecedented exercise of power"); Supp. Appellees' Br. at 40, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (No. 64-543) ("novel assertion of federal power"); Appellee's Br. at 6, *Wickard*, *supra* (No. 41-59) ("complete departure"); Appellee's Br. at 67, *Darby*, *supra* (No. 40-82) ("unprecedented theory of Federal power"); *Jones & Laughlin Steel Corp.*, 301 U.S. at 99 (McReynolds, J., dissenting) ("unprecedented").

in detail to cover the remotest contingency." *New York* v. *United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J.); see *Champion* v. *Ames*, 188 U.S. 321, 362-363 (1903). Such reasoning is especially weak when there is little "probability that the parade will in fact materialize." *Harmelin* v. *Michigan*, 501 U.S. 957, 986 n.11 (1991) (opinion of Scalia, J.). There is no reason to think that a democratically accountable Congress would ever exercise a power to compel the purchases respondents conjure up, much less that doing so would be "highly attractive," States Br. 23 (quoting *Printz*, 521 U.S. at 905). Quite the contrary. Respondents acknowledge that States *do* have the power to enact purchase mandates (*id.* at 17), but they identify no example of any State ever having compelled its citizens to buy cars, agricultural products, gym memberships, or any other consumer product. That is surely because the power is not an "attractive" one, and would be used only when a legislature believes it is necessary to address a problem of sufficient importance to warrant any political accountability consequences that may ensue—as States have done in imposing insurance requirements (Gov't Br. 36-37).

Equally to the point, the minimum coverage provision falls well within Congress's Article I authority for reasons that would not justify respondents' hypothetical mandates. The provision is classic market regulation, intended to correct existing market failures and reduce risk-shifting and cost-shifting, in a way that respondents' hypothetical statutes are not. Compare *Rock Royal Co-op.*, 307 U.S. at 572. This is thus a case in which the activity being regulated, not merely the regulatory scheme itself, substantially affects interstate commerce. Gov't Br. 7-8; pp. 2-3, *supra*.

The minimum coverage provision regulates only how participants in a market finance that participation, *i.e.*, through insurance rather than through attempted self-insurance and financing borne by other market participants.[7] Health insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks. Gov't Br. 41. Because insurance is "essentially different from ordinary commercial transactions," this Court has recognized that constitutional rulings regarding insurance regulation may be "confine[d]" to that setting. *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389, 413-415 (1914) (Due Process Clause); see *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 n.14 (1944). Upholding the minimum coverage provision thus would not authorize Congress to compel purchase of an end-product by a stranger to that end-product's market. American Hosp. Ass'n Amicus Br. 23-24; cf. States Br. 23 (wheat, cars).

The minimum coverage provision is also different than the other insurance schemes respondents posit. States Br. 23, 47. If an individual does not have flood insurance, he cannot compel contractors to repair his flood-damaged home for free. Nor does a funeral home have an obligation to bury the indigent. And the survivors of the bread-winner who dies without life insurance cannot obtain free food from grocery stores and rent-

---

[7] For nearly all the uninsured, the back-stop of uncompensated care is critical. The "median financial assets for an uninsured family [in a study based on 2006-2007 data] were $20," and "[e]ven the wealthiest segment of the uninsured population within that study * * * had median financial assets of only $4,100, completely inadequate to pay a $22,200 hospital bill," the average bill for an uninsured patient. 104 Health Law Professors Amicus Br. 7, 9 n.17; Gov't Br. 8.

free shelter from their landlord. The failure to maintain those types of insurance thus does not have the kind of tangible and direct market-distorting effects that are present here. Gov't Br. 39-40.[8]

In that regard, state respondents contend (Br. 49) that uninsured individuals' "failure to internalize costs originates" with the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd, and that "Congress can hardly expand its constitutional authority by creating problems that it lacks the power to fix." The obligation to provide emergency care regardless of ability to pay did not "originate" with EMTALA. State respondents studiously avoid mention of their own statutes that parallel EMTALA. Gov't Br. 39 & n.9. Nor do they acknowledge the longstanding societal norms underlying all these laws. Stuart M. Butler, Heritage Found., *The Heritage Lectures 218: Assuring Affordable Health Care for All Americans* 6 (Oct. 2, 1989). Congress is surely entitled to take that societal consensus as a given when it regulates.

In any event, no constitutional principle prohibits Congress from regulating in light of circumstances produced by existing federal policy choices. For example, the Court in *Comstock* noted that "Congress could * * * have reasonably concluded * * * that a reasonable number of [sexually violent] individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to 'legal residence in any State' by

---

[8] A requirement that individuals visit the dentist twice a year (States Br. 29) would likely violate the "principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment," *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990).

incarcerating them in remote federal prisons." 130 S. Ct. at 1961. That the federal civil-commitment statute was necessary in part to mitigate the effects of housing prisoners far from home counted as a factor *in favor* of its constitutionality, *id.* at 1961-1962, not a strike against it. See also *Pierce County* v. *Guillen*, 537 U.S. 129, 147 (2003).

In sum, "[r]egulating how citizens pay for what they already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life." *Thomas More*, 651 F.3d at 565 (Sutton, J.).

II. THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER

The minimum coverage provision is independently authorized by Congress's taxing power. Gov't Br. 52-62.

1. In respondents' view, however, the minimum coverage provision must be interpreted as imposing an independent regulatory "mandate" to maintain insurance, 26 U.S.C. 5000A(a), and a separate regulatory penalty to enforce that mandate, 26 U.S.C. 5000A(b), neither of which is supported by Congress's tax power. States Br. 51-57; NFIB Br. 63-64. As the government has explained in its Anti-Injunction Act reply (Br. 11-12), respondents' attempt to artificially subdivide the minimum coverage provision—rather than read this single statutory section as one integrated whole establishing conditions for tax liability—fails. Functionally, Section 5000A is identical to the statute suggested by Judge Kavanaugh that would "definitively" be within Congress's tax power. Gov't Br. 60 (internal citation omitted); see *Li-*

cense Tax Cases, 72 U.S. (5 Wall.) 462, 471-472 (1867) (discussed at Gov't Br. 57).

To the extent the constitutionality of Section 5000A depends on whether Subsection (a) creates an independent legal obligation, the Court should construe it not to do so. Gov't Br. 61-62; see, *e.g.*, *License Tax Cases*, 72 U.S. (5 Wall.) at 471. *New York* is directly on point. That case involved a provision that, read in isolation, appeared to establish a mandate ("[e]ach State *shall* be responsible for" disposing of radioactive waste), with separate provisions establishing "[p]enalties" for failure to comply with that "[r]equirement[]." Gov't Br. 61-62 (internal citations omitted; first two pairs of brackets in original). To avoid a conclusion that the statute violated the Tenth Amendment, the Court interpreted it as creating financial incentives rather than a freestanding command backed by sanctions. *Id.* at 62. Section 5000A is structurally and functionally identical. It is implausible to suggest that it would be "plainly contrary to the intent of Congress," *New York*, 505 U.S. at 170 (citation omitted), to interpret the provision as establishing tax incentives to purchase health insurance rather than a separate statutory command to maintain insurance—especially given that the *only* consequence of failing to maintain insurance is the shared responsibility payment and that construing the provision in this way would not defeat any statutory objective.

2. The shared responsibility payment under Section 5000A is not "punishment for an unlawful act," States Br. 55 (internal citation omitted). Gov't AIA Reply Br. 15. Nor does it have the "features of the act" imposing exactions for employment of child labor that, in combination, the Court viewed as an impermissibly penal exercise of the tax power in *Bailey* v. *Drexel Furniture*

Co., 259 U.S. 20, 37 (1922). The shared responsibility payment is tied to income and is due only for months in which coverage is not maintained, 26 U.S.C. 5000A(b)(1); cf. *Bailey*, 259 U.S. at 36 ("The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day."); there is no scienter requirement, cf. *id.* at 36-37 ("Scienter is associated with penalties not with taxes."); and enforcement is solely by the IRS; cf. *id.* at 37 (enforcement in part by Department of Labor). See SEIU Amicus Br. 22-26.

Nor is it significant that Congress conditioned the payment, as a component of the taxpayer's overall income tax liability, on the practice of attempted self-insuring and thus the "failure to transact" for insurance coverage. States Br. 61. Congress may specify "that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents." *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 591 (1937). Maintenance of health coverage protects the public fisc by lessening cost-shifting onto government programs (as well as onto other market participants).

3. Respondents insist that Congress must expressly invoke its tax power in order to exercise it, so that it cannot "use the courts to impose taxes that it lacks the political support to enact." States Br. 56. That remarkable suggestion is contrary to both the settled rule that "the fact that an exaction is not labeled a tax does not vitiate Congress's power under the Taxing Clause," and the equally settled principle that "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to

exercise." *Seven-Sky*, 661 F.3d at 48 n.37 (Kavanaugh, J., dissenting) (citations omitted). Nothing in the Constitution justifies such judicial superintendence of the political dynamics of enacting legislation, whether in Congress's exercise of its Article I powers in general or its tax power in particular. Compare *Skinner* v. *Mid-America Pipeline*, 490 U.S. 212, 219-223 (1989) (no special non-delegation limitation on Congress's exercise of tax power).

The Affordable Care Act would also make a poor candidate for the first-ever application of such a rule. Congress's tax power was expressly invoked to defeat constitutional points of order in the Senate; opponents of the Act attacked it as a tax; and supporters defended it as a valid exercise of the taxing power. Gov't Br. 58; SEIU Amicus Br. 19-20. And it is farfetched to suggest an absence of accountability, even assuming that were a proper subject of judicial inquiry. Taxpayers will have an annual reminder of the provision's monetary exaction and tax foundation: Every April 15, non-exempted "taxpayer[s]" who lacked coverage (or whose non-exempted dependents lacked coverage) during the prior "taxable year" will have to include a payment to the IRS with their federal income tax return, 26 U.S.C. 5000A(b)(2), (3)(A) and (c)(1)(A), based in part on their adjusted gross income as defined by the Internal Revenue Code, 26 U.S.C. 5000A(c)(2)(B), (4)(B) and (C), and enforceable through offset of tax refunds, Gov't Br. 54.

4. Respondents mistakenly contend that, even if the minimum coverage provision is supported by Congress's taxing power, it is an unapportioned direct tax, and therefore unconstitutional. States Br. 62-63; NFIB Br. 65-67. The Court has identified only two types of taxes that must be apportioned: a tax "imposed upon property

solely by reason of its ownership," *Knowlton* v. *Moore*, 178 U.S. 41, 81 (1900), and a "capitation, or poll tax" imposed on a person "simply, without regard to property, profession, or *any other circumstance*," *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) (original italicization omitted; emphasis added). See *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 544 (1869); *Murphy* v. *IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007), cert. denied, 553 U.S. 1004 (2008).

The shared responsibility payment is not a tax on property, and its imposition is contingent upon numerous factors, including income and the way an individual finances health care, *i.e.*, "a particular *use* of property," *Bromley* v. *McCaughn*, 280 U.S. 124, 136 (1929) (emphasis added). It is accordingly not a direct tax.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals invalidating the minimum coverage provision should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2012