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No. 11-398

IN THE
Supreme Court of the United States

DEPT. OF HEALTH AND HUMAN SERVICES, *et al.*
Petitioners,
v.
STATE OF FLORIDA, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION, THE SOCIAL SECURITY INSTITUTE AND THE 10TH AMENDMENT FOUNDATION, INC. IN SUPPORT OF RESPONDENTS ON MINIMUM COVERAGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide, including briefs filed in the instant case on the severability and Medicaid issues.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU), the Social Security Institute (SSI), and the 10th Amendment Foundation. No counsel for either party authored the brief in whole or in part and no one apart from the ACRU, SSI or 10th Amendment Foundation made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

The Social Security Institute is a 501(c)(4), non-profit foundation dedicated to reform of the nation's entitlement programs.

The 10th Amendment Foundation, Inc. is a grass roots, non-profit, non-partisan educational foundation based in Virginia and Tennessee, that opposes attempts by the federal government to exceed its limited powers under the U.S. Constitution.

The Foundation believes that not only does the individual mandate to purchase health insurance violate the Commerce Clause but also that many other provisions of the law, including those that violate basic individual liberty and/or require the disclosure of confidential patient information, violate privacy rights protected by of the Constitution. In that regard, the Foundation intends to pursue related litigation challenging these other provisions if the Court either upholds the individual mandate or strikes it down but does not sever the mandate from the rest of the statute.

This case is of interest to the *Amici* because we seek to ensure that the Constitutional limits to

federal power are fully recognized and enforced. That includes in regard to this case that the scope and boundaries of the Commerce Clause be fully respected and maintained, and properly applied to analysis of the constitutionality of the Patient Protection and Affordable Care Act.

The *Amici* are also concerned with the increasing erosion of federalism and the diminution of the powers that the Tenth Amendment reserves to the individual states and the people, thereby resulting in serious curtailment of liberty and individual freedom.

SUMMARY OF ARGUMENT

The individual mandate compels the uninsured who are not participating in any interstate market for health insurance to purchase comprehensive health insurance complying with all of the benefit mandates and other requirements of the Patient Protection and Affordable Care Act[2] ("ACA"), from insurance companies validated by the federal government as providing the required insurance. Petitioners rely upon the Commerce Clause as the enumerated power supposedly delegating authority to the federal government for this regulatory compulsion.

But the Commerce Clause grants Congress the power to regulate interstate commerce. It does not

[2] 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).

grant Congress the power to compel individuals to enter into interstate commerce. The Congress itself has recognized this for 220 years, as it has never before enacted a law compelling individuals to purchase particular products and services. Anything like that has always before been recognized as a function of the police power reserved to the states.

As a result, as the courts recognized below, and has been uniformly recognized in related litigation challenging the ACA in courts across the country, no precedent exists upholding anything like the individual mandate compelling all citizens in America to purchase particular products and services.

Upholding the individual mandate here would leave no principled limit on the federal government's powers. As a result, it would demolish the most fundamental doctrine of the Constitution, that the federal government is limited to delegated, enumerated powers.

Every economic decision an individual makes, when aggregated with everyone else, substantially affects interstate commerce in the way the federal government is asserting here. The federal government is claiming here the unlimited power to control every economic decision every individual makes.

Indeed, the unlimited Commerce Clause power Petitioners claim here would be indistinguishable from a national police power, with the federal government authorized to regulate and enforce order to

advance any vision of the general welfare, morals, health, and safety. But if the federal government were considered to hold such a national police power, then the concept of enumerated, delegated powers to the federal level, with traditional government powers otherwise remaining with the states, would be obliterated. All distinctions between federal power and state power, and any scope for state sovereignty, would be demolished. That would destroy a second fundamental doctrine of the Constitution, the constitutional framework of federalism. That is why this Court has always ruled that the police power belongs to the states and not the federal government.

Moreover, the individual mandate compels individuals to purchase health insurance sold only within completely intrastate markets by law, and so does not involve regulation of interstate commerce for this reason as well.

The Necessary and Proper Clause is not a loophole that allows the federal government to exercise authority beyond the delegated, enumerated powers of the Constitution. The Necessary and Proper Clause does not provide an independent justification for the individual mandate, apart from the Commerce Clause. The individual mandate does not carry into execution a federal power delegated and enumerated under the Commerce Clause, or under any other delegated and enumerated power. Consequently, the individual mandate cannot be justified under the Necessary and Proper Clause.

Finally, in the present case, Congress can choose alternative means to achieve all the social goals

meant to be addressed through the individual mandate. So even if the individual mandate is unconstitutional, that does not mean that anyone has to suffer without essential health care.

PRELIMINARY STATEMENT

Upholding the individual mandate in this case would require tearing down fundamental pillars of the entire Constitutional architecture, like blind Sampson pushing over the pillars of the temple, causing it to collapse on the heads of everyone inside.

The first pillar to fall would be the concept of the Constitution as based on the doctrine of limited, enumerated powers for the federal government. If the Commerce Clause could be read to empower the federal government to force every individual in the country into interstate commerce through a mandate that everyone must buy particular products or services as designated by the federal government, then the Commerce Clause would be the power that ate the limits of federal authority. Federal power would then be of unlimited reach, as the Commerce Clause would then grant federal authority not only to regulate those in interstate commerce, but also to compel anyone to participate in such commerce, and thereby submit to federal regulation and control.

As the District Court below explained, "[i]f some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power,…it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate." Pet. App. 325a. Similarly, the Eleventh

Circuit on appeal recognized that, "[a]pplying aggregation principles" to hold that "an individual's decision not to purchase a product" substantially affects commerce "would expand the substantial effects doctrine to one of unlimited scope." Pet. App. 113a.

The second pillar to fall would be the Constitutional framework of federalism. The power to compel the purchase of health insurance for the public good is a function of the police power reserved to the states, and denied to the federal government by the Constitution and this Court's precedents. If the federal government is now to hold a national police power, then the Constitutional framework of federalism, with limited, enumerated powers delegated to the federal government, and the remaining powers of government retained by the states, would be obliterated.

This Court has repeatedly refused to allow that before. That is because this Court has long recognized that the Constitution's federalism is another component of the Constitution's separation of powers, further protecting the liberty of the people. *E.g., New York v. United States*, 505 U.S. 144, 181 (1992) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power."); *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)(In "denying any one government complete jurisdiction over all the concerns of public life,…federalism protects the liberty of the individual from arbitrary power.").

These are the reasons that the Eleventh Circuit below concluded that, "[t]he federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." Pet. App. 155a–56a. These are the reasons that the District Court below concluded that "the individual mandate is neither within the letter nor the spirit of the Constitution." Pet. App. 348a. And these are the reasons that this Court must find the individual mandate unconstitutional, to preserve the fundamental integrity of the Constitution.

ARGUMENT

I. THE INDIVIDUAL MANDATE REGULATES INDIVIDUALS NOT PARTICIPATING IN INTERSTATE COMMERCE FOR HEALTH INSURANCE.

The individual mandate compels the uninsured who are not participating in any interstate market for health insurance to purchase comprehensive health insurance complying with all of the benefit mandates and other requirements of the ACA, from insurance companies validated by the federal government as providing the required insurance. Petitioners rely upon the Commerce Clause as the enumerated power supposedly delegating authority to the federal government for this regulatory compulsion. They repeatedly call this individual mandate,

"the minimum coverage provision." The Kaiser Family Foundation estimates that this "minimum coverage" will cost families roughly $20,000 per year to start. Kaiser Family Foundation, http://healthreform.kff.org/SubsidyCalculator.aspx

As the Supreme Court stated in the seminal case of *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), up until now the reach of the Commerce Clause has been limited to delegating the power to regulate (1) "use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." But an uninsured individual is not using the channels of interstate commerce for health insurance, is not involved with any instrumentality of interstate commerce in regard to health insurance, and is not engaged in any "activity" at all in regard to health insurance, substantially affecting interstate commerce or otherwise. Therefore, the Commerce Clause does not delegate the power to impose the individual mandate forcing individuals to enter the market and purchase health insurance he may not need or want.

The Commerce Clause grants Congress the power to regulate interstate commerce. It does not grant Congress the power to compel individuals to enter into interstate commerce. The Congress itself has recognized this for 220 years, as it has never before enacted a law compelling individuals to purchase particular products and services, which the authorities cited below make clear. Anything like that has

always before been recognized as a function of the police power reserved to the states.

The District Court below recognized all this in denying Defendants' motion to dismiss on this issue, saying in regard to the individual mandate, "[T]he Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent." Slip Op. at 61. On the merits, the court held, "Never 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." Pet. App. 319a. The court added that "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." Pet. App. 324a.

The Eleventh Circuit on appeal affirmed this ruling, holding that the mandate is "unprecedented" and that "th[is] Court has never … interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." Pet. App. 104a-05a. The court added that, "[t]he power to regulate commerce, of course, presupposes that something exists to regulate, but the mandate does not regulate any existing commerce." Pet. App. 98a.

The District Court in *Virginia v. Sebelius*, No. 3:10-cv-188 (E.D. Va. July 1, 2010) reached the same conclusion, saying, "Never has the Commerce Clause and associated Necessary and Proper Clause been extended this far." Slip Op. at 25. The Court

reiterated, "No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so." Slip Op. at 24.

The individual mandate goes beyond the previous outer limits of Commerce Clause jurisprudence in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzalez v. Raich,* 545 U.S. 1 (2005). The farmer in *Wickard* affirmatively acted in the voluntary activity to farm and produce wheat which was part of the national, and therefore interstate, stock of wheat. The aggregate of all farmers such as Filburn who consumed their own grown wheat consequently substantially affected the interstate commerce in wheat under the economic laws of supply and demand. Moreover, part of Filburn's "consumption" of his own wheat was to feed it to his farm animals, who produced milk, poultry, and eggs, that he sold in interstate commerce. 317 U.S. at 114. The parties in *Wickard*, in fact, stipulated that such consumption by farmers of their own home grown wheat amounted to more than 20% of domestic U.S. consumption of wheat. *Id.* at 125, 127. Similarly, in *Raich*, the defendant affirmatively acted to grow and produce marijuana, which was part of the total interstate stock of the drug.

But the individual mandate in the present case compels and regulates entirely uninsured individuals who have taken no voluntary, affirmative act at all in regard to health insurance. The District Court below recognized this distinction as well in denying Defendant's Motion to Dismiss on this issue. Slip Op. at 63.

This was recognized as well by the Congressional Budget Office (CBO) in considering the budget treatment of the individual mandate in the Clinton Administration's health care proposals. The CBO said at the time,

> A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Secondly, it would require people to purchase a specific service that would be heavily regulated by the federal government.

The Budgetary Treatment of an Individual Mandate to Buy Health Insurance, CBO Memorandum, at 1 (August, 1994). Similarly, the opinion of the Congressional Research Service regarding the individual mandate of the ACA, provided in response to a request from the Senate Finance Committee, stated,

> Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress

> may use this Clause to require an individual to purchase a good or service.

Cong. Research Serv., *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* at 3 (2009).

The CBO and the Congressional Research Service consequently both affirm that the Congress itself has recognized for 220 years that the Commerce Clause does not grant it the power to compel individuals to enter interstate commerce by requiring them to purchase particular products or services, because it has never before passed a law doing so. *Accord: Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011).

To extend the Commerce Clause as far as the Petitioners seek would leave no principled limit to the federal government's power to regulate under the Commerce Clause. If Congress can compel an individual who is not even participating in interstate commerce in the good or service at issue to purchase the good or service from another citizen or business, which purchase it then regulates in great detail, where is the limit?

The federal government could then require individuals to purchase cars from auto companies it has bailed out, or nationalized. It could compel everyone to purchase cars or housing just to promote the general economy. Any time it wanted to provide a subsidy to any company or industry, it could do so simply by requiring everyone to buy the product or service of the favored enterprises. It could require

individuals to purchase insurance from companies who contributed to the President's reelection campaign. It could require individuals to purchase goods or services from companies that are unionized by the President's supporters. It could mandate that individuals buy and take certain vitamins or nutritional supplements. It could require individuals to visit their dentist for annual checkups, or submit to other preventive care, on the grounds that this would reduce health costs over the long run.

Every economic decision an individual makes, when aggregated with everyone else, substantially affects interstate commerce in the way the federal government is asserting here. The federal government is claiming here the unlimited power to control every economic decision every individual makes.

This is several roads too far from the original Commerce Clause power which, as James Madison explained,

> grew out of the abuse of the power by the importing States in taxing the non-importing, and 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, in which alone, however, the remedial power could be lodged.

The Founder's Constitution, Vol. 2, Art. I, Section 8, Clause 3 (Commerce). That is why the Supreme Court in *Lopez* has already rejected the notion of

unlimited Commerce Clause power, holding that it will strike down regulation under the Commerce Clause which leaves no principled limit to federal power under the Clause. The Court said, "the Constitution's enumeration of powers does not presuppose something not enumerated and that there will never be a distinction between what is truly national and what is truly local." 514 U.S. at 567-68. Justice Kennedy added further in concurrence in *Lopez* in terms quite apt for the present case, "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or another level of Government has tipped the scales too far." *Id.* at 578.

Indeed, the unlimited Commerce Clause power Petitioners claim here would be indistinguishable from a national police power, with the federal government authorized to regulate and enforce order to advance any vision of the general welfare, morals, health, and safety. As the Court indicated in *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006), "protection of the lives, limbs, health, comfort and quiet of all persons" falls within state police power." Historically, that has encompassed state level commands to act to achieve these ends, such as vaccinations and school attendance laws, which are precisely analogous to the individual mandate at issue in the present case.

But if the federal government were considered to hold such a national police power, then the concept of enumerated, delegated powers to the federal level,

with traditional government powers otherwise remaining with the states, would be obliterated. That is why the Supreme Court held in *United States v. Morrison*, 529 U.S. 598. 618-619 (2000), "We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." (emphasis in original). *see also* 529 U.S. at 619 n.8 ("the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.").

Congress may not exercise its enumerated powers in a way that "infring[es] upon th[at] core of state sovereignty." *New York*, 505 U.S. at 177. The Court in *Morrison* rejected the argument that women who are sexually assaulted would need medical care as providing a sufficient interstate commerce connection under the Commerce Clause. 529 U.S. at 615.

As Justice Kennedy explained in *United States v. Comstock,* 130 S. Ct. 1949, 1967 (2010), "the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place." (Kennedy, J., concurring). The Court added in *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), "[t]he Constitution created a Federal Government of limited powers [and] withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."

Petitioners repeatedly state that people without health insurance do actively participate in the

interstate market for health care services. But the individual mandate of the ACA does not require people to pay for health care services they have consumed. It requires them to pay for health insurance, a market in which they are free to choose not to participate at all, a freedom protected by the Constitution.

II. THE INDIVIDUAL MANDATE COMPELS INDIVIDUALS TO PURCHASE HEALTH INSURANCE SOLD ONLY WITHIN COMPLETELY INTRASTATE MARKETS BY LAW, AND SO DOES NOT INVOLVE REGULATION OF INTERSTATE COMMERCE FOR THIS REASON AS WELL.

Lawyers not steeped in health policy will not recognize how jarring the idea that the individual mandate involves regulation of the "interstate market in health insurance" will seem to those actually engaged in the business of such insurance. The individual mandate again involves a requirement that individuals and families without employer provided health insurance purchase the mandated health insurance directly in the market. *But there is no interstate market in such health insurance* for individuals and families.

By law, individuals and families seeking health insurance on their own, rather than through their employer, operate in what is called the individual insurance market. In that market, such individuals and families can only buy health insurance authorized, issued and regulated within their state. Such

individuals and families cannot under current law buy health insurance across state lines. *See Testimony of J. Robert Hunter, Director of Insurance, Consumer Federation of America, Before the Committee on the Judiciary of the United States Senate,* October 14,2009*; Letter of Richard J. Hillman, Director, Financial Markets and Community Investment, Government Accountability Office (GAO) to Michael G. Oxley, Chairman, Committee on Financial Services, House of Representatives,* July 28, 2005*;* Chris Sagers*, Much Ado About Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort 28* YALE LAW AND POLICY REVIEW *325* (2010).

Those who live in New Jersey, for example, cannot buy the much less expensive health insurance sold in Pennsylvania. Those who live in Texas cannot buy health insurance sold in Oklahoma. Those who live in California can fly to Las Vegas to gamble in the casinos there, but they can't buy health insurance sold in Nevada while they are there.

That is why the statement, "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause," *United States v. South-Eastern Underwriters, Ass'n,* 322 U.S. 533 (1944), does not apply to the health insurance that the individual mandate compels individuals and families to buy. The individual mandate compels individuals and families to purchase health insurance which is sold only within completely intrastate markets by law, and so does not

involve regulation of interstate commerce for this reason as well.

Multistate employers providing insurance to their workers either through a health insurer or through self-insurance under ERISA do cross state lines in the business of insurance. The examples of federal regulation the Petitioners cite involve this interstate employer health insurance market.

III. THE INDIVIDUAL MANDATE CANNOT BE JUSTIFIED UNDER THE NECESSARY AND PROPER CLAUSE.

The Necessary and Proper Clause is not a loophole that allows the federal government to exercise authority beyond the delegated, enumerated powers of the Constitution. As the Court held in *Jinks v. Richland Co.*, 538 U.S. 456, 464 (2003), the Necessary and Proper Clause may not be used "as a pretext for the accomplishment of objects not entrusted to the [federal] government." *Accord: McCulloch v. Maryland*, 17 U.S. 316 (1819); *United States v. Comstock*, 130 S. Ct. 1949 (2010) (Necessary and Proper Clause does not grant the federal government a general police power, which is reserved to the states); *Lopez*, 514 U.S. at 564 ("[I]f we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without the power to regulate.").

Just as argued above in regard to the Commerce Clause, if Congress can force those not even participating in health insurance markets to purchase health insurance with detailed benefits and features

as specified by the federal government, from health insurance companies specified as providing the mandated insurance, then all limits to the scope of federal power will have been obliterated. That would obliterate as well all distinctions between federal power and state power, and any scope for state sovereignty, with the federal government granted the unlimited police power the Supreme Court has always ruled belonged to the states and not the federal authority. *E.g., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 923 (1997) ("When a 'la[w]…for carrying into Execution' the Commerce Clause violates the principle of State sovereignty…it is not a 'La[w]…*proper* for carrying into Execution the Commerce Clause.'" (emphasis in original)). The reach of the Necessary and Proper Clause is also circumscribed by the Ninth and Tenth Amendments.

The Necessary and Proper Clause does not provide an independent justification for the individual mandate, apart from the Commerce Clause. As discussed above in Section I, the individual mandate does not carry into execution a federal power delegated and enumerated under the Commerce Clause, or under any other delegated and enumerated power. Consequently, the individual mandate cannot be justified under the Necessary and Proper Clause.

As Justice Kennedy explained in *Comstock, "*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[.]" *Comstock*, 130 S. Ct. at 1967-68

(Kennedy, J., concurring). But in this case we have 25 states suing the federal government arguing precisely that the ACA transgresses essential attributes of state sovereignty, namely the police power that the Constitution reserves to the states. Indeed, a dozen of those states have actually enacted police power legislation expressly prohibiting the operation of an individual mandate in their states.

Petitioners argue that the individual mandate is necessary for the entire regulatory scheme of the ACA to work, or even to function. That is because of the Act's regulatory requirements for guaranteed issue and community rating.

The Act requires all insurers to cover all pre-existing conditions and issue health insurance to everyone that applies, no matter how sick they are when they first apply or how costly they may be to cover. *ACA, Sections 2702, 2704, 2705.* This is what is known as guaranteed issue. The Act also prohibits insurers from varying their rates based on the medical condition or illnesses of applicants. Insurers can only vary rates within a limited range for age, geographic location, and family size. *ACA, Section 2701*. This regulatory requirement is known as modified community rating.

Under these regulatory requirements, younger and healthier people delay buying insurance, knowing they are guaranteed coverage at standard rates after they become sick. Sick people show up applying for an insurer's health coverage for the first time with very costly illnesses such as cancer and heart disease,

which the insurer must then cover and pay for. This means the insurer's covered risk pool includes more costly sick people and fewer less costly healthy people, so the costs per person covered soar. The insurer then has to raise rates sharply for everyone just to be sure to have enough money to pay all of the policy's benefits.

Those higher rates encourage even more healthy people to drop their insurance, leaving the remaining pool even sicker and more costly on average, which requires even higher premiums, resulting in a financial death spiral for the insurers and the insurance market.

The ACA tries to counter this problem by adopting the individual and employer mandates, seeking to require everyone to be covered and contributing to the pool at all times. Without these mandates, Petitioners argue, those who would remain uninsured would substantially affect the interstate market for health insurance, by allowing the remaining regulatory requirements to cause soaring health insurance premiums through the above process and ultimately a financial death spiral. That is why, Petitioners argue, the individual mandate challenged here is necessary and proper to the Act's overall regulatory scheme.

But the Necessary and Proper Clause does not justify a federal regulation such as the individual mandate that is beyond any federal power delegated and enumerated under the Constitution, even if Congress has chosen to adopt other regulations that it believes cannot function effectively without it. The

Necessary and Proper Clause does not expand federal power beyond the limits otherwise adopted in the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *See also Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("the power to enact laws enabling effective regulation of interstate commerce … extends only to those measures necessary to make the interstate regulation effective"). The Clause authorizes federal actions necessary to effectuate delegated, enumerated powers, such as regulation of existing interstate commerce. But it does not authorize federal actions to create interstate commerce by federal compulsion so that Congress can regulate it. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).

Moreover, the individual mandate will ultimately not solve the problems that Petitioners identify, and, therefore, the argument that it is necessary and proper under the ACA is further refuted. The ACA under its own terms and language does not sufficiently enforce the mandates for them to work to solve the fundamental problem with the ACA's regulatory requirements. Individuals who violate the mandate are required to pay $695 per family member, up to a maximum of $2,085 per family. *ACA, Sections 1501, 1502*. The penalty for employers is $2,000-$3,000 per worker. *ACA, Sections 1511, 1513*. But qualifying health insurance coverage will cost close to $20,000 per year or more, as argued above. *See also,* John Goodman*, Four Trojan Horses,*

Health Alert, National Center for Policy Analysis, April 15, 2010.

Workers and employers can save too much by just foregoing the coverage and paying the penalty, if they are caught and forced to pay it. Moreover, the Act expressly states that criminal penalties will not apply for failing to pay the fine, and it cannot be enforced by imposing liens on the taxpayer's property, so the penalties are not even enforceable. *ACA, Section 1501.* But such individuals can still buy insurance after they or a member of their family get sick.

This is why the American Academy of Actuaries warned in regard to the ACA's mandates,

> [T]he financial penalties associated with the bill's individual mandates are fairly weak compared to coverage costs….In particular, younger individuals in states that currently allow underwriting and wider premium variations by age could see much higher premiums than they face currently (and may have chosen to forego). The premiums for young and healthy individuals would likely be high compared to the penalty, especially in the early years, but even after fully phased in, thus likely leading many to forgo coverage.

American Academy of Actuaries, *Letter to The Honorable Nancy Pelosi and The Honorable Harry Reid, Re: Patient Protection and Affordable Care Act (H.R. 3590) and Affordable Health Care for America Act (H.R. 3962),* January 14, 2010, at 4-5.

And this is why studies have concluded that insurance premiums would rise sharply under the ACA's regulatory requirements. PriceWaterhouse Coopers, *Impact Potential of Health Reform on the Cost of Private Health Insurance Coverage,* October, 2009; Wellpoint, Inc., *Impact of Health Reform on Premiums,* October, 2009; Merrill Mathews, *Should We Abandon Risk Assessment in Health Insurance,"* Issues and Answers No. 154, Council for Affordable Health Insurance, May, 2009; Congressional Budget Office, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act,* Letter to the Honorable, Evan Bayh, November 30, 2009; Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended,* April 22, 2010.

Further confirmation that the mandates will not work is shown by the experience of Massachusetts, where even though the state's individual mandate is enforced, it still doesn't work to solve the problem. As Petitioners themselves suggest, Massachusetts adopted reforms quite similar to the ACA in 2006, with guaranteed issue, community rating, and individual and employer mandates. Since then health insurance premiums in Massachusetts have accelerated faster than the national average, and the state now suffers the highest health insurance costs in the nation. Grace Marie Turner and Tara Persico, *Massachusetts' Health Reform Plan: Miracle or Muddle?,* Galen Institute, July, 2009; Michael Tanner,

Massachusetts Miracle or Massachusetts Miserable: What the Failure of the "Massachusetts Model" Tells Us about Health Care Reform, Cato Institute Briefing Papers No. 112, June 9, 2009; Greg Scandlen, *Three Lessons from Massachusetts,* National Center for Policy Analysis, Brief Analysis No. 667, July 28, 2009; Sally C. Pipes, *Mass Health Meltdown Is Your Future,* Pacific Research Institute, May 25, 2010; Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain, Policy Analysis No. 657,* Cato Institute, January, 2010.

Harvard-Pilgrim, one of the top insurers in Massachusetts, reported that between April 2008 and March 2009, about 40% of its new enrollees dropped their coverage in less than five months, but incurred about $2,400 in monthly medical expenses, about 600% higher than normal. *"The Massachusetts Health Mess,"* The Wall Street Journal, July 11, 2009. This indicates that many in the state are waiting until they need expensive medical care to buy insurance, then dropping it after the insurer pays the costs, knowing they can always get coverage later when they need further expensive care. *See also* Grace Marie Turner, *"The Failure of RomneyCare,"* The Wall Street Journal, March 17, 2010("There is growing evidence that many people are gaming the system by purchasing health insurance when they need surgery or other expensive medical care, then dropping it a few months later.").

Consequently, the individual mandate will not work to solve the problems caused by the regulatory framework of the ACA. This is consequently a

further reason why that mandate cannot be constitutionally justified under the Necessary and Proper Clause.

Petitioners argue further that the individual mandate is necessary and proper because while the uninsured forego health insurance, they do not forego medical care. Too often, however, they are unable to pay for that care. The cost of that uncompensated care is then shifted to others, either to the public through higher insurance premiums, or to the federal government through programs to help hospitals cover these losses. Petitioners allege that the cost of such uncompensated care amounted to $43 billion in 2008.

This issue needs to be put in context. Total annual health expenditures in the U.S. run at $2.5 trillion per year. Sally C. Pipes, *The Truth About Obamacare,* (Wash D.C., Regnery, 2010), at 23. The cost-shifting Petitioners argues is so troubling amounts to 2% of those total expenditures.

A far bigger source of cost-shifting is the federal government itself. Medicaid payments to doctors and hospitals serving the poor under the program are so meager that many of the poor face great difficulty in even finding essential care. *Pipes,* at 76-79. Medicare payments are so low that in 2008, two-thirds of hospitals were already losing money on Medicare patients. Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Providers,* August 5, 2010, at 7. A study conducted

by one of the nation's top actuarial firms, Milliman, Inc., concluded that cost shifting to private insurance due to the low compensation paid to doctors and hospitals by Medicaid and Medicare raised the cost of private health insurance by $88.5 billion per year, or $1,788 for an average family of four. Will Fox, FSA, MAAA, and John Pickering, FSA.MAAA, *Hospital and Physician Cost Shift: Payment Level Comparison of Medicare, Medicaid, and Commercial Payers,* Milliman, Inc., December, 2008. That is twice the amount of cost-shifting due to uncompensated care from the uninsured that Petitioners say the individual mandate is necessary to stop.

Moreover, the ACA greatly increases that cost-shifting arising from Medicaid and Medicare under-payments, in two ways. First, it sharply expands Medicaid to 24 million new beneficiaries by 2015, an increase of over 50%, and to nearly 100 million by 2021, according to CBO. Richard S. Foster, Chief Actuary, Centers for Medicaid and Medicare Services, *Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended,* April 22, 2010; Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2011 to 2021,* January, 2011, at 62. That will result in far more Medicaid underpayments to be cost shifted.

Secondly, the ACA sharply cuts Medicare payments to doctors and hospitals even further, to the tune of nearly $3 trillion at least over the first 20 years of full implementation. Senate Budget Committee, Minority Staff, *Budget Perspective: The*

Real Deficit Effect of the Democrats' Health Package, March 23, 2010. Calculations based on the 2009 Annual Report of the Medicare Board of Trustees are even higher. Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, *The 2010 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds,* August 5, 2010; Peter Ferrara and Larry Hunter, *"How ObamaCare Guts Medicare," Wall Street Journal*, September 9, 2010. Such compensation reductions would shatter all records in cost shifting.

If the ACA is making a much bigger cost shifting problem caused by government so much worse, then how can the individual mandate be necessary to address the far more minor private uncompensated care problem?

In any event, as argued above, the Necessary and Proper Clause cannot be used to justify federal action that does not execute any enumerated power delegated to the federal government.

IV. CONGRESS CAN ACHIEVE ALL THE SOCIAL GOALS MEANT TO BE ADDRESSED THROUGH THE INDIVIDUAL MANDATE THROUGH ALTERNATIVE MEANS THAT ARE FULLY CONSTITUTIONAL.

Congress cannot use unconstitutional means to achieve desirable social goals in any event. But when Congress has a choice between alternative policies to

achieve desirable ends, one of which is constitutional and the other not, it does not have policy discretion. It can only choose the constitutional course. In the present case, Congress can choose alternative means to achieve all the social goals meant to be addressed through the individual mandate. So even if the individual mandate is unconstitutional, that does not mean that anyone has to suffer without essential health care.

For example, each state can set up a high risk pool for the uninsured in the state who have become too sick to obtain new health insurance in the marketplace. Individuals who cannot purchase private health insurance as a result would obtain coverage from the risk pool. They would each pay what they reasonably can for such coverage based on their income. The pools would be subsidized by the general taxpayers to cover remaining costs. J.P. Wieske and Merrill Matthews, *Understanding the Uninsured and What to Do about Them,* Council for Affordable Health Insurance, 2007; NASCHIP, *Comprehensive Health Insurance for High-Risk Individuals: A State-by-State Analysis,* 22nd Edition, 2008-2009, Denver, 2008; Peter Ferrara, *The Obamacare Disaster: An Appraisal of the Patient Protection and Affordable Care Act*, Heartland Policy Study No. 128, Heartland Institute, Chicago, Ill., August, 2010.

This solution would not produce the unstable markets and soaring insurance premiums of guaranteed issue and community rating. Yet the true needs of the uninsured would be covered, at only a fraction of the costs of the ACA's policies. Several states have

already experimented with such risk pools. *NASCHIP, supra.* And the ACA actually sets up a version of them to provide essential coverage for those in need before the Act's much more costly individual mandate, guaranteed issue, and community rating go into effect. Such risk pools can be designed to serve all the needs of the uninsured who become uninsurable, and fully funded to the extent necessary, without violating the Constitution.

Superior alternative solutions within constitutional bounds can also be devised for the problem of cost-shifting due to uncompensated care. The federal government can provide grants to states to establish low cost, quick, collection procedures to enable doctors and hospitals to efficiently collect more of their legitimate charges from those who do have the resources to pay them. New garnishment laws can be established to allow slower, more feasible payment of medical debts over time. The medical costs for the uninsured who cannot make any significant contribution towards their expenses are a general social responsibility, and should be subsidized out of general taxes to the extent the costs are greater than doctors and hospitals can reasonably be expected to absorb as an accommodation to the needy who become sick.

CONCLUSION

For the foregoing reasons, the Court should hold the individual mandate unconstitutional and the ACA invalid.[3]

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[3] While *amici* believe that the individual mandate is clearly unconstitutional and is not severable from the statute, if the Court rules otherwise, *amici* suggest the Court make clear in its opinion that the remaining provisions of the law not before it

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are not necessarily valid in order to avoid any misapprehension of the impact of the Court's ruling by the public.