No. 11-398

In The Supreme Court of the United States

UNITED STATES DEPARTMENT 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

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
STEVEN M. SIMPSON
Counsel of Record
ELIZABETH PRICE FOLEY
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
ssimpson@ij.org

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress has the power under Article I of the Constitution to impose the individual mandate of the Patient Protection and Affordable Care Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE INDIVIDUAL MANDATE VIOLATES THE LONGSTANDING AND FUNDAMENTAL PRINCIPLE OF MUTUAL ASSENT THAT IS AT THE HEART OF ALL CONTRACTS 3

A. Mutual Assent Has Always Been (and Still Is) Required for All Legally Binding Contracts 4

B. At the Time the Constitution Was Drafted and Ratified, It Was Widely Known and Accepted That *Coercion* Necessarily Renders Any Assent Invalid 8

C. This Court's Early Decisions Recognized the Centrality of Mutual Assent to Commercial Relations 13

II. THE INDIVIDUAL MANDATE ERASES THE DISTINCTION, LONG ACKNOWLEDGED BY THIS COURT, BETWEEN THE POWER TO REGULATE COMMERCE AND THE POWER TO COMPEL IT 15

TABLE OF CONTENTS – Continued

Page

A. This Court Has Recognized the Distinction Between the Power to Regulate and the Power to Compel in Decisions Interpreting the Commerce Clause..... 17

B. This Court Has Recognized the Qualitative Difference Between Regulation and Compulsion in Statutory Decisions..... 24

III. THE INDIVIDUAL MANDATE IS NOT A "PROPER" EXERCISE OF CONGRESS'S POWER UNDER THE NECESSARY AND PROPER CLAUSE BECAUSE IT VIOLATES THE PRINCIPLE OF MUTUAL ASSENT..... 27

IV. THIS COURT SHOULD ENFORCE APPROPRIATE LIMITS ON CONGRESS'S POWER..... 30

CONCLUSION..... 33

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Hickman, 20 Va. (6 Munf.) 15 (1817).....7

Bank of Newbern v. Pugh, 9 N.C. 198 (1820) 6

Bond v. United States, 131 S. Ct. 2355 (2011).....3, 21

Collins v. Westbury, 2 S.C.L. (2 Bay) 211 (S.C. Const. Ct. App. 1799) 13

Field v. Harrison, Wythe 273 (Va. High Ch. 1794) 12

Florida v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011) 30

Gardner v. Lane, 94 Mass. (12 Allen) 39 (1866) 7

Gonzales v. Raich, 545 U.S. 1 (2005) 30

Hallet v. Jenks, 7 U.S. (3 Cranch) 210 (1805).....24, 26

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).....22, 23

Inhabitants of Middleborough v. Inhabitants of Rochester, 12 Mass. (11 Tyng) 363 (1815) 7

Inhabitants of Stockbridge v. Inhabitants of West Stockbridge, 14 Mass. (13 Tyng) 257 (1817).....6

Jackson v. Kniffen, 2 Johns. 31 (N.Y. Sup. Ct. 1806) 12

Katzenbach v. McClung, 379 U.S. 294 (1964).....22, 23

Manby v. Scott, (1674) 86 Eng. Rep. 781 5

TABLE OF AUTHORITIES – Continued

Page

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).....2, 27, 28, 29

Nat'l Labor Relations Bd. v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).....17, 19, 20

New York v. United States, 505 U.S. 144 (1992).....18, 19, 21

Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486 (1968).....25, 26

Price v. Campbell, 6 Va. (2 Call) 110 (1799).....6

R v. Gade, (1796) 168 Eng. Rep. 467.....5

Robinson v. Barfield, 6 N.C. (2 Mur.) 391 (1818) 6

Smith v. Kemper, 4 Mart. (o.s.) 409 (La. 1816).....6

Speake v. United States, 13 U.S. (9 Cranch) 28 (1815).....14

St. Joe Paper Co. v. Atlantic Coast Line R. Co., 347 U.S. 298 (1954).....25, 26

Stones v. Keeling, 9 Va. 143 (1804).....7

Taylor v. Patrick, 4 Ky. (1 Bibb) 168 (1808).....6

The Frances, 12 U.S. (8 Cranch) 354 (1814).....5

United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831).....13, 14, 15

Utley v. Donaldson, 94 U.S. 29 (1876) 5

Williams v. Smith, 2 Cai. 13 (N.Y. Sup. Ct. 1804) 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. X 20, 21, 23, 30

U.S. Const. art. I, § 8 .....13, 29

U.S. Const. art. VI, § 3 32

CODES

Patient Protection and Affordable Care Act (PPACA), 26 U.S.C.A. § 5000(A) (West 2010) 1, 28, 29, 33

OTHER PUBLICATIONS

1 H.T. Colebrooke, *Treatise on Obligations and Contracts* (1818) .....*passim*

1 John Joseph Powell, *Essay upon the Law of Contracts and Agreements* (1796).....5, 9

1 John Trenchard & Thomas Gordon, *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (Ronald Hamowy ed., Liberty Fund 1995) (1721) 11

Randy E. Barnett, *Commandeering the People: Why the Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581 (2010).....21

Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* (Yale Univ. Press 2006).....21

TABLE OF AUTHORITIES – Continued

Page

Hugo Grotius, *The Rights of War and Peace* (A.C. Campbell trans., M. Walter Dunne 1901) (1625).....4

Robert G. Natelson, *The Enumerated Powers of the States*, 3 NEV. L.J. 469 (2003).....23

Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (Michael Silverthorne, trans., Cambridge Univ. Press 1991) (1682).....4

William W. Story, *A Treatise on the Law of Contracts Not Under Seal* (1844) 9, 12

The Federalist No. 45 (James Madison) 3

The Federalist No. 78 (Alexander Hamilton) 31, 32

Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (Charles G. Fenwick, trans., William S. Hein & Co. 1995) (1758).....10, 31

James Wilson, *Lectures on Law in* 1 *The Works of James Wilson* (Robert Green McCloskey ed., Belknap Press 1967) (1790-91).....12, 21

INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute is filing this brief in support of the respondents. The parties in the case have consented to the filing of this amicus brief.[1]

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (PPACA) compels covered individuals to purchase health insurance policies for themselves and their dependents. 26 U.S.C.A. § 5000A(a) (West 2010). This provision, known as the minimum coverage provision or individual mandate, requires individuals to enter into contracts whether they wish to do so or not. The mandate thus marks the first time Congress has passed a law, using its commerce power, from which there is no escape.

The Founding generation that drafted and ratified the Constitution never meant for the federal

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity other than amicus curiae Institute for Justice, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

government to possess the power to coerce individuals to engage in commercial transactions against their will. Coercing commercial transactions is antithetical to the foundational principle of mutual assent that permeated the common law of contracts at the time of the founding and continues to do so today. The Founding generation recognized that this principle was critical to protecting individual liberty. It would never have given, and in fact did not give, Congress, through the guise of the Commerce Clause, the power to gut the foundation upon which the entirety of contract law rests.

Equally important, granting Congress the power to eviscerate the doctrine of mutual assent cannot be a "proper" exercise of congressional power within the meaning of the Necessary and Proper Clause. As Chief Justice Marshall declared in *McCulloch v. Maryland*, for a law to be necessary and proper, the "end [must] be legitimate" and it must "consist with the letter and spirit of the constitution . . . ." 17 U.S. (4 Wheat.) 316, 421 (1819). But it is not consistent with the letter and spirit of the Constitution for Congress to compel individuals to engage in commerce and thereby to eviscerate the concept of mutuality of assent.

Construing the enumerated powers of Congress as including a power to coerce individuals to engage in commerce would destroy the longstanding principle of mutual assent. It truly would be the last step in creating a general federal police power to legislate concerning "the lives, liberties, and properties of the

people, and the internal order, improvement, and prosperity of the State" that the Framers assured the American people were reserved to the States. *The Federalist* No. 45 (James Madison). As this Court recently noted in *Bond v. United States*, 131 S. Ct. 2355 (2011), the purpose of the Constitution's scheme of enumerated powers and federalism is to protect individual liberty. *Id.* at 2364 (citing *N.Y. v. United States*, 505 U.S. 144, 181 (1992) (noting that federalism secures liberties to citizens)). Allowing Congress to compel individuals to enter into contracts against their will would destroy a fundamental precept of contract law and would have a devastating impact on individual liberty.

ARGUMENT

I. THE INDIVIDUAL MANDATE VIOLATES THE LONGSTANDING AND FUNDAMENTAL PRINCIPLE OF MUTUAL ASSENT THAT IS AT THE HEART OF ALL CONTRACTS.

The individual mandate requires individuals to enter into contracts of insurance that would never be enforceable at common law because they would violate an essential element of all enforceable contracts – mutuality of assent. This principle is now and has always been a basic presupposition of all legally binding contracts. The Founding generation recognized this principle, and so has this Court.

A. Mutual Assent Has Always Been (and Still Is) Required for All Legally Binding Contracts.

At the time the Constitution was ratified in 1788, the most influential philosophers and the common law of contracts had long recognized that, for a contract to be valid, the parties must mutually assent to its terms. Indeed, all of the major contract law doctrines in place at the time of the Founding, such as capacity, mistake, fraud, and duress are grounded in the commonsense notion that a contracting party who fails to fully and freely assent to the material terms of the contract cannot, by definition, be fairly bound to it.

The importance of mutual assent was understood long before the American Founding as a prerequisite to the legal enforcement of an agreement. *See*, *e.g.*, Hugo Grotius, *The Rights of War and Peace* 147-48 (A.C. Campbell trans., M. Walter Dunne 1901) (1625) ("In all contracts, natural justice requires that there should be an equality of terms. . . . [That equality] includes also an entire freedom of consent in both [parties to the contract]."); Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* 70 (Michael Silverthorne trans., Cambridge Univ. Press 1991) (1682) ("Our unconstrained consent is most particularly required, if our promises and agreements are to oblige us to give or do anything where we previously had no obligation, or to refrain from doing something which we could previously do of right.").

The requirement of mutual assent was embraced by British common-law courts, and firmly entrenched by the time of the American Founding. *See*, *e.g.*, 1 H.T. Colebrooke, *Treatise on Obligations and Contracts* 2 (1818) ("An *agreement*, convention, compact, or accord, is the consent of two or more persons concurring to form, to modify, or to rescind an engagement between them. It is an aggregation of minds. . . .") (footnote omitted); 1 John Joseph Powell, *Essay upon the Law of Contracts and Agreements* vii-viii (1796) ("That these things must coincide, is evident from the very nature and essence of a contract . . . [and] it is necessary that the party to be bound, shall have given his free assent to what is imposed upon him."); *R v. Gade*, (1796) 168 Eng. Rep. 467, 471 ("[T]his transfer is deficient, inasmuch as it was not accepted by the transferree [sic]; and all contracts require the mutual consent of the contracting parties."); *Manby v. Scott*, (1674) 86 Eng. Rep. 781, 783 ("For the first, every gift, contract, or bargain, is, or contains an agreement; for the contractor or bargainor wills, that the donee or bargainee shall have the things contracted for, and the other is content to take them; and so in every contract there is a mutual *assent* of their minds, which mutual assent is an agreement . . . .").

After ratification of the Constitution, American courts continued to follow this common-law doctrine. *See*, *e.g.*, *Utley v. Donaldson*, 94 U.S. 29, 47 (1876) ("There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting."); *The Frances*, 12 U.S.

(8 Cranch) 354, 357 (1814) ("It has been very truly urged for the captors, that to vest this property . . . a contract is necessary; and that to form a contract, the consent of two parties is indispensable. In this case, no such contract appears."); *Taylor v. Patrick*, 4 Ky. (1 Bibb) 168 (1808) ("Certain it is, that where the mind is . . . illegally and unjustly constrained, so as to prevent free volition, a contracting party cannot be said to have been willing to contract, or to have given his assent to the contract[.]"); *Smith v. Kemper*, 4 Mart. (o.s.) 409 (La. 1816) (declaring to be a principle of "incontrovertible truth and soundness . . . that no offer or proposition, tending to a contract, can be binding on the person proposing until the proposition be accepted; because there can exist no contract without the concurrence and simultaneous will of the contracting parties."); *Inhabitants of Stockbridge v. Inhabitants of West Stockbridge*, 14 Mass. (13 Tyng) 257, 260 (1817) ("To a contract of this species, as to every other contract, the consent of two minds is necessary."); *Bank of Newbern v. Pugh*, 8 N.C. 198, 206 (1820) ("an essential part of all contracts [is] the assent of both parties."); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391 (1818) ("[I]t is essential to the validity of every deed, that it be made *freely* and by persons laboring under no disability to contract: in other words, the party contracting must assent to the contract."); *Price v. Campbell*, 6 Va. (2 Call) 110 (1799) (noting that a "contract or agreement presupposes the consent of both [parties].").

The centrality of mutual assent is reinforced by various ancient doctrines that vitiate a contract's enforceability. For example, contracts can be avoided due to fraud, mistake, duress, and incapacity – all of which are grounded in a lack of meaningful consent by one of the parties. In the instance of incapacity – such as mental disability or minority – the individual's inherent inability to give meaningful consent renders his contracts invalid. *See*, *e.g.*, *Inhabitants of Middleborough v. Inhabitants of Rochester*, 12 Mass. (11 Tyng) 363, 365 (1815) (invalidating marriage contract with person "void of understanding, so as to be incapable of making a valid contract"); *Stones v. Keeling*, 9 Va. 143, 145 (1804) (noting that infancy or idiocy would make a marriage void due to "a want of power or capacity to consent to the contract."); 1 H.T. Colebrooke, *Treatise on Obligations and Contracts* 25-26 (1818) ("Any person is *able to contract*, who has the free use of reason, to render him capable of giving consent, which is the essence of agreement. . . . Those who are by nature *incapable* of contracting, are infants, idiots, and insane persons, or any whose reason is, by disease or other cause, suspended . . . ."). *Cf. Arnold v. Hickman*, 20 Va. (6 Munf.) 15 (1817) (upholding contract because "assent to the contract, thus understood, was given when he was not disabled, from contracting, by intoxication or otherwise.").

Similarly, a contract grounded in mistake is unenforceable against the mistaken party because the mistake renders their mutual assent illusory. *See*, *e.g.*, *Gardner v. Lane*, 94 Mass. (12 Allen) 39, 44 (1866)

("[I]t cannot be doubted that if under a contract of sale a delivery was made, through mistake, of an article different from that agreed upon by the parties, there would be no sale of the article delivered, and no property in it would pass, for the simple reason that the vendor had not agreed to sell nor the vendee to buy it. There would in fact be 'no contract between the parties in respect to the article actually furnished;' or, to express it in different words, when a material mistake occurs in respect to the nature of the subject matter of a sale, there is no mutual assent, and therefore the contract is void.") (citing *Story on Sales*, §§ 148, 458); *Williams v. Smith*, 2 Cai. 13 (N.Y. Sup. Ct. 1804) (Livingston, J., concurring) ("If neither of the parties know of a circumstance which subsequent events have discovered to be important, the contract is founded in *mutual error*, in which case the parties cannot be said to have assented to it."); Colebrooke, *supra*, at 47 ("If the mistake be respecting that, at which the person making the contract aimed, the agreement will be void; because his assent is founded on the ground of the matter being as supposed.").

B. At the Time the Constitution Was Drafted and Ratified, It Was Widely Known and Accepted That *Coercion* Necessarily Renders Any Assent Invalid.

As doctrines such as mistake and incapacity show, any individual who cannot give free, full, and knowing consent cannot be fairly characterized as having

assented to a contract. Mutual assent, in other words, presupposes that assent has been *freely given*.

This was well known to the Founding generation and those who drafted and ratified the Constitution. In his influential 1809 multivolume treatise, *Essay Upon the Law of Contracts and Agreements*, John Joseph Powell observed that assent signifies the "free use" of the mind and moral power, making it "clear from the nature of its constitution; [that] one essential ingredient [of a contract is] 'that it is *entered into freely, of the parties' own accord*.'" 1 John Joseph Powell, *Essay Upon the Law of Contracts and Agreements* *10, *371 (1796) (emphasis added). Similarly, H.T. Colebrooke's 1818 *Treatise on Obligations and Contracts* declared,

> A true assent implies the serious and *perfectly free use of power, both physical and moral, to give assentment*. This essential requisite is wanting in promises made in jest or compliment: or made in earnest, but under mistake and illusion; or under deception and delusion; *or in consequence of constraint and compulsion*.

Colebrooke, *supra*, at 45 (emphasis added). *See also* William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 52 (1844) ("[Assent] should be mutual; it should be *without restraint*; it should be understandingly made and without error or mistake.") (emphasis added). Contracts made under "restraint" – i.e., not the product of a party's own free will – are inherently objectionable and unenforceable.

The necessity of free will in contractual relations has deep philosophical roots, extending well before the ratification of the Constitution. The most influential natural rights philosophers – with whom the Founders were intimately familiar – understood that coerced contracts were inherently antithetical to respect for individuals and their inalienable rights. One of the most influential of those philosophers, Emmerich de Vattel, articulated the necessity of contractual freedom in 1758:

> Men . . . *are perfectly free to buy or not buy a thing which is for sale*. . . . No man has any right . . . to sell what belongs to him to one who does not wish to buy. . . .
>
> . . . .
>
> By reason of the natural liberty which belongs to all men, it is for me to judge whether I have need of [things to buy] or if I am in a position to sell them to you. . . .
>
> . . . .
>
> [C]ommerce consists in the reciprocal purchase and sale of all sorts of commodities.

Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* 40-41 (Charles G. Fenwick trans., William S. Hein & Co. 1995) (1758) (emphasis added).

Similarly, the widely read John Trenchard and Thomas Gordon, writing under the pseudonym "Cato," stated in 1721 that "Nothing is more certain, than that

trade cannot be forced; she is a coy and humourous dame, who must be won by flattery and allurements, and always flies force and power; . . . she cannot breathe in a tyrannical air. . . ." 1 John Trenchard & Thomas Gordon*, Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects* 442-43 (Ronald Hamowy ed., Liberty Fund 1995) (1721) (emphasis added).

Founder James Wilson, who signed both the Declaration of Independence and the Constitution, likewise explained in his 1790-91 lectures on law that an intent to be bound cannot occur in the context of compulsion:

> The common law is a law of liberty. The defendant *may plead, that he was compelled to execute the instrument*. He cannot, indeed, deny the execution of it; but he can state, in his plea, the circumstances of compulsion attending his execution; and these circumstances, if sufficient in law, and established in fact, will procure a decision in his favour, that, in such circumstances, *he did not bind himself*. . . . [But] if he executed it voluntarily; if he executed it knowingly; the law will pronounce, that he bound himself. *This has been the regular course of the law during time immemorial – a course, uninterrupted and unrepealed*. In the municipal law of England, therefore, the doctrine is established – that a man can bind himself. This doctrine is established by strict legal inference from the principles and the practice of the common law.

James Wilson, *Lectures on Law*, *in* 1 *The Works of James Wilson* 190 (Robert Green McCloskey ed., Belknap Press 1967) (1790-91). Wilson thus made it clear that, though a man could legally bind himself via contract, the "immemorial . . . uninterrupted and unrepealed" understanding of Anglo-American law was that compelled contracts were not binding.

Equally important to this early philosophical understanding are the deeply entrenched common-law doctrines of fraud and duress, which are grounded in the same fundamental logic: Contracts cannot be coerced. Fraud is a valid defense to the enforcement of a contract because the fraud prevents the innocent party from acquiring information required for mutual assent, thereby effectively coercing her into a contract she did not intend to make. *See*, *e.g.*, *Field v. Harrison*, Wythe 273 (Va. High Ch. 1794) (fraud vitiates consent); Colebrooke, *supra*, at 51 ("There can be no true consent, when the words or writings, by which the assent is said to be expressed, are drawn from either of the parties *by fraud*.").

Similarly, a contract procured by duress is unenforceable because a person who is forced to enter into a contract cannot, by definition, be said to freely consent to that contract. William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 57 (1844) ("The assent however must not only be mutual, but it must be freely and voluntarily given in order to create a valid contract. Compulsion or duress will therefore avoid any agreement."); *Jackson v. Kniffen*, 2 Johns. 31, 34 (N.Y. Sup. Ct. 1806) ("[I]t is essential

to the validity of every deed that the party making it be free from restraints, and not under duress.") (citations omitted). As the Constitutional Court of Appeals of South Carolina acknowledged in 1799,

> So cautiously does the law watch over all contracts, that *it will not permit any to be binding but such as are made by persons perfectly free, and at full liberty to make or refuse such contracts*, and that not only with respect to their persons, but in regard to their goods and chattels also. *Contracts to be binding must not be made under any restraint or fear of their persons, otherwise they are void . . . .*

Collins v. Westbury, 2 S.C.L. (2 Bay) 211 (S.C. Const. Ct. App. 1799) (emphasis altered).

C. This Court's Early Decisions Recognized the Centrality of Mutual Assent to Commercial Relations.

The centrality of mutual assent – and its concomitant prohibition on coerced contracts – was recognized in this Court's early case law involving the mandatory posting of bonds with the federal government. In *United States v. Tingey*, 30 U.S. (5 Pet.) 115 (1831), for example, the Court was asked to consider the validity of a bond entered into by a Navy purser, an officer charged with disbursing money. Pursuant to its powers to regulate the Navy, *see* U.S. Const. art. I, § 8 (giving Congress the power to "provide and maintain a Navy" and to "make Rules for the Government

and Regulation of the land and naval Forces"), Congress had passed a statute requiring Navy pursers to execute a bond for security of U.S. funds.

The Court's earlier decision in *Speake v. United States*, 13 U.S. (9 Cranch) 28 (1815), had endorsed the federal government's power to impose bonds in its own contractual relationships, so long as there was antecedent statutory authorization for the bond. The court reasoned that individuals contracting with the government *after* the enactment of such a statute had *voluntarily assented* to such contractual (bond) obligations as a condition of their doing business with the government. As such, the bond could not be characterized as compelled. *Id.* at 35. In *Tingey*, by contrast, the bond statute did not authorize the type of bond entered into, leading the Court to conclude that the bond was "extorted . . . contrary to the statute . . . as the condition of . . . remaining in the office of purser, and receiving its emoluments." *Tingey*, 30 U.S. (5 Pet.) at 129. Accordingly, the Court declared that "[t]here is no pretence then to say that it was a bond voluntarily given" because it "was demanded of the party, upon the peril of losing his office; it was extorted under colour of office, against the requisitions of the statute." *Id.*

The facts in the case at bar are analogous to those in *Tingey*. Here, as there, the government is compelling individuals to enter into contractual relations under threat of penalty. In both cases, the targeted individuals have not freely and voluntarily assented to such a contractual relationship. As such, the contract

cannot be legally enforceable; it is being "extorted" by the federal government upon threat of punishment. If such extortion is unacceptable when the federal government acts as an employer – as it did in *Tingey* – it is even more unacceptable when the government acts upon the broader citizenry. In either instance, an extorted contractual relationship is contrary to hundreds of years of understandings about the very nature of legally valid contracts.

The necessary implication from the longstanding conception of contract law recognized by the Founding generation and this Court in *Tingey* is that legally binding contracts cannot, by definition, be coerced. Yet that is exactly what the individual mandate does – it forces individuals to enter into lifelong contractual relations with a health insurance company. The individual mandate thus stands against over two centuries' worth of understandings about the core premise of contract law. As the next section shows, the mandate also stands against this Court's understanding of the commerce power.

II. THE INDIVIDUAL MANDATE ERASES THE DISTINCTION, LONG ACKNOWLEDGED BY THIS COURT, BETWEEN THE POWER TO REGULATE COMMERCE AND THE POWER TO COMPEL IT.

This Court's prior decisions, both constitutional and statutory, have embraced the longstanding Anglo-American tradition of mutual assent and the idea

that coercing parties to engage in commerce is antithetical to valid contractual and commercial relations.

Thus, in its Commerce Clause cases, the Court has been careful to distinguish between permissible regulations of commerce and impermissible compulsion. In its Tenth Amendment cases the Court has recognized the flip side of this proposition: Congress lacks the power to force States, and, by implication, the people, to take title to goods against their will. Following the same principle, the Court has refused to interpret the term "commerce" in statutes enacted under the commerce power to include involuntary commercial relationships, or to permit compelled contractual relationships such as mergers or bonds.

In short, as broad as this Court has construed Congress's enumerated powers, it has never interpreted Congress's power to regulate interstate commerce as a power to compel individuals who had not already freely chosen to do business in interstate commerce or otherwise enter into commercial or contractual relationships.

The individual mandate crosses this line. As this section demonstrates, it is contrary not only to hundreds of years of understandings about the nature of contractual relations, but also to this Court's decisions interpreting Congress's enumerated powers and the term "commerce" in federal statutes. The Court's repeated recognition of the difference between regulation and coercion should be viewed as an alarm bell,

warning of the broader ramifications inherent in a constitutional case such as this.

A. This Court Has Recognized the Distinction Between the Power to Regulate and the Power to Compel in Decisions Interpreting the Commerce Clause.

This Court explicitly observed the critical distinction between the power to regulate commerce and the power to compel it in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937). As the Court noted, the National Labor Relations Act (NLRA) "does *not compel agreements* between employers and employees. It does *not compel an agreement whatever*. It does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may by unilateral action determine." *Id.* at 45 (internal quotation marks omitted) (emphasis added).

The *Jones and Laughlin* Court was careful to note that the NLRA did not compel parties to enter into contracts, observing that the "theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements *which the Act in itself does not compel*." *Id.* (emphasis added). Because the Act did not compel employers and employees to reach any agreements – but instead to negotiate in good faith – the *Jones and Laughlin* Court was comfortable upholding

the law as a valid exercise of the power to "regulate" commerce.

This Court similarly recognized the crucial distinction between regulation and compulsion in *New York v. United States*, 505 U.S. 144 (1992). In *New York*, the Court invalidated a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985, a law grounded in the commerce power. Specifically, the Court ruled unconstitutional a portion of the Act that compelled states to "take title" to low-level radioactive waste in certain situations. As the Court noted, "[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to *compel* the States to do so." *Id.* at 149 (emphasis added). Elaborating, the Court stated:

> [T]he Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a *congressionally compelled subsidy from state governments to radioactive waste producers*. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state

> governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

Id. at 175-76 (emphasis added).

New York thus became known as establishing an "anti-commandeering principle" by which Congress could not force state legislative or executive officials to carry out a federal regulatory program. Although the case is principally understood as a Tenth Amendment case, the majority was careful to emphasize that enforcing limits on the commerce power versus preserving the reserved powers of the states via the Tenth Amendment were but "mirror images of each other." *Id*. at 155-56 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."). *Accord Jones and Laughlin*, 301 U.S. at 37 ("Undoubtedly the scope of [the commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.").

Logically, then, the anti-commandeering principle must define the limits of the commerce power as well. That is, if the Tenth Amendment does not permit Congress to compel a state to take title to radioactive waste, then the Commerce Clause must not delegate that power to Congress. Yet the commerce power undoubtedly allows Congress to regulate interstate commerce in radioactive waste. It follows that the power to *regulate* commerce does not include the power to *compel* a party to take title to goods or services against its will. Much like the individual mandate, the take-title provision in *New York* sought to compel states to acquire a product they did not want, leading the Court to conclude that the Tenth Amendment – and, by implication, the Commerce Clause – did not permit such compulsory commercial transactions.

Although the take-title provision at issue in *New York* operated on the states, rather than individuals, the distinction between regulation and compulsion must apply as much when Congress is attempting to compel individuals to purchase a product as it does when Congress attempts to compel states to do so. The Tenth Amendment states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." U.S. Const. amend. X (emphasis added). If it is beyond Congress's authority to "commandeer" the States by compelling them to take title to radioactive waste, then it must likewise be beyond Congress's power to "commandeer" the people, by requiring them to purchase

insurance. *See*, *e.g.*, Randy E. Barnett, *Commandeering the People: Why the Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 626-27 (2010).

Indeed, in *Bond v. United States*, 131 S. Ct. 2355 (2011), this Court unanimously acknowledged that the purpose of the Tenth Amendment and the federal system of government that it preserves is to protect individual liberty, not simply state sovereignty. As the Court stated, "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." *Id.* at 2364 (internal citation omitted). *Accord New York*, 505 U.S. at 181 ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (internal quotation marks and citation omitted).

The Founders understood this point. As James Wilson stated in his *Lectures on Law* in 1790, "The dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man." James Wilson, *Lectures on Law*, *in* 1 *The Works of James Wilson* 81 (Robert Green McCloskey ed., Belknap Press 1967) (1790-91). *See also* Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* 9-15 (Yale

Univ. Press 2006) (discussing the nature of popular sovereignty under the American constitutional structure). One aspect of the liberty that such free and independent men of the time enjoyed was the liberty to enter into commercial arrangements and transactions by one's own consent. As an influential contract law treatise by H. T. Colebrooke, published in 1818, noted:

> [F]orce, whether used, or barely threatened, lays a necessity on a man contrary to his will. So that *it is in appearance, only, that a man forced or menaced gives assent*. The engagement is vitiated by the force put upon his will. . . . Because all undue force or menace, which obliges men, contrary to their inclination, to give their assent, which else they would not do, *takes away that liberty which is essential to a valid engagement* . . . .

1 H.T. Colebrooke, *Treatise on Obligations and Contracts* 49 (1818) (emphasis added).

In sum, this Court has recognized the cardinal distinction between the power to regulate and the power to compel[2] and that compelling commercial

---

[2] This Court's recognition of the distinction between the power to regulate and the power to compel is not altered by its decisions in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). Both cases involved the validity, under the Commerce Clause, of Title II of the Civil Rights Act (CRA) of 1964, which prohibited "discrimination or segregation on the ground of race, color, religion, or national origin" in places of public accommodation such

(Continued on following page)

relationships can trench on the powers reserved to the states and the people under the Tenth Amendment. Contract law is properly the domain of the states, not the federal government. *See* Robert G. Natelson, *The Enumerated Powers of the States*, 3 NEV. L.J. 469, 485 (2003). And a fundamental precept of contract law is that individuals must be free to decide for themselves whether to enter into contractual arrangements. Thus, by compelling individuals to enter into lifelong contracts of health insurance, the individual mandate simply cannot be squared with Congress's commerce power or with the powers reserved to the states and the liberties reserved to the people under the Tenth Amendment.

---

as hotels, restaurants, and movie theaters. *Heart of Atlanta*, 379 U.S. at 247; *Katzenbach*, 379 U.S. at 298.

The CRA of 1964 does not compel commerce. It regulates the terms and conditions on which commerce conducted by businesses such as these can lawfully take place. The CRA did not force the owners of the Heart of Atlanta Motel, for example, to operate a motel or the proprietors of Ollie's Barbeque to operate a restaurant. In both cases, the proprietors had already chosen to enter into businesses that were public accommodations, and the CRA then regulated the terms upon which they could operate in interstate commerce. The individual mandate, by contrast, compels individuals to enter into a type of commercial transaction that they would otherwise not enter into at all.

B. This Court Has Recognized the Qualitative Difference Between Regulation and Compulsion in Statutory Decisions.

The Court has exhibited similar reticence to endorse a power to compel contractual relations, even in decisions raising only statutory, not constitutional, questions.

For example, in the 1805 decision in *Hallet v. Jenks*, 7 U.S. (3 Cranch) 210 (1805), the Court construed a federal act in such a way as to avoid punishment for involuntary or coerced commerce. In *Hallet*, the Court was asked to construe a law, enacted pursuant to the commerce power, that prohibited vessels from engaging in "any traffic or commerce with or for any person resident within the jurisdiction or under the authority of the French republic." *Id.* at 213. The owner of the vessel charged with violating this "non-intercourse" statute argued that the vessel was forced into a French port by severe weather, necessitating the offloading and sale of perishable merchandise. He asserted that the purpose of the federal law was to prevent only *voluntary* commercial intercourse deemed to be against the interests of the U.S., reasoning: "What is traffic? A contract by consent of both parties. *If one is under compulsion, it is no contract, no traffic*." *Id.* at 217 (emphasis added). Chief Justice John Marshall delivered the opinion of the Court, agreeing with the vessel owner that the "terms of the act of congress seem to imply an intentional offence," *id.* at 219, thus avoiding the imposition of punishment for coerced or involuntary commerce. Marshall's terse

opinion suggests that the basic argument made – that *contracts made under compulsion were inherently not commerce* – was logical and accepted by Congress.

Similarly, in a pair of Interstate Commerce Commission (ICC) cases, *St. Joe Paper Co. v. Atlantic Coast Line Railroad Co.*, 347 U.S. 298 (1954), and *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968), the Court refused to interpret statutes defining the ICC's power as including a power to compel contractual relations.

In *St. Joe Paper*, the question before the Court was whether the ICC had the power to compel a bankrupt railroad to merge with another, solvent railroad. 347 U.S. at 299. The Court noted that "[a]dvocacy of giving the Commission power to propose and enforce mergers has been steady and, at times, strong, but *it has consistently failed in Congress*." *Id.* at 306 (emphasis added). The Court could not accept that the Bankruptcy Act had been "stealthily designed [by Congress] to jettison its longstanding and oft-reiterated policy against compulsory mergers." *Id.* at 307-08. The *St. Joe Paper* Court concluded that, under existing law, "one carrier cannot be railroaded by the Commission into an *undesired merger* with another carrier." *Id.* at 309-10 (emphasis added).

A similar question was raised in *Penn-Central*, in which numerous railroads challenged an ICC merger-and-inclusion order requiring that the merging railroads offer smaller railroads inclusion in the merger. 389 U.S. 486 (1968). In addressing an objection that

the Court could not adjudicate the propriety of the proposed merger until the smaller railroads were included, the Court noted "there is no provision of law by which the Commission or the courts may *compel* the three protected roads to accept inclusion in the N & W [merger], as ordered by the Commission, or in any other system . . . . *Id.* at 517. The Court further noted that the Act "does not make provision for compelling an unwilling railroad which is not itself a party to a merger agreement to accept inclusion under the terms the Commission prescribes." *Id.* at 518.

While *Hallet*, *St. Joe Paper*, and *Penn-Central* are only statutory cases, they illustrate the Court's understanding of the intrinsic difference between regulation and compulsion. The Court's reticence to construe statutes based on the Commerce Clause as including the power to coerce contractual relations acknowledges the highly controversial nature of such a power and its potential for abuse in future situations.

By enacting the individual mandate, Congress has crossed that line, using its commerce power to coerce contractual relations. So, unlike in *Hallet*, *St. Joe Paper*, and *Penn-Central*, this Court must now squarely address Congress's constitutional power to do so. Because the individual mandate exceeds Congress's enumerated powers, this Court should strike it down.

III. THE INDIVIDUAL MANDATE IS NOT A "PROPER" EXERCISE OF CONGRESS'S POWER UNDER THE NECESSARY AND PROPER CLAUSE BECAUSE IT VIOLATES THE PRINCIPLE OF MUTUAL ASSENT.

In light of the foregoing, it cannot be "proper," within the meaning of the Necessary and Proper Clause, to exercise the commerce power in a way that eviscerates hundreds of years of understanding of the very essence of legally binding contracts. The Necessary and Proper Clause is designed to ensure that Congress has an array of *means* to accomplish permissible *ends*, which are defined by the enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419 (1819) ("[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution . . . ."). But the Clause was not designed to allow Congress to accomplish *ends* beyond the scope of its enumerated powers. As Chief Justice Marshall declared in *McCulloch*, for a law to be necessary and proper, the "end [must] be legitimate" and it must "consist with the letter and spirit of the constitution . . . ." *Id.* at 421. But, as shown above, it is not consistent with the letter and spirit of the Constitution for Congress to compel individuals to engage in commerce and thereby to eviscerate the concept of mutuality of assent.

Indeed, here the government is attempting to use the Necessary and Proper Clause in the way the

McCulloch Court said it could not be used. As the Court stated in *McCullough*, "should congress, *under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government*; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." *Id.* at 423 (emphasis added).

Yet that is precisely what the government is attempting to do here. The purpose of PPACA is to increase insurance coverage. PPACA's health insurance market reforms – guaranteed issue, community rating, elimination of preexisting-condition exclusions, covering minors until age 26 – make health insurance more expensive and thus reduce coverage. According to the government, the individual mandate is "necessary" to offset the negative effects of these market reforms. *See* Gov'ts Br. 24 ("The minimum coverage provision is necessary to make effective the Act's core reforms of the insurance market . . . ."); *id*. at 32 ("The minimum coverage provision is key to the insurance reforms that were designed to fill that gap [in health insurance coverage].").

This is a classic bootstrapping argument. Using PPACA's market reforms as its base, Congress is attempting to accomplish an object not entrusted to it as part of its enumerated powers – namely, the power to compel contractual relations. The government asserts that the individual mandate is a "necessary and proper" means to effectuate the insurance market reforms contained elsewhere in PPACA, reasoning

that without the mandate, the entire insurance market could collapse due to adverse selection. As the government's brief explained it, the "guaranteed-issue and community-rating [market reforms] enacted in isolation create a spiral of higher costs and reduced coverage because individuals can wait until they are sick." *Id.* at 18. Because PPACA's market reforms, standing alone, would actually *harm* the health insurance market, the government claims that the individual mandate is "necessary" to keep the health insurance market viable.

But it is Congress that created that problem in the first place. Surely it cannot be "proper" for Congress to enact regulations of commerce (here, regulations of health insurance) that are so harmful to the survival of that commercial market that it would then be "proper" to give Congress the additional, awesome power to compel contractual arrangements. The invocation of the Necessary and Proper Clause in this case elevates means over ends, contrary to the Clause's original meaning and purpose. Under the pretext of regulating the health insurance market, the government seeks to use the Necessary and Proper Clause to validate a qualitatively different power than those enumerated in Article I, Section 8 – the power to compel commercial transactions. Using the Necessary and Proper Clause as a bootstrapping mechanism to expand the commerce power in this manner presents the classic pretext situation roundly condemned by the Court in *McCulloch*.

As Justice Scalia observed in his concurrence in *Gonzales v. Raich*, "These phrases [from *McCulloch*] are not merely hortatory. For example, cases such as *Printz v. United States* and *New York v. United States* affirm that a law is not *proper* for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty." 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (internal citations and quotation marks omitted). Because the individual mandate violates the principle of limited federal power and both state and individual sovereignty memorialized in the Tenth Amendment, it cannot be "proper" under the Necessary and Proper Clause.

IV. THIS COURT SHOULD ENFORCE APPROPRIATE LIMITS ON CONGRESS'S POWER.

Several lower courts and judges that have heard challenges to the individual mandate have opined that a properly "restrained" federal judiciary should leave to Congress the task of deciding how to regulate the health care system. But, as the Eleventh Circuit noted in striking down the mandate, "the Constitution requires judicial engagement, not judicial abdication." *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1284 (11th Cir. 2011).

The purpose of a written constitution is to provide an enforceable blueprint for ascertaining the limits of government power and, consequently, the liberty of its citizens. A written constitution is but a dead letter

if its limits on government power are not enforced. As influential political philosopher Emmerich de Vattel observed in 1758:

> The constitution and laws of a State are rarely attacked from the front; it is against secret and gradual attacks that a Nation must chiefly guard. . . . [C]hanges are overlooked when they come about insensibly by a series of steps which are scarcely noted. One would do a great service to Nations by showing from history how many States have thus changed their whole nature and lost their original constitution.

Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* 18 (Charles G. Fenwick trans., William S. Hein & Co. 1995) (1758).

The Founders understood Vattel's point and believed the federal judiciary would be vigilant in enforcing the Constitution's structure, including the concept of limited and enumerated powers. Indeed, at the time of the ratification, there was a widely held fear that Congress would ignore its constitutional limits and the federal courts would acquiesce in the expansion, allowing Congress to become the "constitutional judges of their own powers." *The Federalist* No. 78 (Alexander Hamilton).

In response to this fear, *Federalist* No. 78 assured the American public that "this cannot be the natural presumption" because "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the

latter within the limits assigned to their authority." *Id.* Hamilton explained that meaningful judicial engagement in enforcing the constitutional architecture did not imply a superiority of the judiciary over Congress, but merely that

> the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Id.

Reflexively deferring to Congress's enactment of the individual mandate is an abdication of the judicial duty owed to the American people to enforce and support the Constitution. *See* U.S. Const. art. VI, § 3 ("The . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). If courts cannot find and articulate meaningful limits on the federal government's enumerated powers, the entire constitutional architecture collapses. At a minimum, courts should be willing to draw a line between the power to regulate commerce and the power to *compel* it. Hundreds of years of historical understandings of the centrality of mutual assent, this Court's own constitutional and statutory decisions relating to the commerce power, and the very nature of our

federal structure all support the conclusion that, by enacting the individual mandate, Congress has pushed its commerce power one critical step too far.

CONCLUSION

If the individual mandate of PPACA is upheld, the power to regulate commerce will include the power to *compel* it. This massive new federal power would soon overtake the entirety of the states' residual police power, including the entirety of contract law, enabling the federal government to eviscerate hundreds of years of basic understandings of the voluntary essence of legally binding contracts.

Equally important, from the perspective of individual liberty, a power to compel contractual relations would have no logical stopping point. It would presumably include, for example, the power to compel individuals to buy *any* good or service – not just health insurance – so long as Congress could rationally conclude the market for that product would benefit from forced purchasing. It would also presumably include a power to compel individuals to work for specific employers or in specific occupations, so long as Congress could rationally conclude that those industries or occupations would benefit from such forced contractual relationships. When combined with the Court's highly deferential standard of review for exercises of the commerce power, extending that power to include the awesome power to compel would create

the very Leviathan government the Founders spilled their blood to resist.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
STEVEN M. SIMPSON
Counsel of Record
ELIZABETH PRICE FOLEY
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
ssimpson@ij.org

Counsel for Amicus Curiae