No. 11-398

In the Supreme Court of the United States

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

v.

STATE OF FLORIDA, ET AL.,
Respondents.

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

BRIEF ON BEHALF OF SMALL BUSINESS MAJORITY FOUNDATION, INC. ("SBM") AND THE MAIN STREET ALLIANCE ("MSA") AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (MINIMUM COVERAGE PROVISION)

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QUESTION PRESENTED

This brief will address the following question:

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A.

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STATEMENT OF INTEREST[1]

The Small Business Majority Foundation, Inc. ("SBM") is a national, nonpartisan organization founded and run by small business owners across the United States. SBM is a District of Columbia non-profit organization exempt from tax as an educational organization under section 501(c)(3) of the Internal Revenue Code. SBM represents the interests of small business owners as well as researches and disseminates policy proposals that address their special interests and needs. In recent years, SBM has focused on skyrocketing health care costs, the largest problem facing small businesses.

The Main Street Alliance ("MSA") is a national network of state-based small business coalitions. Led by Main Street small business owners, the MSA network formed in 2008 and now operates as a program of the Alliance for a Just Society, a Washington State non-profit charitable and educational organization exempt from tax under section 501(c)(3) of the Internal Revenue Code. MSA creates opportunities for small business owners to speak for themselves on issues that impact their businesses and their local economies. MSA members' top priority is advancing reforms that make health care work for small businesses.

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or its counsel made a monetary contribution to its preparation or submission.

In this consolidated action, SBM and MSA address only one of the issues before the Court: whether federal law requiring individuals to obtain and maintain minimum health insurance coverage falls within Congress' power under the Commerce Clause in conjunction with the Necessary and Proper Clause. The requirement's constitutionality turns on many commercial and economic factors. Small businesses, representing 99.7% of all U.S. employer firms and 44% of total U.S. private payroll, are especially attuned to those commercial and economic considerations implicated by the federal health care reforms at issue. One of the parties before the Court, the National Federal of Independent Business ("NFIB"), is a business group, but NFIB does not represent the viewpoint of all small businesses. SBM and MSA accordingly submit this brief examining the Patient Protection and Affordable Care Act's constitutionality from the perspective of these small business owners not represented by the parties or other amici.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act ("PPACA" or "Act") redresses growing health care and health insurance costs that are causing substantial burdens on interstate commerce. These burdens are felt widely, but small businesses have been especially hard hit. Small businesses pay on average 10 to 18% more than large employers to provide the same level of health benefits. These higher health care costs translate into substantial competitive disadvantages for small businesses. PPACA pursues broad-based reform, but the law's end result will help remedy those additional problems specifically hurting small business. Small and Main Street businesses

accordingly support Congress' reform effort. In this regard, NFIB does not represent the viewpoint of all small business owners, as illustrated by its own surveys. Part I of the Argument more specifically discusses these burdens on interstate commerce.

Part II establishes that PPACA is within Congress' Commerce Clause powers. It is not in question that health insurance and health care both involve interstate commerce subject to federal regulation. In addition, the Act's minimum health coverage requirement, which is specifically at issue here, targets cost-shifting forces by the uninsured that "substantially affect interstate commerce" consistent with one of the three categories of Commerce Clause regulation recognized by this Court. PPACA's legislative findings document these cost-shifting forces – where the uninsured consume health care but cannot pay for it with those uncompensated costs passing to the insured through higher premiums – and their substantial effects on interstate commerce. Although the Act's findings describe the problem generally and are not dispositive, "particularized findings" or accuracy "in fact" are unnecessary for this Court to sustain the law. Rather, the Act satisfies this Court's "modest" rational basis standard and is constitutional.

The Act's challengers propose a clear cut limit on Congress's reach under the Commerce Clause that contrasts inactive from active market participants. Such categorical line-drawing based on rigid terminology, however, is fundamentally incompatible with this Court's modern Commerce Clause rubric. In assessing Congress' interstate commerce powers, the standard is one of degree. A strict inactive/active distinction is accordingly misguided and should be

rejected. Opponents of the Act also object to Congress anticipating that all uninsured persons will inevitably consume health care without fully paying for it. Yet, this focus on individual circumstances is misplaced because Congress is permitted to regulate the entire class and total incidence of any practice that poses a threat to interstate commerce.

Based on *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000), the Act's challengers further object to class-wide regulation of uninsured persons that aggregates their substantial effects on interstate commerce. Those cases, however, involved narrow federal statutes that concerned areas of traditional state regulation such as crime and that had only attenuated connections to interstate commerce. In contrast, PPACA is comprehensive legislation that regulates commercial and "economic" subject matter (health insurance and health care), and the Act's minimum coverage requirement redresses classic "economic" issues (cost-shifting and free riding). The limits on "aggregation" that constrain Congress' Commerce Clause authority, as defined by *Lopez* and *Morrison*, are therefore inapplicable here.

Moreover, the Necessary and Proper Clause further supplements Congress' Commerce Clause powers to regulate uninsured persons. Through this provision, Congress may regulate even noneconomic subject matter that is an essential component of a larger regulatory scheme concerning interstate commerce. The Necessary and Proper Clause provides additional support to uphold PPACA because the Act has a "legitimate end" under the Commerce Clause to remedy significant cost-shifting problems that are

burdening interstate health care and health insurance markets and because the Act's minimum coverage requirement is "reasonably adapted" to fix that economic drag.

Finally, Part III focuses on PPACA's regulatory model – in particular, requiring individuals to obtain and maintain minimum health insurance coverage. The Act's challengers complain that PPACA's form and sweep are unconstitutional, but the Act's structure is consistent with this Court's prior decisions and other valid federal legislation. Furthermore, the Constitution does not limit the manner or scope of Congress' Commerce Clause powers. The Act is simply a policy decision adopting a particular solution in response to a particular problem. This Court defers to Congress on policymaking matters, leaving the Act in the hands of the people – not the courts – to judge and decide. A close look at how the Framers viewed Congress, its Commerce Clause powers, and the popular constraints on that body further confirm that PPACA should begin and end with our elected representatives.

ARGUMENT

I. The Patient Protection and Affordable Care Act redresses substantial burdens affecting interstate commerce.

Health care desperately needs repair. The United States spends an estimated $2 trillion annually on health care, more than any other developed country

and roughly two-and-one-half times the average.[2] As a result of this country's dominate employment-based health insurance structure, higher health care expenditures hurt many U.S. businesses and their global competitiveness. *See id*. Analysis shows that U.S. industries having the highest levels of employer-sponsored health care also have slower growth than their international industry competitors. *See id*. The drag on employers by health care costs also is felt by their employees. Studies show that access to employer-sponsored health plans has steadily declined since 2000 while health insurance premiums for workers have increased and outpaced earnings over the past decade.[3]

Unsustainable health care costs have squeezed small businesses and their employees in particular. Small businesses with less bargaining power must pay on average 10 to 18% more than large employers to provide the same level of health benefits.[4] In luring

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[2] *See* Toni Johnson, Council on Foreign Relations, *Healthcare Costs and U.S. Competitiveness*, (Mar. 23, 2010), available at http://www.cfr.org/health-science-and-technology/healthcare-costs-us-competitiveness/p13325.

[3] *See* Kaiser Family Foundation, *Kaiser Commission on Medicaid and the Uninsured* (November 2008), available at http://www.kff.org/uninsured/upload/7840.pdf; Paul B. Ginsburg, Robert Wood Johnson Foundation, High and Rising health care costs: Demystifying U.S. health care spending, 1 (October 2008), available at http://www.rwjf.org/files/research/101508.policysynthesis.costdrivers.rpt.pdf.

[4] *See* Jon Gabel, et al., *Generosity and Adjusted Premiums in Job-Based Insurance: Hawaii Is Up, Wyoming Is Down*, 25 Health Affairs 832, 840 (2006).

top job candidates, these higher health care costs are a substantial competitive disadvantage because most small business either cannot afford to provide the same level of health coverage as large companies or are more likely to offer no health benefits at all to their employees.

For example, 48% of all small business employees have health insurance policies that cap their total amount of care, compared to only 37% of all large firm employees.[5] Similarly, small business employees are three times more likely than large firm employees to have health plans with no prescription drug coverage. *Id*. And less than half of all small firms (those having 200 or fewer employees) even offer health benefits, dropping over 10% (from 57 to 46%) between 2000 and 2009.[6]

In addition to causing competitive disadvantages for small businesses in job markets, the gap in health coverage also causes "job lock" over the long term, where employees of companies offering health insurance are reluctant to switch to jobs not having those benefits, even if the job itself better suits that employee's particular skills. *See* Brigitte C. Madrian, *Health Insurance and Job Mobility: Is There Evidence*

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[5] *See* Michelle M. Doty, et al., *Out of Options: Why So Many Workers in Small Businesses Lack Affordable Health Insurance, and How Health Care Reform Can Help*, 67 The Commonwealth Fund, available at http://www.commonwealthfund.org/Content/Publications/IssueBriefs/2009/Sep/Out-of-Options.aspx (Sep. 9, 2007).

[6] *See* Kaiser Family Foundation, *Employer Health Benefits: 2009 Annual Survey* 50 (2009), available at http://ehbs.kff.org/.

of Job-Lock?, 109 Q. J. of Econ. 27, 43 (1994) (determining that job lock "accounts for a 25–30 percent reduction in [job] mobility"); *see also* Kevin T. Stroupe, et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. of Pol'y Analysis & Mgmt. 525, 525 (2001) (finding that workers with chronic illnesses or a family member with chronic illness are 40 percent less likely to voluntarily leave a job which provides health benefits than a similarly-situated healthy worker with a healthy family). "Job lock" leads to economic inefficiencies by potentially trapping workers in undesirable jobs and preventing employers from attracting employees.

Through competitive disadvantages in job markets and job lock, health care is causing acute problems for small businesses on top of the burdens of higher premiums felt generally among all governments, businesses, and individuals. The Patient Protection and Affordable Care Act pursues broad-based reform, but the law's end result will also help redress those additional problems specifically hurting small business. Without reform, small businesses are projected to pay nearly $2.4 trillion over the next 10 years for health care costs, which in turn will reduce job growth, wages, and profitability.[7] For small businesses and their employees, reform on the scale of PPACA is expected to save significant costs and jobs, boost wages and profits, and ease or eliminate job lock.

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[7] *See* Jonathan Gruber, et al., *The Economic Impact of Healthcare Reform on Small Businesses* at pp. 9, 11, 14, 17, available at http://smallbusinessmajority.org/_pdf/SBM-economic_impact_061009.pdf.

Reform that controls health care costs will also help overall U.S. business competitiveness abroad.

To accomplish broad-based reform, the Act's "individual responsibility requirement" (minimum coverage requirement) is a key component specifically at issue here. Congress made several findings regarding the Act's minimum coverage requirement and the "substantial" adverse effects on interstate commerce that the requirement was enacted to correct. 42 U.S.C.A. § 18091(a)(1). Those findings most relevant to small businesses and the Act's constitutionality are highlighted below:

> **(2) The effects on the national economy and interstate commerce**
>
> The effects described in this paragraph are the following:
>
> **(A)** The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. **In the absence of the requirement, some individuals would make economic and financial decision to forgo health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.**
>
> * * *
>
> **(E) The economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured.** By significantly reducing

the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.

(F) The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. **This cost-shifting increases family premiums by on average over $1,000 a year.** By significantly reducing the number of the uninsured, **the requirement**, together with the other provisions of this Act, **will lower health insurance premiums.**

(G) 62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(H) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001, *et seq*.), the Public Health Service Act (42 U.S.C. 201, *et seq*.), and this Act, the Federal Government has a significant role in regulating health insurance. **The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement**

would undercut Federal regulation of the health insurance market.

(I) Under sections 2704 and 2705 of the Public Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. **By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.** The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(J) Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. **By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums.** The requirement is essential to creating effective health insurance markets that do not require

> underwriting and eliminate its associated administrative costs.

42 U.S.C.A. § 18091(a)(2)(emphasis added).

PPACA is part of an already "larger regulation" network. Subsections (2)(H), (I) and (J) specifically recognize this interconnected legal environment. Congress found adverse interstate commerce effects currently existing in health insurance and care delivery markets, the former primarily regulated through the employer-provided health insurance laws of the Employee Retirement Income Security Act (ERISA), and the latter significantly affected by the publicly financed health coverage system that exists under the Public Health Act. Together, these "larger regulation" environments constitute virtually all paid health care services provided in America. Congress enacted comprehensive legislation to fix these dysfunctional markets to make the entire health care system more affordable, both to private payers (employer-provided coverage) and public payers (the Federal, State and tribal Governments).

Subsections (2)(A), (E), (F) and (G) recognize the substantial financial risks to households and medical providers (many of whom are small businesses themselves) that occur when individuals attempt to "self-insure," later incur unexpectedly high medical treatment costs, and then cannot pay. These financial risks lead to increased lost productivity, excessive personal bankruptcies, and significant "cost-shifting" that all have substantial adverse effects on interstate commerce, particularly for small business.

Uninsured workers are more likely to delay medical treatment, which actually worsens their condition and results in more missed work. Since small businesses usually offer less or no health benefits, they suffer disproportionately from lost productivity.

In addition, medical costs are a factor in most bankruptcies, with uninsured persons being more at risk of becoming too indebted to pay for medical services. Excessive bankruptcies impair the collection of accounts receivable and critical revenue upon which small businesses rely to survive and compete. And excessive bankruptcies also squelch the entrepreneurial spirit, at least for a while, by discouraging the lending or investment of working capital from banks or venture capitalists.[8] Although bankruptcies burden companies of all sizes, they particularly impact small businesses that often have to extend credit to those without credit cards but have lesser ability to absorb bankrupted debts.

Finally, large amounts of uncompensated medical care by uninsureds, when aggregated, ultimately are cost-shifted to insureds in the form of higher premiums. Economic theory classifies the phenomenon of "cost-shifting" as a species of the "free rider" problem. Free riders are "actors who take more than their fair share of the benefits or do not shoulder

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[8] *See* Investopedia, *The Impact of Recession on Businesses*, available at http://www.investopedia.com/articles/economics/08/recession-affecting-business.asp#axzz1ib1ApxSE (2008) (discussing the impact of bankruptcies on businesses).

their fair share of the costs of their use of a resource."[9] To deal with the "free rider problem," the policymaker must decide how to "prevent" it or "limit its effects." *Id*. The problem is economic in nature and "particularly important and troublesome when considering goods or resources to which access cannot be excluded." *Id.* Typical government policy tools to deal with it and avoid reliance on volunteer donations include "taxes" or "conscription" (*i.e.*, mandatory rules). *Id.*

PPACA's regulatory model is based on enhancing health insurance markets, but its "larger regulat[ory]" scheme is designed to redress the entire health care delivery system and the free riding that specifically occurs in that system. The free rider problem in health care markets is akin to the overuse of the "commons."[10] In the health care context, typical choices identified to deal with such overuse include "taxes on families or health insurance premiums" or "rules" to ensure the continued availability of health care, at affordable prices for all, in the future. *Id*. Congress clearly chose to deal with the significant economic problem of "cost-shifting" by imposing a minimum coverage requirement, which is consistent with those policy choices available to governments when addressing free rider problems and the need to protect public "commons."

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[9] *See* WordiQ, "*Free rider problem – Definition*," available at: http://www.wordiq.com/definition/Free_rider_problem.

[10] *See* Wikipedia, "*The Commons*," available at: http://en.wikipedia.org/wiki/The_commons.

Furthermore, the reasons for health care free riding are complex. The Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, is part of the equation, but health care free riding cannot be wholly attributed to EMTALA because many health care providers and hospital systems are bound by professional ethics, religious or charitable institutional requirements, or state law to provide health care for free or at a very reduced prices to those who cannot afford required medical treatment and are uninsured. Ultimately, the source of such free riding is unimportant; Congress recognized in PPACA's findings that the problem has grown so severe that health insurance and care delivery markets are overly distorted due to cost-shifting's heavy toll on private payers of health care (increased premiums in employer-based insurance policies) and the public payer system (increased costs to the Federal and State Governments through programs such as Medicaid and Medicare). Congress reacted accordingly. Small and Main Street businesses who also desire maintaining the "common" good of affordable health care in America fully support Congress' choice through PPACA to protect it.

Interestingly, NFIB once espoused exactly what SBM and MSA believe to be the reasons that small businesses need the reforms enacted by Congress. The following quotes from NFIB's *Small Business Principles for Healthcare Reform* reinforce the interests of small businesses in America:

> **Our current system of health insurance and healthcare is financially unsustainable and threatens the health and financial security of the American**

people. Small-business owners and their employees are especially vulnerable to the weaknesses of our current system. . . . The resulting healthcare system would be:

> **Universal**: All Americans should have access to quality care and protection against catastrophic costs. A government safety net should enable the neediest to obtain coverage.
>
> Several reasons underlie our support for universal access to care. First, **lack of insurance is especially problematic for small businesses and their employees**. Second, **having millions of uninsured Americans distracts us from focusing on affordability, quality and comprehensiveness of care and coverage**. Third, **laws already provide some level of insurance for everyone, but coverage is expensive, inefficient and often inadequate - guaranteed access to emergency rooms is one example. Under this piecemeal coverage, costs fall arbitrarily and inequitably on individuals, providers, governments and businesses**.
>
> * * *
>
> **Private**: To the greatest extent possible, Americans should receive their health insurance and healthcare through the private sector. Care must be taken to minimize the extent to which governmental safety nets crowd out private insurance and care.
>
> * * *

> **Affordable**: Healthcare costs to individuals, providers, governments and businesses must be reasonable, predictable and controllable.
>
> * * *
>
> **Portable**: Americans should be able to move throughout the United States and change jobs without losing their health insurance.
>
> Our current health-insurance system locks people into jobs and localities. . . . **This phenomenon of job lock is not only a tragedy for the locked-in worker. [sic] It harms the overall economy by preventing workers from discovering their own entrepreneurial talents or accepting more productive jobs**. It creates a significant impediment to those who wish to leave positions as employees and start small businesses of their own.
>
> * * *
>
> **Efficient**: Healthcare policy should encourage an appropriate level of spending on health care. Laws, regulations and insurance arrangements should direct health care spending to those goods and services that will maximize health. **Adequate risk pools throughout the health care system are vital to accomplishing these goals**.[11]

Furthermore, past surveys of NFIB members have found majority support for an individual coverage

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[11] *See* NFIB's *Small Business Principles for Healthcare Reform*, available at http://www.nfib.com/Portals/0/PDF/healthcare/New-Principles-%28FINAL%29.pdf (emphasis added).

requirement similar to the one included in PPACA. For example, a health care survey of 1,654 NFIB members conducted by the NFIB Research Foundation in March/April 2007 and released in May 2007 found a majority of respondents supported an individual coverage requirement. A press release from NFIB dated May 22, 2007 about this survey included the following statement: "57 percent indicate a preference for individuals above a reasonable income level to be required to have health insurance or be able to prove financial responsibility."[12] Although NFIB challenges PPACA, the law addresses the concerns of small business owners. In addition, the law satisfies constitutional standards based on the reasons stated below.

II. The Patient Protection and Affordable Care Act is constitutional based on the Commerce Clause in conjunction with the Necessary and Proper Clause.

Congress possesses only those powers enumerated and delegated to it by the Constitution. *See* U.S. Const., Art. I, § 8. PPACA is based on Congress' power "[t]o regulate Commerce ... among the several States...." U.S. Const., Art. I, § 8, cl. 3. The Court groups Congress' Commerce Clause powers into three general categories of regulation that include: (1) the power to regulate the "channels of interstate commerce"; (2) the power to regulate and protect the "instrumentalities of interstate commerce"; and (3) the

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[12] *See* NFIB Releases Small Business Health-Care Survey Results (May 22, 2007), available at http://www.insurancenewsnet.com/article.aspx?a=top_lh&id=79862.

power to regulate "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). PPACA invokes the third kind of regulation. 42 U.S.C.A. § 18091(a)(1).

In this case, the Act's requirement that individuals obtain and maintain minimum health insurance coverage is specifically at issue. This provision is designed to redress, in part, large cost-shifting problems caused by uninsureds who inevitably consume health care services but frequently cannot fully pay for them. *See* 42 U.S.C.A. § 18091(a)(2)(F). The minimum coverage requirement should be upheld because it merely reflects a policy decision on how to regulate matters that plainly fall within Congress' purview under the Commerce Clause.

It is not in question that health insurance and health care both involve interstate commerce subject to federal regulation. This Court long ago recognized that insurance is within Congress' Commerce Clause authority. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In addition, PPACA is the latest law in a long line of expansive federal health care legislation based on the Commerce Clause. *See Florida ex rel. Atty. Gen. v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1302-03 (11th Cir. 2011)(citing Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104–191, 110 Stat. 1936 (1996); Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub.L. No. 99–272, 100 Stat. 82 (1986); Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93–406, 88 Stat. 829 (1974); Social Security Amendments of 1965, Pub.L. No. 89–97, 79 Stat. 286 (1965) (establishing Medicare and Medicaid); Federal

Food, Drug, and Cosmetic Act, Pub.L. No. 75–717, 52 Stat. 1040 (1938)). The minimum coverage requirement, in particular, targets cost-shifting forces that "substantially affect interstate commerce" relating to health insurance and health care that is fully consistent with the third category of Commerce Clause regulation.

PPACA's legislative findings actually document the substantial interstate commerce effects of cost-shifting. Congress found that $43 billion of uncompensated health care for the uninsured was cost-shifted to the insured through higher premiums. *See* 42 U.S.C.A. § 18091(a)(2)(F). These findings, of course, describe the problem generally and are not dispositive, but "particularized findings" or accuracy "in fact" are unnecessary for this Court to sustain the law. *See Raich*, 545 U.S. at 21-22. Rather, the Act satisfies constitutional standards if Congress had a "rational basis" for its conclusion that cost-shifting by uninsureds was substantially affecting interstate commerce. *See id*. PPACA meets this Court's "modest" rational basis threshold. *See id*.

Opponents of the Act complain because individuals must have health coverage despite not presently wanting or even needing health care or health insurance. The Act's challengers thus propose a clear cut limit on Congress's reach under the Commerce Clause that contrasts inactive from active market participants. This Court, however, has abandoned tests that "give controlling force to nomenclature." *Wickard v. Filburn*, 317 U.S. 111, 120 (1942). A strict inactive/active distinction is similarly too neat.

Furthermore, categorical line-drawing is fundamentally incompatible with this Court's modern Commerce Clause rubric. In assessing Congress' interstate commerce powers, the "criterion is necessarily one of degree and must be so defined." *Id*. at 123. A more flexible assessment, in line with this Court's standards, reveals that PPACA actually regulates market activity. The Act is based, in part, on legislative findings that uninsured persons, as a class, actively consume but usually cannot fully pay for health care services resulting in significant cost-shifting to insureds in the form of higher premiums. *See* 42 U.S.C.A. § 18091(a)(2)(F). This legislative finding has a "rational basis" and is accordingly sufficient to sustain the law. *See Raich*, 545 U.S. at 22.

Opponents of the Act object to Congress anticipating that all uninsured persons will inevitably consume health care without fully paying for it. Congress, however, is "entitled to foresee and to exercise its protective power to forestall" any "future and like dangers to interstate commerce" pursuant to its Commerce Clause authority. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937). Therefore, "recurring practices" that burden interstate commerce – such as cost-shifting by the uninsured – are plainly subject to regulation. *See id*. at 41.

Indeed, Congress is permitted to "regulate the entire class" when it "decides that the total incidence of a practice poses a threat to a national market." *See Raich*, 545 U.S. at 17. This concept applies here. Although *some* uninsured persons may never consume health care or may have the financial wherewithal to pay for it, these "individual instances" are of "no

consequence" because Congress has rationally determined that *most* uninsured persons consume health care without full compensation. *See id*. Congress is not required to legislate with "scientific exactitude" and the Court should not "excise" any "individual components" out of PPACA's larger regulatory scheme. *See id*. at 17, 21.

Based on *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000), the Act's challengers further object to class-wide regulation of uninsured persons that aggregates their substantial effects on interstate commerce. Those cases, however, involved narrow federal statutes that concerned areas of "traditional state regulation" such as crime and that had only "attenuated" connections to interstate commerce. *Morrison*, 529 U.S. at 598. In contrast, PPACA plainly regulates commercial and "economic" subject matter – health insurance and health care – that is well within Congress' established Commerce Clause authority. And the minimum coverage requirement redresses classic "economic" issues – specifically cost-shifting, which is a species of the free-rider problem – as part of the Act's larger regulatory scheme. These features critically distinguish PPACA from the laws at issue in *Lopez* and *Morrison*. The touchstone is whether the subject matter being regulated is "quintessentially economic." *See Raich*, 545 U.S. at 25. In this case, the economic and commercial character of PPACA and its minimum coverage requirement are "visible to the naked eye." *See id.* at 28-29 (quoting *Lopez,* 514 U.S. at 563). Therefore, the limits on "aggregation" that constrain Congress' Commerce Clause authority, as defined by *Lopez* and *Morrison*, are inapplicable here.

Finally, the Necessary and Proper Clause further supplements Congress' Commerce Clause powers to regulate uninsured persons. Through this provision, Congress may regulate even "noneconomic" subject matter that is "a necessary part of a more general regulation of interstate commerce." *See Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment)(citing *Lopez*, 514 U.S. at 561). Enhancing Congress' regulatory capability under the Necessary and Proper Clause is valid so long as the "means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power." *United States v. Comstock*, ___ U.S. ___, 130 S. Ct. 1949, 1957 (2010)(quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment)).

PPACA's objective to redress significant cost-shifting problems that are burdening interstate health care and health insurance markets is plainly a "legitimate end under the commerce power," and the minimum coverage requirement is "reasonably adapted" – if not essential – to remedy that economic drag. Congress has pursued health care reform that "builds upon and strengthens" the existing private employer-based health insurance system instead of greater government intervention, but it is self-evident that Congress' attempt to fix economic breakdowns in this current regime and to enhance it going forward will be undercut unless individuals are required to have insurance.

In sum, the Commerce Clause in conjunction with the Necessary and Proper Clause are sufficient to uphold the Act.

III. The Patient Protection and Affordable Care Act's regulatory model – in particular, requiring individuals to obtain and maintain minimum health insurance coverage – falls within constitutional boundaries.

In addition to attacking PPACA's commercial or economic character, the Act's challengers also contest PPACA's regulatory form and sweep. The Act's structure, however, is consistent with this Court's prior decisions and other valid federal legislation. In *Wickard v. Filburn*, this Court sustained federal quotas on wheat production despite the quotas "forcing some farmers into the market to buy what they could provide for themselves." 317 U.S. at 129. The Court further recognized that "stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon." *Id*. at 128. Other federal laws based on the Commerce Clause also do more than solely restrict or forbid conduct. *See Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011)(Davis, J. dissenting)(collecting statutes). With respect to the Act's goal of near-universal health coverage, *Gonzales v. Raich* upheld federal legislation on a similar scale intending universal market eradication of certain drugs.

Moreover, the Constitution does not limit Congress' Commerce Clause powers based on the form of regulation. Congress is empowered to "regulate" interstate commerce in general. From the time of our Framers to present, the term "regulate" has been defined as including the power to direct, which in turn has meant to order or command. *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011). This terminology

fairly encompasses – not excludes – the power to require minimum health coverage. The Constitution's text also nowhere limits the scope of Congress' Commerce powers. Indeed, a categorical bar forbidding Congress from regulating everybody in a particular fashion has the perverse effect of shrinking Congress' powers when combatting truly nation-wide problems.

PPACA's regulatory model reflects both the nature of the problem and its solution, not constitutional infirmities. The health care industry embraces nearly everybody. Although other industries – such as food and energy – have similar breadth, those industries are not experiencing similar free-rider problems creating market affordability and accessibility issues for so many Americans. Congress responded to this nation-wide problem with reforms that were equally national in scope.

The Act's challengers complain that PPACA's regulatory model has no "limiting principles" and is tantamount to impermissible "general police powers." This critique is without merit. *Lopez* and *Morrison* define the limits of Congress' Commerce Clause powers; PPACA does not trespass the constitutional boundaries set out by those decisions. The Act is, instead, simply a policy decision adopting a particular solution in response to a particular problem. This Court defers to Congress on such policymaking matters. The Act is accordingly in the hands of the people – not the courts – to judge and decide. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964)("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections,

are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."); *see also Wickard v. Filburn*, 317 U.S. at 120 ("[E]ffective restraints on its exercise must proceed from political rather than from judicial processes[.]").

That the wisdom of the Act lies in the hands of the people, is exactly how the Framers of the Constitution would interpret the enumerated powers of Article I, Section 8. In Federalist No. 31, speaking to Congress' delegated powers, Alexander Hamilton wrote:

> A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, **free from every other control but a regard to the public good and to the sense of the people**.
>
> * * *
>
> **The moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss and fairly put ourselves out of the reach of all reasoning. . . . Whatever may be the limits or modifications of the powers of the Union, it is easy to imagine an endless train of possible dangers; and by indulging an excess of jealousy and timidity, we may bring ourselves to a state of absolute skepticism and irresolution.** I repeat here what I have observed in substance in another place, that all observations founded

> upon the danger of usurpation ought to be referred to the composition of and structure of the government, not to the nature or extent of its powers.
>
> * * *
>
> **[I]t is by far the safest course . . . to confine our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped will always take care to preserve the constitutional equilibrium between the general and the State governments.**

Federalist No. 31, pp. 190, 192-193, *The Federalist Papers*, edited by C. Rossiter, Intro. & Notes, C. Kesler (published by Signet Classic, Div. of Penguin Group (USA), Inc., 2003 edition) (emphasis added) (hereafter "The Federalist Papers").

Hamilton clearly recognized that the final and best check on any alleged "usurpation" of a constitutionally delegated power lies in the people at the ballot box. He further recognized a slippery slope in conjecturing what may be the absolute limits of any delegated power, a slope that inexorably leads to a state of "skepticism and irresolution."

In Federalist No. 42, speaking to the Constitution's conferred powers, James Madison wrote:

> The powers included in [the regulation of intercourse with foreign nations] are those

which provide for the harmony and proper intercourse among the States.

. . . I shall confine myself to . . . the remaining powers . . ., to wit: **to regulate commerce among the several States** . . ..

The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. . . . **A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it would be foreseen that ways would be found to load the articles . . . during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances**; and both by that and a common knowledge of human affairs that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. . . .

. . . **Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care**.

Federalist No. 42, pp. 263-264 & 267, *The Federalist Papers* (emphasis added).

Madison was prescient in foreseeing that Congress may someday need to deal with national problems such as those that exist with health care in America. While no state-imposed "levies" or "duties" are the source of problems with health care, Madison foresaw "future contrivances" to arise where "consumers" in one state would be adversely impacted by practices existent in another. That is what Congress found in PPACA, and is not, therefore, "unworthy of [Congress'] care." Insured individuals nationwide are negatively affected by the problem of free riding and cost-shifting which occurs in states all across the country. This erodes the affordability of health coverage for everyone. Congress clearly has the constitutional authority to chart a nationally oriented, corrective course.

In Federalist No. 44, speaking to Congress' necessary and proper powers,

Madison also wrote:

> Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws . . .; **for in every new application of a general power, the *particular powers*, which are the means of attaining the object of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same**.
>
> . . . **No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are**

> **authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included**.
>
> . . . **If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution and exercise powers not warranted by its true meaning, I answer** . . .. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; **and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the ursurpers**.

Federalist No. 44, pp. 281-282, *The Federalist Papers* (emphasis added).

Madison's Federalist No. 44 reiterates the point made in Hamilton's Federalist No. 31: the "last resort" for an alleged "usurpation" of a delegated power is the "election of more faithful representatives." Of course, the judiciary must first construe and apply legislative acts, but where Congress has expressed specific legislative findings to support its nation-wide regulation of health care, its findings should not be set aside, but remedied, if at all, only by the electorate.

Federalist No. 44's axiom – "wherever the end is required, the means are authorized . . . [and] every particular power necessary for doing it is included" – predicts what the courts have long held: Congress possesses not only the authority to regulate interstate commerce, but the choice of "means" and "every

particular power necessary" to do it. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); *see also Gonzales v. Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment) ("where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective,'") (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-119 (1942)).

Congress chose the minimum coverage requirement to effectuate an "end" of fixing an unaffordable and discriminatory nation-wide health insurance and care delivery system. Choosing the "means" of this requirement is not constitutionally infirm, despite the lack of precedent for employing such "means." As Madison stated, "the means of attaining [an] object . . . necessarily var[ies] with th[e] object." Congress properly required minimum coverage as a reasonably adapted and necessary method of regulating a uniquely national health care problem.

The minimum coverage provision in PPACA is, therefore, perfectly constitutional as it is not prohibited and is consistent with the letter and spirit of Congress' enumerated powers in Article I, Section 8 of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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