No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
PETITIONERS
v.
STATES OF FLORIDA, ET AL.,
RESPONDENTS

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

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, PACIFIC LEGAL FOUNDATION, 14 OTHER ORGANIZATIONS, AND 333 STATE LEGISLATORS SUPPORTING RESPONDENTS (INDIVIDUAL MANDATE ISSUE)

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QUESTION PRESENTED

Can a limited government to whom a free people have delegated only certain enumerated powers commandeer that people into purchasing a product from a private business pursuant to its power to pass laws "necessary and proper for carrying into execution" the authority to "regulate Commerce . . . among the several States"?

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INTEREST OF *AMICI CURIAE*[1]

Amici groups are national and state think tanks and public-interest law firms dedicated to advancing individual liberty: the Cato Institute, Competitive Enterprise Institute, Pacific Legal Foundation, Committee for Justice, National Tax Limitation Committee, Arkansas Policy Foundation, Commonwealth Foundation (Pennsylvania), Illinois Policy Institute, John W. Pope Civitas Institute (North Carolina), Minnesota Free Market Institute at Center of the American Experiment, Mississippi Center for Public Policy, Montana Policy Institute, Nevada Policy Research Institute, North Carolina Institute for Constitutional Law, Rio Grande Foundation (New Mexico), Texas Conservative Coalition Research Institute, and Wyoming Liberty Group. By publishing reports, books, and articles, as well as through litigation, they have established themselves at the forefront of the movement for limited government and free markets.

Amici individuals are a bipartisan group of 333 legislators from 17 states (listed by name and state in the Appendix) that have not passed Health Care Freedom Acts.[2]

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[1] Pursuant to this Court's Rule 37.3(a), all parties have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, except that earlier versions of this brief that were filed in several lower courts were partly authored by Prof. Randy Barnett, who has since become of counsel to the private respondents here. No person or entity other than *amici* made a monetary contribution for the preparation or submission of this brief.

[2] Legislators from states that *have* enacted HCFAs have joined an *amicus* brief filed by the Goldwater Institute. The American

This case concerns *amici* because it represents the federal government's most egregious attempt to exceed its constitutional authority since at least the Second World War. *Amici* believe that "the Court either should stop saying that there is a meaningful limit on Congress's power or prove that it is so." *Thomas More Law Center v. Obama,* 651 F.3d 529, 555 (6th Cir. 2011) (Sutton, J., concurring in part).

SUMMARY OF ARGUMENT

The individual mandate[3] exceeds Congress's power to regulate interstate commerce under existing doctrine. The outermost bounds of this Court's Commerce Clause jurisprudence—the "substantial effects" doctrine—stop Congress from reaching intrastate non-economic activity regardless of its effect on the economy. Nor can Congress compel someone to engage in commerce, even if it purports to do so as part of a broader regulatory scheme.

The Constitution does not permit Congress to conscript citizens into economic transactions to remedy the admitted shortcomings—which the government usually terms "necessities"—of a hastily assembled piece of legislation. See Br. for State Petitioners on Severability at 2-4, *NFIB v. Sebelius*, Nos. 11-393 & 11-400 (recounting the "tortuous" legislative history of the Affordable Care Act). Although the Necessary

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Legislative Exchange Council has also filed a brief on behalf of its members (about 2,000 state legislators), some of whom have also individually joined this or the Goldwater brief.

[3] 26 U.S.C. § 5000(A). Also known as the "minimum coverage provision" of the Patient Protection and Affordable Care Act ("PPACA" or "ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

and Proper Clause allows Congress to execute its regulatory authority over interstate commerce, it is not a blank check permitting Congress to ignore constitutional limits by manufacturing necessities and commandeering citizens to do its bidding. "[Salutary] goals and creative drafting have never been sufficient to offset an absence of enumerated powers." *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 780 (E.D. Va. 2010), *vacated and remanded with instructions to dismiss on other grounds*, 656 F.3d 253 (4th Cir. 2011). The individual health insurance mandate is not constitutionally warranted simply because it is "necessary" to make other legislation function properly. Indeed, any law—"necessary" or otherwise—that purports to compel otherwise inactive citizens to engage in economic activity is unconstitutional.

While the government emphasizes the "uniqueness" of the healthcare market and the wisdom of the legislation, "this case is not about whether the Act is wise or unwise…in fact, it is not really about our healthcare system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government." *Florida v. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1263 (N.D. Fla.), *aff'd in relevant part*, 648 F.3d 1235 (11th Cir. 2011).

Moreover, what Congress is trying to do here is literally unprecedented, as recognized even by the lower courts that ruled for the government. "Congress has never exercised its commerce power in this way, and nothing suggests that this tradition reflects 220 years of self-restraint." *Thomas More Law Center*, 651 F.3d at 549 (Sutton, J., concurring). "The Government concedes the novelty of the mandate and the

lack of any doctrinal limiting principles." *Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011).

The Congressional Budget Office agrees: "The government has never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994). Nor has Congress ever before imposed on everyone a civil penalty for declining to participate in the market. And never before have courts had to consider such a breathtaking assertion of power under the Commerce Clause. Even in *Wickard v. Filburn*, 317 U.S. 111 (1942), the federal government claimed "merely" the power to regulate what farmers grew, not to *mandate* that people become farmers, much less to force people to purchase farm products.[4] Even if *not* purchasing health insurance is considered an "economic activity"—which of course would mean that every aspect of human life is economic activity—there is no constitutional warrant for Congress to force Americans to enter the marketplace to buy a particular good or service.

*A*lthough often conceived as a Commerce Clause doctrine, the substantial effects test actually applies the Necessary and Proper Clause in the context of the power to regulate commerce. And the Necessary and Proper Clause's grant of discretion to "carry into execution" an enumerated power does not imply a one-way ratchet towards unlimited federal power. In-

[4] So, too, in *Helvering v. Davis*, 301 U.S. 619 (1937), the government successfully defended the constitutionality of the Social Security Act in part by emphasizing that it did *not* compel economic activity. *See id.* at 621 (argument of Mr. Jackson) ("No compliance with any scheme of Federal regulation is involved.")

stead, the clause both augments *and limits* Congress's regulatory authority. Consequently, the outermost limits of the substantial effects doctrine are also the outermost limits of Congress' discretion in enforcing its power to regulate commerce. Because economic mandates do not fall within these boundaries, it is unconstitutional to impose them under the guise of regulating commerce.

Moreover, even if economic mandates are deemed "necessary," they are not a "proper" means of executing an enumerated power because they "commandeer" individuals and thereby avoid constitutionally designated avenues of political accountability. Economic mandates alter the constitutional structure in an unprecedented way and thus do not "consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The explicit purpose of Article I is to grant Congress certain enumerated powers and then strictly limit them. James Madison, the architect of our system of government, famously observed that "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *The Federalist* No. 51, at 322 (C. Rossiter, ed., 1961). Thus, Article I gives Congress only certain legislative powers "herein granted," Articles II and III check those powers, and the Tenth Amendment emphasizes that all other powers remain with those who breathed life into the new government in the first place: the sovereign "people of the United States." The Framers believed that limiting federal power, and reserving the "residual" power in the hands of the states and

the people would help "ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citation omitted).

Given the Framers' clear intent to establish a limited government of enumerated powers, it is unsurprising that this Court has consistently reaffirmed that the federal government does not enjoy a general police power. *See, e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 405; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824); *Kansas v. Colorado*, 206 U.S. 46, 87 (1907); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997). The Court should not now break with this well established and foundational American principle.

ARGUMENT

I. The Individual Mandate Exceeds the Scope of the Necessary and Proper Clause as Used to Execute the Power to Regulate Interstate Commerce Under the "Substantial Effects" Doctrine

A. The "Substantial Effects" Doctrine Applies the Necessary and Proper Clause to the Commerce Clause and Allows Congress to Use Its Regulatory Authority While Cabining That Authority

Since the New Deal, the Supreme Court has asked whether a particular "economic activity substantially affects interstate commerce" when considering whether Congress can regulate it. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005). The New Deal cases which first developed the "substantial effects" doctrine,

however, found the authority for that doctrine not in the Commerce Clause itself but in its execution via the Necessary and Proper Clause. Although often described as expanding the definition of the word "commerce," these cases show that the New Deal Court actually asked whether federal regulation of the activity in question was *a necessary and proper means* of exercising the regulatory power, because the activity substantially affects that commerce. "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id.* at 34 (Scalia, J., concurring) (citing *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838); *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *United States v. E. C. Knight Co.*, 156 U.S. 1, 39-40 (1895) (Harlan, J., dissenting)). Congress has never been allowed to go further.

In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court considered Congress's power to "prohibit the employment of workmen in the production of goods 'for interstate commerce' at other than prescribed wages and hours." *Id.* at 108. Instead of stretching the definition of "commerce," the Court focused on how congressional power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate." *Id.* at 118. The authorities cited for this proposition did not come from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)—the foundational Commerce Clause case cited

throughout *Darby*—but from *McCulloch,* the seminal Necessary and Proper Clause case.

A year later, in *Wickard,* the Court used the same reasoning: not redefining "commerce," but ruling that the challenged measures were necessary and proper for regulating commerce. Like *Darby*, *Wickard* explicitly relied on the Necessary and Proper Clause, citing *McCulloch*. *See,* 317 U.S. at 130 n.29. *Wickard* did not expand the Commerce Clause itself to allow Congress power to regulate intrastate activity that, when aggregated, substantially affects interstate commerce. Instead, "like *Darby*, *Wickard* is both a Commerce Clause and a Necessary and Proper Clause case[,]" with the substantial effects doctrine reaching Roscoe Filburn's wheat growing via the Necessary and Proper Clause. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L.L. 581, 594 (2011). Thus the aggregation principle can only apply to economic activities the regulation of which is necessary and proper to effectuating Congress's enumerated power to regulate commerce.

Accordingly, the Court in *Lopez* found that aggregation could apply only to *economic* activity: "Even *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not." 514 U.S. 549, 560 (1995). And in *United States v. Morrison*, the Court held that gender-motivated violence is not economic activity and thus that the substantial effects doctrine was inapplicable. 529 U.S. 598, 613 (2000). The Court thus clarified the substantial effects doctrine by setting the regulation of intrastate

economic activity (in certain contexts) as the absolute limit of federal power under the Commerce and Necessary and Proper Clauses. "Where *economic activity* substantially affects interstate commerce, legislation regulating *that activity* will be sustained." *Lopez*, 514 U.S. at 560 (emphasis added).

Conversely, non-economic activity (or, as in this case, inactivity) cannot be regulated merely because it affects interstate commerce through a "causal chain," or has, in the aggregate, "substantial effects on employment, production, transit, or consumption." *Morrison*, 529 U.S. at 599. The activity being regulated must have a "close and substantial relation to interstate commerce," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), and that relationship must be qualitative, not just quantitative. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 843 (4th Cir. 1999) (en banc), *aff'd sub nom Morrison, supra*; *accord, United States v. Bird*, 124 F.3d 667, 677 n.11 (5th Cir. 1997).

Adopting such a categorical distinction between economic and noneconomic activity allowed the Court to determine whether legislation is "necessary" under the Necessary and Proper Clause without involving it in complex, potentially insoluble evaluations of the "more or less of *necessity* or *utility*" of the challenged law. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), *in Hamilton: Writings* 619 (J. Freeman, ed., 2001). This distinction limits congressional power when regulating *intrastate economic activity* to activities closely connected to interstate commerce, thus withholding from Congress any unconstitutional police powers, *see*, *e.g.*, *Lopez*, 514 U.S. at 567, preserving the role of

states in the federalist system, and minimizing the degree of judicial involvement in utilitarian considerations that are outside the courts' expertise.

Since the New Deal, the Court has eschewed *fact-based* inquiries into the degree of means-end fit (unless a fundamental right is at stake). In *Lopez*, and again in *Morrison*, the Court instead adopted a judicially administrable *categorical* distinction between economic and non-economic activity. As the court below observed, abandoning this categorical rule would force courts to "sit in judgment over every economic mandate issued by Congress, determining whether the level of participation in the underlying market, the amount of cost-shifting, the unpredictability of need, or the strength of the moral imperative were enough to justify the mandate." *Florida*, 648 F.3d at 1296-97. Legislatures are more suited for that task, in just the way that courts are more suited to enforce the Constitution's principled limits on congressional power.

By limiting the substantial effects doctrine to economic activities, *Lopez* and *Morrison* preserved the constitutional scheme of limited and enumerated powers, drawing a judicially administrable categorical line beyond which Congress cannot go when choosing "necessary" means to execute its authority.

But if regulating intrastate *economic* activity can be a "necessary" means of regulating interstate commerce as that term is understood under the Necessary and Proper Clause, the obvious corollary is that regulating *non-economic* activity cannot be "necessary," regardless of its economic effects. And a power to regulate *inactivity* is even more remote from Congress's power over interstate commerce.

Most recently, in *Raich*, the Court found the cultivation of marijuana to be an economic activity—indeed, a type of "manufacture," 545 U.S. at 22—that Congress could prohibit as a necessary and proper means of exercising its commerce power. *Raich* explicitly adhered to the economic/non-economic distinction set out in *Lopez* and *Morrison*: "Our case law firmly establishes Congress's power to regulate purely local activities that are part of an *economic 'class of activities'* that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added).

Raich also rejected the government's contention that it was Angel Raich's or Roscoe Filburn's non-purchase of an interstate-traded commodity that subjected them to federal law. *See* Barnett, *supra*, at 602-03. Instead, the Court invoked the Webster's Dictionary definition of "economics"—"the production, distribution, and consumption of commodities," *Raich*, 545 U.S. at 25—and refused to adopt the government's sweeping theory that any activity that substitutes for a market activity is "economic." That rejected theory is akin to the one the government advances here: that probable participation in the market in the future constitutes economic activity now.

This Court's precedents are clear: Congress may reach non-commerce under its power to regulate commerce only via the Necessary and Proper Clause, and this executory power is categorically limited—indeed *must* be categorically limited to be judicially administrable—to the qualitatively distinct class of economic activity. In other words, Congress's regulatory authority extends only to certain *types* of activity, rather than to any activity (or inactivity) that passes some threshold *degree* of effect on interstate

commerce. The latter fact-based line would not be judicially administrable, would undermine the principle of enumerated powers, and would involve courts in economic balancing and speculation beyond their ken.

B. Compelling Activity Transcends the Necessary and Proper Clause's Limits on the Commerce Clause

This "Court has always described the commerce power as operating on already existing or ongoing activity." *Florida*, 648 F.3d at 1285. Indeed, no precedent allows Congress to *compel* activity in the guise of regulating commerce. Roscoe Filburn was actively growing wheat. *Wickard*, 317 U.S. at 114-15. The Jones & Laughlin Steel Corporation was voluntarily engaged in the economic activity of steelmaking. *Jones & Laughlin*, 301 U.S. at 26. The Civil Rights Era cases concerned parties that chose to engage in the economic activity of operating a restaurant, *Katzenbach*, 379 U.S. at 296, or a hotel, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). The *Raich* plaintiffs grew, processed, and consumed medicinal marijuana—all voluntary activities the Court characterized as "manufactur[ing]." 545 U.S. at 22.

These cases fall into two general categories. *Id.* at 35-38 (Scalia, J., concurring) (discussing the "two general circumstances" in which "the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce"). First, if persons voluntarily engage in economic activity, for example by undertaking a commercial endeavor, Congress can *regulate the manner* by which their activities are conducted. Such regulation of voluntary economic activity may include *conditional* mandates

such as recordkeeping requirements. The second category, exemplified by *Raich*, concerns Congress's power to *prohibit* a type of commerce altogether—a power the Court has recognized at least since *Champion v. Ames*, 188 U.S. 321 (1903). In *Raich*, the Court found that Congress may prohibit wholly intrastate instances of economic activity as a "necessary" means of prohibiting a type of interstate commerce.

Under either theory, however, Congress can regulate or prohibit *voluntary* economic actions, but cannot *force* people to undertake such actions—even if those actions would have economic consequences. The distinguishing characteristic between a legitimate regulation within the constitutional scheme of enumerated powers, and a limitless federal police power capable of compelling whatever behavior Congress sees fit, is whether a person can, in principle, avoid federal regulations by *choosing not to engage in the regulated activity—i.e.,* not engaging in an economic endeavor or obtaining contraband. *See Florida*, 648 F.3d at 1286 ("[T]he diverse fact patterns of *Wickard, South-Eastern Underwriters, Heart of Atlanta Motel, Lopez, Morrison*, and *Raich* share at least one commonality: they all involved attempts by Congress to regulate preexisting, freely chosen classes of activities."). No such option exists with regard to the individual mandate; it cannot be avoided in principle. It is not, therefore, a regulation of commercial activity, but an unprecedented command that individuals engage in commerce.

C. The *Comstock* Factors That Are the Most Recent Articulation of the Necessary and Proper Clause's Limits Weigh Against the Individual Mandate

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), this Court reiterated the limits of the Necessary and Proper Clause, noting that a law which "confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States" would not be necessary and proper. *Id.* at 1964 (quoting *Morrison*, 529 U.S. at 618). The *Comstock* Court upheld the federal civil commitment law at issue after weighing five factors: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in criminal prosecution, (3) the "sound reasons" for the statute given the government's public safety goal, (4) "the statute's accommodation of state interests" and (5) its narrow scope. *Id.* at 1965.

The Court avoided calling these factors a "test"; nor did it explain how they inter-relate, which weigh most heavily, or what to do when different factors point in different directions. *See* Ilya Shapiro & Trevor Burrus, *Not Necessarily Proper: Comstock's Errors and Limitations*, 61 Syracuse L. Rev. 413, 415 (2011). Nevertheless, most of these factors—the lack of a deep history of federal involvement, PPACA's failure to accommodate state interests, and its extraordinarily broad scope—weigh *against* the constitutionality of the individual mandate. *See* Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 Cato Sup. Ct. Rev. 239, 260-67 (2010) (assessing *Comstock*'s implications on PPACA litigation).

First, although the Necessary and Proper Clause is "broad," in that it gives Congress leeway to choose the means for executing legitimate ends, it is not a grant of potentially endless power. *McCulloch* held that only those means which are "within the scope of the constitution . . . which are not prohibited, [and which] consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) at 421. *Cf.* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of The Sweeping Clause,* 43 Duke L.J. 267, 297 (1993) ("executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights."). The breadth of the Necessary and Proper Clause thus should not be used as a consideration to further expand the federal reach in a manner that contradicts fundamental constitutional principles like federalism and enumerated powers. The "breadth of the Clause" does not vary from case to case; it is a constant.

Second, there is no "long history" of federal involvement here, unlike in *Comstock*. Not only is the individual mandate without constitutional parallel, but federal involvement in private health insurance is an entirely modern phenomenon. *See, e.g.,* Jeannie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy* 67 (1997) ("[T]he bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years.").

Third, the mandate does not accommodate state interests. The provision challenged in *Comstock* allowed states to assert authority over any individual civilly committed under it, and indeed to prevent federal detention at the outset. 130 S. Ct. at 1962-63.

The individual mandate, by contrast, does not allow states to assert authority or prevent the compulsory purchase of health insurance. Instead, it ejects states from their longstanding role as the primary authority for regulating this market. And with over half the states suing to have PPACA declared unconstitutional—and many enacting legislation challenging the individual mandate—it is clear that states do not believe their interests are being accommodated.

Finally, the individual mandate is not narrow in scope. It unavoidably applies to every resident American, excepting only the impoverished, and prescribes a blanket rule: buy insurance or pay a fine. It asserts federal authority over *not engaging* in any activity that has ultimate economic consequences—hardly a "narrow" proposition.

The individual mandate fails the *Comstock* multi-factor test and therefore cannot pass muster under the Necessary and Proper Clause.[5] More broadly, it conflicts with fundamental principles of limited federal power, intrudes on traditional state autonomy, and essentially converts Congress's power to regulate commerce into a generalized police power with no principled limit. The Constitution does not authorize such power either directly or by implication.

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[5] For more discussion of the *Comstock* factors as they apply here, see the Washington Legal Foundation's *amicus* brief.

II. The Individual Mandate Cannot Be Justified as an "Essential Part of a Broader Regulatory Scheme" Because Congress Cannot Regulate Inactivity

Unable to justify the individual mandate under existing doctrine, the government has resorted to a new theory: that the Necessary and Proper Clause authorizes Congress to *mandate* economic activity when doing so is an essential part of a broader regulatory scheme. In other words, while not itself a regulation of interstate commerce, or of intrastate economic activity—or even of intrastate *non*-economic activity—the individual mandate is a necessary and proper means of exercising the lawful ends of regulating the interstate health insurance industry.

The government contends that Congress can expand its own power by jerry-rigging a large legislative scheme and then repairing its gaps and fissures by further legislation that Congress lacks any enumerated authority to impose, thus "resort[ing] to the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause." *Printz v. United States*, 521 U.S. 898, 923 (1997). But in all the cases the government cites for this proposition, from *Darby* to *Hodel v. Indiana*, 452 U.S. 314 (1981), Congress only asserted power over individuals who were voluntarily engaged in economic activity, such as producing and shipping lumber, *Darby*, 312 U.S. at 108, or mining coal, *Hodel*, 452 U.S. at 318.

The government also relies on Justice Scalia's concurring opinion in *Raich*, which analyzed Congress's power under a broader regulatory scheme. Yet Justice Scalia only identified circumstances in which Congress may reach intrastate non-economic *activity*.

See Raich, 545 U.S. at 35 (Scalia, J., concurring) ("Our cases show that the regulation of intrastate *activities* may be necessary to and proper for the regulation of interstate commerce in two general circumstances." (emphasis added)). The first of these circumstances included the substantial effects doctrine, which is limited to reaching economic activity. The second is the proposition that Congress may reach "even non-economic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (emphasis added). This rationale does not justify expanding Congress's authority to allow it to compel economic activity.

A. Inactivity Is Not a Type of Activity

The government and the courts ruling in its favor have implicitly acknowledged that Congress can regulate only "activity" by redefining that word to include the making of an "economic decision" concerning how "the uninsured finance what they will consume in the market for health care services." Pet. Br. at 50; *see also Mead v. Holder*, 766 F. Supp. 2d 16, 36 (D.D.C. 2011) (activity/inactivity distinction is "pure semantics"; Congress can regulate any "mental activity, *i.e.,* decision-making," that has ultimate economic effects). Thus, simply abstaining from buying something—one of the infinite goods each of us is not currently buying—is recharacterized as the "activity" of forestalling a purchase (regardless of whether the non-activity is the result of a conscious decision or inertia) and becomes subject to federal regulation. Such linguistic alchemy has at least three weaknesses.

First, the categorical difference between activity and inactivity—or acts and omissions—is a genuine and long-respected one. *See, e.g., Prosser and Keeton*

on the Law of Torts § 56 at 373 (5th ed. 1984) ("there runs through much of the law a distinction between action and inaction."). It is a basic principle of tort law, for example, that one has no duty to act, and cannot generally be punished for nonfeasance, but has only a duty to act reasonably, and not commit misfeasance. *See*, *e.g.*, *McFarlane v. Sheridan Square Press*, *Inc.*, 91 F.3d 1501, 1511 (D.C. Cir. 1996). So too in criminal law one cannot generally be convicted without engaging in some activity. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) (the law "does not punish mere thought"). The categorical distinction between activity and inactivity is intuitively obvious and understood by the ordinary person. It is also the foundation of moral philosophy relevant to debates over healthcare law and policy. *See, e.g.,* Philippa Foot, *Killing and Letting Die, in Moral Dilemmas* 78-87 (2002) (distinguishing between prohibited killing and allowable withholding of care).

Second, while *activity* means engaging in a particular, definite act, *inactivity* means *not* engaging in a literally infinite set of acts. At any instant, there are innumerable economic transactions into which one is *not* entering. To allow Congress discretionary power to impose compulsory economic mandates within this infinite set of *inactions* would amount to granting it a plenary and unlimited police power of the sort the Constitution specifically withholds. *See Morrison*, 529 U.S. at 618-19 ("The Constitution . . . withhold[s] from Congress a plenary police power") (citing *Lopez*, 514 U.S. at 566); *id.* at 584-85 ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.") (Thomas, J., concurring).

Finally, if inaction is deemed "economic" due to its economic effects, then the categorical distinction between economic and non-economic activity established in *Lopez* and reaffirmed in *Morrison* and *Raich* would collapse. Indeed, *Lopez* and *Morrison* stand for the proposition that Congress may not regulate intrastate non-economic activities even if, in the aggregate, they have substantial effects on interstate commerce. But *any* class of activity or inactivity, in the aggregate, can be said to have *some* economic consequences. To redefine inactivity as economic activity because of its effects would destroy the line the Supreme Court has time and again drawn between the intrastate economic activity that Congress may reach and the intrastate non-economic activity it may not. This Court should not so undermine its precedent now governing the scope of the Commerce *and* Necessary and Proper Clauses.

B. The Activity-Based Categorical Distinction Provides Judicially Manageable Standards with a Minimum of Judicial Policymaking

There must be some principled limit to Congress's regulatory authority to prevent it from laying claim to a general police power. The most obvious line to draw is one between regulating *activity*—whether economic or non-economic—and *inactivity*. Such a categorical distinction provides a judicially administrable limiting principle with a minimum of judicial intrusion into complicated political or economic analysis. It is also both consistent with and implied by existing precedent. In *Lopez*, the Court observed that Congress can regulate intrastate non-economic activity when doing so is "an essential part of a larger

regulation of economic *activity*, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." 514 U.S. at 561 (emphasis added). In *Raich*, Justice Scalia proposed that "Congress may regulate even non-economic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce." 545 U.S. at 37 (emphasis added). Indeed, in his *Raich* opinion, Justice Scalia used the word "activity" or "activities" 42 times. *See* Jason Mazzone, *Can Congress Force You to Be Healthy?* N.Y. Times, Dec. 16, 2010, at A39.

That the government agrees that "activity" is a categorical prerequisite for federal power under the Commerce and Necessary and Proper Clauses is implied by the many pages of its individual mandate brief it expends trying to turn the inactivity of not buying something into some sort of activity. Thus the uninsured are "*active* in the market for health care" and the mandate "merely regulates how individuals finance and pay for that *active* participation." Pet. Br. at 50 (emphasis added).

But this verbal manipulation of the category of "economic activity" eliminates the principled limit on congressional power under the Necessary and Proper Clause this Court has devised. Virtually all forms of insurance represent "timing" decisions—paying up front for burial costs, loss of life, disability, supplemental income, credit default, business interruption, etc. *See Florida*, 648 F.3d at 1296 (discussing cost-shifting and timing decisions in all insurance markets). Only a government of unbounded powers could mandate that every American insure against such risks. *Id.* ("[T]here is no reason why Congress could not similarly compel Americans to insure against any

number of unforeseeable but serious risks."). The government's fact-based "unique market" plea thus provides no *legal* limit on federal authority, instead inviting standardless judicial examination of "how necessary" a congressional action is. Courts should not be drawn into factual determinations of whether a particular market is "unique" or judgment calls of whether it "makes sense" to require that a given product be paid for at one time or another.

The government essentially asks this Court to predicate the application of our constitutionally limited scheme of powers on a factual assessment of the relationship among those who pre-purchase healthcare, those who go without insurance, and those who cost-shift their healthcare consumption. But these considerations do not provide a judicially administrable line by which future courts can enforce limits on congressional power: They demand instead precisely the sort of inquiry into the "more or less necessity" of a measure that this Court has always rejected as outside the judiciary's proper sphere. Courts must "identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis)." *Raich*, 545 U.S at 47-48 (O'Connor, J., dissenting).

Limiting Congress to *regulating or prohibiting* activity under *both* the "substantial effects" and the "essential to a broader regulatory scheme" doctrines would serve the same general purpose as the categorical distinction between economic and non-economic activity: ensuring that uses of the Necessary and Proper Clause to execute the commerce power are truly incidental to that power and not re-

mote, or mere "pretext[s]" for "the accomplishment of objects not entrusted to the government." *McCulloch,* 17 U.S. (4 Wheat.) at 423. While *all* categorical lines are imperfect, some such line must be drawn to preserve Article I's structure of enumerated and thus limited powers. *See Lopez*, 514 U.S. at 575 (Kennedy, J., concurring) ("Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances."). The government's theory here would effectively demolish that structure while offering no suitable replacement, which is constitutionally unacceptable.

Denying Congress the power to *mandate*, as distinct from regulate or prohibit, activity—whether economic or not—by contrast, requires no such judicial policymaking and would affect no other existing law. Congress could have reformed the healthcare system in many ways—including even a Medicare-for-all "single payer" scheme—that would have been legally unassailable under existing doctrine. That it chose a scheme so flawed as to require otherwise unconstitutional patches to make it function does not make those "essential" provisions constitutional.

III. The Individual Mandate is Not "Proper" Under the Necessary and Proper Clause Because It Constitutes an Unconstitutional Commandeering of the People

A. The Constitution Creates a Federal System That Recognizes and Protects Both State and Popular Sovereignty

Even if this Court agrees with the government that mandating activity is *necessary* to Congress's regulation of interstate commerce, it can still hold the action *improper* because people are being commandeered in a manner that violates their sovereignty and avoids political accountability.

In two cases presenting then-unprecedented assertions of power under the Commerce Clause, this Court stated that Congress cannot use this power to mandate or "commandeer" state legislatures and executive officers. *Printz v. United States,* 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Such commandeering is "fundamentally incompatible with our constitutional system of dual sovereignty," and therefore improper under our federalist system. *Printz*, 521 U.S. at 935. That is, "residual state sovereignty" was woven into the fabric of the Constitution and is "implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Id.* at 919. Underscoring the enumeration of powers in Article I, Section 8, is the Tenth Amendment, which reiterates that the Constitution preserves state and popular sovereignty by limiting Congress's power. *Id.* Thus, the mandate struck down in *Printz*, even if necessary, could not be justified under the Necessary and Proper Clause: "When a 'la[w]…for carrying into

Execution' the Commerce Clause violates the principle of state sovereignty reflected in" the Tenth Amendment and other constitutional provisions, "it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'" *Id.* at 923-24 (quoting U.S. Const. art. I, § 8, cl. 18) (emphasis added).

The Tenth Amendment thus recognizes the existence of multiple sovereigns, of which the *people* are one: "The powers not delegated by the Constitution to the United States, nor prohibited by it to the states, are reserved to the states respectively, *or to the people*." U.S. Const. amend. X (emphasis added). In this way, the Constitution protects not just state sovereignty, but also popular sovereignty. Just as mandating that states legislatures and executive officials take action is improper "commandeering," so too is mandating that individual citizens enter into transactions with private companies.

As Chief Justice John Jay noted in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471-72 (1793), the people are "truly the sovereigns of the country," and elected officials merely their deputies, exercising delegated authority. Founding Father James Wilson agreed, recognizing that sovereignty starts with the individual: "If one free man, *an original sovereign*, may do all this; why may not an aggregate of free men, *a collection of original sovereigns*, do this likewise?" *Id.* at 456 (emphasis added). Although the Eleventh Amendment reversed the outcome of *Chisholm* and the Supreme Court interpreted that amendment as guaranteeing certain types of state sovereign immunity, this Court has never repudiated the priority of popular sovereignty. Instead, as recently as last term, this Court strongly endorsed

"[f]ederalism as secur[ing] the freedom of the individual," and "protect[ing] the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."); *accord Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) ("In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.").

B. Congress Can Intrude on State and Popular Sovereignty Only for Certain Limited Purposes in Certain Circumscribed Ways

The Constitution does allow the federal government to intrude on state and popular sovereignty by commandeering states and individuals for certain limited purposes in certain circumscribed ways. Comparing permissible with impermissible instances of commandeering can help sketch the outer limits of this dangerous power.

1. Commandeering is constitutional only when it is textually based or when it relates to the functioning of the Republic or the duties of citizenship.

The few examples of constitutional commandeering are instructive for the exceptional occasions when commandeering is allowed.

State officials can be called on to carry out explicit constitutional duties. In the words of Justice Story,

"The executive authority of the several states may be often called upon to exert Powers or allow Rights given by the Constitution," such as temporarily filling vacant congressional seats or surrendering fugitives from justice. Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1839 (1833).

Similarly, the few legal mandates imposed on the people by the federal government are either implied by specific constitutional clauses—such as responding to censuses, U.S. Const. art. I, § 2, cl. 3, serving on juries, U.S. Const. amend. VI & VII, or paying income taxes, U.S. Const. amend. XVI—or derive from the fundamental preexisting duties that citizens owe that government. *See*, *e.g.*, *Selective Draft Law Cases*, 245 U.S. 366, 378, 390 (1918) (relying on the "supreme and noble duty of contributing to the defense of the rights and honor of the nation" to reject a Thirteenth Amendment claim).

Not only are the instances of constitutional commandeering rare and carefully circumscribed, but the Constitution reflects an *anti*-commandeering principle in various other provisions. For example, people may not be mandated to quarter soldiers in their homes in peacetime, testify against themselves, labor for another, or relinquish unenumerated rights. U.S. Const. amends. III, V, IX, XIII. There is not even a mandatory duty to vote.

U.S. citizens are not owned by their government and cannot be presumed to be subject to an indefinite command by federal agents. There is certainly no preexisting "supreme and noble duty" to engage in economic activity whenever doing so would be convenient to national regulatory schemes. To hold otherwise would be to deprive Americans of the residual

sovereignty recognized in the Tenth Amendment and make them the servants, rather than the masters, of Congress. *Cf. The Federalist* No. 78 *supra*, at 467 (Alexander Hamilton) ("[to say] that the legislative body are themselves the constitutional judges of their own powers" would "be to affirm that the deputy is greater than the principal; that the servant is above his master.").

2. The individual mandate's commandeering of citizens intrudes on popular sovereignty and allows Congress to avoid the Constitution's call for political accountability and transparent budgeting.

New York and *Printz* expressed deep concerns that allowing Congress to commandeer state legislatures and officials would encourage it do so to avoid political accountability. As Justice O'Connor explained in *New York*, mandates on states are improper because, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. Similarly, the *Printz* Court found it significant that, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." 521 U.S. at 930.

These same accountability concerns are even more present here. Unlike the laws addressed by *New York* and *Printz*, PPACA is one of the largest, most politi-

cally contentious, and most expensive laws ever enacted. Congress realized the negative political repercussions of such legislation and thus tried to diffuse political accountability across a range of public and private actors. Yet the Constitution was designed to direct congressional action through politically accountable channels, as illustrated by the Origination Clause, U.S. Const. art. I, § 7, cl. 1, and the Statement and Account Clause, U.S. Const. art. I, § 9, cl. 7. The individual mandate avoids such channels and thus does not "consist with the letter and spirit of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

a. The Origination Clause ensures that mandated wealth transfers are passed through the most politically accountable house of Congress.

The generation of Americans that fought against taxation without representation was understandably wary of government's power to take wealth. To protect against the kind of taxing abuses that helped bring about the American Revolution, the Constitution thus requires that "All Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7, cl. 1. For many at the Constitutional Convention, it was so important for the taxing power to be closely accountable to the people that omitting the clause could have derailed the entire endeavor. J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 Tulsa L. J. 165, 170 (1987).

As Convention Delegate Elbridge Gerry noted, "[t]axation and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall

meddle with their purses." 4 *Debates in the Several State Conventions* 416 (J. Elliot, ed. 1836). Similarly, Madison wrote: "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government. They, in a word, hold the purse . . . . This power over the purse may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people." *The Federalist*, No. 58 *supra*, at 359.

Although *amici* do not argue that the Affordable Care Act violates the Origination Clause, that clause should be recognized for the principle it represents: the Framers' concern that laws mandating wealth transfers and exactions should be the most accountable to the people. If commandeering the people through the individual mandate is allowed, then "Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*, 521 U.S. at 930. Instead, they can simply commandeer individuals into economic transactions and claim they did not raise taxes. Commandeering the people in this fashion creates constitutional concerns very similar to those recognized in *Printz*.

Having granted the federal government the power to mandate that citizens give up some of their wealth for the support of the general government, the delegates to the Convention placed that power in the House so as to best check that power by popular sovereignty. Yet the individual mandate allows Congress (and the president) to escape political accountability for what would otherwise be a tax increase on persons making less than $250,000 per year by com-

pelling them to make payments directly to private companies rather than to the U.S. Treasury. That evasion of political accountability explains why the mandate was formulated as a regulatory "requirement" enforced by a "penalty."

b. The Statement and Account Clause works with the Origination Clause to ensure that the people can accurately assess how much wealth is being extracted from them.

The Origination Clause would be largely useless without a requirement that budgetary information be accurately kept and timely published. Article I, Section 9, Clause 7 thus requires "a regular Statement and Account of the Receipts and Expenditures of all public Money [to] be published from time to time." According to Justice Story, this clause makes Congress's "responsibility complete and perfect" by ensuring "that the people may know, what money is expended, for what purposes, and by what authority." 3 *Commentaries* § 1342.

Congress tried to avoid this clause's requirements and, more importantly with regard to PPACA, to thwart the Constitution's underlying principle of accountability. Although the Act includes many taxes and fees, much of its total cost will be laid on private individuals, as citizens are commandeered to purchase health insurance many do not want and cannot afford. Through clever political machinations, these costs are largely kept off the books.

In 1994, President Clinton introduced a major healthcare reform proposal that included many similarities to PPACA, most notably an individual health insurance mandate. *See* Ezra Klein, *The Number-*

Cruncher-in-Chief, The American Prospect, Jan. 14, 2009, at 17. The Clinton proposal was unpopular in part because the Congressional Budget Office decided to include in the budget the costs incurred by those individuals. Robert Pear, *The Clinton Budget: Health Care; Congress's Budget Office May Deal New Blow to Clinton Plan*, N.Y. Times, Feb. 8, 1994, *available at* http://www.nytimes.com/1994/02/08/us/clinton-budget-health-care-congress-s-budget-office-may-deal-new-blow-clinton.html. The CBO report galvanized the bill's opponents, who called it a "Federal takeover of health care and a mammoth tax hike to boot." *Propagandizing a Health Report*, N.Y. Times, Feb. 10, 1994, at A22.

Fifteen years later, on the eve of PPACA's enactment, the CBO again analyzed how the individual mandate would be treated for budgeting purposes. CBO, *The Budgetary Treatment of Proposals to Change the Nation's Health Insurance System* 3 (2009). Specifically, the CBO asked whether "cash transactions between private entities—in which the funds do not pass through the U.S. Treasury—[could] be reflected in the federal budget" and whether the mandate could "justify inclusion in the budget of the private-sector costs of the mandated activity." *Id.* It concluded that the budget should include private expenditures when a "nominally private entity is acting as an agent of the government in carrying out a federal program." *Id.* The important question is whether the federal controls "mak[e] health insurance an essentially governmental program, tightly controlled by the federal government with little choice available to those who offer and buy health insurance." *Id.* at 4.

In a subsequent memo issued just 11 days before PPACA was passed, the CBO "determined that setting minimum MLRs[6] under the PPACA at 80 percent or lower for the individual and small-group markets or at 85 percent or lower for the large group market would not cause CBO to consider transactions in those markets as part of the federal budget." CBO, *Budgetary Treatment of Proposals to Regulate Medical Loss Ratios* 2 (2009). As enacted, PPACA mandates these *exact* MLRs. PPACA § 1001 (adding § 2718(b)(1)(A)(i)-(ii) to the Public Health Service Act). The federal budget as interpreted by the CBO thus does not reflect the commandeered-citizen expenditures in the total cost of PPACA.

Amici do not ask this Court to enforce the Statement and Account Clause, except insofar as invalidating the novel power to mandate economic activity would deprive Congress of a new way to evade the accountability imposed by this Clause. Nor do we have a view on the proper method of accounting for the CBO. We simply ask this Court to view the forgoing information in light of the entire circumstances surrounding PPACA, and with the same concern for the abuses of commandeering expressed in *New York*, *Printz*, *McCulloch*, and, ultimately, the Constitution.

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[6] Medical Loss Ratios: the proportion of premium dollars that an insurer spends on healthcare costs rather than administrative or other costs.

C. If Congress is Allowed to Avoid Both Political Accountability and Courts' Enforcement of the Necessary and Proper Clause's Limits, It Will Improperly Define the Limits of its Own Power

By permitting the unconstitutional commandeering of citizens, the individual mandate crosses the fundamental line between limited, accountable constitutional government and unlimited power cabined only by Congress's political will—which is to say, not cabined at all. Congress's "political will" often directs it to the path of least political resistance, which will often be the path of least political accountability. If Congress can mandate whatever behavior it believes appropriate, without a principled constitutional limit, Congress becomes the sole judge of its powers, contrary to the Constitution.

In *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), for example, this Court rejected the proposition that Congress is the sole arbiter of what acts are necessary and proper to carrying out its own enumerated powers. To admit that Congress has such unreviewable discretion,

> and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to [be "necessary and proper"], would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers.... It would obliterate every criterion which this court, speaking through the venerated Chief Justice [Marshall] in [*McCulloch*], established

> for the determination of the question whether legislative acts are constitutional or unconstitutional.

Id. at 617-18.

If the word "proper" is more than dead letter, it must at least mean that acts that destroy the very purpose of Article I—to enumerate and thus limit Congress's powers—are improper. If the federal power to enact economic mandates is upheld, Congress would be free to require *anything* that is part of a national regulatory plan and to then hide those costs from the American public. "If the commerce power permits Congress to force individuals to enter whatever markets it chooses, any remaining hold on national power will evaporate, leaving future limits to the whims of legislative restraint, the epitome of a system *without* restrictions, balance or any other constraints on power." *Thomas More Law Center*, 651 F.3d at 549 (Sutton, J.). "Indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause." *Seven-Sky*, 661 F.3d at 14-15.

Outside of explicit constitutional authority or a preexisting duty of citizenship, imposing "economic mandates" on people is improper, both in the lay and constitutional senses of that word. Allowing Congress to exercise such power would convert it from a government of delegated powers into one of general and unlimited authority, and would reverse the relationship of American citizens to their government.

CONCLUSION

For the first time, the federal government has imposed a mandate not derived from specific constitutional clauses or duties of citizenship. Such mandates cannot be justified by existing doctrines defining and limiting Congress's powers. Upholding the power to impose them "would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution limits federal power." Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—and Pose Serious Challenges*, 29 Health Affairs 1229, 1232 (June 2010).

In sum, there is no "generally applicable, judicially enforceable limiting principle that would . . . uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers." *Florida*, 648 F. 3d at 1328. Unless this Court wishes to make federal power boundless—a result contrary to the Constitution's text, structure, and history—it should affirm the judgment below.

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APPENDIX

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Sen. Jonathan Dismang
Sen. Jake Files
Sen. Bruce Holland
Sen. Jeremy Hutchinson
Sen. Missy Irvin
Sen. Johnny Key
Sen. Michael Lamoureux
Sen. Jason Rapert
Sen. Bill Sample
Sen. Eddie Joe Williams
Rep. Denny Altes
Rep. Duncan Baird
Rep. Jonathan Barnett
Rep. Nate Bell
Rep. Lori Benedict
Rep. Mark Biviano
Rep. David Branscum
Rep. John Burris
Rep. Les Carnine
Rep. Davy Carter
Rep. Ann Clemmer
Rep. Charlie Collins
Rep. Linda Collins-Smith
Rep. Bruce Cozart
Rep. Robert Dale
Rep. Gary Deffenbaugh
Rep. Jane English
Rep. Jon Eubanks
Rep. Ed Garner
Rep. Jeremy Gillam
Rep. Kim Hammer
Rep. Justin Harris
Rep. Prissy Hickerson
Rep. Debbie Hobbs
Rep. Karen Hopper
Rep. Jon Hubbard
Rep. Donna Hutchinson
Rep. Lane Jean
Rep. Josh Johnston
Rep. Allen Kerr
Rep. Bryan King
Rep. Andrea Lea
Rep. Kelley Linck
Rep. Stephanie Malone
Rep. Loy Mauch
Rep. Andy Mayberry
Rep. David Meeks
Rep. Stephen Meeks
Rep. Terry Rice
Rep. David Sanders
Rep. Matt Sheperd
Rep. Mary Lou Slinkard
Rep. Gary Stubblefield
Rep. Tim Summers
Rep. Bruce Westerman
Rep. Jon Woods

Illinois
Rep. Joe Sosnowski

Iowa
Rep. Erik Helland

Kentucky
Sen. Joe Bowen
Sen. Tom Buford
Sen. Jared Carpenter
Sen. Julie Denton
Sen. Carroll Gibson
Sen. David Givens
Sen. Ernie Harris
Sen. Jimmy Higdon
Sen. Paul Hornback
Sen. Tom Jensen
Sen. Alice Forgy Kerr
Sen. Bob Leeper
Sen. Vernie McGaha
Sen. Dan Seum
Sen. John Schickel
Sen. Brandon Smith
Sen. Katie Stine
Sen. Robert Stivers II
Sen. Damon Thayer
Sen. Jack Westwood
Sen. David L. Williams
Sen. Charles M. Wilson
Sen. Ken Winters
Rep. Kevin D. Bratcher
Rep. Regina Petrey Bunch
Rep. Dwight D. Butler
Rep. John "Bam" Carney
Rep. Tim Couch
Rep. Ron Crimm
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Rep. J. Stan Lee
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Rep. Lonnie Napier
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Rep. Ben Waide
Rep. Alecia Webb-Edgington
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Rep. Jill K. York

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Rep. Jonathan McKane

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Del. Joe Boteler III
Del. Addie Eckardt
Del. Bill Frank

Del. Jeannie Haddaway-Riccio
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Del. Wade Kach
Del. Susan McComas
Del. Anthony J. O'Donnell
Del. Charles Otto
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Del. Justin Ready
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Asm. Gary Chiusano
Asm. Alison Littell McHose

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Sen. Austin Allran

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Rep. Barbara Bailey
Rep. Vincent Buys
Rep. Cathy Dahlquist
Rep. Susan Fagan
Rep. Bill Hinkle
Rep. Shelly Short