No. 11-398

In the
Supreme Court of the United States

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

v.

STATE OF FLORIDA, ET AL.,
Respondents.

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

BRIEF FOR STATE RESPONDENTS ON THE MINIMUM COVERAGE PROVISION

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QUESTION PRESENTED

The question presented is whether the minimum coverage provision of the Affordable Care Act exceeds Congress' powers under Article I of the Constitution.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants/cross-appellees below, are the U.S. Department of Health & Human Services; Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services; the U.S. Department of Treasury; Timothy F. Geithner, Secretary, U.S. Department of Treasury; the U.S. Department of Labor; and Hilda L. Solis, Secretary, U.S. Department of Labor.

The State Respondents, who were the appellees/cross-appellants below, are 26 States: Florida, by and through Attorney General Pam Bondi; South Carolina, by and through Attorney General Alan Wilson; Nebraska, by and through Attorney General Jon Bruning; Texas, by and through Attorney General Greg Abbott; Utah, by and through Attorney General Mark L. Shurtleff; Louisiana, by and through Attorney General James D. "Buddy" Caldwell; Alabama, by and through Attorney General Luther Strange; Attorney General Bill Schuette, on behalf of the People of Michigan; Colorado, by and through Attorney General John W. Suthers; Pennsylvania, by and through Governor Thomas W. Corbett, Jr., and Attorney General Linda L. Kelly; Washington, by and through Attorney General Robert M. McKenna; Idaho, by and through Attorney General Lawrence G. Wasden; South Dakota, by and through Attorney General Marty J. Jackley; Indiana, by and through Attorney General Gregory F. Zoeller; North Dakota, by and through Attorney General Wayne Stenehjem; Mississippi, by and through Governor Phil Bryant; Arizona, by and through Governor Janice K. Brewer and Attorney General Thomas C. Horne; Nevada, by and through

Governor Brian Sandoval; Georgia, by and through Attorney General Samuel S. Olens; Alaska, by and through Attorney General Michael C. Geraghty; Ohio, by and through Attorney General Michael DeWine; Kansas, by and through Attorney General Derek Schmidt; Wyoming, by and through Governor Matthew H. Mead; Wisconsin, by and through Attorney General J.B. Van Hollen; Maine, by and through Attorney General William J. Schneider; and Governor Terry E. Branstad, on behalf of the People of Iowa. The National Federation of Independent Business, Kaj Ahlburg, and Mary Brown are also Respondents, and were also appellees below. Individuals Dana Grimes and David Klemencic were also made Respondents by this Court's order of January 17, 2012.

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INTRODUCTION

The individual mandate rests on a claim of federal power that is both unprecedented and unbounded: the power to compel individuals to engage in commerce in order more effectively to regulate commerce. This asserted power does not exist. If Congress really had this remarkable authority, it would not have waited 220 years to exercise it. If this power really existed, both our Constitution and our constitutional history would look fundamentally different. We would not have a federal government with limited and enumerated powers, or States that continue to enjoy dignity and residual sovereignty. The extraordinary power that the federal government claims here is simply incompatible with our founding document.

The Constitution protects and promotes individual liberty, while the mandate's threat to liberty is obvious. The power to compel a person to enter into an unwanted commercial relationship is not some modest step necessary and proper to perfect Congress' authority to regulate existing commercial intercourse. It is a revolution in the relationship between the central government and the governed.

The Constitution grants the federal government only limited and enumerated powers and reserves the plenary police power to the States. There is nothing limited about the federal power asserted here. Given the breadth of the modern conception of commerce, there is almost no decision that Congress could not label "economic" and thereby compel under the federal government's theory. There is nothing

left of the residual authority reserved to the States if Congress really has the power claimed.

Finally, the Constitution divides and limits power to ensure accountability. Legislation, especially legislation raising taxes, is supposed to be difficult to pass. Those subjected to costly new regulations are expected to object. But if taxes can be disguised as mandates to enter into unwanted transactions and the regulated enticed by the promise of expanded business via those compelled transactions, the normal democratic process cannot perform its vital and intended limiting function.

By checking this first assertion of this unbounded power, this Court will endanger no other legislation. Nor will it imperil health care policy, as all agree that there are ample constitutional—though perhaps not politically feasible—alternatives to the mandate. However, by making clear that this uncabined authority is not among the limited and enumerated powers granted the federal government, this Court will preserve our basic constitutional structure and the individual liberty, state sovereignty, and government accountability it guarantees.

STATEMENT OF THE CASE

A. The Individual Mandate

The Patient Protection and Affordable Care Act (the "ACA" or "Act") imposes new and substantial obligations on every corner of society, from individuals to insurers to employers to States. Those obligations are designed to work together to expand both the demand for and the supply of health insurance, so as to achieve Congress' ultimate goal of

"near-universal" health insurance coverage. ACA § 1501(a)(2)(D).[1]

The centerpiece of the ACA and its goal of near-universal health insurance coverage is an unprecedented mandate that nearly every individual, "just for being alive and residing in the United States," Pet. App. 319a, must maintain health insurance at all times. In a provision entitled "Requirement to maintain minimum essential coverage," Congress commanded that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." ACA § 1501(b); 26 U.S.C.A. § 5000A(a). To be clear, "applicable individual" is just the ACA's legalistic and vaguely Orwellian way of referring to virtually every human being lawfully residing in this country. The mandate to maintain insurance applies to all individuals except foreign nationals or aliens residing here unlawfully, incarcerated individuals, and individuals falling within two very narrow religious exemptions. *Id.* § 5000A(d).

Significantly, although the individual mandate forces individuals to *obtain* insurance, it does not require individuals to *use* that insurance if and when they obtain health care services. Nor does any other provision of the ACA impose a requirement that

[1] All citations of provisions of the "ACA" are of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education and Reconciliation Act of 2010, Pub. L. No. 111-152.

individuals ever use the insurance that the Act requires them to secure.

The individual mandate is enforced by a separate statutory provision labeled euphemistically a "Shared Responsibility Payment." *Id.* § 5000A(b). Under that provision, "[i]f a taxpayer who is an applicable individual … fails to meet the requirement" that the individual mandate imposes, "then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty." *Id.* This "penalty" has its own set of five "exemptions." *Id.* § 5000A(e). Importantly, though, individuals exempted from the *penalty* are *not* thereby exempted from the *mandate*. Thus, individuals fully subject to the mandate may be exempt from the penalty, but exemption from the penalty does not obviate their obligation to comply with the mandate to maintain a minimum level of health insurance coverage at all times.

The constitutionality of a mandate to maintain insurance was subject to serious question long before Congress enacted the ACA. While Congress considered various proposals to reform the health insurance industry throughout the twentieth century, none featured such a mandate. When the concept of imposing such a mandate first arose in the early 1990s, the Congressional Budget Office (CBO) informed Congress that "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action." CBO, *The Budgetary Treatment of an Individual Mandate To Buy Health Insurance* ("CBO Report") 1 (August 1994). In the course of debate over the current legislation, the Congressional Research Service (CRS) advised that "[d]espite the breadth of powers

that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." CRS, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* ("CRS Report") 3 (July 24, 2009). CRS deemed that constitutional uncertainty "the most challenging question posed by such a proposal." *Id.*

During the legislative process, Congress considered multiple proposals to enact a "tax" on the uninsured rather than a mandate forcing individuals to obtain insurance. *See, e.g.*, H.R. 3962, § 501, 111th Cong. (2009); H.R. 3200, § 401, 111th Cong. (2009). Ultimately, however, Congress rejected those proposals in favor of a command to obtain insurance, enforced by a separate provision expressly labeled a "penalty" for "fail[ure] to meet the requirement" that the mandate imposes. ACA § 1501(b); 26 U.S.C.A. § 5000A(a), (b). In keeping with Congress' decision to discard tax proposals, the President emphatically insisted that the penalty for failure to obtain insurance was not a tax. *See, e.g.*, *Obama: Requiring health insurance is not a tax increase*, CNN (Sept. 20, 2009) ("For us to say you have to take responsibility to get health insurance is absolutely not a tax increase.").[2]

The individual mandate is accompanied by a set of congressional findings expressly addressing Congress' authority to impose the "Requirement to

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[2] *Available at* http://articles.cnn.com/2009-09-20/politics/obama.health.care_1_health-insurance-coverage-mandate-medicare-advantage?_s=PM:POLITICS.

maintain minimum essential coverage," *i.e.*, the mandate. ACA § 1501(a). Those findings repeatedly characterize the mandate as a "requirement" grounded in Congress' power to "regulate" under the Commerce Clause. They make no mention of the penalty or "Shared Responsibility Payment" through which Congress chose to enforce the individual mandate, and do not attempt to ground either the penalty or the mandate in Congress' tax power.

According to the findings, the individual mandate "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." ACA § 1501(a)(2)(A). Underscoring its intent to preclude individuals from choosing to remain outside the health insurance market, Congress explained that the mandate would prevent individuals from "mak[ing] an economic and financial decision to forgo health insurance coverage." *Id.* Congress also emphasized that the mandate was designed not just to target individuals who want or need health insurance, but also to "broaden the health insurance risk pool to include healthy individuals," ACA § 1501(a)(2)(I), who are less likely to use the insurance that they nonetheless must purchase.

In that respect, Congress intended the mandate to subsidize costs created by other provisions of the Act, specifically, regulations that prohibit insurers from denying, canceling, capping, or increasing the cost of coverage based on an individual's preexisting health conditions or history. *See id.*; ACA § 1201. By forcing individuals less to likely to use insurance into the market, Congress endeavored to subsidize

the costs created by requiring the insurance industry to insure individuals who are very likely to need expensive care. Congress also explained that the mandate was intended to counteract the adverse effects of those insurance market regulations. In Congress' view, "if there were no requirement [that currently healthy individuals purchase insurance], many individuals would wait to purchase health insurance until they needed care." ACA § 1501(a)(2)(I). By forcing all individuals to purchase insurance regardless of their needs or desires, Congress expected the mandate to "minimize this adverse selection." *Id.*

B. The Proceedings Below

Shortly after the ACA was enacted, Florida and 12 other States brought this action seeking a declaration that the individual mandate is facially unconstitutional and the Act as a whole is invalid. They have since been joined by 13 additional States, the National Federation of Independent Business, and multiple individuals.

1. The District Court's Decision

The District Court concluded that the individual mandate is unconstitutional and granted summary judgment to the States. Pet. App. 296a–350a. The court recognized that "[n]ever before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States," and concluded that "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." Pet. App. 319a, 324a. As the court explained, "[i]f some type of already-

existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, … it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate." Pet. App. 325a.

The court also rejected the federal government's argument that the mandate is permissible under the Necessary and Proper Clause, concluding that "the individual mandate is neither within the letter nor the spirit of the Constitution." Pet. App. 348a. And it concluded that the mandate may not be upheld under Congress' tax power because Congress enacted not a tax, but "a penalty imposed in aid of an enumerated power." Pet. App. 429a.

2. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's holding that the individual mandate is unconstitutional. Pet. App. 63a–172a. In a joint opinion by Chief Judge Dubina and Judge Hull, the court concluded that "[t]he federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." Pet. App. 155a–56a.

Like the District Court, the Court of Appeals recognized that the mandate is "unprecedented" and that "th[is] Court has never … interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." Pet. App. 104a–05a. The court found the utter lack of such mandates "telling" given that "[f]ew

powers, if any, could be more attractive to Congress than compelling the purchase of certain products." Pet. App. 106a. Observing that "[t]he power to regulate commerce, of course, presupposes that something exists to regulate," the court concluded that the mandate does not regulate any existing commerce, and that "[a]pplying aggregation principles" to hold that "an individual's decision not to purchase a product" substantially affects commerce "would expand the substantial effects doctrine to one of unlimited scope." Pet. App. 98a, 113a.

The court also rejected the federal government's attempt to characterize the mandate as regulating participation in the market for health care services, as opposed to the market for health insurance, noting that the "mandate does *not* regulate behavior at the point of consumption" or "even require those who consume health care to pay for it with insurance when doing so." Pet. App. 118a–19a. And the court found the federal government's claim that the health care and insurance markets are unique neither factually accurate nor constitutionally relevant. Pet. App. 120a–25a. Although the court noted that Congress has regulated certain facets of both markets, it concluded that "[i]t simply will not suffice to say that, because Congress has regulated broadly in a field, it may regulate in any fashion it pleases." Pet. App. 135a. Emphasizing that the Constitution's "*structural* limits … are of equal dignity to the express prohibitions," and that health care laws have always been a core component of the States' police power, the court also found it relevant "that the individual mandate supersedes a multitude of state policy choices in these key areas of

traditional concern." Pet. App. 135a, 141a. Adding "this federalism factor … to the numerous indicia of constitutional infirmity," the court concluded that mandate "cannot be sustained as a valid exercise of Congress's [commerce] power." Pet. App. 143.

The Court of Appeals also rejected the federal government's argument that the mandate is permissible under the Necessary and Proper Clause because it is "essential to a larger regulatory scheme." Pet. App. 144a. The court first noted that this Court "has to date never sustained a statute on the basis of t[hat] doctrine in a facial challenge, where plaintiffs contend that the entire class of activities is outside the reach of congressional power." Pet. App. 145a. But even assuming the doctrine might be applicable to some facial challenges, the court found it inapplicable here because "the individual mandate does not remove an obstacle to Congress's [other] regulation[s]." Pet. App. 150a.

Finally, the court concluded that "[t]he individual mandate as written cannot be supported by the tax power" because it is enforced by "a civil regulatory penalty and not a tax." Pet. App. 171a–72a. Indeed, Judge Marcus concurred in that portion of the court's opinion, while dissenting with respect to the Commerce and Necessary and Proper Clauses. Pet. App. 189a–262a.

SUMMARY OF ARGUMENT

The individual mandate is an unprecedented law that rests on an extraordinary and unbounded assertion of federal power. Under any faithful reading of the Constitution's enumeration of limited

federal powers, the mandate cannot survive constitutional scrutiny.

The Constitution grants Congress the power to *regulate* commerce, not the power to compel individuals to enter into commerce. That distinction is fundamental. A power to regulate existing commercial intercourse is precisely what the framers sought to confer upon the new federal government. The power to compel individuals to enter commerce, by contrast, smacks of the police power, which the framers reserved to the States. And while this distinction would have been both obvious and vital to the framing generation, it has become even more essential in light of the breadth of the modern conception of commerce. An individual can do very little to avoid the long arm of the federal government other than refrain from entering into the commerce that Congress may regulate. If Congress not only can regulate individuals once they decide to enter into commerce, but can compel them to enter commerce in the first place, then there is nothing left of the principle that Congress' powers "are defined, and limited," *Marbury v. Madison*, 5 U.S. 137, 176 (1803), as Congress could simply force within its regulatory reach all those who would remain outside it.

Congress itself recognized for the first 220 years of its existence that the Commerce Clause does not encompass such an unbounded power or eliminate the Constitution's reservation of the police power to the States. The individual mandate is the first *ever* law of its kind. That is remarkable. Surely, as the nation has grown, developed a truly continental economic market, suffered through depressions and recessions, and waged two world wars, Congress has

not lacked for motive or opportunity to force individuals into countless interstate markets. How much easier, for example, to support the price of wheat by compelling individuals to purchase wheat than to devise an elaborate system of subsidies and quotas and limit on-farm consumption to prevent an indirect effect on prices. And how much easier to stimulate the economy and promote the automobile industry by compelling new car purchases rather than by merely offering incentives, such as "cash for clunkers." The only explanation for the utter absence of comparable mandates is the utter absence of constitutional authority to enact them.

Rather than attempt to place any meaningful limits on the power that Congress *actually* asserted in the ACA, the federal government focuses most of its efforts on recharacterizing the individual mandate as a regulation of "the timing and method of financing the purchase of health care services." Govt.'s Br. 23. But the federal government's euphemistic description cannot obscure the simple reality that that is not what the individual mandate does. The mandate forces individuals to purchase *insurance*. It does not require individuals to *use* that insurance if and when they ultimately obtain health care *services*. Congress itself recognized as much when it characterized the mandate not as a regulation of commercial transactions for health care services, but as a purported regulation of "economic decisions" not to purchase insurance.

The implications of Congress' newly minted theory of its commerce power are breathtaking. *Every* decision not to purchase a good or service has a substantial effect on the interstate market for that

good or service once aggregated with the similar decisions of other individuals. A power to control every class of decisions that has a substantial effect on interstate commerce would be nothing less than a power to control nearly every decision that an individual makes.

Nor may the federal government save the mandate by resort to that "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). The individual mandate is not a "La[w] … for carrying into Execution" the commerce power, U.S. Const. art. I, § 8, cl. 18; it is a law for carrying into execution a "great substantive and independent power" that the Constitution does not grant. *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819). Even were that not the case, it is not a "La[w] … *proper* for carrying into Execution" the commerce power because it is not "consist[ent] with the letter and spirit of the constitution." *Id*. at 421.

The federal government may not avoid that inescapable conclusion simply by arguing that the otherwise impermissible provision is part of a "comprehensive regulatory scheme." It would be an odd notion of limited and enumerated powers that allowed the comprehensiveness of surrounding legitimate regulations to empower Congress to go the final mile and compel individuals to enter into its regulatory sphere. Contrary to the federal government's assertions, the Court has not hesitated to strike down laws that are not proper, even when they are integral components of otherwise permissible regulatory schemes. Indeed, this Court has done so

while rejecting challenges to the balance of the regulatory scheme.

In all events, the federal government's attempts to prove that the mandate is a necessary and proper regulation of the health care market only underscore why it is not. The focus on the purported "uniqueness" of the health care market and the centrality of the individual mandate might explain why this is the *first* time Congress has asserted this unprecedented power, but it does not explain why it will be the *last*. Nor does it explain why the Court should give Congress *carte blanche* to resort to means wholly inconsistent with the Constitution's structural limitations when Congress quite clearly could achieve its objectives through means as constitutionally unobjectionable as increasing taxes and making transparent its effort to have healthy individuals subsidize the costly reforms that the insurance companies otherwise would have resisted.

The federal government's last ditch effort to abandon its earlier rhetoric and defend the mandate as a tax fails for the simple reason that, regardless of its enforcement mechanism, the mandate itself is not a tax. Moreover, any conception that the structural provisions of the Constitution ensure accountability in government decision-making is surely offended by the notion that Congress can enact legislation that would not have passed had it been labeled a tax and then turn around and defend it as a valid exercise of the tax power.

In short, there is no way to uphold the individual mandate without doing irreparable damage to our basic constitutional system of

governance. If this is to remain a system of limited and enumerated federal powers that respects individual liberty, accountability, and the residual dignity and sovereignty of the States, the individual mandate cannot stand.

ARGUMENT

I. The Individual Mandate Is Not A Valid Exercise Of Congress' Commerce Power.

A. The Mandate is Not a Permissible Regulation of Interstate Commerce.

The Commerce Clause does not grant Congress the power to compel individuals to enter into commerce. As Congress itself has recognized for the past 220 years, it has the power to "regulate" extant commerce, not the power to bring commerce into existence. Both the text and the structure of the Constitution make that critical distinction clear. It could hardly be otherwise, as that limitation is essential to prevent the Commerce Clause from becoming a grant of the very police power that all concede the Constitution withholds from Congress and reserves to the States. Because the individual mandate does not regulate commerce, but instead simply commands individuals to enter into commerce, the mandate is not a valid exercise of Congress' commerce power.

1. The power to regulate commerce does not include the power to compel individuals to enter into it.

The Constitution grants Congress the power "[t]o regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. While the term

"commerce" has not always been "marked … by a coherent or consistent course" of interpretation, *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring), the term "regulate" has: For nearly two centuries, the Court has defined "the power to regulate" as the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824); *see also, e.g.*, *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885) ("The power to regulate [interstate] commerce … is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted[.]"); *United States v. Darby*, 312 U.S. 100, 113 (1941) (same); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 254–55 (1964) (same); *Lopez*, 514 U.S. at 553 (same).

It is axiomatic that the power to "regulate commerce" presupposes the existence of commerce to be regulated. It is not the power to compel individuals to engage in commerce so that Congress has something to regulate. The difference between the two is self-evident. The power to regulate is far more modest and allows Congress to reach individuals only if they decide to engage in conduct that constitutes (or substantially affects) interstate commerce. The difference would have been obvious to the framing generation. The commerce power was viewed as a relatively innocuous power, *see* The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce … [is] an addition which few oppose, and from which no apprehensions are entertained."), designed to give the new federal government the power to regulate ongoing commercial intercourse

between States and to remedy a glaring inadequacy in the Articles of Confederation. The power to regulate that ongoing commercial intercourse is precisely what the framers intended to confer. The power to force individuals to engage in commercial transactions against their will was the kind of police power that they reserved to state governments more directly accountable to the people (or "applicable individuals," as the ACA would have it).

That distinction, obvious to the framers, is if anything more fundamental in light of subsequent developments, including the breadth of this Court's modern Commerce Clause jurisprudence. The modern commerce power is a broad one, as there is little left of the "distinction between what is truly national and what is truly local" under the Court's present-day notions of "commerce." *United States v. Morrison*, 529 U.S. 598, 617–18 (2000). But even as the Court has expanded its conception of "commerce," it has not wavered from the notion that the power to "regulate" is the power to prescribe rules for commerce, and it has never suggested that power includes the power to compel the existence of commerce in the first place.[3] The breadth of the modern conception of "commerce" only underscores the importance of preserving that distinction.

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[3] This Court has made clear that the power to prescribe the rule by which commerce is to be governed includes the power to strictly limit or even prohibit interstate commerce in a particular article. *See, e.g.*, *Champion v. Ames,* 188 U.S. 321 (1903). But a rule forbidding or strictly limiting commerce is just a classic example of a rule governing pre-existing commerce. Indeed, such a law has no effect in the absence of pre-existing voluntary commerce.

It is common ground that the powers of the federal government "'are few and defined'" and those of the States "'numerous and infinite.'" *Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45, at 292–93). But if those fundamental precepts are to be anything more than slogans honored only in the breach, the difference between regulating commerce and compelling individuals to engage in it must be reaffirmed. Precisely because Congress' power to regulate commerce extends so broadly, it would be "difficult to perceive any limitation on federal power," *id.* at 564, or any exclusive "residuum of power remaining" in the States, *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2011) (Kennedy, J., concurring), if Congress could compel individuals to enter into any commerce that Congress may regulate. Indeed, such a power to compel commerce the better to regulate it would allow Congress to control the most basic of decisions about how to live life—in other words, to withhold from individuals the very liberty that the Constitution was designed to protect. *See Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty."). The notion that a power so invasive and so antithetical to the core values of our Nation was smuggled into the Constitution through the seemingly innocuous power "[t]o regulate … commerce"—a power that, at the time, "few oppose[d], and from which no apprehensions [we]re entertained," The Federalist No. 45, at 293—is incredible.

That the Commerce Clause is not susceptible to the federal government's implausibly boundless interpretation is confirmed not just by the traditions

upon which our Nation was founded, and the basic structure of the limited federal government created by the Constitution, but by the text of the founding document itself. The provisions immediately surrounding the Commerce Clause confirm that the power to regulate does not encompass the power to create the thing to be regulated. In the only two other provisions of Article I, section 8 that grant Congress a power to regulate, the Constitution first grants Congress the *separate* power to bring into existence the object of regulation. Thus, section 8 grants Congress the power "[t]o coin Money" before granting the power "to regulate the Value thereof," and the powers to "raise and support Armies" and "provide and maintain a Navy" before the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I., § 8, cls. 5, 12–14.

Had the power "to regulate" been commonly understood as sufficient to call into existence the thing to be regulated, those separate, anterior, and far more controversial powers would have been redundant. The power to raise a standing army was perhaps the most controversial provision in the proposed Constitution and gave rise to the Second and Third Amendments. By contrast, the power to regulate a standing army, if one were to be raised at all, was not controversial, as there is little to be said for an unregulated standing army. In the same way, the power to regulate existing commerce between the States created "no apprehensions," while a power to compel people to engage in unwanted commercial transactions would have raised a firestorm—and produced several additional constitutional

amendments to cabin it in the unlikely event such a power survived at all.

Moreover, when the Constitution does grant Congress the power to bring something into existence, it does so in language that is unmistakably clear. For example, Congress has the power "[t]o *establish* Post Offices and post Roads" and "[t]o *constitute* Tribunals inferior to the Supreme Court." Art. I, § 8, cl. 7, 9 (emphasis added). The Constitution does not grant Congress a separate and anterior power to "establish" or "constitute" interstate commerce because the Commerce Clause quite logically presupposes the existence of the commerce to be regulated, and empowers Congress to do nothing more (and nothing more apprehensive) than to prescribe the rule by which *that* commerce will be governed.

The federal government's half-hearted attempt to suggest otherwise is unconvincing. The federal government admits that the primary definition of "regulate" when the Constitution was drafted was "[t]o adjust by rule or method," but it emphasizes the secondary definition "[t]o direct," a term that, in turn, had its own fifth alternative definition of "to order; to command." Govt.'s Br. 48 (quoting Samuel Johnson, 2 Dictionary of the English Language 1619 (4th ed. 1773) (reprinted 1978), and T. Sheridan, A Complete Dictionary of the English Language (2d ed.) (1789)). The notion that this second-to-the-fifth definitional chain is what governed the popular understanding of the power granted to the new federal government is wholly implausible. The lack of apprehensions about the new power and the contrast between "regulate" and the surrounding

terms that far more naturally empowered the federal government to establish, constitute, raise, coin, or otherwise bring things into existence suffices to make the point. The contention is even less plausible given that the first kind of commerce that the text empowered the new Congress to regulate was that "with foreign nations," not an area where the fledgling republic was well-positioned to issue orders, directions, or commands, as opposed to regulating ongoing voluntary intercourse.

Moreover, even accepting the attenuated and farfetched contention that the Constitution was commonly understood as empowering Congress to "order or command commerce," the fact remains that "[t]he subject to be regulated is commerce," not individuals. *Gibbons*, 22 U.S. at 72. While Congress unquestionably has the power to regulate (and perhaps "direct" or "command") individuals when they choose to participate *in commerce*, that is a far cry from the power to command individuals to enter into commerce in the first place. *Cf. New York v. United States*, 505 U.S. 144, 176 (1992) (recognizing distinction between permissible regulation of States' participation in commerce and impermissible "command[s] to state governments" to regulate commerce).

Congress itself appreciated the distinction between the power to regulate commerce and the power to compel individuals to enter into commerce for the first 220 years of its existence. The federal code books are replete with provisions regulating the conduct of individuals who engage in commercial transactions, as well as provisions encouraging, enticing, and incentivizing individuals to enter into

commercial transactions of all stripes. But neither the federal government nor the numerous lower courts to consider the constitutionality of the individual mandate have identified a single other federal law throughout our Nation's entire history that simply *compels* individuals to enter into commerce. *See, e.g.*, Pet. App. 106a ("Congress has never before exercised this supposed authority"); Pet. App. 319a (same); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring) (same); *Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011) (same).

Not surprisingly, the federal government no longer even attempts to ground the individual mandate in any comparable historical or modern-day practice. Congress' own advisors warned of the unprecedented nature and dubious constitutionality of such a mandate long before Congress decided to impose one. When the idea first arose during debate over health care reform in the mid-1990s, the CBO candidly advised Congress that a "mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action." CBO Report 1. As the CBO explained, Congress "has never required people to buy any good or service as a condition of lawful residence in the United States," but has instead limited itself to imposing regulations that "apply to people as parties to economic transactions." *Id.* at 2. When the idea resurfaced during debate over the ACA, the CRS confirmed the same, and cautioned that "[d]espite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional

foundation for legislation containing a requirement to have health insurance." CRS Report 3.

That "[t]here is not only an absence of" such mandates "in early Congresses, but … in our later history as well," *Printz*, 521 U.S. at 916, is truly a remarkable thing. Congress surely has not lacked incentives to exercise such a "highly attractive power." *Id.* at 905. How much easier to support the price of wheat directly by compelling individuals to buy wheat than to devise an intricate system of quotas and subsidies in hopes of preventing wheat for on-farm consumption from having an indirect effect on prices. *But see Wickard v. Filburn*, 317 U.S. 111 (1942). Or to compel all individuals living in flood plains to purchase and maintain flood insurance rather than to attach a flood insurance requirement only as a condition applicable to homes purchased in federally regulated transactions. *But see* 42 U.S.C. § 4012a; Pet. App. 107a–08a. Or to compel well-off individuals to purchase new cars rather than to subsidize the cost of purchase for individuals who volunteer to trade in their old ones. *But see* Supplemental Appropriations Act of 2009, Pub. L. 111-32, 123 Stat. 1859, Title XIII (establishing "cash for clunkers" program).

Yet even as Congress struggled to devise creative and novel responses to the shift from a more localized to a more centralized economy, to the protracted Great Depression and other economic crises, and to the instability of two world wars, Congress *never* saw fit to attempt to stabilize or stimulate any market by forcing individuals to enter into it. The sheer "numerousness of … statutes" carefully crafted to encourage wider participation in

countless markets, "contrasted with the utter lack of statutes" conscripting individuals into markets in dire need of stimulation, is powerful evidence of "an assumed *absence* of such power." *Printz*, 521 U.S. at 907–08; *compare Gibbons*, 22 U.S. at 72 (finding instructive that power to regulate navigation "ha[d] been exercised from the commencement of the government, ha[d] been exercised with the consent of all, and ha[d] been understood by all to be a commercial regulation"). Indeed, the failure to seize on this power even once during the massive expansion of Congress' conception of its commerce power over the last century is particularly telling. "That prolonged reticence would be amazing if such [laws] were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); *cf. Raines v. Byrd*, 521 U.S. 811, 826 (1997).

2. The individual mandate rests on unbounded assertions of federal power.

The power that the federal government asserts is as unbounded as it is unprecedented. Indeed, the federal government's effort to liken it to more familiar legislation only succeeds in highlighting the complete absence of any limiting principle for the power asserted.

The federal government attempts to minimize the lack of constitutional grounding for a mandate to purchase health care insurance by recharacterizing it as something it is not: a "regulat[ion of] … the way in which individuals finance their participation in the health care market." Govt.'s Br. 18. That is

simply not true. The mandate does not regulate or even speak to how "individuals finance their participation in the *health care market*." Nowhere in the mandate—or anywhere else in entire 2,700 pages of the ACA—did Congress require individuals to actually *pay* for health care services with the insurance that the mandate requires them to obtain. The mandate neither addresses the "health care services" market nor regulates the method of financing purchases in that market. All the mandate does is force individuals to purchase *insurance*, which they are free to use or not use in the event that they actually need health care services. Indeed, Congress quite plainly explained that the mandate is largely directed at "*healthy* individuals," in hopes that they will *not* use the insurance they are required to obtain, and will instead subsidize costs generated by *other* individuals who use insurance to finance *their* participation in the market for health care services. ACA § 1501(a)(2)(I) (emphasis added).

That distinction between markets matters not because Congress' authority to regulate the market for health care services differs from its authority to regulate the market for health care insurance, or because the Constitution compels some sort of categorical distinction between the two. *But see* Govt.'s Br. 41. It matters because there is a critical difference between a mandate that individuals obtain insurance and a mandate that individuals who obtain health care services use insurance when they do so. Whereas the latter would regulate *actual participation* in the market for health care services, the former is an unprecedented command to *enter*

into the market for insurance. That is why the federal government gains nothing from its strained attempts to portray the mandate as merely "regulating" the purchase of health care services in advance of some inevitable point of consumption. Even assuming it were inevitable that all individuals would obtain health care services someday, the mandate *does not regulate the purchase of health care services*, whether at, before, or after the point of service. The federal government's felt-need to conflate the purchase of insurance with the purchase of services only underscores the importance of the distinction and how unprecedented the mandate, accurately characterized, really is.

As Congress itself recognized, what the mandate actually purports to "regulate" is not participation in any market at all, but rather "economic and financial *decisions*," namely, the decision whether to purchase health insurance. ACA § 1501(a)(2)(A) (emphasis added); *see also id.* (recognizing that, without the mandate, "some individuals would make *an economic and financial decision* to forego health insurance coverage" (emphasis added)). Economic or not, a "decision" whether to purchase a good or service cannot plausibly be construed as "commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Congress instead asserted control over such decisions through its third and most attenuated category of Commerce Clause power: "the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). In Congress' words, it may force individuals to purchase insurance because the decision whether to

do so is "commercial and economic in nature." ACA § 1501(a)(2)(A)–(B).

The implications of that theory are breathtaking. To be sure, the decision whether to purchase insurance can have economic consequences, both for the individual who decides not to purchase it and for those who *do* participate in the insurance market. But *every* decision whether to purchase a service or product has an economic or commercial effect on the market for that service or product, in much the same way that "any conduct in this interdependent world of ours has an ultimate commercial origin or consequence." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). If the "economic" nature of a decision were enough to allow Congress to displace the decision-making power of individuals and *compel* them to make whatever decisions Congress deems useful for the more efficient regulation of commerce, it would be "difficult to perceive any limitation on federal power," *id.* at 564, or any "residuum of power" reserved to the States, *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring).

The federal government's theory would allow for no meaningful distinction, for example, between a decision not to purchase health insurance and a decision not to purchase a car. Both are "economic and financial decisions" that, when aggregated with the decisions of other individuals, could be said to have a "tangible, direct, and strong" effect on interstate commerce. Govt.'s Br. 23. There is no principled reason why the asserted power to compel individuals to purchase insurance could not be exercised to compel individuals to purchase cars. Indeed, when presented with that very premise, the

federal government did not—and could not—disagree. Pet. App. 330a; *see also Seven-Sky*, 661 F.3d at 14–15 ("at oral argument, the Government could not identify *any* mandate to purchase a product or service in interstate commerce that would be unconstitutional … under the Commerce Clause" (emphasis added)).

Nor would the federal government's logic end with mandates to purchase products or services. Just like the "costs of crime" and "national productivity" reasoning that the Court emphatically rejected in *Lopez* and *Morrison*, its rationale could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of [decisions relating to] marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Morrison*, 529 U.S. at 615–16; *see also Lopez*, 514 U.S. at 565 ("depending on the level of generality, any activity can be looked upon as commercial").

Precisely because the one undeniable feature of our Constitution is that it "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation," *id.* at 566, such boundless interpretations of the Commerce Clause must be "rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Morrison*, 529 U.S. at 615. That is true not just because of the limited nature of the powers the Constitution confers on Congress, but also because of the powers that it "reserve[s] to the States," which consist of the "the whole, undefined residuum of power remaining after taking account of powers granted to the National Government." *Comstock*,

130 S. Ct. at 1967 (Kennedy, J., concurring). If the Commerce Clause granted to Congress the very residuum of power that the Constitution purports to reserve to the States, it would be impossible to conclude that the Constitution "preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

Once again, the modern-day breadth of the substantial effects doctrine and the deference it affords Congress only make the problem more acute. Unless the Court wants to get into the business of second-guessing congressional determinations as to which "decisions" have a sufficiently "tangible, direct, and strong" effect on interstate commerce to count, Govt.'s Br. 23, there would be almost no end to the "economic decisions" that Congress could compel. To pick an example from the "health care services" realm, some of the high costs generated by emergency dental care could have been prevented by regular trips to the dentist's office. The dynamic involves the same cost-shifting potential arising from the humane impulse not to deny care in emergency situations that the federal government suggests makes the mandate unique. It would hardly be "irrational" for Congress to attempt to reduce that burden on the health care services market by mandating that everyone visit the dentist twice a year.

And the potential to eliminate that kind of indirect burden on the health care services market is nothing compared to Congress' ability to employ this new-found power to compel economic decisions in more obviously economic markets. Problems in the

automobile industry could be solved by mandatory new car purchases. The congressional interest in ensuring the viability of the agricultural industry, which has typically been addressed through subsidies, could be furthered instead by compelling the purchase of agricultural products. Individuals' surprising unreceptiveness to substantial incentives to invest in 401(k) accounts could be overcome by mandating such investments. And so on. Most economic problems involve questions of demand and supply, and if Congress has the power not just to regulate commercial suppliers and those who voluntarily enter the market, but to compel demand as well, then we have truly entered a brave, new world. The possibilities are quite literally endless.

While the unpopularity of these potential mandates may put some check on their proliferation, that is not a sufficient answer. This Court has steadfastly declined to step aside and leave enforcement of the Constitution's critical structural protections to the political process. *See Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scale too far."). And here, part of the perniciousness of the individual mandate is its tendency to undermine the healthy democratic restraints on government action. While taxpayers can be expected to resist new taxes and insurance companies can ordinarily be expected to resist burdensome new regulations, the mandate ensured the quiescence of the latter (forced purchases are good for business,

after all), while cloaking the burden on individuals in terms that avoid the politically unpopular nomenclature of new taxes. Indeed, it is hard to imagine what regulations the automobile industry would not accept in exchange for a car-purchase mandate or what rules dentists would not embrace for a federal mandate of twice-annual visits.

Confronted with the irrefutable implications of its logic, the federal government elsewhere has "concede[d] … the lack of any doctrinal limiting principles" on its theory, *Seven-Sky*, 661 F.3d at 14, and does not attempt to identify any now. It instead simply insists that concerns about Congress' ability to compel countless actions with economic consequences are beside the point because they "'seem[] more redolent of Due Process Clause arguments' than any principled enumerated powers analysis." Govt.'s Br. 51 (quoting *Seven-Sky*, 661 F.3d at 19). The federal government severely misunderstands the purpose of the enumeration of powers in the Constitution.

"Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond*, 131 S. Ct. at 2364. By delegating to the federal government powers "few and defined," and reserving to the States powers "numerous and indefinite," The Federalist 45 at 313, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York*, 505 U.S. at 181. In "denying any one government complete jurisdiction over all the concerns of public life," and limiting the most pervasive powers to governments closer to the governed, "federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct.

at 2364. Thus, the argument that Congress has exceeded its enumerated powers and the argument that Congress has encroached upon individual liberty are, in fact, one and the same.

To be sure, the Due Process Clause and other amendments serve as essential backstops when the Constitution's structural protections fail to prevent such encroachments. But the mere presence of those *additional* restraints on federal power does not mean "that the Constitution's enumeration of powers does not presuppose something not enumerated." *Lopez*, 514 U.S. at 566. Indeed, the framers were acutely aware of that flawed argument and drafted the Ninth and Tenth Amendments to guard against it. *See* The Federalist No. 84 at 573–74 (A. Hamilton) (arguing that a bill of rights was "unnecessary" and "dangerous" because it "would afford a colorable pretext to claim more [powers] than were granted"). To require resort to the murky doctrine of substantive due process to impose any meaningful limits on the commerce power would deprive of all meaning the structural protections that those amendments were enacted to reinforce.

Indeed, if anything, the Bill of Rights is powerful evidence that the Commerce Clause does *not* grant Congress the remarkable power asserted here. If the Constitution were understood to empower Congress to seize control over decisions so basic as to how the people spend their money and order their affairs, surely the Bill of Rights would have been longer and specific amendments would have been proposed to cabin the exercise of such an extraordinary power. If the power to raise a standing army generated two amendments, surely a

power to compel commerce the better to regulate it would have inspired several more. But such amendments were not proposed even by anti-federalists deeply suspicious of the power of the new federal government for the rather obvious reason that the Commerce Clause was not some vortex of authority that rendered the entire process of enumeration beside the point.

B. The Mandate Is Not a Necessary and Proper Means of Executing the Commerce Power.

Implicitly recognizing the lack of any viable theory of the Commerce Clause that would render the individual mandate itself a permissible regulation of commerce, the federal government channels much of its energy into that "last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz*, 521 U.S. at 923. But all of the federal government's efforts to establish that the mandate is integral to the ACA's permissible regulations of interstate commerce are for naught, as the mandate does not "carry[] into Execution" Congress' power to regulate interstate commerce, let alone do so through "necessary and proper" means. U.S. Const. art. I, § 8, cl. 18.

1. The mandate is not a "Law … proper for carrying into Execution" the commerce power.

The federal government's attempt to ground the individual mandate in the Necessary and Proper Clause fails at the outset because the mandate is not a "Law … for carrying into Execution" the power to regulate interstate commerce. It is a law for

carrying into execution a power that Congress does not have: the power to compel individuals to enter into commerce. As Chief Justice Marshall concluded for the Court nearly two centuries ago, the Necessary and Proper Clause does not give Congress any "great substantive and independent power" that may be "used for its own sake." *McCulloch*, 17 U.S. at 411. It gives Congress the authority only to employ "means by which other objects are accomplished." *Id.* The power to compel individuals into commerce is exercised not to effectuate regulation of existing commerce, but rather to *create* commerce so that Congress may regulate it. That is a "great substantive and independent power"—indeed, as noted, it is a power that would rival if not exceed the power to "raise and support armies" in degree of controversy—that "cannot be implied as incidental to" the power to regulate commerce. *Id.*

The federal government maintains the mandate is not an end in itself, but merely a means of "mak[ing] effective the Act's core reforms of the insurance market," namely, the guaranteed issue and community ratings provisions. Govt.'s Br. 24. That argument distorts the concept of a law that serves "the purpose of effecting something else." *McCulloch*, 17 U.S. at 411. The problem with the guaranteed issue and community ratings provisions is not that they would be ineffective without the individual mandate. Quite the contrary, the problem is that those provisions would work far too well—many would "tak[e] advantage of" those guarantees by "'wait[ing] to purchase health insurance until they needed care.'" Govt.'s Br. 29 (quoting ACA § 1501(a)(2)(I)). Congress deemed the mandate

necessary to *counteract* the effectiveness of those provisions by forcing individuals to purchase a product they may neither want nor need. The Constitution authorizes Congress to "carry[] into Execution" its enumerated powers, not to expand its enumerated powers by creating problems in need of extraconstitutional solutions. *See Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("the power to enact laws enabling effective regulation of interstate commerce … extends only to those measures necessary to make the interstate regulation effective").

In any event, even assuming the mandate might be construed as a means of executing the commerce power, rather than an exercise of a power that Congress does not have, it is not a "Law … *proper* for carrying into Execution" that power. Congress may execute its enumerated powers through only those "means … consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. That "[t]hese phrases are not merely hortatory," *Raich*, 545 U.S. at 39 (Scalia, J., concurring), is beyond peradventure after this Court's decisions in *New York* and *Printz*, both of which held unconstitutional federal regulations of interstate commerce on the ground that the means Congress employed were "inconsistent with the federal structure of our Government established by the Constitution." *New York*, 505 U.S. at 177; *see also Printz*, 521 U.S. at 923–24. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).

As the Court's decisions reflect, "the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place." *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). The most basic and enduring of those precepts is that "[t]he Constitution created a Federal Government of limited powers," *Gregory*, 501 U.S. at 457, and "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566; *see also Morrison*, 529 U.S. at 619 n.8 ("the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history" (internal quotation marks and alterations omitted)). That power belongs to States, and so Congress may not exercise its enumerated powers in a way that "ingfring[es] upon th[at] core of state sovereignty." *New York*, 505 U.S. at 177.

When the primary problem with the federal government's view of the commerce power is that it lacks any limiting principle, it is no answer to suggest that it is the Necessary and Proper Clause that allows Congress to go the final mile. Any theory of Congress' power that obliterates any meaningful boundaries on Congress' limited and enumerated powers cannot be squared with the Constitution. And any law that amounts to an exercise of the very police power that the Constitution reserves to the States and withholds from Congress is not a law "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421.

For all the reasons already discussed, *see* Part I, *supra*, the individual mandate is just such a law. A power to compel individuals to enter into commerce would amount to a plenary power to compel individuals to live their day-to-day lives according to Congress' dictates. That is not a power "narrow in scope," *Comstock*, 130 S. Ct. at 1964, but rather could be exercised as least as broadly as (and far more intrusively than) the commerce power itself. Congress could use such a power to control every "class" of decisions that has a substantial effect on interstate commerce, which is to say, nearly every decision. To read such an extraordinary and invasive power into the Constitution "would require [the Court] to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated," *Lopez*, 514 U.S. at 567, which the Necessary and Proper Clause does not license the Court to do.

That Congress is attempting to exercise this unprecedented power in the realm of health care only underscores how dangerous, unbounded, and improper that power is. Since its earliest days, the Court has recognized that "health laws of every description" are among "that immense mass of legislation … which can be most advantageously exercised by the States themselves." *Gibbons*, 22 U.S. at 203. Even as Congress has played an increased role in the health care industry, predominantly through its spending power, the Court has repeatedly reiterated that "[i]t is a traditional exercise of the States' police powers to protect the health and safety of their citizens," *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (internal

quotation marks omitted); *see also, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428 (1963); *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and Congress has been quite careful not to displace that role. *See, e.g.*, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) ("nothing in [ERISA] indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern"). If Congress can exercise this power over a sector traditionally left to the States, and where Congress has generally acted through its spending power, its authority to compel individual activity in more traditional interstate markets is truly without limit.

"It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause[.]" *Comstock*, 130 S. Ct. at 1967–68 (Kennedy, J., concurring). There is no question that the individual mandate usurps the States' police power to protect the health and liberty of their residents. Indeed, a dozen States have enacted police power legislation explicitly protecting their residents from the very requirement that the individual mandate imposes.[4] If Congress could wield

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[4] Ariz. Const. art. XXVII (2010), § 2; Ga. Code Ann. § 31-1-11 (2011); Idaho Code Ann. § 39-90 (2010); Ind. Code § 4-1-12 (2011); Kan. Stat. Ann. § 65-6231 (2011); La. Rev. Stat. Ann. § 22:1018 (2010); Mo. Const. art. I, § 35 (2010); N.H. Rev. Stat. Ann. § 400-A:14-a (2011); N.D. Cent. Code § 26.1-36 (2011); Ohio Const. art. I, § 21 (2011); Okla. Const. art. II, § 37 (2010);

that same power as to every "class of decisions" that touches upon interstate commerce, the Necessary and Proper Clause would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *compare Comstock*, 130 S. Ct. at 1962 ("[T]he statute properly accounts for state interests."). Precisely because the individual mandate rests on such an untenable theory of federal power, it "is not a 'La[w] … *proper* for carrying into Execution' the Commerce Clause and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923–24 (quoting The Federalist No. 33, at 204 (A. Hamilton)).

2. Congress may not circumvent the Constitution's restraints by enacting a "comprehensive regulatory scheme."

The federal government insists it does not matter whether the mandate is itself a "La[w] … *proper* for carrying into Execution" the Commerce Clause because the mandate "is an integral part of a comprehensive scheme of economic regulation" that Congress had the authority to enact. Govt.'s Br. 24. That argument rests on a fundamental misreading of this Court's precedents. Neither *Wickard* nor *Raich* gives "Congress *carte blanche* to enact unconstitutional regulations so long as such enactments [a]re part of a broader, comprehensive regulatory scheme." Pet. App. 148a–49a. Those

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Tenn. Code Ann. § 56-7-1016 (2011); Utah Code Ann. § 63M-1-2505.5 (2010); Va. Code Ann. § 38.2-3430.1:1 (2010).

cases instead establish the much more limited—and ultimately irrelevant—proposition that the Court will not "excise individual *applications* of a concededly valid statutory scheme." *Raich*, 545 U.S. at 23 (emphasis added). But an otherwise invalid statutory provision derives no immunity from the company it keeps.

The federal government's contentions to the contrary overlook a simple but "pivotal" distinction between the States' challenge to the individual mandate and the challenges at issue in *Wickard* and *Raich*: The States' challenge is a facial one, and those challenges were as-applied. *See id.* The Court drew just that distinction when explaining that *Lopez* and *Morrison* did not resolve *Raich*—the former involved "assert[ions] that a particular statute or provision fell outside Congress' commerce power in its entirety," whereas the latter involved challenges only to "individual applications of a concededly valid statutory scheme." *Id.* Like the challengers in *Lopez* and *Morrison*, the States are not asking the Court to "excise, as trivial, individual" applications of the individual mandate. *Id.* (internal quotation marks omitted). They are asking the Court to invalidate the mandate itself. The Court cannot avoid entirely the question of the mandate's facial validity simply because *other* provisions of the ACA are constitutional.

Nor is the federal government correct that, since *Wickard*, "the Court has not once invalidated a provision enacted by Congress as part of a comprehensive scheme of national economic regulation." Govt.'s Br. 26–27. The Court did exactly that in both *New York* and *Printz*. What is more, the

Court did so for the very same reason that dooms the federal government's arguments here: because the means Congress adopted were neither valid exercises of the commerce power itself nor means "proper for carrying into Execution" that power.

New York involved a facial challenge to isolated provisions of a comprehensive federal scheme for regulation of radioactive waste disposal. *New York*, 505 U.S. at 151. The Court independently analyzed the constitutionality of each of those provisions even after expressly acknowledging that "[r]egulation … of the interstate market in waste disposal is … well within Congress' authority under the Commerce Clause." *Id.* at 160. The Court never questioned Congress' determination that compelling States to take title to waste produced within their borders was "a particularly well-adapted means," Govt.'s Br. 23, of achieving its "objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste." *New York*, 505 U.S. at 187. Yet the Court did not hesitate to hold the take-title provision facially unconstitutional once it concluded that the means Congress employed in *that* provision were "inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 177.

Printz is no different. That case involved a facial challenge to provisions integral to a comprehensive scheme to regulate the interstate market for firearms. *Printz*, 521 U.S. at 902. The Court did not question that the provision mandating States' officers to enforce the act's national background check scheme was "'an integral part of the regulatory program [or] that the regulatory

scheme when considered as a whole' [wa]s within the commerce power." Govt.'s Br. 25 (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981)). Yet the Court nonetheless concluded that the particular means Congress had chosen—"command[ing] the States' officers … to administer or enforce a federal regulatory program"—rendered the challenged provisions unconstitutional, regardless of how necessary or integral they were. *Printz*, 521 U.S. at 935.[5]

As *New York* and *Printz* make clear, even assuming the individual mandate is "an integral part of a comprehensive scheme of economic regulation," Govt.'s Br. 24, that does not immunize the mandate from constitutional review or automatically render it a "La[w] … proper for carrying into Execution" other permissible provisions. Indeed, even the federal government implicitly recognizes as much, as it does not go so far as to contend that *every* integral piece of the ACA automatically passes constitutional muster. To take just one example, the ACA's vast expansion of Medicaid is undoubtedly one of the most critical

[5] Nor can *Printz* and *New York* be distinguished as Tenth Amendment cases. This Court was at pains in both cases to underscore that it was not relying on a Tenth Amendment principle unrelated to the absence of an enumerated power. *See New York*, 505 U.S. at 159; *Printz*, 521 U.S. at 923. The fundamental problem with the provisions struck down in both cases is that they were not proper legislation and so could not be sustained under the Necessary and Proper Clause. *See New York*, 505 U.S. at 166; *Printz* 521 U.S. at 924. Indeed, just last Term this Court unanimously rejected the federal government's effort to distinguish commandeering claims as distinct from enumerated power claims. *See Bond*, 131 S. Ct. at 2366–67.

pieces of Congress' comprehensive regulatory scheme—that expansion *alone* will cover fully 50% of individuals expected to obtain insurance as a result of the ACA. *See* Br. for State Petrs. on Severability 49–50. But the federal government has never suggested that it may overtly compel states to expand their Medicaid programs, notwithstanding the commandeering doctrine, just because that expansion is integral to the ACA's broader regulation of the market for health care insurance. In short, just as Congress may not compel States to regulate simply because it enacts a comprehensive regulatory scheme, Congress may not compel individuals to enter into every market that it comprehensively regulates.

3. No matter how powerful the federal interest, unconstitutional means remain unconstitutional.

The federal government alternatively attempts to demonstrate that the individual mandate *is* proper because "[i]nsurance … is the predominant method of paying for health care in this country." Govt.'s Br. 35. The federal government confuses the inquiry. The relevant question is not whether insurance is an "ordinary means" of financing health care services, but whether compelling individuals to purchase insurance is an "ordinary means of execut[ing]" the commerce power. *McCulloch*, 17 U.S. at 409. 220 years of constitutional history make clear that compulsion to enter into commerce is not the ordinary means of executing the commerce power. *See* Part I.A, *supra*. There is no "longstanding history" of federal mandates compelling individuals to purchase insurance or any other product or service. *Compare*

McCulloch, 17 U.S. at 401 ("The power now contested was exercised by the first congress elected under the present constitution."), *and Comstock*, 130 S. Ct. at 1958 (detailing "longstanding history" of federal civil commitment statutes), *with New York*, 505 U.S. at 177 ("The take title provision appears to be unique."), *and Printz*, 521 U.S. at 909 (emphasizing "the utter lack of statutes imposing obligations on the States' executive"). Quite the contrary, Congress has *never* before exercised that "highly attractive power," *id.*, which itself is powerful evidence that the mandate is not "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421.

Notwithstanding more than "two centuries of apparent congressional avoidance of the practice," *Printz*, 521 U.S. at 918, the federal government attempts to identify a number of characteristics that purportedly render such a mandate permissible *here*, even though Congress apparently never considered it permissible anywhere else. *See* Govt.'s Br. 35–37. Those arguments are entirely beside the point because "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to" enact legislation that is "inconsistent with the federal structure of our Government." *New York*, 505 U.S. at 177–78.

Indeed, the Constitution imposes structural limits "precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187. To hold that Congress may employ constitutionally impermissible means whenever "conditions throughout the nation have created a situation of national concern … is but to say that

whenever there is a widespread similarity of … conditions, Congress may ignore constitutional limitations upon its own powers." *United States v. Butler*, 297 U.S. 1, 74–75 (1936). The Court has consistently and emphatically rejected the federal government's invitations to "license[] extraconstitutional government with each issue of comparable gravity." *New York*, 505 U.S. at 187–88.

In all events, the federal government undermines its argument for true necessity by repeatedly reiterating the undisputed existence of permissible means through which it could accomplish the same end result as the mandate. The mere fact that an *end* is "legitimate" does not render all *means* to that end "appropriate"; only those means "which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421. That there are ordinary and constitutional means through which Congress could further the same objectives underscores why the Court should not legitimize an unprecedented power to compel individuals to enter into commerce. The Court should not lightly read the Necessary and Proper Clause to empower Congress to execute its enumerated powers through extraordinary and unprecedented means when the same ends could be achieved by means "not less usual, not of higher dignity, not more requiring a particular specification than other means." *Id.*

Moreover, there is one thing that distinguishes many of the alternative means from the mandate: accountability. While it is true that a similar end could be achieved by increased taxes and subsidies

for the insurance industry, no one familiar with the dynamic of the ACA's final passage believes such initiatives would have been enacted. As Congress itself explained, a central purpose of the individual mandate is to pay for costly new regulations of the insurance industry. Congress was well aware that the insurance industry would vehemently oppose those regulations without some form of federal subsidy to offset their costs, yet it was also aware that the public would not support a general tax increase to pay for that subsidy. By imposing an unprecedented command that healthy individuals simply subsidize the insurance industry directly by buying insurance they did not want or were unlikely to use, Congress neatly avoided the political constraints that the Constitution contemplates will limit its power to enact unpopular regulations and general taxes. Even in contexts where the Court has forsworn judicial efforts to limit Congress' intrusion on the States, it has taken comfort in the "safeguards of the political process." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985). The fact that the mandate allowed Congress to circumvent those safeguards is just one more reason to be wary of the federal government's claim that the power Congress asserts is "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421.

4. The federal government's attempts to prove the mandate necessary and proper only underscore why it is not.

In all events, the federal government's efforts to demonstrate why a mandate to enter into commerce

is appropriate *here* only underscore the utter lack of meaningful limits on the power Congress asserts. While those arguments might explain why this is the *first* context in which Congress has imposed such a mandate, they do not remotely explain why it will be the last.

The federal government's basic argument is a simple one: Congress has a uniquely strong interest in forcing individuals to maintain health care insurance because most people are likely to need health care services sometime in their lives but cannot predict the timing and magnitude of that need in advance, and may shift the costs of such services if they do not have insurance when the need arises. All of that may be true, but the health care market is hardly the only market that fits that description. For instance, life insurance and burial insurance both finance far more universal needs that are every bit as likely to arise "from a bolt-from-the-blue event," Govt.'s Br. 35 (internal quotation marks omitted), and will be paid for one way or another even if individuals fail to plan for them. It would be no less reasonable for Congress to conclude that mandates requiring individuals to finance those needs before they arise would help alleviate the inevitable cost-shifting that occurs when individuals fail to do so.

Moreover, the federal government's logic would apply equally to markets where the need for insurance is less universal but just as vital. For example, most individuals living in a flood zone will suffer flood-related losses at some point, and those losses are likely to be shifted to the rest of society through mechanisms such as publicly funded

disaster relief. And the same kind of cost-shifting is just as inevitable in markets for basic necessities such as food and clothing, even though they are not financed by insurance. The federal government attempts to distinguish those examples on the ground that the need is less universal or the potential for cost-shifting of a lesser magnitude, but those are differences in degree not kind. The federal government spends billions of dollars feeding the hungry, clothing the poor, and sheltering the homeless. By the same logic employed in defense of the individual mandate, it would be equally reasonable for Congress to compel individuals to make financial decisions that would obviate or at least alleviate the cost-shifting that results from "the deeply ingrained societal norms," Govt.'s Br. 39, that we will not deny such basic necessities to people who cannot afford them.

Precisely because cost-shifting is so ubiquitous, the federal government gains little from its attempt to portray the individual mandate as a uniquely necessary response to the "societal norm," reflected in state laws and the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, that hospitals will not turn away those in need of emergent care, regardless of their ability to pay for it. The notion that an individual will not fully internalize the potential costs of emergency medical services (and therefore fail fully to internalize the benefits of insurance) because the government or someone else will shoulder the costs is hardly unique to the health care context. Economists have long acknowledged such "moral hazards" and recognized that they are pervasive. *See* The New Palgrave: A Dictionary of

Economics 869 (1988). Indeed, insurance creates moral hazards of its own, as the insured may engage in riskier behavior or overuse medical services because they incur little marginal cost.

The fact that the failure to internalize costs originates with EMTALA is not a limiting principle. The logic of the federal government's position would allow Congress to compel purchases any time it determines that consumers are purchasing something in suboptimal quantities because they have failed to internalize its benefits, whether due to government policies or market failures. The failure of individuals to buy "enough" insurance because of EMTALA is just one of countless examples. Moreover, if anything, the fact that the cost-shifting at issue here is largely a product of Congress' own making is a reason to *reject* the argument that it licenses Congress to use extraordinary and unprecedented means to combat it. Congress can hardly expand its constitutional authority by creating problems that it lacks the power to fix.

The federal government's admission that the individual mandate is in substantial part a response to EMTALA also reveals that it is the federal government that "fundamental[ly] misunderstand[s] … the economics of insurance." Govt.'s Br. 51. The federal government insists "[t]he point of obtaining insurance is to internalize risk." *Id.* That is fundamentally wrong. The point of obtaining insurance is to diversify risk, not to internalize it. It may be that the *federal government's* point in *forcing* people to buy insurance they do not want is to cause them to internalize the costs associated with emergency care that EMTALA may lead them to view

as externalities. But forcing individuals to buy insurance is hardly the only or most direct means to force would-be-cost-shifters to internalize those costs. And in all events, it is not a constitutional means.

The federal government insists it has no choice but to impose such a mandate because imposing a requirement for insurance or cash payment at the point of consumption of health care services would effectively abandon "the deeply ingrained societal norms" that we will not deny critical care to those who cannot afford it. Govt.'s Br. 39. The federal government attacks a straw man. The States have not argued, and the Court of Appeals did not hold, that requiring individuals to purchase insurance or make a cash payment at the point of consumption is "Congress's *only* permissible option" of ensuring that individuals who can afford to do so pay for the health care services they consume. Govt.'s Br. 38 (emphasis added).

For example, Congress could have conditioned an individual's right to guaranteed issue or community rating on obtaining qualifying insurance during an initial fixed enrollment period, so that individuals could obtain the full benefit of those regulations but could not "buy their insurance on the way to the hospital." Govt.'s Br. 39 (internal quotation marks omitted); *see, e.g.*, Paul Starr, *The Mandate Miscalculation*, The New Republic, Dec. 29, 2011, at 11–13. Congress also has many permissible means through which it could spread throughout society the costs that those regulations and EMTALA create. Most obviously, Congress could impose a national tax increase to fund, *inter alia*, critical medical care for those who cannot afford it,

subsidies to insurance companies that insure high-risk individuals, or government-sponsored insurance for every individual. That there is not the political will to do so does not give Congress license to resort to a shortcut for which there was just barely the presence of political will, but the absence of constitutional authority.

II. The Individual Mandate Is Not A Valid Exercise of Congress' Tax Power.

The federal government's final resort is to defend the mandate as a valid exercise of Congress' power "[t]o lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. art. I, § 8, cl. 1, by arguing that the "penalty" provision that Congress enacted to enforce the mandate is a constitutionally permissible tax. That argument fails at the outset because the States are challenging the mandate, not the penalty. The mandate is a distinct regulatory requirement that must be supported by a distinct regulatory authority. The federal government may not avoid that reality by attempting to reconceptualize the mandate as a tax statute that Congress made a deliberate decision not to enact. Nor may the Court simply treat the penalty as a tax, as it is well settled that a penalty for violation of a separate legal command is not a tax. In all events, the federal government gains nothing by asking the Court to jettison both the mandate and the penalty and replace them with a tax, as the hypothetical tax statute the federal government proposes would be no more constitutional than the statute Congress actually enacted.

1. The States "seek injunctive and declaratory relief to prevent anyone from being subject to the mandate … irrespective of the means Congress chooses to implement it." *Seven-Sky*, 661 F.3d at 8–9. That distinction is "critical," *id.* at 9, because the mandate and the penalty are distinct. The mandate is a stand-alone command that every "applicable individual shall" obtain and maintain insurance. 26 U.S.C.A. § 5000A(a). That command makes it unlawful for an "applicable individual" (which means nearly any individual) to live in the United States without approved health care insurance.

While section 5000A(b) imposes a "penalty" on individuals "who fail[] to meet the requirement" that the mandate imposes, § 5000A(b)(1), that penalty provision only underscores that the mandate is, itself, a separate legal command. First, the penalty does not apply as broadly as the mandate because it is subject to its own set of exemptions, and exemption from the penalty does not obviate the need to comply with the mandate. *Compare* § 5000A(e), *with* § 5000A(d). Indeed, the States are injured most obviously by the effect of the mandate on the very needy, who are *not* subject to the penalty but *are* subject to the mandate. *See* Br. for State Respts. on Anti-Injunction Act 3. Second, payment of the penalty does not satisfy the mandate; an individual paying the penalty remains in breach of the mandate. Indeed, the penalty is a "penalty" precisely because it *penalizes* individuals who violate the mandate by failing to obtain insurance. *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) ("[I]f the concept

of penalty means anything, it means punishment for an unlawful act or omission.").

That the mandate and the penalty are distinct means that the federal government must justify the constitutionality of both provisions. Just as the constitutional invalidity of an enforcement provision would not necessarily undermine the validity of the mandate, the constitutional validity of an enforcement mechanism does not give Congress power it would otherwise lack. Respondents are challenging the mandate, not the means by which Congress chose to enforce it. Whether Congress enforces the mandate through a penalty, a tax, denial of federal benefits, or criminal consequences, the question concerning the constitutionality of the mandate remains the same. That question is whether Congress has the authority to impose the mandate, not whether it has the authority to impose whatever enforcement mechanism accompanies it. Even the federal government does not contend that the tax power is so expansive as to authorize Congress to command individuals to enter into commerce so that the federal government may tax them. Accordingly, the federal government's attempt to change the subject by pointing to its power to impose the penalty is unavailing. The question before the Court is whether the mandate is constitutional. The tax power adds nothing to that question.

2. Implicitly recognizing that it cannot rely on the constitutionality of an enforcement mechanism to establish the constitutionality of a separate legal command, the federal government attempts to abandon defense of the mandate to the extent that it applies to individuals exempt from the penalty, and

to focus all of its efforts on defending the penalty as a tax. Its efforts fail because the federal government defends a statute that Congress made a deliberate decision not to enact.

In the federal government's words, the mandate is nothing more than a "predicate for tax consequences imposed by the rest of the section." Govt.'s Br. 60. Even if true, that observation would in no way obviate the federal government's need to establish the power to create the predicate. But it is not true. The description of the mandate as a mere predicate for the tax consequences imposed by the penalty fundamentally conflates what is the tail and what is the dog. Indeed, it is belied by the federal government's repeated emphasis on the centrality of the mandate. The argument simply ignores the text, structure and statutory history of section 5000A. The statute does not impose a "tax" dischargeable by a payment to the federal government or to a third person. It imposes a freestanding mandate enforced (as to a subset of those subject to the broader mandate) by a "penalty" for "failure" to abide by the "requirement" that the mandate creates. *See* ACA § 1501(b); 26 U.S.C.A. § 5000A(b)(1) ("[i]f … an applicable individual … fails to meet the *requirement* of subsection (a) …, then … there is hereby imposed on the taxpayer *a penalty*" (emphasis added)).

Congress' decision to label the mandate's enforcement mechanism a "penalty" (and repeatedly refer to it as such) was not some linguistic oversight; Congress called it a penalty because it operates in precisely the manner that distinguishes a penalty from a tax—it enforces a separate legal command. *See Reorganized CF&I Fabricators*, 518 U.S. at 224

("'A tax is an enforced contribution to provide for the support of the government; a penalty … is an exaction imposed by a statute as punishment for an unlawful act.'" (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)); *infra*, pp. 57–62. Indeed, Congress considered proposals to enact the kind of tax statute the federal government now defends, and it rejected each of them in favor of a mandate enforced by a penalty. *See supra*, p. 5. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 422–23 (1987).

That Congress understood the consequences of its decision to eschew the tax model is evident in the findings accompanying section 5000A. Those findings do not attempt to establish Congress' authority to impose the *penalty*. They attempt to establish Congress' authority to impose the *mandate*. What is more, they do so by invoking Congress' power to *regulate* interstate commerce. That matters not because it evinces Congress' intent to "disavow[]" reliance on an otherwise applicable tax power, Govt.'s Br. 57, but because it evinces Congress' correct understanding that it was imposing a regulatory command, not a tax. Indeed, the federal government itself has recognized in this very litigation that section 5000A is not an exercise of Congress' tax power: In the District Court, the federal government initially insisted that the penalty need not satisfy constitutional restrictions on Congress' tax power because "[t]h[o]se

requirements apply only to statutes enacted exclusively in the exercise of Congress's taxing power, and not to statutory penalties *in aid of other constitutional authorities*." Govt.'s Mem. Supp. Mot. Dismiss 55 [R.E. 150] (emphasis added).

Constitutional avoidance is a powerful doctrine, but it is not a license to rewrite a statute in a way that bears no resemblance to the enacted text and is "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *compare New York*, 505 U.S. at 170 ("The Act could plausibly be understood either as a mandate to regulate or as a series of incentives."). That is all the more true in the context of Congress' tax power, a power that by design is constrained principally by the very unpopularity of its exercise. The reason why the mandate's penalty provision is not labeled a tax, is not structured as a tax, and is not grounded in Congress' tax power, and why the President emphatically assured the public that it is not a tax, is because the political branches lacked the public support to enact a tax. To eliminate the mandate and convert its penalty provision into a tax therefore would create more constitutional problems than it would avoid, as it would license Congress to use the courts to impose taxes that it lacks the political support to enact, thus eliminating the most potent constraint on Congress' vast tax power. *See Missouri v. Jenkins*, 495 U.S. 33, 68 (1990) (Kennedy, J., concurring) ("In our system the legislative department alone has access to the pockets of the people, for it is the Legislature that is

accountable to them and represents their will." (internal quotation marks and citation omitted)).

3. The federal government insists the Court need not resort to constitutional avoidance because, notwithstanding the plain text and Congress' clear intent not to impose a tax, the "'practical operation'" of the penalty makes it "materially indistinguishable" from a tax. Govt. Br. 52 (quoting *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941)), 60. But that argument is another dead end because the penalty plainly operates as a penalty, not a tax.

What makes a penalty a penalty, as distinct from a tax, is that it is "imposed … as punishment for an unlawful act." *La Franca*, 282 U.S. at 572; *see also Reorganized CF&I Fabricators*, 518 U.S. at 224 ("[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission."). Thus, the operative question is whether a monetary exaction is imposed as a consequence for failure to abide by a separate legal command. If it is, labeling it a "tax" does not make it a tax, as "the so-called tax … loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (internal quotation marks omitted); *see, e.g.*, *United States v. Sanchez*, 340 U.S. 42, 45 (1950) (examining whether tax was imposed on something "made an unlawful act under the statute"); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (examining whether tax was "attended by an offensive regulation"); *Alston v. United States*, 274 U.S. 289, 294 (1927) (examining whether tax had any

"necessary connection with any requirement of the act which may be subject to reasonable disputation").

That distinction may be of little consequence "[w]here the sovereign enacting the law has power to impose both tax and penalty." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). But "when one sovereign can impose a tax only, and the power of regulation rests in another," the validity of a "so-called" tax that operates as a penalty depends on the validity of the regulatory command that it enforces, as the power to tax does not include the power to use taxes (or penalties) to enforce impermissible laws. *Id.* Thus, Congress may not use its tax power to circumvent the Constitution's enumeration of limited *regulatory* powers by "enact[ing] a detailed measure of complete regulation of [a] subject and enforc[ing] it by a so-called tax upon departures from it." *Id.; see also United States v. Kahriger*, 345 U.S. 22, 31 (1953) ("Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid."). When it purports to do so, both the so-called tax and the regulatory command must fall, as neither has any constitutional grounding.

That is what makes the federal government's insistence on examining the "practical operation" of the penalty so counterproductive. If Congress *had* called the penalty for failure to comply with the individual mandate a "tax," that would only have underscored the need to examine the constitutionality of the mandate, as the tax itself could not be constitutional unless the mandate were as well, since its "practical operation" would still be

as a penalty, not a tax. By asking the Court to treat the penalty as a tax even though it enforces a separate legal command, the federal government asks the Court to create the very tax power problem that Congress attempted to avoid by calling the provision what it is: a penalty. Congress thought it could avoid that problem because it thought it possessed the power to impose the mandate under its commerce power. If Congress lacked that power, that is the end of the matter as far as the statute that Congress actually passed is concerned.

The federal government attempts to sidestep the tax power problem it would create by insisting that the Court has "abandoned the view that bright-line distinctions exist between regulatory and revenue-raising *taxes*.'" Govt.'s Br. 55 (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 743 n.17 (1974); emphasis added). But that is doubly irrelevant. First, there *is* no analogous doctrine under which Congress treats penalties as taxes, which is why the federal government cannot identify a single case in which the Court concluded that a penalty was actually a tax. *Compare Bailey*, 259 U.S. at 38 (construing "so-called tax" as penalty); *Helwig v. United States*, 188 U.S. 605, 617 (1903) (same); *Lipke v. Lederer*, 259 U.S. 557, 561–62 (1922) (same); *Hill v. Wallace*, 259 U.S. 44, 67 (1922); *Kurth Ranch*, 511 U.S. at 781–83 (same).[6] Thus, even were it correct

[6] To the extent that the federal government suggests the Court did so in *New York*, it is mistaken. The provision it alludes to authorized the federal government to collect a percentage of a surcharge that the statute authorized States to impose on certain radioactive waste transactions. *See New York*, 505 U.S. at 171. While the Court concluded that the "collection of a

that the Court had abandoned its efforts to determine which taxes are really penalties, *but see id.* at 779, that would hardly be a reason to start treating penalties as taxes. Moreover, to the extent that the Court has been more reluctant to treat a tax as a penalty when Congress expressly imposed a tax, it would be quite bizarre to invoke that as a justification for treating a penalty as a tax when Congress expressly imposed a penalty. If Congress' intent is controlling, it is just as controlling when Congress deliberately imposes a penalty as when Congress deliberately imposes at tax.

Nor is there any reason to treat this penalty as a tax just because it is housed in the tax code and will be "'productive of some revenue.'" Govt.'s Br. 55 (quoting *Sozinsky*, 300 U.S. at 514). Contrary to the federal government's assumption, penalties do not become taxes—or valid exercises of Congress' tax power—simply because they are housed in the tax code and collected by the Internal Revenue Service. To be sure, Congress may invoke its tax power (in conjunction with its power under the Necessary and Proper Clause) to impose penalties that enforce *tax* laws. But that is because Congress has the power to enforce the laws that it has the power to enact, not because such a penalty is itself a tax. *See License Tax Cases*, 72 U.S. 462, 474 (1866) (penalty for failure to pay license taxes "is only a mode of enforcing the payment of such taxes"). Nor is every

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percentage of the surcharge" was "a federal tax on interstate commerce," it concluded that the provision authorizing States to impose the surcharge (*i.e.*, the piece that might resemble a penalty) was an exercise of Congress' commerce power. *Id.*

revenue-raising measure in the tax code a tax. "Criminal fines, civil penalties, [and] civil forfeitures … all … generate government revenues," *Kurth Ranch*, 511 U.S. at 778, but that does not mean those measures suddenly become permissible exercises of the tax power just because Congress decides to place them (or the commands they enforce) in the tax code.

In any event, the federal government's effort to reconceptualize the mandate as a tax does not provide the limiting principle it otherwise lacks or help it locate a historical analogue for this unprecedented power. The bottom line is that Congress has never compelled individuals to enter into a transaction and backed such a mandate by a penalty keyed to the amount it would cost to engage in the required transaction. The framers did not grant the new, limited federal government the power to compel transactions in order to tax them (or penalize the failure to transact) any more than it granted the power to compel commerce the better to regulate it. Indeed, if anything, the federal government's tax power argument is even more alarming than its commerce power theory because Congress is not limited to taxing commercial transactions.

In short, the federal government's efforts to shift the Court's focus to the "practical operation" of the mandate's penalty provision only succeed in confirming what has been obvious to nearly every court that has considered the issue: Congress called the penalty a penalty because it is, in fact, a penalty. Thus, the federal government ends up right back where it started, as the constitutionality of a penalty

depends on the constitutionality of the legal command that it enforces.

4. In all events, the federal government's attempts to read both the mandate and the penalty out of the ACA and convert section 5000A into a tax statute ultimately get it nowhere because the statute the federal government defends is no more constitutional than the statute Congress enacted.

Congress' tax power is not limited to commercial transactions, but it is not without limits. The Constitution distinguishes between "direct" taxes and indirect "Duties, Imposts and Excises," and requires direct taxes to be apportioned according to population. *See* U.S. Const. art. I, § 9. The tax the federal government proposes—a tax imposed simply because an individual does not purchase insurance—would not qualify as an indirect tax levied on the "importation, consumption, manufacture, [or] sale of [any] commodities, privileges, particular business transactions, vocations, occupations, [or] the like." *Thomas v. United States*, 192 U.S. 363, 370 (1904). Nor would it constitute a tax imposed on any derived income. *See* U.S. Const. amend. XVI (exempting taxes on derived income from apportionment requirement). It would instead be a direct tax on an individual's wealth, simply because the individual chooses to keep that wealth rather than spend it to purchase insurance. *See* S. Willis & N. Chung, *Constitutional Decapitation and Healthcare*, Tax Notes, July 12, 2010. There is no question that such a tax would fail the apportionment requirement, thus rendering it an unconstitutional direct tax.

Indeed, the federal government identifies no other tax that is imposed only upon individuals who refrain from purchasing a costly good or service. Moreover, it is both telling and troubling that the amount of the so-called tax would be keyed to the amount of the insurance an "applicable individual" is forced to purchase. Thus, the statute would levy what is essentially an unavoidable sanction. At the very least there are grave doubts as to the constitutionality of such a statute, which only underscores why it would be inappropriate to rewrite section 5000A in the manner that the federal government advocates. Constitutional avoidance does not serve its purpose when the constitutionality of the statute as reconceived by the Court would be no more certain than the constitutionality of the one that Congress actually enacted. *Cf. Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions.").

* * *

In the end, the federal government's tax power argument suffers from the very same failing as every other constitutional argument that it advances in defense of the ACA. Congress may not "break down all constitutional limitation [on its] powers … and completely wipe out the sovereignty of the states" by invoking its tax power to enforce commands that it lacks the authority to impose. *Bailey*, 259 U.S. at 38. The federal government implicitly recognizes as much when it acknowledges that the Court would have to read the individual mandate out of section 5000A to uphold the statute under the tax power. Govt.'s Br. 60–62. That the federal government's tax power

argument would require this Court to effectively ignore what Congress itself described as an "essential" piece of the Act, ACA § 1501(a)(2)(I), is reason enough to reject it. The statute the federal government defends under the tax power is not the statute that Congress enacted. In *that* statute, the penalty provision is merely the tail and the mandate is the proverbial dog, not vice-versa. And *that* statute imposes a command that is unprecedented and invokes a power that is both unbounded and not included among the limited and enumerated powers granted to Congress. It is therefore unconstitutional, no matter what power the federal government purports to invoke.

CONCLUSION

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

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February 6, 2012