No. 11-398

In The
Supreme Court of the United States

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

v.

STATE OF FLORIDA, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CAESAR RODNEY INSTITUTE IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

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QUESTIONS PRESENTED

I. Whether the activity regulated by the Patient Protection and Affordable Care Act lacks a limiting jurisdictional element, or explicit nexus with interstate commerce?

II. Whether the Congressional findings fail to provide a rational basis for the imposition of a minimum coverage requirement on all Americans under the authority of the Commerce Clause?

III. Whether the use of the Commerce Clause to compel Americans to purchase products from favored merchants is inconsistent with the Constitution's structure of limited, enumerated Federal power?

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INTEREST OF THE *AMICUS CURIAE*

The Caesar Rodney Institute (CRI) is a Delaware-based non-for-profit research and educational organization that focuses on promoting individual liberty, property rights, rule of law, and transparent and limited government for all Delawareans.

Delaware has for many years been a leading domicile for U.S. corporations (over fifty percent (50%) of all publicly traded companies in the U.S. and 63% of the Fortune 500) because of the singular competence and proficiency of its courts in business law. As Delawareans, CRI and its members have great interest in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 42 U.S.C. §18001 *et. seq.* (2010) ("PPACA") because it requires all U.S. citizens and legal residents to purchase or otherwise obtain qualifying health insurance, imposes significant new requirements on corporate employers, and establishes new rules in the private insurance market.

In particular, CRI is concerned that the PPACA extended Congressional power under the Commerce Clause without any explicit jurisdictional limit. CRI's expertise on issues of rule of law, transparency and the free market in the U.S. corporate context make it uniquely situated to contribute to this litigation as *amicus curiae*. CRI previously briefed the issues of jurisdictional element and congressional findings before the U.S. Court of Appeals for the Eleventh Circuit, and the

U.S. Court of Appeals for the D.C. Circuit because they had not been briefed by the parties or other *amici*. We now respectfully raise these issues for the Court's consideration.

SUMMARY OF THE ARGUMENT

This case is about the limits of Federal Government power under the Commerce Clause and Taxation Clause. Without meaningful limits, the Federal Government's power descends the slippery slope to a general welfare power which is reserved to the States under the U.S. Constitution.

This *amicus* focuses on three issues. First, the Patient Protection and Affordable Care Act ("PPACA") fails the Supreme Court's test under *United States v. Lopez,* 514 U.S. 549, 562-63, 115 S.Ct. 1624 (1995), because the mandate does not contain an express jurisdictional element which would limit its reach to activities in interstate commerce. *See id.*

Second, the Congressional findings of the PPACA do not provide a rational basis for the minimum coverage requirement because the findings employ circular logic and "but-for" causal reasoning that has been discouraged by this Court in *U.S. v. Morrison*, 529 U.S. 598, 615-20, 120 S.Ct. 1740, 1752-55 (2000).

Third, the Commerce Clause, a limited, enumerated power of the Federal Government was not intended to force all Americans to purchase private products from a favored set of merchants or businesses. Such a use of the interstate commerce power effectively grants the Federal Government a general welfare power that is incompatible with the federalist structure of enumerated federal power.

The minimum coverage provision of the PPACA is unconstitutionally broad, and the decision of the U.S. Court of Appeals for the Eleventh Circuit finding the minimum coverage provision unconstitutional should be affirmed.

ARGUMENT

I. Introduction

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 42 U.S.C. §18001 *et. seq.* (2010) (collectively, the "Act" or "PPACA") provides that, "…an individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual…is covered under minimum essential coverage for such month." PPACA §1501(b), 26 U.S.C. § 5000A(a). An individual who does not comply, and is not otherwise exempt from the requirement, must pay a monetary penalty to the Federal Government. *See id.*

Accordingly, under the Act, individuals, including those who are not consuming any health care at all, those who would rather not receive medical care for personal or philosophical reasons other than religious convictions, those who are only consuming health care intrastate, and those who prefer to directly pay their doctors or other providers rather than use health insurance, are all compelled by the Federal Government to purchase health insurance products.

This case was initially heard in the Northern District of Florida. The Respondents challenged, among other things, the individual mandate of

Section 1501(b) of the Act, arguing that Congress lacked the power to require individual minimum coverage under the Commerce Clause and the Necessary and Proper Clause of the U.S. Constitution. The District Court held that the individual mandate was unconstitutional and not severable from the Act. *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 780 F.Supp.2d 1256, (N.D. Fla. 2011).

On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed the decision of the lower court with regard to the unconstitutionality of the individual mandate, holding that the individual mandate exceeds Congress' enumerated commerce power, but that the mandate is severable from the rest of the Act. *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services,* 648 F.3d 1235 (11th Cir. 2011).

Specifically, the Eleventh Circuit pointed to the unprecedented nature of the mandate requiring an individual to enter into a compulsory contract with a private company for the duration of their lifetime, the expansion of the substantial effects doctrine to justify invocation of the Commerce Clause, the lack of an adequate jurisdictional element in the Act, the highly attenuated link between the Congressional findings related to cost shifting and the activity to be regulated, and the individual mandate's intrusion into areas of traditional state concern. *Id.* at 1282-1313.

Two other U.S. Courts of Appeal have considered this issue, and have found that the individual mandate is constitutional. *See Seven-Sky*

v. Holder, 661 F.3d 1, 18-19 (D.C. Cir. 2011) (upholding the individual mandate but expressing discomfort with the lack of a limiting principle); *Thomas More Law Center v. Obama*, 651 F.3d 529, (6th Cir. 2011).

This brief focuses on two elements of constitutional review that the Court has applied in the past to Commerce Clause cases, and that the Eleventh Circuit identified as factors in its conclusion that the individual mandate is unconstitutional, but which have not otherwise received much attention in the briefing of this matter. The first issue is whether the activity regulated by the PPACA lacks an adequate jurisdictional element, or explicit nexus with interstate commerce, as required by *United States v. Lopez*, 514 U.S. 549, 562-63, 115 S.Ct. 1624, 1631-32 (1995). The second issue is whether the Congressional findings of the PPACA provide a rational basis for the imposition of the minimum coverage provision on all Americans under the authority of the Commerce Clause. *See U.S. v. Morrison*, 529 U.S. 598, 615-20, 120 S.Ct. 1740, 1752-55 (2000).

Neither issue standing alone is necessarily fatal to the Act. However, when viewed together with the unprecedented scope of the Act, and the PPACA's infringement in the areas of health and welfare which are traditionally the concern of the States, these questions collectively point to the constitutional infirmity of the Act. *See generally, Florida*, 648 F.3d 1235. Finally, this brief concludes by considering the constitutionality of the minimum

coverage requirement against the Anglo-American tradition of limiting state sanctioned monopoly.

II. The Lack of a Limiting Jurisdictional Element Tends to Show that the Minimum Coverage Requirement Exceeds the Commerce Clause Power.

Currently, individuals who do not obtain health insurance from an employer or public health insurance program, either purchase individual health insurance, or directly pay a health provider for service. In particular, young people often choose to forego the purchase of health insurance in favor of paying off student loans, or saving for their first home simply because they tend to be healthier than older members of the population.

Starting in 2013, the Act's individual mandate requires U.S. citizens and legal residents to purchase a health insurance product if they do not otherwise have health insurance or fall into an exception. PPACA §1501, 26 U.S.C. § 5000A(a). American Indians, illegal aliens, incarcerated individuals, and persons with financial hardship, or religious objections, or a gap in health insurance for less than three months, or incomes below a certain level are exempt from the requirement to purchase health insurance. *Id.*

There is no identifiable jurisdictional element in the text of the mandate that ties the minimum coverage requirement to interstate commerce. The

lack of an express jurisdictional element does not by itself render the requirement unconstitutional, but does tend to show that the enactment was not made in accordance with Congress' regulation of interstate commerce. *See Morrison*, 529 U.S. at 614.

A. Activity Regulated by the Commerce Clause should have a Concrete Nexus with Interstate Commerce.

The Court has stated that an important factor in determining whether a statute affects interstate commerce is the presence of a jurisdictional element which concretely ties the activity to be regulated to interstate commerce.[1] *Lopez*, 514 U.S. at 561-62; *Morrison*, 529 U.S. at 611-12.

In *Lopez*, the Court determined that the Gun-Free School Zones Act of 1990 ("GFSZA"), 18 U.S.C. § 922(q)(1)(A), which made it a federal offense to possess a firearm near a school zone, exceeded Congress' authority under the Commerce Clause because the statute did not contain an express jurisdictional element which, "ensure[d] through

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[1] It is well established that under its Commerce Clause powers, Congress may regulate three types of activities. Namely, "the use of the channels of interstate commerce….the instrumentalities of interstate commerce or persons or things in interstate commerce...[and] activities that substantially affect interstate commerce." *See generally, Lopez* 514 U.S. 549. The case at bar concerns the "substantially affects" class of activities regulated under the Commerce power.

case-by-case inquiry that the firearm possession in question affects interstate commerce." *Id.* Similarly in *Morrison*, the Court, relying upon *Lopez*, struck down the Violence Against Women Act of 1994 ("VAWA"), § 40302, 108 Stat. 1941-1942, 42 U.S.C. § 13981(b), because it failed to contain an adequate jurisdictional element tying the statute's federal civil remedy for acts of violence motivated by gender to interstate commerce. *See Morrison*, 529 U.S. at 611-12.

A jurisdictional element is a section in the statute itself that ties the activity in question, on a case-by-case basis to interstate commerce. For example, in *Bass*, the Court affirmed the reversal of a conviction under a firearms statute, the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.App. §1202(a) because the Government had failed to demonstrate that the particular allegation involved possession of the weapon in commerce or affecting commerce. *U.S. v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522 (1971). In that case, the Court confirmed that the elements of the crime included a jurisdictional element. " 'Any person who… receives, possesses or transports in commerce or affecting commerce… any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.'" *See id.* at 337.

Another example of a jurisdictional element is the language Congress subsequently added to the GFSZA after the Court determined that the statute was unconstitutional in the *Lopez* decision. Congress explicitly added a jurisdictional element. "'It shall be unlawful for any individual knowingly to

possess a firearm that has moved in or that otherwise affects interstate or foreign commerce….'" 18 U.S.C. § 922 (q)(2)(A). Again, the conduct to be regulated was concretely tied on an individualized basis to interstate commerce. A case by case analysis could be performed by determining whether the particular firearm in question had been moved or procured in interstate commerce.

B. The PPACA does not contain an Express Jurisdictional Element.

The PPACA does not contain a jurisdictional element which limits the statute's reach to activities conducted in interstate commerce. *See Florida*, 648 F. 3d at 1293-95. Rather, the statute sweeps all Americans into a class that is compelled to purchase private health insurance products, whether or not the individual is consuming health care, or has consumed health care in the past without payment.

As a threshold matter, it is not entirely clear from the text of the statute what activity is being regulated by this statute. The PPACA provides that "an individual" shall obtain health insurance for herself and her dependents for life. *See* PPACA §1501(b). The activity to be regulated appears to be the act of living and breathing in lawful status in the United States. Based upon the text of the mandate, neither the individual, nor the health care provided, nor the health insurance purchased has to have a nexus with interstate commerce. *See id.*

Moreover, the categories of individuals who are exempt from having to get health insurance

(American Indians, illegal aliens, incarcerated individuals, and persons with financial hardship, or religious objections, or a gap in health insurance for less than three months, or incomes below a certain level) are not differentiated from the group subject to the minimum coverage provision by factors related to interstate commerce. *See id.* These individuals appear to have been excluded merely as a matter of policy preference. As the *Florida* court noted, the minimum coverage requirement, "… is not even tied to those who consume health care. Rather, the language of the mandate is unlimited, and covers even those who do not enter the health care market at all. " 648 F.3d at 1293-94. This Court has never held that merely existing suffices to bring an individual in the United States under the purview of the Commerce Clause.

As the Act is currently written, there is no statutory text for the Court to perform the type of case by case analysis it required in *Bass, Lopez* and *Morrison*. In those cases, the Court assessed whether the regulated activity had an interstate nexus.

In *Bass*, the Court determined that the Government needed to demonstrate that the defendant had possessed a firearm in interstate commerce because Congress had passed the statute using its Commerce Clause authority. 404 U.S. at 347. In *Lopez*, the GFSZA forbade, "'…any individual knowingly to possess a firearm at a place that [he] knows …is a school zone,'" 514 U.S. at 549 (*citing* 18 U.S.C. § 922(q)(1)(A)). Like the PPACA, the GFSZA applied to any individual engaged in the

activity to be regulated with no reference to interstate commerce, and the Court found the statute deficient from a Commerce Clause perspective.

Finally, the issue in *Morrison* was the VAWA civil liability provisions declaring that, "' [a] person … who commits a crime of violence motivated by gender… shall be liable to the party injured...." 529 U.S. at 605-06 (citing 42 U.S.C. § 13981(c)). VAWA also defined a "crime of violence" without reference to whether or not it involved interstate commerce. *Id.* Thus similar to the PPACA, neither the regulated individual nor the predicate act expressly required a nexus with interstate commerce, and the Court found a jurisdictional element lacking in the statutory provision. *Id.* at 611-12.

In the case at bar, the Court should also examine the presence of an express jurisdictional element in the course of weighing whether or not the minimum coverage provision is a proper exercise of the Commerce Clause. Congress could have provided that a person who utilizes health care in interstate commerce shall obtain health insurance. *See e.g.* Jennifer Staman & Cynthia Broughter, Cong. Research Serv., R. 40725, Requiring Individuals To Obtain Health Insurance: A Constitutional Analysis 7 (2009). Congress chose not to. It is not enough to assert that the health insurance industry is interstate in nature in the Congressional findings or in the Government's arguments. As this Court determined in *Lopez* and *Morrison*, the text of the regulatory provision should itself articulate the jurisdictional limits of the

statute. Without a jurisdictional limit to Federal laws passed under the auspices of the Commerce Clause, the federalist structure of enumerated powers underpinning the Constitution is eviscerated, and the federal –state balance of power rests on the political whims of Congress.

III. The Congressional Findings of the PPACA Do Not Provide a Rational Basis for the Imposition of a Minimum Coverage Provision on All Americans.

The PPACA contains several findings by Congress. *See* PPACA § 1501(a)(1)-(3), 42 U.S.C. § 18091(a)(1)-(3). In past cases, this Court has examined Congressional findings to analyze Congress' assertion that the regulated activity in the statute at issue substantially affects interstate commerce. *See e.g. Lopez*, 514 U.S. 549, *Morrison*, 529 U.S. 598, *and Gonzales v. Raich* 545 U.S. 1, 22, 125 S.Ct. 2195, 2208 (2005). The Congressional findings in this case do not provide a rational basis for the individual mandate.

A. When Congress Piles Inference Upon Inference to Establish a Nexus with Interstate Commerce, the Court is not Required to Give those Findings Deference.

When acting under color of the Commerce Clause authority, Congress makes findings which identify the factual predicate or activity that impacts

interstate commerce. *See e.g. Lopez*, 514 U.S. 549, *Morrison*, 529 U.S. 598, *and Raich* 545 U.S. 1. However, the Court does not indiscriminately defer to those findings. *See Morrison*, 529 U.S. at 614 ("[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (citing *Lopez*, 514 U.S. at 557, n.2)). Rather, the Court analyzes the findings to determine whether a rational basis exists for Congress' conclusions. *Raich* 545 U.S. at 22 (citing *Lopez* 514 U.S. at 557).

While a rational basis review is admittedly deferential, if the findings reflect a "but-for" causal logic that brings highly attenuated effects into the ambit of the Commerce Clause, this Court has historically rejected those findings. *See Morrison*, 529 U.S. at 616, n.6 (citing *Lopez*, 514 U.S. at 567 and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)).

In *Morrison*, Congress made numerous findings in the VAWA regarding the serious impact of gender-motivated violence on victims and their families. *Id.* at 614-15. Among other things, Congress found that gender-motivated violence affects interstate commerce, " '…by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; …increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Id.* at 615 (citing H.R. Conf. Rep. No. 103-711 at 385, U.S. Code Cong. & Admin. News 1994, pp. 1803, 1853).

Despite this plethora of findings linking the regulated act – gender based violence – to interstate commerce, the Court rejected the logic of Congress' findings, holding that a "but-for" causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce was not permissible under the Commerce Clause power. *Id.* The Court reasoned that accepting such a premise would allow Congress to reach and regulate any type of violent crime nationwide. *Id.* In addition, the Court went on to express concern that under a "but-for" causal logic, Congress could regulate any activity that it found was related to the economic productivity of individual citizens, including family law and other areas of traditional state regulation. *Id.* at 615-16.

B. The PPACA's Congressional Findings Utilize Circular Logic and Prohibited "But-for" Causal Analysis to bring Every American within the Reach of the Statue.

In the PPACA, Congress found, as the primary, general cause for the legislation, that, " [t]he individual responsibility requirement provided for in this section,… is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)." PPACA § 1501(a)(1). Effectively, Congress stated that it was invoking the Commerce Clause power because its proposed regulation would substantially affect interstate commerce.

This circular logic does not withstand the most deferential level of judicial scrutiny. Congress cannot create the activity to be regulated, by offering up the regulatory means (the individual mandate) as itself the activity to be regulated under the Commerce Clause. *See Florida*, 648 F. 3d at 1298. If the Court were to accept such Orwellian reasoning, there would effectively be no substantive limits to the Commerce Clause. *See generally, Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Congress may not exercise its authority under the Commerce Clause simply because its proposed regulation would affect interstate commerce. The cart cannot come before the horse.

The Act also lists several secondary findings, described as, "Effects on the national economy and interstate commerce." PPACA §1501(a)(2). The first of those secondary findings, Finding (A) states in part that, "[t]he requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." PPACA §1501(a)(2)(A). The Government now argues that this secondary finding is in fact the primary rationale for regulation. *See* Br. For Pet'rs on Minimum Coverage Provision p. 41. Even accepting this as true and ignoring the declared primary finding in the text of the Act, *see* PPACA § 1501(a)(1), Finding (A) does not indicate *why* every American's decisions on how to pay for their health care should be regulated by the Commerce Clause power.

Other findings in section (2) attempt to link an individual's decision of how to pay for her health care with interstate commerce concerns. For example, in Finding (B), Congress states, "Health insurance and health care services are a significant part of the national economy…. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce." PPACA §1501(a)(2)(B).

Here, Congress is conflating the health insurance market with the health care market. In fact, there is a distinction between health care and health insurance. An individual does not need to possess health insurance in order to purchase health care. Health care services are provided by doctors and other health professionals. In contrast, health insurance is a financial product; a risk management device that hedges against the costs associated with potential future medical care.

The Government now argues before this Court that is proper to treat the health insurance and health care markets as the same market because the majority of health care is financed through health insurance, *see* Br. For Pet'rs on Minimum Coverage Provision p. 35, and that Congress is entitled to define the market it is regulating as broadly as it wishes. Br. For Pet'rs on Minimum Coverage Provision p. 41. In other words, the Government is reasoning that because most Americans pay for their health care using health insurance, and health insurance is a significant part of the national

economy, the Federal Government can regulate how all Americans pay for their health care. Congress did not explicitly make such assertions in the Act, and even if it had, such reasoning epitomizes the "but-for" causal logic this Court rejected in *Morrison*. 529 U.S. at 614.

In another example of this type of reasoning, in Finding (E), Congress asserts that the economy loses up to $207 billion dollars a year because of the poorer health and shorter lifespan of the uninsured. PPACA §1501(a)(2)(E). In other words, an individual should be forced to carry health insurance because without health insurance, she might not seek as much medical care as she would if she had health insurance, therefore her health might be poorer and she might have a shortened lifespan, therefore her productivity would be reduced, and when this effect is multiplied, in the aggregate it would affect the size of the national economy.

Under this logic, it would be perfectly appropriate for Congress to legislate that every American buy a certain amount of fruits, vegetables, vitamins and supplements every day, and purchase a gym membership because, like the purchase of health insurance, such purchases would likely increase the health and lengthen the lifespan of more Americans, thereby increasing their productivity and the size of the national economy.

In other findings of the Act, Congress does not even bother to tie the individual mandate requirement to interstate commerce. For example, in Findings (C) and (D), Congress asserts that the

minimum coverage provision will increase the number of Americans who are insured and strengthen the private employer-based health insurance system. PPACA §1501(a)(2)(C)-(D). In Finding (F), Congress indicates that the cost of uncompensated medical care is passed on by health care providers to health insurance companies who then raise the premiums of families. PPACA §1501(a)(2)(F). In Finding (G), it is asserted that the financial security of families will be enhanced because increased health insurance coverage will lessen the number of personal bankruptcies. PPACA §1501(a)(2)(G). In Finding (I), the Act states that the requirement will enable the coverage of pre-existing conditions by increasing the pool of health insurance purchasers. PPACA §1501(a)(2)(I). In Finding (J), Congress concludes that a larger pool of health insurance purchasers will increase economies of scale thereby reducing the administrative costs and thus the premiums in the individual and small group insurance markets. PPACA §1501(a)(2)(J). None of these effects, however laudable are alleged to affect interstate commerce.

Lastly, the remaining two findings – that the requirement is part of a larger regulatory scheme, PPACA §1501(a)(2)(H), and that *United States v. South-Eastern Underwriters Association*, 32 U.S. 533 (1944) held that insurance is interstate commerce, PPACA §1501(a)(3) – also do not answer the question of why every American's decision of how to pay for their health care affects interstate commerce.

It is particularly troubling that Congress failed to make a more explicit statement in its findings underlying the Act because historically, health care and welfare is the domain of the States, not the Federal Government. *See Brecht v. Abrahamson,* 507 U.S. 619, 635, 113 S.Ct. 1710 (1993).

Writing for the Court in *Bass*, Justice Marshall explained that in traditionally sensitive areas such as those involving the balance of power between the Federal Government and the States, Congress must make a clear statement that it has faced and intends to bring that particularly sensitive area into issue. 404 U.S. at 349-50. In that case, the Court chose a narrower reading of the statute at issue in order to limit the reach to the Federal Government under the Commerce Clause into state criminal jurisdiction because Congress had not made a clear statement that it intended to regulate in that area. *Id.*

In this case, the circular reasoning and "but-for" causal logic in the PPACA's underlying findings do not provide a rational basis for the minimum coverage requirement, particularly in light of the traditionally sensitive area (health care) at issue here. Given these defects, and the lack of jurisdictional element in the text of the mandate itself, the Court should find the minimum coverage requirement unconstitutional.

IV. Use of the Commerce Clause to Compel Americans to Purchase Private Products from Favored Merchants is Unprecedented, and Inconsistent with the Constitution's Structure of Limited, Enumerated Federal Power.

The Act requires that every covered American purchase or otherwise obtain private health insurance products. As the Eleventh Circuit observed in the case below, "[f]ew powers, if any, could be more attractive to Congress than compelling the purchase of certain products." *Florida*, 648 F.3d at 1289. Yet historically, Congress has never used the Commerce Clause to force Americans to buy private goods.

Indeed, it is clear from commentary contemporaneous with the drafting of the Constitution, that the Founding Fathers did not envision that the national Federal Government could ever compel Americans to purchase products from private companies under the commerce power. The Commerce Clause was originally envisioned as a means of forming beneficial treaties with foreign powers, and stopping interstate taxes and tariffs which impeded the commerce between the States. *The Federalist No. 22*, at 139 (Alexander Hamilton), *and The Federalist No. 42,* at 263-64 (James Madison) (C. Rossiter ed., 1961).

When concerns were raised at the Constitutional Convention that the Commerce Clause together with the Necessary and Proper Clause could lead to Congress granting monopolies in trade and commerce, *see e.g.* George Mason,

Papers of George Mason, *in The Anti-Federalist Papers and the Constitutional Convention Debates,* 171, 175 (R. Ketcham ed., 1986); Letters of Agrippa, *in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 512, n. 200 (1971), such fears were allayed in large part by pointing to the enumerated nature of Federal power. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45* at 289 (James Madison); *see also,* Schwartz, *supra*, at 451-52. In addition, it was emphasized that any grant of monopoly by the new government would be limited to copyrights and patents for new inventions. *See* James Madison, *Writings* 756 (J.N. Rakove ed., 1999); *see generally,* Tyler Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPY. SOC. 675, 685 (2002).

Indeed, in light of the ancient struggle against monopolies in the English and American legal tradition it would have been inconceivable that delegates to the Constitutional Convention would have approved of a construction of the Commerce Clause that would allow the Federal Government to grant monopolies. Beginning in 1215 with Chapter 39 of the Magna Carta, protecting substantive property rights, to the enactment of the Statute of Monopolies in 1624 declaring most monopoly rights invalid, to the American colonies adoption of their own anti-monopoly statutes, the development of the law has been towards curbing the power of the State or in the English example, the Sovereign to force its citizens or subjects to purchase products from

favored businesses or merchants. *See generally,* Ochoa & Rose, *supra* at 677-85; Frank R. Strong, *Unraveling the Tangled Threads of Substantive Due Process*, *in Power and Policy in Quest of Law*, 73, 73-89 (Myres S. McDougal & W. Michael Reisman eds., 1985).

In particular, the Statute of Monopolies, which was part of the *corpus juris* of the newly independent American States at the time of the ratification of the Constitution, was enacted to halt the royal abuse of "letters patent," merchant monopolies, such as those granted by Queen Elizabeth, in salt, playing cards and wine to reward her political favorites. In the *Case of Monopolies*, the King's Bench rejected (after the Queen's death) her monopoly grant to a favored subject for playing cards, holding that monopolies were against the common law. Strong, *supra* at 73-80 (citing Darcy *v. Allein (Allen)* 11 Co. 84b, 77 *Eng. Rep.* 1260 (K.B. 1603)).

Despite this common law heritage, Americans are now mandated by the Act to purchase health insurance from a private company to solve the "unique" health care cost crisis. In addition, the health insurance industry is legally exempt from federal anti-trust laws. *See* The McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011 *et seq.* (2010). The minimum coverage provision starts to look rather like the monopolies of old.

The Commerce Clause does not empower the Federal Government to compel Americans to purchase products from a favored set of merchants

or businesses under the guise that a particular industry is particularly important to the national economy. Such a use of the interstate commerce power effectively grants the Federal Government a general welfare power that would utterly eviscerate the federalist Federal-State balance of power. The minimum coverage provision is unconstitutional and should be struck down.

CONCLUSION

For all the foregoing reasons, the Eleventh Circuit's decision should be affirmed with regard to the unconstitutionality of the minimum coverage requirement.

Respectfully submitted,

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