No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

v.

STATE OF FLORIDA, ET AL.,

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PRIVATE RESPONDENTS ON THE INDIVIDUAL MANDATE

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QUESTION PRESENTED

Congress effected a sweeping and comprehensive restructuring of the Nation's health-insurance markets in 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. 109 (2010) (collectively, the "Act" or the "ACA"). Here, the question presented is:

Whether Congress exceeded its Article I authority when it enacted the ACA's mandate that virtually every individual American must obtain health insurance, 26 U.S.C.A. § 5000A(a).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Three private individuals or organizations were Plaintiffs-Appellees below and are Respondents here: National Federation of Independent Business ("NFIB"); Kaj Ahlburg; and Mary Brown. Two other private individuals were made Respondents here by this Court's order of January 17, 2012: Dana Grimes and David Klemencic. NFIB is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their businesses across the fifty States and the District of Columbia. NFIB is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in NFIB.

26 States, by and through their Attorneys General or Governors, were Plaintiffs-Appellees/Cross-Appellants below and are Respondents here: Alabama; Alaska; Arizona; Colorado; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Michigan; Mississippi; Nebraska; Nevada; North Dakota; Ohio; Pennsylvania; South Carolina; South Dakota; Texas; Utah; Washington; Wisconsin; and Wyoming.

Six federal officers or agencies were Defendants-Appellants/Cross-Appellees below and are Petitioners here: Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; Timothy F. Geithner, in his official capacity as Secretary of the Treasury; Hilda L. Solis, in her official capacity as Secretary of Labor; and the United States Departments of Health and Human Services, of the Treasury, and of Labor.

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BRIEF FOR PRIVATE RESPONDENTS ON THE INDIVIDUAL MANDATE

Private Respondents respectfully submit this brief arguing that the ACA's individual mandate is unconstitutional.

RESTATEMENT OF THE CASE

Having already comprehensively described the ACA and this litigation, Private Petrs. Severability Br. 1-26, we focus here on why the mandate exceeds Congress' Article I authority.

1. As its title reflects, the Patient Protection and Affordable Care Act had two primary goals in restructuring the Nation's health-insurance markets: increasing health-insurance coverage and decreasing health-insurance costs. *See id.* 2-5. Among its most significant means of increasing coverage, the Act contains regulations forcing insurers to provide below-cost insurance to the less healthy. But those burdensome regulations alone would undermine the goal of decreasing costs. Congress thus adopted the individual mandate, which forces healthier people to purchase above-cost insurance, thereby counteracting the regulations' inflationary effect on premiums. In short, the mandate's primary purpose and effect is not to regulate uninsured individuals engaging in harmful economic activity, but to compel the uninsured into engaging in economic activity that is harmful for them but beneficial to third parties. Never before has Congress enacted such a regulatory mandate.

a. The Act prohibits insurer practices that Congress believed were "discrimination based on health status," such as declining to insure individuals who are already sick or setting premiums

based on individual actuarial risk. *Id.* 3-4, 10-11. As of 2014, the Act thus requires insurers to provide "guaranteed-issue" coverage and charge "community-rated" premiums. *Id.* 10-11. It relatedly limits their ability to restrict the scope and duration of covered services. *Id.* 11.

Consequently, the Act effectively compels insurers to offer limitless health insurance to any individual, no matter how sick, at average rates that ignore actuarial risk. These measures further the goal of expanding coverage, but undermine the goal of reducing costs. The Congressional Budget Office ("CBO") found that the various insurance regulations, standing alone, would raise costs in the individual market by roughly *27-30%*. *See id.* 11.

b. To counteract those regulations' inflationary effect, Congress heeded the insurance industry's lobbying for a mandate compelling individuals to obtain insurance. *See id.* 12; *see also* AHIP Severability Br. 8 ("Congress adopted its insurance-market reforms … together with the mandate as a package deal."). Congress claimed that the "[r]equirement" for virtually every American "to maintain minimum essential coverage" (26 U.S.C.A. § 5000A(a)) reduces premiums in three ways.

First, and most significantly, Congress found that the mandate directly subsidizes costs for insurers and their customers by "broaden[ing] the health insurance risk pool." *See* 42 U.S.C.A. § 18091(a)(2)(I). Specifically, it "will add millions of new consumers to the health insurance market" (*id.* § 18091(a)(2)(C)), who will be profitable for insurers because they primarily will be "healthy individuals" (*id.* § 18091(a)(2)(I)) who otherwise would not have

purchased comprehensive and collectively-priced insurance. *See* Private Petrs. Severability Br. 13-14. Indeed, CBO estimates that the increased demand caused by the mandate will, in an inversion of the normal economic axiom, *lower* prices in the non-group market by *15-20%* (to $5800 from roughly $7000 annually)—essentially offsetting two-thirds of the increase caused by the insurance regulations and corresponding to a *$28-39 billion subsidy* in 2016 alone. *See id.* 14 & n.15; *see also* AARP Mandate Br. 30 (regulations "would increase rates and make coverage unaffordable for many if not offset by an expansion of the insurance risk pool accomplished by the [mandate]"). Congress thus correctly found that the mandate's conscription of "healthy individuals" was "essential" to "lower[ing] health insurance premiums" given the new regulations. *See* 42 U.S.C.A. § 18091(a)(2)(I).

Second, Congress asserted that the mandate protects insurers from a strategic type of "adverse selection" supposedly enabled by the bar on health-status "discrimination"—namely, that people "would wait to purchase health insurance until they need[] care." *See id.* The credibility of Congress' assertion, however, is seriously undermined by its lack of theoretical or empirical support.

Such gamesmanship is theoretically implausible because, as the Eleventh Circuit emphasized, the Act allows insurers to adopt limited enrollment-periods and coverage waiting-periods, which will make it enormously risky to delay purchasing insurance by gambling that coverage will be available when needed. *See* Pet.App. 178a n.139 (citing 42 U.S.C.A. §§ 300gg-1(b), 300gg-7). Notably, neither the

Government nor its countless *amici* have attempted to explain how such gamesmanship could be perpetrated. Moreover, no empirical evidence exists regarding the extent to which such gamesmanship might have occurred. Of course, there was testimony before Congress that the States which enacted guaranteed-issue and community-rating rules without a mandate had suffered from insurance "death spiral[s]," in which rising premiums caused individuals to drop coverage, which caused premiums to rise more. *See* Govt. Mandate Br. 15-16, 30. But no effort has been made to estimate the extent to which healthy individuals were delaying coverage based on the perceived ability to invoke the "nondiscrimination" protections later, rather than dropping coverage simply because they were unwilling to pay the inflated cost of premiums. *See, e.g.*, Blue Cross & Blue Shield of MA Mandate Br. 12-13 (describing this non-strategic reason for declining to purchase insurance when premiums are inflated by insurance regulations). Tellingly, had gamesmanship been a serious concern, Congress could have prevented it by imposing a cut-off date or age for invoking the "nondiscrimination" protections.

Third, Congress stated that the mandate indirectly lowers premiums by reducing the amount of uncompensated care. *See* 42 U.S.C.A. § 18091(a)(2)(F). Specifically, Congress asserted that some number of uninsured individuals received $43 billion of uncompensated care in 2008, causing average annual premiums to rise by $1,000 due to "cost-shifting" from providers to insurers. *See id.* But again, the credibility of Congress' assertion is seriously undermined by its lack of theoretical or empirical support.

As the Eleventh Circuit and expert economists have explained: (1) the overwhelming majority of uncompensated care is attributable to individuals unaffected by the mandate, such as those who will *voluntarily* purchase insurance under the Act's myriad means of expanding coverage or who will be *exempt* from the mandate; and conversely (2) those targeted by the mandate are *unlikely* to obtain annual healthcare at all and mostly *pay* when they do. *See* Private Petrs. Severability Br. 15-18; Economists Mandate Br.; *see also* AHIP Severability Br. 19 ("[H]alf of the population accounts for just 3% of health care spending," whereas "just 5% of the population accounts for almost 50% of all health care costs."). Again, neither the Government nor its *amici* have offered an estimate of the actual amount of uncompensated care the mandate would eliminate. Indeed, Congress' general ban on purchasing inexpensive catastrophic-coverage plans, *see* Pet.App. 35a, confirms that its goal was not preventing future uncompensated care, but compelling immediate subsidization of insurers and their voluntary customers.

In sum, the predominant purpose and effect of conscripting the uninsured individuals affected by the mandate was not to prevent *some* unidentified number of them from engaging in strategic "adverse selection" or "cost-shifting," but instead to force *most* of them to purchase insurance that was economically disadvantageous for them, but economically advantageous for insurers and their customers. Ultimately, though, whatever their relative factual support, none of these justifications legally establishes the mandate's constitutionality.

c. Precisely because it is "essential" to "broaden the health insurance risk pool" to "lower … premiums," 42 U.S.C.A. § 18091(a)(2)(I), Congress imposed a *legal duty* for virtually everyone to obtain insurance. Specifically, the mandate is a substantive "[r]equirement" that every "applicable individual *shall* for each month beginning after 2013 ensure that the individual … is covered under minimum essential coverage." 26 U.S.C.A. § 5000A(a) (emphasis added); *see also id.* § 5000A(d) (exempting only illegal aliens, incarcerated prisoners, and certain religious objectors). The mandate is enforced through a non-compliance "penalty" imposed on most "taxpayer[s]" who "fail[] to meet the requirement" to obtain insurance. *Id.* § 5000A(b)(1); *see also id.* § 5000A(e) (exempting from the penalty five classes of individuals who remain subject to the mandate).

As we have explained, the ACA's text, structure, and context establish that the mandate in § 5000A(a) is a free-standing legal duty to obtain insurance—*i.e.*, compliance with the mandate is neither satisfied nor excused by paying the penalty in § 5000A(b), as would be the case if the mandate merely described the voluntary predicate for avoiding a tax on being uninsured. *See* Private Resps. AIA Br. 3-5.

Congress knew its decision to impose a federal purchase mandate was unprecedented. The Congressional Research Service ("CRS") warned that "[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service." Pet.App. 105a-106a.

2. Private Respondents NFIB, Ahlburg, and Brown, along with 26 States, brought this action challenging the ACA's facial validity. *Id.* 2a. As relevant here, they argued that the Act's individual mandate exceeds Congress' Article I authority. *Id.* 3a. The district court held that the mandate is unconstitutional. *Id.* 365a.

The Eleventh Circuit affirmed that holding, in an opinion jointly authored by Chief Judge Dubina and Judge Hull, from which Judge Marcus dissented. The court summarized its analysis as follows: "This economic mandate represents a wholly novel and potentially unbounded assertion of congressional authority.... We have not found any generally applicable, judicially enforceable limiting principle that would permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers." *Id.* 187a.

SUMMARY OF ARGUMENT

I. The mandate imposes an extraordinary and unprecedented duty on Americans to enter into costly private contracts. By commanding citizens to subsidize voluntary participants in the insurance industry through disadvantageous contracts, it exemplifies the threat to individual liberty that occurs when Congress exceeds its limited and enumerated powers.

II. Under the Commerce Clause, Congress has the power to regulate interstate commerce by prescribing the rules that govern interstate commercial intercourse. But forcing people into commerce does not regulate commerce. Otherwise, Congress could compel the purchase of *any* product.

Under the Necessary and Proper Clause, Congress also may employ incidental means for carrying into execution its power to regulate interstate commerce. This Court has established the basic contours of that authority through its doctrine that Congress may regulate certain activities that "substantially affect" interstate commerce or its regulation.

The "substantial effects" cases have turned on whether the regulation is "necessary"—*i.e.*, whether the means selected are plainly adapted or otherwise rationally related to *implementing* the legitimate end of regulating interstate commerce. The Government erroneously reads those cases to allow Congress to choose *any* rational means that *advances or promotes* interstate commerce. But this Court's precedents instead demonstrate that the requisite connection exists only where the regulated conduct *itself* (1) substantially interferes with interstate commerce or its regulation, (2) is either economic in nature or an impediment to the effective execution of a commercial regulatory scheme, and (3) could be regulated without effectively authorizing plenary federal power. None of the mandate's asserted justifications satisfies these requirements.

Congress emphasized that the mandate will lower premiums by forcing healthy individuals into the insurance risk pool. The relevant question, however, is not whether Congress' *regulation* will beneficially affect commerce, but whether the *regulated conduct* negatively affects commerce in a cognizable way. And uninsured status neither interferes with commerce or its regulation nor constitutes economic activity. Instead, the

uninsured's *defining* characteristic is their *non-participation* in commerce. If that nonparticipation can be overridden simply to benefit voluntary market participants, then Congress could conscript Americans to purchase *any* product.

Studiously avoiding Congress' principal subsidization justification, the Government instead defends the mandate on two purportedly narrow grounds: *first*, that the mandate will prevent strategic "adverse selection" by some uninsured individuals who otherwise might delay purchasing insurance given the Act's promise of protection from later health-status "discrimination"; and *second*, that the mandate will reduce "cost-shifting" by some uninsured individuals who otherwise will receive uncompensated healthcare.

The threshold flaw with these seemingly fact-based defenses is that they are not judicially enforceable limits on Congress' authority to impose purchase mandates. The Government provides no principled legal reason why Congress has the power to mandate insurance purchases to prevent any strategic "adverse selection" or "cost-shifting" that some uninsured individuals might have caused in the future, but somehow lacks the power to mandate such purchases to achieve the far more significant and immediate effect of forcing all the uninsured to subsidize insurers so that they can lower premiums now. Instead, the Government's reasoning confirms that no constitutionally material distinction exists.

Moreover, the Government's defenses are flawed even on their own terms. As for strategic "adverse selection," even if that practice were to occur, the effective execution of the ACA's "nondiscrimination"

bar would not be undercut simply because it would be costly for the regulated insurers that uninsured individuals were invoking their statutory rights. Although Congress has the power to make a regulatory scheme effective by eliminating barriers to its complete enforcement, Congress lacks the power to *offset the costs* of a *fully executed* scheme by conscripting strangers to that scheme who are otherwise beyond its commerce power. As for "cost-shifting," the mandate does not regulate the failure to pay for healthcare, but rather the failure to purchase health insurance. Yet Congress lacks the power to regulate a practice that is *outside* the commerce power simply because *some* of those who engage in it are also statistically likely to engage in regulable conduct *in the future*. Both of the Government's expansive theories would enable Congress to mandate the purchase of any product. And this Court should be particularly loathe to accept either justification because the mandate's predominant purpose and effect was instead to conscript the uninsured to provide a $28-39 billion annual subsidy to insurers and their customers.

At a minimum, the mandate is not a "proper" means for carrying into execution Congress' power to regulate interstate commerce. Far from being an incidental means consistent with the Constitution's letter and spirit, the mandate is an unprecedented and draconian regulation that fails to accommodate the States' traditional regulatory role and compels individuals to subsidize legal strangers through economically disadvantageous contracts.

III. The mandate cannot be upheld under the tax power. The mandate itself is a substantive

regulatory requirement to purchase insurance, not a tax. The Government's startling suggestion that law-abiding citizens can ignore that requirement so long as they pay the non-compliance sanction is foreclosed by the mandate's unambiguous text and Congress' unambiguous intent. Moreover, the sanction for unlawfully failing to purchase insurance is a penalty, not a tax, and Congress affirmatively disavowed any invocation of its tax power regardless. Finally, any tax here would be a direct tax that Congress unconstitutionally failed to apportion.

ARGUMENT

I. CONGRESS' POWERS ARE LIMITED AND ENUMERATED TO PROTECT INDIVIDUAL LIBERTY, WHICH IS THREATENED BY THE ACT'S UNPRECEDENTED PURCHASE MANDATE

"[T]he Founders denied the National Government" a "plenary police power" and "reposed [it] in the States." *United States v. Morrison*, 529 U.S. 598, 618 (2000). Accordingly, while the powers that "remain in the State governments are numerous and indefinite," "[t]he powers delegated … to the federal government are few and defined." *United States v. Lopez*, 514 U.S. 549, 552 (1995). The Commerce Clause, for example, "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994). Similarly, the Necessary and Proper Clause was "not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out [its] specifically

granted … powers." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406, 420-21 (1819) (the clause "remove[s] all doubts respecting … incidental powers"). Of course, "the great changes that ha[ve] occurred in the way business [is] carried on" have "greatly expanded the … authority of Congress" under its commerce power. *Lopez*, 514 U.S. at 556. But this Court has *always* admonished that appeals to "our complex society" can never be allowed to "effectually obliterate the distinction between what is national and what is local." *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937)).

Preserving "our Government's federal structure" is essential, "not [to] protect the sovereignty of [the] States … as abstract political entities," but "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). Our Federalism "enhances freedom" by "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). It protects against a *politically unresponsive* government, by protecting citizens from "having to rely solely upon the political processes that control a remote central power." *Id.* And it protects against a *substantively unchecked* government, "[b]y denying any one government complete jurisdiction over all the concerns of public life." *Id.* While it "may appear 'formalistic' in a given case to partisans of the measure at issue," the Constitution divides power "precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz v. United States*, 521 U.S. 898, 933 (1997).

The threat to individual liberty is especially acute when federal regulation elides the "deeply rooted" "difference … between 'misfeasance' and 'nonfeasance'—[*i.e.*,] between [an individual's] active misconduct working positive injury to others" and his passive "failure to take steps to protect them from harm." *Prosser & Keeton on the Law of Torts* § 56, 373 (5th ed. 1984). That traditional distinction reflects the greater restraint on freedom from laws mandating activity: whereas restrictions against "the commission of … acts of harm" only limit one's choices, "mandate[s]" directly "forc[e] men to help one another," leaving no other choices. *See id.* Mandates to act for third-party benefit thus infringe upon a fundamental principle of Anglo-American jurisprudence: "[l]et a man … be ever so abandoned in his principles, or vitious in his practice[;] provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws." 2 St. George Tucker, *Blackstone's Commentaries*, 124 (1803).

Particularly suspect are mandates that "take[] property from A. and give[] it to B," thus usurping the power of individuals to preserve their property and to choose with whom they financially associate. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). In the Framers' generation, this Court thought it "against all reason and justice" to "presume[]" that sovereigns could compel such private subsidization, *id.*, describing such mandates not only as "contrary both to the letter and spirit of the Constitution," but as "monster[s] in legislation [that] shock all mankind," *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795). That extreme skepticism persists in the modern era. *See,*

e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion); *id.* at 549-50 (Kennedy, J., concurring in the judgment and dissenting in part).

Thus, in depriving Congress of a "plenary police power," the Founders reduced the opportunity for "tyranny and abuse" that federal mandates pose. *See Lopez*, 514 U.S. at 552, 566. As the Eleventh Circuit noted, even though the authority to mandate activity is a "highly attractive power" (*Printz*, 521 U.S. at 905), Congress has historically restricted itself to a "limited set of personal mandates" that "contain clear foundations in the constitutional text" and are traditional "duties owed to the government attendant to citizenship." *See* Pet.App. 106a-109a.

CBO thus recognized that Congress "has never required people to buy any good or service as a condition of lawful residence in the United States," but instead regulated only "parties to economic transactions." *Id.* 105a. Over "two centuries of apparent congressional avoidance of th[is] practice," *standing alone*, "tends to negate the existence of the congressional power asserted." *Printz*, 521 U.S. at 918. More fundamentally, as demonstrated below, Congress' power to regulate interstate commerce does not remotely authorize it to regulate individuals whose defining characteristic is their commercial non-participation. Therefore, just as this Court rejected Congress' novel attempt to use the commerce power to impose a mandate that "commandeer[ed]" the States, *id.* at 925, 933, so too should it reject Congress' unprecedented mandate that commandeers "the people" to purchase insurance for the benefit of insurance market participants, *see* U.S. Const., amend. X.

II. THE ACT'S MANDATE THAT INDIVIDUALS MUST PURCHASE INSURANCE EXCEEDS CONGRESS' COMMERCE POWER

Under the Constitution, Congress has the power "[t]o regulate Commerce … among the several States" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[at] … Power[]." U.S. Const., art. 1, § 8, cls. 3, 18. Under controlling precedent, there are "three broad categories of activity that Congress may regulate under [that] commerce power": (1) "the use of the channels of interstate commerce"; (2) the operation of "the instrumentalities of interstate commerce"; and (3) "those activities that substantially affect interstate commerce" or its regulation. *See Lopez*, 514 U.S. at 558-59, 561; *Gonzales v. Raich*, 545 U.S. 1, 16-17, 22 (2005). Yet none of those "categories of activity" covers the inactivity regulated by the mandate—*i.e.*, the non-purchase of health insurance.

A. Under The Commerce Clause, The Mandate Does Not Regulate Interstate Commerce Itself, In Either Its Channels Or Instrumentalities

The interstate "commerce" that Congress may regulate is "commercial intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824); *Lopez*, 514 U.S. at 553; *see also* 1 Samuel Johnson, *A Dictionary of the English Language* 421 (6th ed. 1785) (defining "commerce" as "exchange of one thing for another"; "trade"; "traffick"; or "intercourse"). That "include[s] … business[es] in which persons b[uy] and s[ell], [or] bargain[] and contract[]," such as "insurance." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 539 (1944). And Congress

"regulate[s]" that "commercial intercourse" by "prescribing rules for carrying [it] on." *Gibbons*, 22 U.S. at 189-90; *Lopez*, 514 U.S. at 553; *see also* 2 Johnson, *supra*, 483 (defining "to regulate" as "to adjust by rule or method" or "to direct").

Thus, at the core of Congress' commerce power is the authority to set rules for use of the "channels" and "instrumentalities" of commercial intercourse, "since they are the ingredients of interstate commerce itself." *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment). Congress may ensure that goods flowing in interstate channels are free from both invidious restraints, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (discriminatory state laws), and undesirable uses, *United States v. Darby*, 312 U.S. 100, 113-115 (1941) (goods made in sub-standard labor conditions). Likewise, Congress may protect the instrumentalities of interstate commerce from external impairment, *Perez v. United States*, 402 U.S. 146, 150 (1971) (aircraft destruction), or restrict their internal operation, *S. Ry. Co. v. United States*, 222 U.S. 20, 24 (1911) (railroad safety standards). In sum, the Commerce Clause broadly empowers Congress to prescribe the rules governing participation in interstate commercial intercourse.

But the non-purchase of insurance is not "commerce," and the mandate is not "regulating" commerce. An individual has not engaged in "commercial intercourse" by *refusing* to "bargain[] and contract[]" for insurance. *See Se. Underwriters Ass'n*, 322 U.S. at 539. As the Eleventh Circuit held, that refusal "is defined by the *absence* of" intercourse. Pet.App. 115a. Likewise, the mandate

does not "regulate" the commerce in health insurance (or healthcare) by "prescribing rules for carrying [it] on." *See Gibbons*, 22 U.S. at 189-90. The mandate governs neither the terms of health-insurance (or healthcare) contracts nor the existing parties to such contracts. Rather, the mandate "compel[s] non-market participants to *enter into* commerce so that Congress may regulate them" for the benefit of voluntary market participants. Pet.App. 152a.

Compelling commerce is not *regulating* commerce. As the Eleventh Circuit recognized, "[t]he power to regulate commerce, of course, presupposes that something exists to regulate." *Id.* 98a; *see also Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885) (describing the power as "prescrib[ing] …the *conditions* upon which [commerce] shall be conducted" (emphasis added)). For example, although Congress may regulate the terms of voluntary contracts between General Motors and its customers, it may not compel individuals to enter into contracts with GM, because there is no pre-existing "commerce" to regulate. Otherwise, Congress could force individuals to purchase literally *any* product: factual distinctions among products would be irrelevant, because Congress, "[w]hatever [its] motive and purpose," has "plenary power" over "regulations of commerce." *Darby*, 312 U.S. at 115.

Nevertheless, the D.C. Circuit reasoned that because one meaning of "regulate" is "to direct," and one meaning of "direct" is "to command," it follows that "to 'regulate' can mean to require action" even by those who are *not* "already active in relation to an interstate market." *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011). The court's reasoning ignores

that the *object* of Congress' power "to regulate" is "Commerce … among the several States." Thus, under the Commerce Clause's text, Congress may certainly "direct" and "command" participants in interstate commerce—thereby "prescrib[ing] the rule by which commerce is to be governed," *Gibbons*, 22 U.S. at 196—but Congress may not "direct" or "command" non-participants to become (regulated) participants. The power to regulate traffic is the power to "direct" or "command" traffic, not to compel citizens to enter traffic, much less to require pedestrians to buy cars. Moreover, the court's reasoning is inconsistent with the Commerce Clause's purpose, which "was to create an area of free trade among the several States," *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402 (1984), *not* to advance "the positive purposes of the General Government" by bolstering market participants, *see W. Lynn Creamery*, 512 U.S. at 193 n.9.

It thus is entirely implausible that the Founding-era public would have understood the Commerce Clause to authorize Congress to subsidize an industry by conscripting unwilling customers—*e.g.*, by forcing rich New York bankers to buy peaches from poor Georgia farmers—particularly because such "regulation" was then, as it remains now, an unprecedented and extraordinary intrusion on basic individual freedoms. *See* Former DOJ Officials Mandate Br. Yet, as the D.C. Circuit admitted, such raw subsidies are constitutionally indistinguishable from the ACA's mandate, given the absence of "any clear doctrinal principles [for] limiting congressional mandates that any American purchase any product or service." *Seven-Sky*, 661 F.3d at 18. Notably, therefore, even the Government does not argue that

the power to regulate interstate commerce itself authorizes the power to compel commerce.

B. Under The Necessary And Proper Clause, The Mandate Does Not Regulate Conduct That Substantially Affects Interstate Commerce Or The Regulation Thereof

Congress and the Government instead defend the mandate under the so-called "substantial effects" doctrine. Their sweeping view of that doctrine, however, contravenes the Constitution's plain text, this Court's precedent, and the entire concept of enumerated powers.

1. The Nature And Scope Of The "Substantial Effects" Doctrine

The "substantial effects" doctrine implements Congress' power under the Necessary and Proper Clause to "carry[] into Execution" its power to regulate interstate commerce. *See* U.S. Const., art. 1, § 8, cls. 18. The doctrine therefore has various important limits that the Government here obscures.

a. The Commerce Clause does not *itself* grant Congress the power, "as such," to regulate conduct with a substantial aggregate effect on interstate commerce or its regulation. *See Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *accord Raich*, 545 U.S. at 34, 38 (Scalia, J., concurring in the judgment). Textually, the power to regulate "interstate commerce" does not include the power to regulate "conduct with a substantial aggregate effect on interstate commerce or its regulation"—the latter power is entirely different from, and exponentially broader than, the former. Moreover, the power to regulate all classes of conduct that "substantially affect" interstate commerce or its regulation would

be indistinguishable from the police power that the Founders denied Congress, because *all* human endeavors—from crime to education to family—have a substantial aggregate effect on commerce. *Lopez*, 514 U.S. at 564-65.

Consequently, it must be the Necessary and Proper Clause that authorizes Congress to regulate "activities intrastate which [substantially] affect interstate commerce or the exercise of the power of Congress over it." *Darby*, 312 U.S. at 118-20 & n.3 (citing *McCulloch*, 17 U.S. at 421). The exercise of that *incidental* authority to "carry into execution" the commerce power is therefore permissible only if it is a necessary and proper "means to the attainment of a legitimate end"—*i.e.*, "the effective execution of the granted power to regulate interstate commerce." *See United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

This Court has held that the "necessary" prong generally requires that the means selected be "plainly adapted" to the legitimate end—a means-ends fit satisfied by laws that are "convenient," "useful," "conducive," or otherwise "rationally related to the implementation of [the] constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956-57 (2010). Although this standard gives Congress wide leeway to carry its interstate commerce power into execution, it nevertheless imposes three important constraints on the "substantial effects" doctrine.[1]

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[1] The "proper" prong imposes additional constraints. *Infra* at Part II.B.3.

First, the regulated intrastate conduct must be a substantial "burden[] [or] obstruction[],"*Jones & Laughlin*, 301 U.S. at 36-37, preventing the "effective execution" of Congress' preferred market conditions in "interstate commerce or … the exercise of [Congress'] power to regulate [such commerce]," *Wrightwood Dairy*, 315 U.S. at 119, 121. No case has ever suggested that Congress may regulate conduct that is neither participation in interstate commerce nor a barrier to such commerce or its regulation, simply because the regulation itself will substantially affect interstate commerce. Instead, the "substantial effects" cases address the elimination of *impediments* to Congress' "implementation" of its commerce power. *See Comstock*, 130 S. Ct. at 1956-57.

Specifically, for "interstate commerce … to be effectively controlled," Congress must often regulate local activities. *Darby*, 312 U.S. at 121. Even where individual instances of a local "practice" are each "*de minimis*," *Raich*, 545 U.S. at 17, the practice's "total incidence" (*id.*) may create "obstructions" or "stimulants" to interstate commerce, *id.* at 35 (Scalia, J., concurring in the judgment), or may otherwise create "enforcement difficulties" for the regulatory scheme, *id.* at 22 (majority opinion).

Thus, Congress may regulate intrastate conduct *obstructing* interstate commerce it wants to flourish. Most traditionally, it may eliminate state laws burdening interstate commerce. *E.g.*, *Shreveport Rate Cases*, 234 U.S. at 353-54 (local railroad rates undercutting federal interstate rates); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (conflicting local employee-benefits laws created

administrative and financial burdens). Similarly, it may eliminate private activities burdening interstate commerce. *E.g.*, *Wrightwood Dairy*, 315 U.S. at 118-21 (local milk prices undercutting out-of-state prices); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-58 (1964) (racial discrimination by certain public accommodations).

Conversely, Congress may regulate intrastate conduct *stimulating* interstate commerce it wants to restrict. In *Raich*, Congress' goal of eliminating the interstate marijuana market would have been impaired by the intrastate manufacture and possession of locally authorized "medical" marijuana, which could be diverted into the proscribed interstate market and which also created practical difficulties in enforcing the interstate ban. 545 U.S. at 12-14, 18-22, 25-32. Likewise, in *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress limited the interstate wheat supply in order to increase interstate wheat prices. *Id.* at 113-15. Yet that regulation would have been impaired by farmers' excessive production of home-grown wheat, which could increase supply, particularly because of rising prices, and which also decreased the demand for purchasing the federally reduced interstate wheat supply. *Id.* at 127-29.

In sum, whether Congress seeks to encourage or discourage interstate commerce, it cannot regulate conduct that is not interstate commerce simply because *the regulation itself* would improve interstate commerce. Rather, it may regulate such conduct solely as a means of carrying into execution its regulation of interstate commerce. Thus, Congress may reach only intrastate conduct that

functions as a barrier or stimulant that interferes with Congress' preferred conditions in, or regulation of, interstate commerce.

Second, not even all such intrastate impediments fall within the "substantial effects" doctrine. Although "economic activity" is covered, *see Lopez*, 514 U.S. at 559-60, "noneconomic activity" is not, *see Morrison*, 529 U.S. at 610-11, 613, unless it "undercut[s]" "a larger regulation of economic activity," rather than merely affecting interstate commerce itself, *see Raich*, 545 U.S. at 24; *id.* at 36-37 (Scalia, J., concurring in the judgment). That is the essential teaching of *Lopez*, *Morrison*, and *Raich*.

Lopez invalidated a ban on gun possession near schools, and *Morrison* invalidated a civil remedy for gender-motivated violence, even though the regulated activities indisputably had serious deleterious effects on the Nation's commercial productivity. *Lopez*, 514 U.S. at 551, 563-64; *Morrison*, 529 U.S. at 601-02, 614-15. Indeed, the harms there fell on the very commercial markets referenced here to justify the mandate: gender-motivated violence "increase[d] medical and other costs" by "$5 to $10 billion a year," *Morrison*, 529 U.S. at 631-34 (Souter, J., dissenting), and the "substantial" costs of crime "are spread throughout the population" "through the mechanism of insurance," *Lopez*, 514 U.S. at 564. Despite the uncontestable economic *effects* from these significant barriers to commerce, this Court invalidated the laws attacking them, because the regulated activities were not *themselves* "economic." *Id.* at 567; *Morrison*, 529 U.S. at 617.

The reason for this distinction between "economic activity" and other human endeavors is straightforward. Intrastate economic activities—*i.e.*, the "sort[s] of economic endeavor[s]," *Morrison*, 529 U.S. at 611, that "arise out of or are connected with a commercial transaction," *Lopez*, 514 U.S. at 561—"ha[ve] a commercial character" akin to the commerce that Congress is empowered to regulate at the interstate level. *See id.* at 580 (Kennedy, J., concurring). While regulating such intrastate conduct is just beyond the express scope of the Commerce Clause, it is a "plainly adapted" incidental means under the Necessary and Proper Clause for carrying into execution interstate commerce regulation. *See McCulloch*, 17 U.S. at 421. After all, particularly in modern times, intrastate and interstate markets "in the commercial sphere" are closely intertwined into "a single [national] market," *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring), and distinguishing between them would create serious "enforcement difficulties" for regulating at the national level, especially when "fungible" products are involved, *Raich*, 545 U.S. at 18-19, 22; *id.* at 40-41 (Scalia, J., concurring in the judgment). Moreover, intrastate economic activity is less likely to involve the areas that states traditionally regulate under the police power. *See Lopez*, 514 U.S. at 564. Accordingly, because the Necessary and Proper Clause authorizes broad federal power to select "convenient" means for the commerce power's effective "implement[ation]," *Comstock*, 130 S. Ct. at 1956-57, it allows Congress essentially to override the distinction between interstate and intrastate "commerce."

But it cannot allow Congress to regulate noneconomic activities that lack any commercial character whatsoever, at *either* the local or national level, simply because they *affect* commerce in the aggregate. That would eviscerate all textual limits in the Commerce Clause and grant Congress "the police power [that] the Founders denied [it]," because even those areas that are the subjects of "traditional state regulation" have a "significant aggregate effect … on the national economy." *Morrison*, 529 U.S. at 615-18. Noneconomic activity's lack of a commercial character thus inherently renders it too "attenuated" from interstate commerce: allowing Congress to regulate such activity based solely on its inevitable aggregate effect on interstate commerce would not be sanctioning a "plainly adapted" *means* of regulating commerce, but would be permitting Congress to expand its regulatory *ends* to any desired activity. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 464 (2003) (citing *McCulloch*, *Lopez* and *Morrison*).

That said, although noneconomic activity may not be regulated based on its inevitable aggregate effect on interstate commerce, it may be regulated where it specifically "interfere[s] with," "obstruct[s]," or "undercut[s]" "a more general regulation of interstate commerce," such that its incidental regulation is "needed to make th[e] [larger] regulation effective." *Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment). For example, whereas the *Raich* majority viewed marijuana possession as "quintessentially economic" activity, *id.* at 25-26, Justice Scalia's concurrence viewed it as "noneconomic activity" that could be regulated as a barrier to "compliance with the regulatory scheme" banning interstate marijuana

transactions, because all marijuana is "fungible" and "never more than an instant from the interstate market," *id.* at 37, 40. Regardless, so long as noneconomic activity may be regulated only where it undercuts the effective execution of valid commerce regulation, Congress' power under the Necessary and Proper Clause remains plainly tethered to its power under the Commerce Clause. *Id.* at 40.

Third, any attempt to use the "substantial effects" doctrine to "effectually obliterate the distinction between what is national and what is local" must be rejected. *Lopez*, 514 U.S. at 557, 567-68 (quoting *Jones & Laughlin*, 301 U.S. at 37). A law that "undermine[s] the enumeration of powers" can hardly be characterized as "plainly adapted" to carrying into execution that enumeration. *Jinks*, 538 U.S. at 464. This Court thus has carefully "consider[ed] the implications of the Government's arguments" and rejected them when "it [was] difficult to perceive any limitation on federal power." *Lopez*, 514 U.S. at 564, 567; *see also Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring in the judgment) (warning against "congressional powers becom[ing] completely unbounded").

b. The Government's threshold characterization of the commerce power thus has two fundamental flaws. The Government suggests that Congress may regulate conduct outside of interstate commerce (1) if the regulation "advance[s]" or "promote[s]" interstate commerce, (2) with Congress possessing "broad power" to choose "what means to deploy to achieve that end." *See* Govt. Mandate Br. 21-23. Both parts of that assertion are wrong.

First, the correct question is not "whether the challenged *regulation* substantially affects interstate commerce, [but] rather … whether the *activity* being regulated does so." *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc). This Court has repeatedly emphasized that fundamental point: "the only function of courts is to determine whether the particular activity regulated … is within the reach of the federal power." *Perez*, 402 U.S. at 152 (quoting *Darby*, 312 U.S. at 120-21). That is why *Jones & Laughlin*'s discussion of "advanc[ing]" or "promot[ing]" interstate commerce focused on eliminating "injurious" "burdens and obstructions." *See* 301 U.S. at 36-37. The *regulated conduct* thus must itself be the type of barrier to Congress' "effective execution" of the commerce power that justifies "the exertion of the power of Congress over it." *See Wrightwood Dairy*, 315 U.S. at 119. Otherwise, Congress' power would cover *any and all* legislation, because Congress will always be able to identify a substantial economic effect from its legislation, *Morrison*, 529 U.S. at 615-16, and courts cannot second-guess its "conception of public policy," *Darby*, 312 U.S. at 115.

Second, the *Constitution* limits the "means" available for addressing interference with commerce or its regulation, rather than leaving the "choice" to Congress' unfettered discretion. Although Congress has broad power to choose means "*within th[e] [commerce] power's outer bounds*," it has no power to exceed that constitutionally imposed "boundary." *Morrison*, 529 U.S. at 616 n.7. *Comstock* makes clear that the Necessary and Proper Clause enables Congress only to choose "means … rationally related

to the *implementation* of a *constitutionally enumerated power*." 130 S. Ct. at 1956 (emphasis added). Thus, no matter how "rational" it may be, Congress cannot exercise the police power or otherwise regulate conduct that is too "remote" from the commercial sphere, *see Lopez*, 514 U.S. at 557, 566-67, for that would not "implement" the commerce power, but instead *expand* that power beyond the "end … within the scope of the constitution," *see McCulloch*, 17 U.S. at 421; *see also Jinks*, 538 U.S. at 464. Again, it was undisputed in *Morrison* that gender-motivated violence created substantial healthcare costs, but the Constitution simply did not authorize Congress' chosen means of attacking the problem, however rational or effective it was. 529 U.S. at 615-17.

2. The Mandate Is Not A "Necessary" Means Of Carrying Into Execution Congress' Commerce Power

Congress justified the mandate because it will lower premiums by forcing healthy individuals to participate in the insurance risk pool (a justification ignored by the Government) and because it will supposedly prevent strategic "adverse selection" and reduce "cost-shifting" by some of the uninsured (the justifications advanced by the Government). Yet none of these rationales satisfies the "substantial effects" doctrine.

a. Lowering Premiums By Forcing Healthy Individuals Into The Risk Pool

Congress reasoned that the mandate's "individual responsibility requirement … substantially affects interstate commerce," because it

"will lower … premiums" by "broaden[ing]" the "risk pool to include [more] healthy individuals." *See* 42 U.S.C.A. § 18091(a)(1),(a)(2)(I). As noted, however, the relevant question is not whether *the mandate* beneficially affects interstate commerce, but whether *the uninsured* negatively affect it. And the uninsured neither interfere with commerce or its regulation, nor engage in economic activity by failing to purchase insurance, except insofar as Congress could mischaracterize the failure to buy *any* product as an economic decision harming voluntary market participants.

i. The fact that compelling the uninsured to buy insurance will lower premiums does not make their failure to do so a "burden[] [or] obstruction[]" on Congress' effective execution of the power to regulate insurance markets. *See Jones & Laughlin*, 301 U.S. at 36-37. As the Eleventh Circuit recognized, the defining characteristic of the individuals regulated by the mandate is that they are *declining* to participate in commerce. Pet.App. 115a. Unlike intrastate market participants, nonparticipants are strangers to the insurance market at both the local and national level, and thus they "in no way interfere[] with" participants in the market or Congress' regulation thereof. *Id.* 149a-150a. Willing buyers remain free to engage in "commercial intercourse" with willing sellers, and Congress remains free to "prescribe the rule by which [that intercourse] is to be governed." *See Gibbons*, 22 U.S. at 189-90, 196.

Wickard illustrates the fundamental distinction between obstructing commerce and not participating in commerce. The "substantial effects" doctrine

authorized restriction of Filburn's intrastate wheat *production* because that economic activity, in the aggregate, was *impairing* Congress' goal of raising interstate wheat prices. 317 U.S. at 113-15, 127-29. But that holding obviously did not imply that Congress could instead raise prices by mandating that Filburn or his neighbors *buy* wheat, even though that would directly counteract the *lower* demand and prices attributable to their *failure to purchase* wheat. In other words, while the "substantial effects" doctrine allows Congress to regulate local bootleggers because of their aggregate harm to the interstate liquor market, it may not conscript teetotalers merely because conditions in the liquor market would be improved if more people imbibed. Yet the uninsured regulated by the mandate are the teetotalers, not the bootleggers, of the health-insurance market.

The D.C. Circuit, however, remarkably suggested that regulating producers of home-grown wheat and commanding all citizens to buy wheat are materially indistinguishable. It opined that *Wickard* "comes very close to authorizing a mandate" to buy wheat, "at least indirectly," because restricting home-grown production, practically speaking, "forced some farmers into the market to buy [wheat]" to "suppl[y] [their] need." *Seven-Sky*, 661 F.3d at 17 (quoting *Wickard*, 317 U.S. at 128-29). In both premise and conclusion, this reasoning fundamentally misconstrues *Wickard*.

Congress did not "force" individuals to buy wheat by banning home-grown production. It is a basic precept of enumerated-powers law that Congress may incentivize indirectly even where it may not

mandate directly. Most obviously, although Congress may not commandeer "a State to adopt a legislative program," it may "encourage a State to regulate in a particular way," such as by "attach[ing] conditions on the receipt of federal funds" or by threatening that contrary "state law[s] [will be] pre-empted." *New York*, 505 U.S. at 166-67. The critical distinction is that the regulated entity retains "the choice" of how to respond to such "incentives." *Id.* In *Wickard*, specifically, rather than being "forced" to subsidize the out-of-state wheat industry by purchasing wheat at federally inflated prices, Filburn retained the *choice* to make do with less wheat or to switch to a substitute.

Moreover, even assuming that Congress' regulation of self-consuming producers "forced" them to purchase wheat to satisfy their own demand, such regulation cannot be equated with a mandate for non-consuming citizens to purchase wheat they do not demand. Those who produce products, even if only for self-consumption, are necessarily interfering with commerce and its regulation in a way that those who are simply not consuming the product inherently cannot. Self-producers are increasing the "supply" of intrastate products in competition with interstate products and undercutting the "demand" that otherwise naturally exists, *Raich*, 545 U.S. at 18-19, as well as creating "enforcement difficulties" by producing "fungible" products that cannot be distinguished from regulated interstate products, *id.* at 22. By contrast, non-consumers pose no such barriers to federal commerce regulation. While distillers of bathtub moonshine would interfere with federal attempts to raise liquor prices by restricting interstate supply, teetotalers would not. Just as the

"refusal" to contribute to candidates or pay for abortions does not "interfere with" the exercise of those rights, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), refusing to consume a good does not interfere with the market for that good or its regulation.

Instead, the only way that market nonparticipants could be said to negatively affect the market or its regulation is *relative to* the beneficial effect from *compelling* their participation. But that truism is irrelevant, for it simply shows that the *legislation* beneficially affects commerce. Otherwise, again, Congress could mandate *any* product's purchase, because refusals to purchase will *always* negatively affect the product's seller *relative* to compelling individuals to buy from the seller. Pet.App. 113a-114a. Moreover, by that flawed logic, Congress could force uninsured healthy individuals simply *to reimburse* insurers for the loss incurred from insuring the less healthy at non-actuarial rates. That is economically indistinguishable from the mandate, which forces the healthy to buy at premiums exceeding their actuarial risk by the same amount. *Supra* at 2-3.

ii. The fact that compelling the uninsured to buy insurance will lower premiums also does not make their failure to do so "economic activity." *See Morrison*, 529 U.S. at 610. As the Eleventh Circuit reasoned, "[u]nder any framing, the regulated conduct" of being uninsured "is defined by the *absence* of … 'the production, distribution, and consumption of commodities'—the broad definition of economics in *Raich*." Pet.App. 115a (quoting 545 U.S. at 25). More fundamentally, being uninsured, like all other inactivity, is not an "economic

endeavor," *Morrison*, 529 U.S. at 611, or an "activit[y] that arise[s] out of or [is] connected with a commercial transaction," *Lopez*, 514 U.S. at 561.

Anticipating this problem, Congress described an individual's failure to purchase insurance as an "economic and financial decision[]." 42 U.S.C.A. § 18091(a)(2)(A); *see also Seven-Sky*, 661 F.3d at 16-17. But that is mere wordplay. Relabeling non-participation in economic activity as an "economic decision" to be a non-participant cannot obscure that no "economic *activity*" has occurred. That "facile" characterization could be made about "any decision not to purchase a good or service." Pet.App. 114a-115a. For example, Congress could mandate that all schools purchase science-lab equipment and that all adults purchase condoms, simply by characterizing the contrary curricular and family-planning decisions as "economic decisions" to refrain from purchasing. *But see Lopez*, 514 U.S. at 564. Substantive constitutional principles cannot be evaded through such "semantic" distinctions. *Id.* at 569 (Kennedy, J., concurring).

Indeed, the failure to purchase insurance is even less "connected with a commercial transaction" than was the gun possession in *Lopez*. *See* 514 U.S. at 561. After all, "commodities" like guns can be possessed only *after* being "produc[ed], distribut[ed], and [acquired]" through commercial transactions. *Raich*, 545 U.S. at 25. Plus, Lopez himself was a *paid gun courier*. Pet.App. 118a n.100. As his "possession of a gun in a local school zone" was nevertheless deemed "in no sense an economic activity," *Lopez*, 514 U.S. at 567, that same conclusion necessarily follows for the uninsured's

continued estrangement from the insurance market, which leaves them even more "remote" from commerce than was Lopez, *id.* at 557.

Accordingly, it is irrelevant that "the means of paying for [healthcare] are 'quintessentially economic,'" *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 557-58 (6th Cir. 2011) (Sutton, J., concurring in relevant part), and that the uninsured could be described as "self-insur[ing]," 42 U.S.C. § 18091(a)(2)(A). As the Eleventh Circuit explained, the mandate does not regulate the "economic activity" of paying for healthcare (with "self-insured" funds or otherwise), but rather forces the uninsured to purchase insurance every month to reduce market premiums, whether or not the regulated actors will be obtaining healthcare, let alone failing to pay for it. Pet.App. 118a-119a, 128a-129a.

iii. Finally, allowing Congress to mandate insurance purchases to lower premiums would effectively "create a completely centralized government." *See Morrison*, 529 U.S. at 608. As discussed, *any* failure to purchase a product—"even in areas … where States historically have been sovereign," *Lopez*, 514 U.S. at 564—could be equally mischaracterized as an "economic decision" that "harms" market participants. Thus, as CBO presciently warned, "a mandate-issuing government" could lead to "a command economy[] in which the President and the Congress dictated how much each individual and family spent on all goods and services." *See* Pet.App. 114a n.96. Indeed, upholding the ACA's mandate would ratify the "jarring prospect" that Congress could impose "criminal punishment—including imprisonment—for

failure to comply … with future mandatory-purchase requirements." *Seven-Sky*, 661 F.3d at 51 (opinion of Kavanaugh, J.). The "implications" for "tyranny and abuse" underlying Congress' position are sufficient basis to reject it. *See Lopez*, 514 U.S. at 552, 564.

Apparently recognizing that Congress' unbounded premium-reduction rationale has no limit, the Government studiously ignores that Congressional purpose and instead tries to create the appearance of limiting principles by focusing on *economic* and *policy* considerations purportedly unique to health insurance—namely, strategic "adverse selection" and "cost-shifting." *See* Govt. Mandate Br. 17-20. But such *factual* distinctions provide no principled *constitutional* basis for limiting a federal mandatory-purchase power to the health-insurance context.

The threshold problem is that "such fact-based criteria can[not] serve as … 'judicially enforceable' limitations on the commerce power," since courts are ill-suited to "sit in judgment" over complex policy questions. Pet.App. 122a. More fundamentally, as the Government itself emphasizes, Congress has "broad power to enact laws" that it rationally believes "are 'convenient, or useful' or 'conducive['] to the [enumerated] authority's 'beneficial exercise.'" Govt. Mandate Br. 22-23 (quoting *Comstock*, 130 S. Ct. at 1956). Thus, under the Government's conception of the Necessary and Proper Clause, upholding the mandate would authorize purchase mandates whenever *Congress* deemed them "useful," regardless of whether they overrode strategic "adverse selection," "cost-shifting," or any conceivably analogous factual problem.

Indeed, compelling purchases *solely* to subsidize an industry's customers is far *more* defensible under the Government's position than doing so for other reasons allegedly specific to the health-insurance context. The significant direct effect from conscripting all the uninsured into the risk pool is *more* "useful" to the "beneficial exercise" of lowering premiums than the smaller indirect effect from reducing the amount of strategic "adverse selection" or "cost-shifting" by some of the uninsured. *Supra* at 2-5. Likewise, the former effect is less "attenuated" than the latter, *Jinks*, 538 U.S. at 464, given that it does not require "pil[ing] inference upon inference" concerning how the uninsured will later act, *Lopez*, 514 U.S. at 567. Accordingly, the D.C. Circuit correctly observed that "the Government[] fail[s] to advance any clear doctrinal principles limiting congressional [purchase] mandates." *Seven-Sky*, 661 F.3d at 18.

Inexplicably, however, that court shrugged off this fatal defect, blithely opining that "[t]he right to be free from [such] federal regulation" must "yield[] to the imperative that Congress be free to forge national solutions to national problems, no matter how local … their individual origins." *Id.* at 20. But it was precisely the fear of a "completely centralized [federal] government" imposing such "national solutions" that led the Framers to "den[y] the National Government" the police power. *Morrison*, 529 U.S. at 608, 618. And that limitation applies regardless of how well the States are exercising their police power. *See Lopez*, 514 U.S. at 581-83 (Kennedy, J., concurring). In *Morrison* itself, a "voluminous congressional record" proved the States were *exacerbating* the obstructions to commerce

caused by gender-motivated violence, by performing "insufficient investigation and prosecution." 529 U.S. at 615, 620. Congress nevertheless could not fill the breach, for fear that it "might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615.

b. Preventing Strategic "Adverse Selection"

The Government seeks to justify the mandate as a necessary response to problems created for insurers by the ACA's guaranteed-issue and community-rating rules. *See* Govt. Mandate Br. 25-30. To be sure, the mandate's conscription of healthy people offsets the various costs imposed on insurers by the ACA's provisions banning "discrimination" against the less healthy. That the mandate subsidizes costs for regulated insurers, however, hardly renders it a valid means of carrying into execution Congress' commerce power. Although Congress may reach even noneconomic activity interfering with the execution of its regulatory scheme, that power to make its regulations effective does not allow it *to counteract* the costs of its own *fully executed* scheme by regulating non-interfering individuals who are otherwise outside the reach of its commerce power. Stated differently, given that Congress cannot conscript the uninsured just to lower premiums, it cannot somehow acquire that power simply because the Act itself raises premiums by imposing costs on insurers. The Government's contrary position would allow Congress to compel the purchase of any product burdened in any way by federal regulation, which is every product.

i. At the outset, the full scope of the Government's argument must be clarified. As noted, the Act's insurance regulations, including especially the "nondiscrimination" rules, would impose two types of economic harm on insurers standing alone. Most significantly, the regulations would drastically increase insurers' coverage costs, which the CBO estimated would raise premiums by roughly 27-30%. *Supra* at 1-2. Of course, that price increase would directly undermine Congress' goal of affordable premiums and further undermine it by causing fewer people to buy the higher priced insurance, potentially leading to a premium "death spiral." *Supra* at 2-4. Additionally, some individuals may instead engage in strategic "adverse selection," by *delaying* their insurance purchases until it becomes economically advantageous under the non-actuarially-priced insurance required by the "nondiscrimination" rules—although neither CBO nor anyone else estimated the extent to which this unlikely gamesmanship would occur in the face of serious deterrents. *Supra* at 3-4. The mandate solves these two problems together: by forcing healthy individuals to immediately start paying inflated premiums that exceed their actuarial risk, the mandate does not just preclude any possible gamesmanship; more importantly, it provides insurers and their voluntary customers with a *$28-39 billion annual subsidy*, thereby offsetting roughly two-thirds of the premium increases that the insurance regulations otherwise would have caused. *Supra* at 2-4.

Accordingly, it is misleading for the Government to focus exclusively on the mandate's role in preventing strategic "adverse selection." That

secondary and unquantified benefit is dwarfed by the mandate's primary and quantified role in conscripting the healthy to prevent the insurance regulations from massively increasing premiums. Indeed, even were gamesmanship *impossible*—*e.g.*, if there were a cut-off date or age for purchasing insurance under the Act's "nondiscrimination" protections—the mandate's conscription of the healthy *still* would be needed to offset the sizeable costs those rules would impose on insurers when *immediately* invoked by the less healthy. Yet the Government ignores this "essential" function of the mandate, even though Congress identified it, 42 U.S.C.A. § 18091(a)(2)(C),(I), and the Eleventh Circuit specifically addressed it, Pet.App. 128a-129a, 150a-151a.

Despite the Government's efforts to shift attention from Congress' unbounded subsidization rationale, it is necessarily implicated here. Again, under the Government's theory that preventing the insurance regulations from increasing premiums is a "beneficial exercise" of the commerce power, the large and concrete deflationary effect from forcing all the uninsured to purchase insurance is far more "useful," and far less "attenuated," than the limited and speculative effect from precluding any strategic "adverse selection." *Supra* at 35-36. Thus, while the Government will not openly defend the mandate's subsidization rationale, acceptance of the Government's strategic "adverse selection" justification would necessarily sanction a pure subsidization justification for future mandates to purchase any regulated product. In all events, as explained below, the Necessary and Proper Clause authorizes *no form* of this "offsetting" power.

ii. The failure to purchase insurance does not "undercut," "interfere with," or "obstruct" Congress from carrying into execution the guaranteed-issue and community-ratings rules. *See Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment). Absent the mandate, those regulations still would prohibit insurers from considering pre-existing health conditions, and the failure of the uninsured to purchase insurance would not create any "enforcement difficulties," *id.* at 22 (majority opinion), that prevent the Government from "mak[ing] th[ose] regulation[s] effective," *id.* at 36 (Scalia, J., concurring in the judgment). Instead, the very premise of strategic "adverse selection"—*i.e.*, that some uninsured individuals will "tak[e] advantage" of those regulations, *see* Govt. Mandate Br. 29—*presumes compliance* with the Act's *fully executed* "nondiscrimination" rules.

Indeed, the notion that individuals who will later *avail themselves* of these "nondiscrimination" protections are somehow *undercutting* them is virtually a *non sequitor*. Nondiscrimination requirements often impose significant costs on regulated entities—*e.g.*, protections against disability discrimination—but no one would suggest the protected class is *interfering* with those protections simply by invoking them. If, however, Congress did not want to protect from future health-status "discrimination" any uninsured who delayed purchasing insurance, it could have limited protection to individuals who purchased insurance by a cut-off date or age. Alternatively, it could have made "the public as a whole" *pay* insurers for the costs imposed, *Armstrong v. United States*, 364 U.S. 40, 49 (1960), which is the traditional means of

compensating those required to provide below-cost services for the public welfare, *e.g.*, 42 U.S.C. § 1395ww(d)(5)(F) (subsidizing costs of federally mandated uncompensated care). Instead, Congress simply made the policy choice to impose an unlimited "nondiscrimination" requirement on insurers without subsidizing the costs imposed from the public fisc.

Thus, as the Eleventh Circuit explained, the mandate does not "enable the execution" of Congress' insurance regulations by "remov[ing] an obstacle" to their complete enforcement, but instead solely "counteract[s] the significant regulatory costs … stemming from the fully executed reforms." Pet.App. 150a. Having compelled insurers to contract at any time with less-healthy people at below-cost premiums, Congress preemptively compelled more-healthy people to contract with insurers at above-cost premiums, thereby offsetting the various costs of its "nondiscrimination" policy. *Supra* at 2-4.

Ultimately, then, the Government's argument reduces to the remarkable proposition that the Necessary and Proper Clause empowers Congress to make its reforms effective, not just by eliminating barriers to "carrying [them] into Execution," U.S. Const., art. 1, § 8, cl. 18, but also by regulating third parties, even though they are neither barriers to the regulatory scheme nor otherwise within the reach of the commerce power, simply to undo the harm that the executed scheme has imposed on regulated parties. The Government never expressly defends that proposition, and it is indefensible.

iii. At the Founding, "to carry" meant "to bring forward" or "to effect," and "execution" meant "performance" or "practice." 1 Johnson, *supra*, 338,

727. Thus, laws that "carry into execution" commercial regulations are those that make effective the complete performance of the enacted regulations.

"[I]n its most basic sense," this "means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth." Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 331 (1993). Furthermore, Congress may "make [its] regulation effective" by eliminating conduct that "interfere[s] with," "obstruct[s]," or "undercut[s]" the execution of "the regulatory scheme." *Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 429 (1821) (enumerated powers "carr[y] with [them] all those incidental powers which are necessary to [their] complete and effectual execution"). That is why, in his *Raich* concurrence, Justice Scalia concluded that a total ban on marijuana possession was justified by the enforcement difficulties that would be created from trying to carve out an exemption for certain types of possession from the generally valid ban. 545 U.S. at 40. Finally, because laws that eliminate barriers to commercial regulation might themselves face barriers to their execution, Congress may eliminate such downstream barriers to its overall scheme. *Comstock*, 130 S. Ct. at 1963-64.

But once all barriers to enforcement have been eliminated, the "legitimate end" of the regulation's "effective execution" has been achieved. *See Wrightwood Dairy*, 315 U.S. at 119 (citing *McCulloch*, 17 U.S. at 421). At that point, whatever

costs are imposed on the regulated parties simply reflect Congress' policy choices. As the Eleventh Circuit held, Congress cannot be allowed to regulate individuals who are otherwise outside its reach, just to offset the burdens it chose to impose on regulated parties through its fully executed regulations. Pet.App. 149a-151a. Congress' powers are derived from the Constitution, not its own statutes, and so Congress cannot be allowed *to bootstrap* additional regulatory powers based solely on its own statutes' burdens. Such an offsetting regulation is not "a means by which [the] object[]" of commerce regulation is "accomplished," but instead is impermissibly "used for its own sake." *See McCulloch*, 17 U.S. at 411.

In short, the Necessary and Proper Clause's authorization for Congress to "carry into execution" its commerce regulations does not remotely permit Congress to reduce a regulatory scheme's costs for regulated parties by further regulating strangers to that scheme who are otherwise beyond its power. That would be like the President employing his authority to "take Care that the Laws be faithfully *executed*," not just to ensure "that a congressional policy [is] executed in [the] manner prescribed by Congress," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (emphasis added), but also to make that policy work "better" by reimbursing costs that it imposed. Indeed, venerable precedent confirms the Necessary and Proper Clause does no such thing.

In *United States v. DeWitt*, 76 U.S. 41 (1869), the Government defended a federal ban on intrastate sales of certain "illuminating oils" by claiming the

ban "was in aid and support of the internal revenue tax imposed on other illuminating oils," because eliminating competition from the banned oils would "increas[e] the production and sale of [the taxed] oils and, consequently, the revenue derived from them." *Id.* at 44. Thus, as here, the regulation of third parties was defended as a way to "aid and support" parties burdened by government regulation and thereby make the regulatory scheme more "effective." Yet this Court unanimously held the ban was not "an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes." *Id.*

Likewise, when later explaining his *McCulloch* opinion, Chief Justice Marshall emphasized that Congress may not increase its ability to collect taxes by preempting state taxes that diminish the funds of its taxpayer-base:

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, *or any means whatever*, to be employed in collecting the tax of the United States.... It is not a means "plainly adapted," or conducive to[,]" the end.

"A Friend to the Union," *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphasis added); *see also* Lawson & Granger, *supra*, at 331 ("To carry a law or power into execution … does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.").

iv. Furthermore, allowing Congress to conscript third parties otherwise beyond its reach just to offset costs imposed on regulated parties would confer

plenary power to mandate purchases. There is nothing constitutionally unique about Congress' finding that the ACA's mandate is "essential" to prevent its insurance regulations from enabling strategic "adverse selection" in the "health insurance" market. 42 U.S.C.A. § 18091(a)(2)(I). Per the Government, Congress could regulate individuals who were not undercutting a regulatory scheme in *any* market (not just the "health insurance" market), if doing so was "convenient" (not just "essential"), for any "beneficial" reason (not just to avoid strategic "adverse selection" costs). *Supra* at 35-36.

Allowing Congress to offset regulatory burdens onto regulatory strangers would thus enable it to compel the purchase of any product related to a regulated industry. For example, Congress could: (1) compel uninsured individuals to buy exercise equipment and healthy foods, hoping to offset the costs that the "community-rating" rules would impose if those with unhealthy lifestyles later sought insurance; (2) force Filburn and his neighbors to purchase wheat, if federal price manipulation caused wheat sellers to make fewer sales, *compare Wickard*, 317 U.S. at 113-15, 127-29; and (3) require consumers to dine out, when federal anti-discrimination rules cause restaurants to "lose a substantial amount of business," *compare Katzenbach v. McClung*, 379 U.S. 294, 297 (1964).

Indeed, under the Government's position, there is no basis for limiting Congress to *offsetting* costs of its regulatory scheme, rather than simply *improving* the scheme's function. The Government argues that, if a measure is "part of a comprehensive scheme of national economic regulation," it suffices that the

measure "contribute[s] to the success of other measures in the [scheme]." *See* Govt. Mandate Br. 26-27, 31-32. Thus, Congress could compel any product's purchase to improve conditions in regulated markets. For example, Congress could require Americans to buy GM cars, not only to offset the costs of compliance with federal safety regulations, but also to "contribute to the success" of the "comprehensive scheme" to bail out GM.

In sum, as the Eleventh Circuit held, to prevent Congress from "eviscerat[ing] the Constitution's enumeration of powers and vest[ing] [itself] with a general police power," Congress is limited to "remov[ing] … obstacle[s]" to "the execution of [its] regulations," as opposed "to counteract[ing] the significant regulatory costs … from [its] fully executed reforms." Pet.App. 148a-151a. If this critical distinction nevertheless "appear[s] 'formalistic' in [this] case to partisans of the measure at issue" given the "perceived necessity" of achieving affordable near-universal coverage, it bears emphasis that "the Constitution protects us from our own best intentions … so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz*, 521 U.S. at 933.

v. Finally, the Government's defense of the mandate based on strategic "adverse selection" is particularly untenable given the dubiousness of its factual premise. As noted, while many individuals would refuse to pay the inflated, roughly $7000 annual premiums caused by the insurance regulations alone, the Government fails to support the notion that some would do so based on the

gamble that they could safely delay purchasing insurance due to the "nondiscrimination" rules. That is theoretically implausible given limited enrollment-periods and coverage waiting-periods, and it is empirically unfounded given the absence of any attempt to estimate the degree to which it would occur. *Supra* at 3-4. There is thus no "demonstrated link in fact, based on empirical demonstration," for upholding the mandate due to strategic "adverse selection." *See Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment).

Moreover, the predominant purpose and effect of the mandate is instead to force the uninsured to provide insurers and their voluntary customers with a multi-billion-dollar subsidy, *supra* at 2-3, and Congress notably eschewed solving any strategic "adverse selection" problem through the more straightforward means of adopting a cut-off date or age for the insurance regulations, *supra* at 4. Accordingly, there are compelling reasons to view the alleged gamesmanship "as a 'pretext' for 'the accomplishment of objects not entrusted to the federal government." *See Jinks*, 538 U.S. at 464 (quoting *McCulloch*, 17 U.S. at 423).

c. Reducing "Cost-Shifting"

The Government also seeks to justify the mandate as a rational means of reducing uncompensated care. *See* Govt. Mandate Br. 33-44. The mandate, however, does not regulate the activity of failing to pay for healthcare, but rather the status of being uninsured, which is held by countless individuals who fully pay for whatever limited care they may receive in any given month. Thus, the Government seeks to regulate a class of conduct that

falls outside Congress' commerce power simply because it overlaps with different, regulable activity engaged in by different people at different times. That position is squarely foreclosed by this Court's precedents and would allow Congress to reach non-regulable conduct whenever it is *statistically related* to regulable conduct, which will be always.

i. Because the failure to purchase insurance does not obstruct the health-insurance market or regulation of insurance contracts, that same failure cannot possibly obstruct the healthcare market or regulation of healthcare contracts. This common-sense observation does not "artificially isolat[e] [a market] from the overall commerce of which it is a part" or dispute "Congress' judgment about how to define the market it is regulating." *See id.* 41. Instead, it reflects the fact that failing to purchase insurance is *necessarily* more "remote" (*Lopez*, 514 U.S. at 557) and "attenuated" (*Jinks*, 538 U.S. at 464) from the health-*care* market than from the health-*insurance* market.

Similarly, given that Congress cannot reach noneconomic activity simply because it has an immediate aggregate "effect" on commerce, *Morrison*, 529 U.S. at 615-17, Congress plainly cannot reach noneconomic activity because it may, in turn, affect economic activity that will affect commerce. Nor is being uninsured itself an "economic activity," as some have claimed, simply because there is an economic effect if an uninsured individual later receives uncompensated care. *See Thomas More*, 651 F.3d at 556-58 (Sutton, J., concurring in part). Such "conflation" of "an economic effect" with "the activity being regulated" is a "question begging"

error, under which the law in *Morrison* "[w]ould be regarded as regulating the 'consumption of health care services,' because such consumption inevitably and empirically flows from gender-motivated violence." Pet.App. 134a n.119.

The Government does not seriously dispute these points—it is not illogically contending that the mere status of being uninsured is *itself* an economic activity burdening the healthcare market, *regardless* of whether the uninsured class would ever seek healthcare services, let alone fail to pay for them. Rather, the Government contends that *some* uninsured individuals will receive uncompensated care leading to "cost-shifting" onto insurers, and that Congress chose to prevent that burdensome economic activity by forcing virtually all the uninsured to purchase insurance. *See* Govt. Mandate Br. 34-35, 42-44. Ultimately, then, the Government's argument reduces to the remarkable proposition that the Necessary and Proper Clause empowers Congress to regulate individuals engaged in a class of conduct outside Congress' commerce power, simply because some of them will later engage in different conduct that is inside it. That proposition is foreclosed by principle and precedent.

ii. "In passing on the validity of legislation" where "Congress itself has said that a particular activity affects the commerce," "the *only function* of courts is to determine whether *the particular activity regulated* … is within the reach of the federal power." *Perez*, 402 U.S. at 152 (emphases added). Here, the "particular [in]activity regulated" is being uninsured, so the "only" question is whether *that* decision "is within the reach of the federal power."

Applying that type of focused inquiry, this Court has consistently invalidated laws where the class of activity regulated exceeded Congress' commerce power, regardless of whether *some*, or even the *vast majority*, of the regulated individuals were engaged in *other* activity that could have been regulated.

For example, *Lopez* invalidated a blanket federal ban on gun possession near schools, even though roughly "95% of the firearms in the United States were transported across state lines" and thus "within Congress's regulatory authority," Pet.App. 116a n.97, and even though "Antonio Lopez himself was paid $40 to traffic the gun for which he was [prosecuted]," *id.* 118a n.100. Likewise, in *Morrison*, Justice Breyer's dissent *unsuccessfully* contended that a civil remedy for gender-motivated violence should be upheld because Congress could "reenact the present law in the form of 'An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce.'" 529 U.S. at 659. Similarly, this Court has distinguished between an unconstitutional federal civil-rights law that indiscriminately applied to *all* public accommodations and a constitutional one that was "carefully limited" to a class of enterprises that had a "direct and substantial relation to the interstate flow of goods and people," even though *many* of the businesses covered by the former law undoubtedly had the requisite relation. *Heart of Atlanta*, 379 U.S. at 250. The contrary rule would render it unnecessary for Congress *ever* to use "jurisdictional element[s] [that] ensure, through case-by-case inquiry, that the [activity] in question affects

interstate commerce," *compare Lopez*, 514 U.S. at 561, because the Government could always identify some individuals engaged in regulable activity.

Ignoring this adverse precedent, the Government makes several arguments why the mandate may commandeer nearly all the uninsured. But its arguments are simply variations on the theme that all the uninsured may be regulated just because some will later engage in regulable conduct. That position, however formulated, is meritless.

First, the Government insists that, if some of the uninsured engage in regulable conduct, then "Congress may … regulate the uninsured as a class." *See* Govt. Mandate Br. 42 (citing *Seven-Sky*, 661 F.3d at 20). But the "class of activities" cases merely hold that Congress may regulate the "entire class" of a harmful "practice" without "excis[ing], as trivial" or "*de minimis*," "individual instances" of that regulable practice. *Raich*, 545 U.S. at 17, 23. These cases never suggest that a "practice" that is not itself regulable can be reached simply because some of the individuals engaged in it also will engage in a regulable practice. Instead, the cases emphasize that the "entire class" (*id.* at 17) must be "similarly situated," *McClung*, 379 U.S. at 301, and "within the reach of federal power," *Raich*, 545 U.S. at 23. They thus provide no support for the proposition that the entire class of uninsured individuals may be reached *regardless of whether* they are engaged in the different "practice" of "cost-shifting" (or even the "economic activity" of consuming healthcare).

Second, the Government invokes *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221-22 (1938) ("*Con. Ed.*"), for the proposition that Congress need

not "await the disruption of … commerce," but instead may take "reasonable preventive measures" to forestall it. *See* Govt. Mandate Br. 42. But *Con. Ed.* "is wholly inapposite," because "Congress was regulating the labor practices of *utility companies*" who were "*presently* supplying economic services to instrumentalities of interstate commerce." Pet.App. 118a n.100. As the regulated utilities had entered the sphere of federal commerce regulation by providing "essential service to interstate and foreign commerce," Congress could proactively eliminate potential "interstate commerce … injury" from the manner in which the service was provided. *Con. Ed.*, 305 U.S. at 220-22. *Con Ed.* thus holds only that, when determining whether an "economic 'class of activities' … have a substantial effect on interstate commerce," Congress may "rational[ly]" consider the *potential* commercial effects of such activity *within* its regulatory sphere. *See Raich*, 545 U.S. at 17-19, 22, 25-26 (same, for wheat and marijuana production and possession).

That the *substance* of commerce regulation within its proper sphere may prevent harm before it occurs does not support the radically different proposition that the *reach* of the commerce power extends to individuals outside its sphere simply because some will predictably come within it eventually. While *Con. Ed.* would authorize a prophylactic condition that all mortgagees must purchase mortgage insurance to prevent potential disruptions from default, it does not authorize a mandate that all *citizens* must *now* purchase mortgage insurance since a large majority will ultimately buy a dwelling.

Third, the Government contends that "requiring insurance today and requiring it at a future point of sale amount to policy differences in degree." *See* Govt. Mandate Br. 38 (quoting *Thomas More*, 651 F.3d at 563 (Sutton, J., concurring in part)). To the contrary, the whole point of the "economic activity" requirement is to preserve spheres in which citizens remain free from federal superintendence. *Supra* at 23-26. That is no more of a "policy difference" than was *Lopez*'s invalidation of the blanket federal ban on *all* gun possession near schools, even though 95% of the guns were regulable under a more tailored law. Requiring college seniors to attend Title VII sexual-harassment training "today," simply because the vast majority will enter the labor market in the "future," is hardly a legitimate commerce regulation left to Congress' unfettered "policy" judgment.

Fourth, the Government objects that the mandate is "a more reasonable and humane" way to prevent uncompensated care than the permissible alternative of requiring that insurance be possessed "at the point at which healthcare services are provided." *See* Govt. Mandate Br. at 38-40. Again, though, the test for commerce regulation is not the *policy* question whether the regulation is more humane than other alternatives, but the *constitutional* question whether the regulated activity cognizably impairs commerce or its regulation. The fact that Congress may be unwilling, for humanitarian reasons, to exercise its power to regulate harmful economic activity does not give it the power to regulate nonharmful inactivity as an alternative means of preventing those economic harms. Indeed, in *Morrison*, Congress never would have denied victims of gender-motivated violence

access to healthcare in order to reduce the multi-billion-dollar social costs incurred, but that still did not allow Congress to regulate the perpetrators of the violence as a more humane alternative for preventing those costs. 529 U.S. at 615-17.

Regardless, there is nothing about a "point-of-consumption" alternative that is less *humane* for *patients*. The only difference between that alternative and the ACA is that the mandate to have insurance, though still enforced solely through a non-compliance "penalty," would be triggered *only* when an individual consumes healthcare, rather than "each month beginning after 2013." *Compare* 26 U.S.C.A. § 5000A(a),(b)(1). This difference in timing would be *better for patients*, who still never would be denied healthcare, and additionally would not be forced to pay costly premiums during the vast majority of the time when they were not obtaining care. Healthcare *providers*, too, still would be compensated through insurance. The only difference is that *insurers* would be *financially harmed* by decreased premiums. But that policy concern, though legitimate, underscores that the issue is *not* humaneness to patients, but *costs to insurers*.

Last, the Government suggests that it is fair to regulate all the uninsured based on "cost-shifting" by a few, because the healthcare market supposedly uniquely involves near-universal participation paired with unpredictable expenditures for essential services that will be provided regardless of ability to pay. *See* Govt. Mandate Br. 35-36, 39-40, 43-44. As noted, such factual distinctions cannot serve as constitutional limiting principles on Congress' ability to regulate people outside its commerce power.

Supra at 35-36. Moreover, these distinctions are largely illusory. Initially, many of the uninsured will *not* receive healthcare in any given month or year, let alone incur anywhere near the $5800 in annual expenses that they now must pay in premiums. *Supra* at 3, 5. More fundamentally, *whenever* individuals fail to pay for services rendered, the costs from their default are "shifted" to the provider and its other customers. Tellingly, the Government trumpets that Respondent Mary Brown's bankruptcy filing includes roughly $4500 in medical bills, but it ignores the remaining $55,000 in bills from utilities, retailers, and other unsecured creditors. *See* Govt. Mandate Br. 44. For each of those goods and services, the Government's reasoning would allow Congress to compel the purchase of insurance (or other products) that would have reduced the "cost-shifting" facilitated by bankruptcy laws and other government benefits for the needy. *See* Pet.App. 121a-122a. Yet modern societies provide the needy with all manner of essential goods and services, including food, shelter, transportation, education, and legal services, to name but a few.

iii. Finally, the Government's defense of the mandate based on "cost-shifting" is particularly untenable given the dubiousness of its factual premise. As noted, the mandate will not reduce uncompensated care anywhere near as much as Congress misleadingly suggested, because the Government's own data shows that 80% or more of that uncompensated care is attributable to individuals not affected by the mandate. *Supra* at 5. Indeed, the uninsured individuals affected by the mandate are *mostly* not responsible for *any* uncompensated care, and the $900 million to $8

billion that is attributable to some of them is roughly the same magnitude as the $3.3 billion attributable to the *insured*. *See* Private Petrs. Severability Br. 16-18.

If this Court were ever to create an exception allowing Congress to regulate people beyond the commerce power due to their nexus to people disrupting commerce, surely the closeness of the fit and the intensity of the problem would have to be far more precise and serious. That is especially true here, because the mandate's $28-39 billion subsidy for insurers is at least four times greater than its reduction of uncompensated care, and Congress notably eschewed the more tailored means of reducing "cost-shifting" by requiring the uninsured to buy actuarially-priced catastrophic coverage. *Supra* at 5. Thus, as with strategic "adverse selection," there are compelling reasons to suspect that "cost-shifting" was a pretext for Congress' real objective of conscripting *nearly all* uninsured individuals to pay roughly $5800 annually in subsidies to insurers. *Supra* at 47.

3. The Mandate Is Not A "Proper" Means Of Carrying Into Execution Congress' Commerce Power

Apart from lacking the "necessary" means-ends relationship, the mandate fails the separate requirement that it must be a "proper" means for implementing the commerce power. *See Jinks*, 538 U.S. at 462-64. Laws are "proper" only if they "consist with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. This Court's cases identify at least three important factors to that inquiry: whether the law (1) is an ordinary means of

executing the enumerated powers, (2) accommodates the States' sovereignty, and (3) respects the People's liberties. The mandate flunks all three.

a. Regulations are more likely to "consist with the letter and spirit of the constitution" if they invoke "the ordinary means of execution." *Id.* at 409, 421. The Necessary and Proper Clause merely confirms the existence of "incidental or implied powers" to execute Congress' enumerated authority, and the powers most readily "deduced from the nature of the objects themselves" are the "ordinary means of execution." *Id.* at 406-09, 420-21.

Accordingly, *McCulloch* upheld the Second National Bank because a corporation was a "usual" "means for carrying into execution the great powers vested in government," and a bank was the obvious corporation "required for … fiscal operations." *Id.* at 421-22. *Raich* likewise observed that possession bans are "commonly utilized[] means of regulating commerce in [a] product." 545 U.S. at 26 & n.36. And *Comstock* emphasized that the provision there was "a modest addition" to, and "reasonabl[e] exten[sion]" of, the "longstanding civil-commitment system" governing federal prisoners. 130 S. Ct. at 1958-61. Conversely, when invalidating a federal law commandeering state officials to enforce part of a comprehensive regulation of firearms commerce, *Printz* observed that the "compelled enlistment of state executive officers for the administration of federal programs [was], until very recent years at least, unprecedented." 521 U.S. at 905.

Here, far from being "ordinary," "usual," "common," "modest," or otherwise "incidental or implied," the awesome power to compel commerce is

the type of "great and substantive independent power" that the Framers never would have left to mere inference from the traditional power to regulate commerce. *See McCulloch*, 17 U.S. at 411. That is why the mandate "plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal … legislation." *See Lopez*, 514 U.S. at 563. Aside from "supreme and noble dut[ies]" of citizenship grounded in express text and historical tradition, *e.g.*, *Selective Draft Law Cases*, 245 U.S. 366, 387-90 (1918); Pet.App. 109a, Congress had respected the traditional, fundamental distinction between free-standing mandates to act and restrictions or conditions on voluntary conduct, *supra* at 14. It did so even in trying circumstances where such mandates would have been "highly attractive." Pet.App. 106a-107a. "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); *accord Printz*, 521 U.S. at 905.

b. The degree to which the regulation "properly accounts for state interests" is another important factor. *Comstock*, 130 S. Ct. at 1962; *see also id.* at 1967-68 (Kennedy, J., concurring in the judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised."). That accords with Founding-era legal usage, which "suggests that a 'proper' law is one that is *within the peculiar jurisdiction or responsibility of the relevant governmental actor*." Lawson & Granger, *supra*, at 267, 291 (advancing this "jurisdictional interpretation" of the Necessary and Proper Clause).

Thus, *Comstock* praised the civil-commitment statute for "requir[ing] *accommodation* of state interests," as a State retained its "right, at any time, to assert its authority over the individual, which [would] prompt the individual's immediate transfer." 130 S. Ct. at 1962. By contrast, *Printz* condemned the statute commandeering state authorities to enforce federal gun regulations: where "a 'Law … for carrying into Execution' the Commerce Clause violates the principle of state sovereignty …, it is not a 'Law … *proper* for carrying into Execution the Commerce Clause[.]'" 521 U.S. at 923-24 (citing Lawson & Granger, *supra*, at 297-326, 330-33). Notably, that was so even though commandeering state officials directly enforced federal commerce regulation, and no constitutional provision expressly barred the practice. *Id.* at 903-05, 918-19.

Here, the mandate evinces a clear lack of "account[] for state interests," *see Comstock*, 130 S. Ct. at 1962, by "foreclos[ing] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise," *see Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Indeed, notwithstanding the Government's repeated invocation of ERISA, Congress in that statute and elsewhere has expressly refused to displace States as the primary regulators of "the business of [health] insurance," *FMC Corp. v. Holliday*, 498 U.S. 52, 57-58, 62-63 (1990), and this Court likewise recognizes that "matters of health and safety" are "presumpti[vely]" within the States' province, *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). Yet, far from "requir[ing] *accommodation* of state interests," *Comstock*, 130 S. Ct. at 1962, the mandate

contravenes the view of (at least) the *26 State Plaintiffs* concerning "wise policy," *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). Accordingly, it "is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *see City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and "the precepts of federalism" strongly suggest it was not "properly exercise[d] by the National Government," *see Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring).

c. Federal interference with *individual* autonomy, as with state autonomy, is also a critical factor. This parallel treatment makes sense because "the critical postulate" of our federalist system is that "sovereignty is vested in the people" and that *all* governmental "powers are granted by them." *US Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794, 821 (1995). That precept is reflected in the Tenth Amendment's admonition that all powers not delegated to the Federal Government "are reserved to the States respectively, *or to the people*." U.S. Const., amend. X (emphasis added). Federalism and state sovereignty are "not just an end in [themselves]," but "protect[] the liberty of all persons … by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond*, 131 S. Ct. at 2364. Thus, under the "jurisdictional interpretation" of the Necessary and Proper Clause relied upon in *Printz*, *supra* at 58, "laws that are peculiarly within the jurisdiction or competence of Congress … do not tread on the retained rights of individuals." Lawson & Granger, *supra*, at 272.

Among citizens' most fundamental liberties is the power of choosing the private parties whom they will transfer property to or contract with. During the Founding era, *Calder v. Bull* warned against "presum[ing]" that the "people [have] entrust[ed] a Legislature" with the power to "take[] property from A. and give[] it to B." 3 U.S. at 388 (opinion of Chase, J.). Even "independently of the constitution of the United States," such laws contravene "the nature of republican and free governments." 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1393, 268 (1833). "Such an act" of conscription is "contrary both to the letter and spirit of the Constitution" even when solving "public exigencies," because it "lay[s] a burden upon an individual, which ought to be sustained by the society at large." *Vanhorne's Lessee*, 2 U.S. at 310; *see also Armstrong*, 364 U.S. at 49. Thus, Congress should not be presumed to have the power to force "a new contract" on a party "without [his] assent," for "the assent of all the parties to be bound by a contract be of its essence." *Cf. Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 662-63 (1819) (opinion of Washington, J.). Indeed, "creat[ing] a contract" is "within the same mischief, and equally unjust[] and ruinous," as unconstitutionally "impair[ing] or destroy[ing] one." 3 Story, *supra*, § 1392, 267. Just as Congress may not exercise the States' power to choose the laws they will create, it may not exercise individuals' power to choose the contracts they will create. *See New York*, 505 U.S. at 176.

These longstanding principles apply with particular force where, as here, the compelled contract is economically harmful. For example, this

Court invalidated a state law mandating that certain employers fund novel pension obligations, reasoning that it violated the Contracts Clause by "impos[ing] a completely unexpected liability in potentially disabling amounts" on a narrow class of employers. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 238-39, 247 (1978). Likewise, this Court invalidated a federal mandate that coal companies pay for certain health benefits of their retired former workers. *E. Enters.*, 524 U.S. at 522-23, 528-29, 537(plurality opinion). Citing *Calder*, the plurality concluded that compelling the companies to cover healthcare costs "unrelated to any commitment that the employers made or to any injury they caused" contravened the "fundamental principles of fairness underlying the Takings Clause," *id.* at 523, 537, and Justice Kennedy's concurrence reached the same result under the Due Process Clause, *id.* at 549-50.

A fortiori, these interests are gravely threatened by the ACA's mandate, which compels *individuals* to enter into disadvantageous contractual associations with *wealthier businesses* to reduce costs "unrelated to … any injury … caused" by those individuals. *See id.* at 537 (plurality opinion). That is hardly an "incidental or implied power[]." *See McCulloch*, 17 U.S. at 406. The limited "power of the Federal Government would be augmented immeasurably if it were able to impress [individuals] into its service … at no cost to itself." *See Printz*, 521 U.S. at 919-22. Yet that "risk of tyranny and abuse," *see Lopez*, 514 U.S. at 576 (Kennedy, J., concurring), is not "properly within the reach" of Congress, for it is far from "consistent with the letter and spirit of the constitution," *see Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment).

III. THE ACT'S MANDATE THAT INDIVIDUALS MUST PURCHASE INSURANCE EXCEEDS CONGRESS' TAX POWER

Congress has the power "[t]o lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. art. I, § 8, cl. 1, though "[n]o capitation, or other direct, Tax shall be laid, unless in Proportion to the Census," *id.* art. I, § 9, cl. 4. But the ACA's mandate to purchase insurance, enforced through a non-compliance penalty, falls well outside this tax power.

A. Neither The Mandate Nor The Non-Compliance Penalty Is A Tax

The mandate is an independent legal requirement to obtain insurance, not a tax. Moreover, the sanction for unlawfully failing to comply is a penalty, not a tax. Congress clearly recognized these fundamental distinctions, and the Government's *post hoc* attempts to erase them fail.

1. The dispositive point here is that the mandate's legal "[r]equirement" that covered individuals "shall" obtain insurance, 26 U.S.C.A. § 5000A(a), cannot possibly *itself* be upheld as a tax. It is thus irrelevant whether the sanction for unlawfully "fail[ing] to meet th[at] requirement," *id.* § 5000A(b)(1), is a tax. That sanction cannot be imposed once the *mandate* is invalidated, because there will be no "requirement" left to "fail to meet."

The Government responds that the mandate in § 5000A(a) does not "create[] an independent legal obligation," but "serves only as the predicate for [avoiding] tax consequences imposed by the rest of the section." *See* Govt. Mandate Br. 60-62. Congress, however, intentionally and unambiguously structured the mandate as an unconditional

"requirement," separate from the "penalty," precisely because it wanted to deprive individuals of the *lawful choice* to remain uninsured by paying a "tax." *See* Private Resps. AIA Br. 3-5, 19-22.

2. Furthermore, even the non-compliance sanction is not a "tax," but a "penalty" imposed as "punishment for an unlawful act or omission." *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); *see also* Private Resps. AIA Br. 26-27. This Court has always applied that bedrock distinction when reviewing the constitutionality of a purported "tax." *E.g.*, *United States v. Sanchez*, 340 U.S. 42, 45 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922); *see also* Private Resps. AIA Br. 30-32 (distinguishing "penalties" imposed for unlawful acts from "taxes" that, despite a regulatory motive, are imposed for acts without regard to their legality). Under that distinction, the ACA's "penalty" for unlawfully failing to comply with the mandate is not a "tax." Pet.App. 161a; *Thomas More*, 651 F.3d at 552. Tellingly, not even the Government contends that the "penalty" is a "tax" *if* it is imposed as a sanction for non-compliance with the mandate's legal requirement.

Moreover, and regardless, Congress and the President refused to invoke the tax power, by consistently treating the mandate's "penalty" differently from the ACA's "taxes." *See* Private Resps. AIA Br. 3-5, 33. Although the tax power need not be *expressly invoked*, *see* Govt. Mandate Br. at 58-59, it may be *affirmatively disavowed*, Pet.App. 164a; *Thomas More*, 651 F.3d at 553. The Government disputes this disavowal, noting that the

mandate is enforced by the IRS as part of the Tax Code and was defended by some legislators as a "tax." *See* Govt. Mandate Br. 57-58. But such weak indicia of legislative intent cannot overcome the overwhelming textual, structural, and contextual evidence that neither Congress nor the President intended the "penalty" to be treated as a "tax." Pet.App. 159a-166a, 169a-171a; *Thomas More*, 651 F.3d at 551-52.

B. Any Tax Here Would Be A Direct Tax That Congress Failed To Apportion

In any event, the mandate's so-called "tax" is not apportioned based on population. That alone is fatal, since taxing the failure to purchase insurance would be a direct tax that required apportionment.

1. After identifying a "capitation" (or head tax) as a "direct" tax that must be apportioned based on population, the Constitution generally provides that "other direct" taxes must likewise be apportioned. U.S. Const., art. I, § 9, cl.4. A "Tax[]" is direct if it falls outside the unapportioned "Duties, Imposts and Excises" authorized by the Tax Clause, *id.* art. I, § 8, cl. 1, because "the words 'duties, imposts and excises' are put in antithesis to direct taxes." *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 622 (1895); *see also Thomas v. United States*, 192 U.S. 363, 370 (1904) (recognizing "these two classes" as "apparently embrac[ing] all forms of taxation contemplated by the Constitution").

Non-direct taxes "comprehensively … cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Thomas, 192 U.S. at 370. "Excise," specifically, encompasses taxes "upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

Conversely, taxes on the "general ownership" of real or personal property—rather than any particular property or use thereof—are direct. *See Bromley v. McCaughn*, 280 U.S. 124, 136 (1929). *Pollock* further held that taxes on income from real or personal property are direct, as *de facto* taxes on the owner's *retention* of that property. *See* 158 U.S. at 627-29, 637.[2]

2. Any so-called "tax" on failing to purchase insurance would be a direct tax. It would not fall on a "particular use or enjoyment of property" or any "shifting" of a property right. *See Fernandez*, 326 U.S. at 352. Nor would it be triggered by any importation, consumption, manufacture, sale, business transaction, or exercise of a privilege, vocation, or occupation. *See Thomas*, 192 U.S. at 370. Rather, it would be levied on the *absence* of any transaction, shift in property rights, or particular use of property—*i.e.*, as a "tax" on the *retention* of one's "general ownership of property," for not having used some of it to purchase insurance. *See Bromley*, 280 U.S. at 136; *Pollock*, 158 U.S. at 627-29.

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[2] *Pollock* remains governing precedent on the scope of direct taxes, despite the mooting of its specific holding when the Sixteenth Amendment exempted income taxes from the apportionment requirement.

The Government does not expressly address this direct-tax objection. If it is suggesting that a tax on the failure of individuals to purchase insurance would be analogous to taxes on the failure of businesses, heath plans, and participants in tax-deferred retirement plans to take specified operational steps, *see* Govt. Mandate Br. 56 n.10, that is incorrect. Such non-direct taxes are excises on the privilege of performing business in certain ways or conditions on income-tax benefits, rather than direct taxes on retention of an individual's property. Moreover, if it is suggesting that the mandate is itself an "income tax," *see id.* 56, that too is incorrect. That the penalty's *amount* is calculated partly with reference to income, 26 U.S.C.A. § 5000A(c),(e), does not change the fact that the penalty is laid on the "fail[ure]" to purchase insurance, *id.* § 5000A(b)(1). A law "that imposed fines upon all appellate judges who took too long in issuing decisions … would not suddenly become an 'income tax'" if the fines were measured in "terms of a small percentage of the judge's federal income tax liability." *See Jefferson Cnty. v. Acker*, 527 U.S. 423, 449 (1999) (Breyer, J., dissenting).

CONCLUSION

This Court should hold that the individual mandate is unconstitutional and affirm in relevant part the judgment below.

Respectfully submitted,

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