

Nos. 11-1057 & 11-1058

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,  
in his official capacity as Attorney General of Virginia,

Plaintiff-Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and  
Human Services, in her official capacity,

Defendant-Appellant/Cross-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

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BRIEF OF *AMICI CURIAE* FORMER  
UNITED STATES ATTORNEYS GENERAL  
WILLIAM BARR, EDWIN MEESE, III, AND DICK THORNBURGH,  
IN SUPPORT OF APPELLEES

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## STATEMENT OF IDENTITY AND INTEREST

*Amici curiae* are former Attorneys General of the United States, serving two Presidents. An important part of *amici curiae*'s duties was to interpret, advise on, enforce, and vindicate in court both the powers that the United States Constitution truly grants to the federal government and the limits that the Constitution sets thereupon. Given this experience, and the continuing sense of duty it has instilled, *amici curiae* wish to assist the Court by presenting their views on the important issues presented here.<sup>1</sup>

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<sup>1</sup> All parties have consented to the filing of this brief; no party or party's counsel authored it in whole or in part; and no person other than *amici* or their counsel contributed money to fund the brief's preparation or submission.

## SUMMARY OF ARGUMENT

Notwithstanding the vast expanse of federal regulation today based on Congress's powers under the Commerce Clause and Necessary and Proper Clause, the individual insurance mandate contained in the Patient Protection and Affordable Care Act stands alone. 124 Stat. 119, 143 (2010) ("Act"). It is without foundation in constitutional text and unsupported by precedent, legislative or judicial.

The mandate compels individuals to enter into a health-insurance contract merely because they are lawful residents of the United States. It forces this transaction on them to subsidize health-insurance providers—third parties to whom they are legal strangers. Congress sought to dragoon healthy individuals into the insurance market to financially aid insurance companies, by increasing their customer base, adding healthy individuals to their risk pool, and offsetting the costs that the Act imposed on insurers by prohibiting the exclusion of customers with preexisting health conditions.

No analytical gymnastics can transform this forced subsidy from those who have engaged in *no commercial activity at all* into a direct regulation of interstate commerce. The individual mandate regulates neither the channels of interstate commerce, nor the instrumentalities of interstate commerce, nor a class of

economic activities that, in the aggregate, “substantially affects” interstate commerce.

Nor can the Government defend the mandate as either a “necessary” or “proper” means for “carrying into Execution” a regulation of interstate commerce. Rather than executing any regulation of commerce, the mandate does the opposite—attempting to *offset* the negative effects of Congress’s regulations *after they are fully executed*. Moreover, the supposed means employed—forcing an undesired contract on a private party to subsidize a business—is precisely the sort of unprecedented and oppressive law that the Founders would have deemed not a “proper” implied power. Indeed, each of the Government’s novel arguments for the individual mandate would eliminate any conception of a federal government of enumerated powers.<sup>2</sup>

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<sup>2</sup> The Government has virtually abandoned its argument that the mandate can be defended based on Congress’s taxing power. U.S.Br. 58-61. In any event, as *amici* explained before the district court, the mandate is not a tax in form or substance, SJ Mem. 22-28, and even if considered as a tax, would exceed Congress’s powers in light of the requirement that direct taxes be apportioned among the States, SJ Mem. 29.

## ARGUMENT

### I. THE INDIVIDUAL MANDATE IS AN UNPRECEDENTED SUBSIDY FOR INSURANCE PROVIDERS, COMPELLING COMMERCE BY PRIVATE INDIVIDUALS NOT ENGAGED IN ANY FORM OF COMMERCIAL ACTIVITY.

Given the notoriously high costs of health insurance, it is often economically beneficial for currently healthy individuals to forego insurance and directly pay for their infrequent health-care services. *See* Jonathan Gruber, *Public Finance and Public Policy* 428-29 (3d ed. 2009). Congress nevertheless forced these often disadvantageous contracts on healthy individuals in order to financially aid insurance companies, and in turn to lower health insurance premiums.

The individual mandate subsidizes the insurance industry, which supported the Act,<sup>3</sup> for two related reasons. First, it forces “millions of new customers [in]to the health insurance market,” thereby increasing the companies’ revenue base. 42

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<sup>3</sup> *See, e.g., Addressing Insurance Reform: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 111th Cong. (2009) (submission of Ronald A. Williams, Chairman & CEO, Aetna, Inc.) (“Since 2005, we at Aetna have been speaking out in support of an individual-coverage requirement . . . .”); *Comprehensive Health Reform Discussion, Day 3: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 111th Cong. (2009) (statement of Karen Ignagni, President & CEO, America’s Health Insurance Plans) (“We applaud the House committees for developing a bill that . . . combin[es] insurance market reforms with an individual-coverage requirement . . . .”); *id.* (statement of Alissa Fox, Senior Vice President, Office of Policy and Representation, Blue Cross and Blue Shield Ass’n) (“BCBSA supports a new health coverage responsibility program for all Americans to obtain and maintain health coverage, with subsidies to help those likely to have difficulty affording insurance.”).

U.S.C. § 18091(a)(2)(C). This effect is particularly significant because the mandate “broaden[s] the health insurance risk pool to include *healthy* individuals,” *id.* at § 18091(a)(2)(I) (emphasis added), thereby decreasing the insurance company’s payouts relative to premiums collected and, Congress hoped, reducing the average cost of private health insurance, *id.*

Second, the individual mandate is intended to mitigate the economic costs caused by the Act’s prohibition on refusing to insure people with preexisting conditions. 42 U.S.C. § 300gg; *see also* U.S.Br. 14. Having forced insurers to enter into disadvantageous contracts with people who already possess the trait being “insured” against, Congress “counteracted” this burdensome contractual obligation by forcing individuals to contract with insurance companies, thereby preventing them from later “taking advantage” of the contractual obligation imposed on insurers. *See* U.S.Br. 34-39.

Furthermore, there is no argument that the individual mandate is generally economically beneficial for those required to purchase insurance. Rather, the *increased demand* created by the individual mandate will purportedly *lower* the price of insurance policies, 42 U.S.C. § 18091(a)(2)(C), a complete inversion of the normal economic principle that increased demand drives prices *up*. The reason for this inversion must be that the compelled contracts are a net *benefit* to the insurance companies, and thus a net cost to the coerced customers.

In short, Congress has purported to regulate interstate commerce by forcing people to engage in the relevant commerce, on the grounds that the compelled transactions benefit the seller of those products, by directly subsidizing them now and by protecting them in the future against people “taking advantage” of government-imposed obligations. No doctrine or precedent under the Commerce Clause or the Necessary and Proper Clause allows this sort of compelled wealth transfer among private parties.

## **II. THE MANDATE DOES NOT REGULATE INTERSTATE COMMERCE, OR “ECONOMIC ACTIVITY” THAT HAS A “SUBSTANTIAL EFFECT” ON INTERSTATE COMMERCE.**

### **A. The Mandate Does Not Regulate Commerce**

By any formulation of Congress’s power to regulate interstate commerce, the individual mandate does not do so. The Supreme Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), gave the classic definition that “[c]ommerce” “describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” *Id.* at 189-90. Chief Justice Marshall added that when “in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce,” “the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation.” *Id.* at 229-30. That is, Congress’s power to regulate commerce is the power to set

rules for an otherwise freely existing “intercourse” in, or “exchange” of, “commodities.”

More recently, the Supreme Court has described this power as containing three categories:

First, Congress may *regulate the use of the channels* of interstate commerce.

Second, Congress is empowered to *regulate and protect the instrumentalities* of interstate commerce, or persons or things in interstate commerce . . . .

Finally, Congress’s commerce authority includes the power to *regulate* those activities having a substantial relation to interstate commerce, *i.e., those activities that substantially affect interstate commerce.*

*E.g., United States v. Lopez*, 514 U.S. 549, 558 (1995) (emphasis added) (internal citations omitted).

The Court’s modern formulation shares *Gibbons*’s premise and implied limitation: Congress’s commerce power is the power to set rules governing or protecting *some otherwise freely existing transaction*. Thus, Congress may regulate the terms and conditions of voluntary contracts between General Motors and its employees and customers. It may not, however, compel individuals to enter into employment and other contracts with General Motors, because there is no transaction—no “commerce”—to regulate.

The individual mandate does not regulate commerce. The people regulated are not engaged in the commerce of insurance contracts and the mandate is not a

rule governing channels, instrumentalities or movement of goods or services in interstate commerce. And *compelling* commerce—*i.e.*, punishing people for their inactivity and *non-exchange* of commodities—is not *regulating* commerce, under the definitions in *Gibbons*, the modern formulation, or any other. This must be so, not merely as a matter of text and precedent but also given the limited nature of federal power in the Constitution. Were the rule otherwise, Congress could mandate literally any transaction between private, inactive parties, on the theory that, by compelling the transaction, the Government is “regulating” its own creation.

For these reasons, the Government does not even *contend* that the inactivity regulated here is commerce, but nonetheless seeks to accomplish the same facially illegitimate end under the guise of the “substantial effects” doctrine and the Necessary and Proper Clause.

**B. The Mandate Cannot Be Justified As Regulating Economic Activities That In The Aggregate “Substantially Affect” Interstate Commerce.**

The only way inactivity could be said to “affect” commerce is in the same way it could (erroneously) be said to *be* “commerce”—by positing government-compelled activity and then contending that such forced activity will “affect” the commercial marketplace. But just as the decision of a desert dweller not to purchase flood insurance is not interstate commerce, so too it does not “affect”

interstate commerce. The Supreme Court's "substantial effects" doctrine in no way supports the counter-intuitive and limitless theory that persons who do not produce, possess, or consume the goods or services being regulated nevertheless have "affected" the interstate market for those goods or services, simply because forcing products on unwilling buyers will purportedly have a positive effect on the market. While the "substantial effects" doctrine, at its broadest, essentially eliminates the distinction between intrastate and interstate commerce, it plainly does not obliterate the distinction between those who engage in commerce and those who do not. Although Congress may limit Mr. Filburn's production of intrastate wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942), it may not compel him or his neighbors to produce or buy wheat in order to benefit the interstate wheat market.

1. Under the "substantial effects" doctrine, Congress has "power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). This doctrine recognizes that, due to the interrelated nature of markets, intrastate activities may be "so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."

*United States v. Darby*, 312 U.S. 100, 121 (1941).<sup>4</sup> Local instances of “the production, distribution, [or] consumption of commodities” multiplied thousands or millions of times can severely affect interstate commerce, and so Congress may address all such instances. *Raich*, 545 U.S. at 25 (internal quotation marks omitted).

The Court’s cases illustrate both the uses and the limits of the doctrine. In *Wickard*, the Court upheld a restriction on the amount of wheat a farmer could grow, even for personal consumption. 317 U.S. at 128-29. Congress had sought to limit the supply of wheat in interstate commerce to increase its price, and it could not accomplish that regulation if it did not also restrict the local production of wheat, as such wheat necessarily both increased supply and substituted for demand in interstate commerce. *Id.* at 127-28.

Likewise, in *Raich*, the Court applied *Wickard* to uphold the application of the Controlled Substances Act (CSA) to the possession and production of home-grown marijuana. 545 U.S. at 18-19. Banning such possession and production was permissible because “a primary purpose of the CSA is to control the supply and demand of controlled substances,” and Congress could reasonably “conclude[e]

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<sup>4</sup> As several Justices have noted, the substantial-effects doctrine may be better understood as based on the Necessary and Proper Clause. *See Raich*, 545 U.S. at 34-35 (Scalia, J. concurring in the judgment). Because this distinction does not alter the legal bottom line, however, *amici* have retained the analytical approach of the majority in *Raich*.

that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.” *Id* at 19.

Thus, in both *Raich* and *Wickard*, like other “substantial effect” cases,<sup>5</sup> the persons regulated were voluntarily engaged in a local instance of the commercial activity being regulated on the interstate level. Such local production and consumption, in the aggregate, threatened congressional efforts to reduce or eliminate supply, and also forced upon Congress the “enforcement difficulties” of distinguishing interstate products from identical intrastate products. *Raich*, 545 U.S. at 19, 22. But persons who neither produce nor consume a commodity have no such effect and are therefore outside the scope of permissible regulation endorsed in *Wickard* and *Raich*. Such non-participants do not pose any obstacle to regulating market participants and they “affect” the relevant market only in the sense that the market price would be different if they and others were forced to purchase a product they do not want.

In short, the private parties in *Wickard* and its progeny affected the relevant market in the same way local bootleggers affect, in the aggregate, the liquor market. But the *inactive* private parties here affect the market only in the way a teetotaler affects the liquor market. The fact that the “substantial effects” cases authorize

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<sup>5</sup> *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Darby*, 312 U.S. at 121; *Shreveport Rate Cases*, 234 U.S. 342, 351 (1914).

regulating a local bootlegger does not remotely authorize conscripting a teetotaler to buy liquor.

2. Conversely, the Supreme Court's decisions in *Lopez* and *Morrison* affirmatively foreclose using the "substantial effects" doctrine to authorize government-compelled purchases. In *Lopez* and *Morrison*, the Court struck down laws restricting gun possession near schools and violence against women, notwithstanding their presumed effect on interstate commerce, on the ground that such actions were not "economic activity" reachable under the Commerce Clause. *Lopez*, 514 U.S. at 560-61; *United States v. Morrison*, 529 U.S. 598, 613 (2000). By the same token, since inactivity is not "economic activity" or reachable under the Commerce Clause, it cannot be regulated regardless of its effect on the interstate health-insurance market.

The *inactivity* here is even further removed from "commerce" than the non-economic activity in *Lopez*. Most obviously, the gun possession at issue in *Lopez* is analogous to the marijuana possession deemed a properly regulated "economic activity" in *Raich*. 545 U.S. at 15. Like marijuana, a gun can be possessed only if one produces it or acquires it through a transaction. Thus, like marijuana possession, gun possession involves the "production, distribution and consumption of commodities" and virtually always "arise[s] out of or [is] connected with a commercial transaction." *Id.* at 24. In contrast, the defining characteristic of the

class of persons subject to the individual mandate is that they are unconnected to the “commercial transaction” of purchasing health insurance.

Moreover, seeking to apply the “substantial effects” test in this context creates the same fatal flaw that precluded application of that test in *Lopez* and *Morrison*: it is subject to no coherent limiting principle. Since Congress has no plenary legislative power, the commerce power ““may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”” *Morrison*, 529 U.S. at 608 (quoting *Lopez*, 514 U.S. at 556-57 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))). That is, since virtually *all* human activity has some aggregate effect on commerce, some “outer limits” must be placed on the substantial effects doctrine or it would grant Congress plenary power. *Lopez*, 514 U.S. at 556-57. Consequently, the Court has limited the doctrine to those “activities that arise out of or are connected with a commercial transaction.” *Id.* at 561.

Thus, even if inactivity were as close to “commerce” as is gun possession, extending congressional regulatory power to such inactivity would produce the same impermissible result rejected in *Lopez* and *Morrison*: a plenary congressional regulatory power. *All* inactivity “affects” markets *relative to* compelled activity.

Consequently, accepting the Government's interpretation would authorize Congress to compel *all* purchasing decisions—from food to transportation to stocks—because the compelled purchases inherently “affect” the interstate market being regulated. The Government's theory of the “substantial effects” doctrine is thus inconsistent with logic, precedent, and the fundamental premise of limited federal power.

**III. THE MANDATE IS NEITHER “NECESSARY” NOR “PROPER” FOR CARRYING INTO EXECUTION CONGRESS'S POWER TO REGULATE INTERSTATE COMMERCE.**

The individual mandate also cannot be justified based on Congress's power to enact laws that are “necessary and proper for carrying into Execution” an enumerated power. U.S. Const., art. I, § 8, cl. 18.

**A. The Mandate is Not “Necessary” To “Carry[ ] into Execution” Congress's Regulation of Interstate Commerce, But Instead Attempts to *Counteract* the Effects of Executed Regulations.**

Relying on Justice Scalia's concurring opinion in *Raich*, the Government contends that it can impose the individual mandate because, under the Necessary and Proper Clause, “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” U.S.Br. 40 (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment)). This argument profoundly misconceives the inherently limited scope of the Necessary and Proper Clause and finds no support even in the *Raich* concurrence.

1. The Necessary and Proper Clause does not expand the “legitimate”

“*end[s]*” to which Congress may direct legislation, but only the “*means*” by which it may “carry into *Execution*” a regulation of commerce (or another enumerated power). See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (upholding “means” that are “plainly adapted” to a “legitimate end”). Since the Clause does not expand the scope of congressional powers beyond those enumerated, no case has upheld a federal commerce law unless it regulated commercial activity, or some related activity that interfered with or obstructed regulation of commercial activity.

Consequently, the most the Necessary and Proper Clause can reach (even under Justice Scalia’s concurrence in *Raich*) is “activities” that affect a regulation of commerce, not inactivity. See *Raich*, 545 U.S. at 36 (Necessary and Proper Clause may allow regulation of activities where a “regulatory scheme could be undercut unless the intrastate *activity* were regulated.” (quoting *Lopez*, 514 U. S. at 561)). That is because the only things that can “undercut” a larger “regulatory scheme” are “intrastate *activities* ‘which in a substantial way interfere with or obstruct the exercise of the granted power.’” *Id.* (quoting *Wrightwood Dairy Co.*, 315 U.S. at 119) (emphasis added).

For all the reasons discussed above, the *inactivity* of nonparticipants inherently cannot obstruct or interfere with regulation of interstate market participants. Unlike intrastate activity, such inactivity neither is a “potential

stimulant” to the interstate commerce that Congress seeks to “restrict” nor creates “the enforcement difficulties” of distinguishing between local and interstate transactions. *Raich*, 545 U.S. at 15 (plurality opinion); *id.* at 35 (Scalia, J. concurring in the judgment). Those regulated by the individual mandate have no connection to the contracts between other people and their insurance companies, so their inactivity in no way interferes with or obstructs Congress’s regulation of those commercial transactions. And, as noted, their “failure” to contract on disadvantageous terms with insurance companies does not *obstruct* the Act’s regulation of insurance companies’ contracts. Rather, those regulated by the mandate have simply failed to subsidize insurance companies or offset the economic harm caused by the government-imposed preexisting condition ban. Citizens do not “interfere with” or “obstruct” political participation by failing to contribute to political candidates or by refusing to pay the candidates’ government-imposed filing fees.

Indeed, the Government’s explanation before the district court of the individual mandate’s purpose vividly demonstrates that it is *not* designed to “carry into Execution” Congress’s regulation of health-insurance contracts. The Government argued below that the individual mandate was “essential” because, “if Congress had enacted the insurance industry reforms without the minimum coverage provision, healthy individuals would have overwhelmingly strong

incentives to forego insurance coverage, knowing that they could obtain coverage later if and when they become ill.” U.S. SJ Mem. 29. Under this very formulation, the individual mandate is not a means of implementing or enforcing any other provision of the Act. Rather, this defense *assumes compliance* with the preexisting condition ban and says the mandate is needed to *offset* the negative consequences of that compliance.

2. Early discussions of the Necessary and Proper Clause confirm that merely reducing the costs of an already-executed regulation is not a means to a legitimate end. For example, during the Second Congress’s debate over a bill establishing post roads, a proposed amendment would have allowed mail carriers to transport passengers for hire notwithstanding state laws granting private monopolies over such business. 3 Annals of Cong. 308-309 (1792). Criticizing the amendment, Representative Niles argued:

Now, sir, is it necessary, in order to the transportation of your mail, that you should erect stage-coaches for the purpose of transporting passengers? What has your mail to do with passengers transported for hire? Why, sir, nothing more than this—by granting to the carrier of your mail a right to carry passengers for hire, the carriage of the mail *may be a little less expensive*. . . . But, sir, if the trifling pecuniary saving proposed by this regulation, entitles it to the character of a *necessary* one, or, in the sense of the Constitution, a *proper* one, and so a constitutional one, what may not Congress do under the idea of *propriety*?

*Id.* (first emphasis added). The House rejected the law. *Id.* at 311.

Likewise, in the wake of *McCulloch*, Chief Justice Marshall defended his opinion in a pseudonymous letter, arguing that the Necessary and Proper Clause does not empower Congress to increase its ability to collect taxes by, for example, preempting state taxes that diminish the citizen's funds:

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 an instrument to be so employed. It is not a *means* "plainly adapted," or "conducive to" the end.

John Marshall, "A Friend to the Union," *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphases added); *see also United States v. Dewitt*, 76 U.S. 41, 44 (1869) (unanimously holding that law prohibiting intrastate trade in certain oils was not "a plainly adapted means" of executing Congress's power to tax *other* oils, even though the prohibition would increase revenue from those oil taxes). Thus, the Founders would not have understood the Necessary and Proper Clause to allow Congress to regulate matters beyond the scope of the Commerce Clause simply to offset the burdens of some separate and fully executed regulation of interstate commerce.

3. Moreover, if the Necessary and Proper Clause were interpreted to authorize regulating inactivity, this would, again, impermissibly bestow plenary regulatory power on Congress. The government could claim virtually any power simply by citing one of the myriad federal laws that affects the economy, and then

claiming that a compelled commercial transaction was necessary to adjust for the consequences of that law. Thus, the government could force every American to purchase a car (or a General Motors car) on the rationale that environmental regulation of the auto industry has imposed severe costs (or that it will ameliorate the taxpayer burden caused by the GM bailout). Or the government could force every American with sufficient assets to take out a mortgage on the theory that government regulation of the mortgage markets has altered incentives regarding housing decisions.

The Government suggests it is not bestowing such boundless power on Congress, because the health-insurance market is “unique” (since the vast majority of people will eventually need health care) and because the individual mandate was forged in response to the preexisting condition ban imposed on insurers. U.S.Br. 34-39, 41-43. But this is no real limitation and, indeed, it is a wholly *improper* limitation under the Necessary and Proper Clause.

First, there is nothing “unique” about health care. Just as with the health-care market, Congress could assume that every individual will participate in some fashion in the markets for transportation, housing, food, clothing, etc. It could likewise find that its own regulations, including regulation of credit, the bankruptcy laws, and foreclosure restrictions, burden these markets by enabling some individuals to default on payment. In those markets, then, the government

would be authorized to mandate cash purchases of cars or homes by those who can afford them now, to offset the effects of later defaults.

More fundamentally, if Congress really did have the power to override inactivity in order to make a regulatory scheme less costly for the regulated, there would be no legitimate basis for holding that Congress may only do so in a “unique” market or where such requirements are *essential* to make the scheme “work”. The Necessary and Proper Clause authorizes congressional action if it is merely “convenient” to effective regulation, and the means chosen by Congress are subject only to deferential review. *McCulloch*, 17 U.S. at 413-14; Appl. Br. 40 (“the Court asks [only] ‘whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.’”) (quoting *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010)). Thus, if compelled contracting to subsidize regulated industries were, in fact, an appropriate means of executing those regulations, Congress could compel purchases in any market, not just “unique” ones, and for any rational reason, not just to avoid “free-riding” on a congressionally-mandated contractual term.

In short, since compelling insurance purchases does not regulate commerce or eliminate impediments to such regulation, it is not in furtherance of a “legitimate” end “within the scope of the constitution,” and therefore cannot be justified under the Necessary and Proper Clause. *McCulloch*, 17 U.S. at 421.

**B. Forcing Private Parties To Enter Into Disadvantageous Contracts To Subsidize a Private Industry Is Not a “Proper” Means of Executing a Regulation of Interstate Commerce.**

Even if the individual mandate were a necessary means, it would not be a “proper” one. Forcing an individual to engage in private commerce to subsidize regulated companies is not a “proper” incident of carrying into execution the power to regulate interstate commerce.

1. The word “proper” requires that, in executing its enumerated Commerce Clause authority, Congress use only those means that are consistent with the limited role of the federal government. *See generally* Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993) (favorably cited in *Printz v. United States*, 521 U.S. 898, 924 (1997)); *Gibbons*, 22 U.S. at 187 (describing clause as a “limitation on the means which may be used”). That role, in turn, is informed by the customary methods of regulation that, at the Founding, would have been considered naturally incident to Congress’s exercise of enumerated authority and thus not of such significance as to merit explicit mention. *See generally* Lawson *et al.*, *The Origins of the Necessary and Proper Clause* (2010) (“necessary and proper” referred to the concept of incidental powers as employed in private agency law and was meant to authorize those means that were both reasonably necessary and customary).

As Chief Justice Marshall put it, the Necessary and Proper Clause allows only those regulations that are “appropriate,” “not prohibited,” and “consistent with the letter and spirit of the constitution.” *McCulloch*, 17 U.S. at 421. Thus, in *McCulloch* itself, the Court upheld the congressionally chartered national bank because history and custom suggested that the use of the corporate form was *not* such a great or remarkable power that one would expect it to be enumerated, rather than “implied as incidental to other powers.” *Id.* at 411.

Conversely, *Printz* demonstrates that laws exceeding Congress’s customary and incidental means of regulation are not “proper,” particularly if they are inconsistent with the autonomy of States and persons that underlies the constitutional structure. U.S. Const., amend. X (reserving non-enumerated powers “to the States respectively, or to the people”). In *Printz*, the Court invalidated provisions that “commandeered” state officials to enforce the Brady Handgun Violence Prevention Act, even though no express provision in the Constitution barred Congress from doing this, and even though having state officials enforce the law was a direct means of carrying it out. 521 U.S. at 904-905, 933. The Court surveyed historical sources from the Founding Era as well as statutory practice and found “no evidence of an assumption that the Federal Government may command the States’ executive power in the absence of a particularized constitutional authorization.” *Id.* at 905-911, 916. The Court also emphasized the Constitution’s

structure, noting that the intended limited role of the federal government would be fantasy if “the Federal Government . . . were able to impress into its service—and at no cost to itself—the police officers of the 50 States.” *Id.* at 922. Finally, the Court turned to “the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause.” *Id.* at 923. That Clause did not save the commandeering provisions, because, “[w]hen a ‘Law . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . , it is not a ‘Law *proper* for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely an act of usurpation’ which ‘deserves to be treated as such.’” *Id.* at 923-24.

The Court has used this or similar reasoning in other cases. *See, e.g., Alden v. Maine*, 527 U.S. 706, 732-33 (1999) (applying *Printz* to hold that it was not “proper” to subject non-consenting States to private suits for damages in state courts); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955) (Clause cannot be used to circumvent certain protections for criminal defendants); *Myers v. United States*, 272 U.S. 52 (1926) (limiting Congress’s power to restrict President’s removal of officers, over dissent’s reliance on Necessary and Proper Clause).

2. Like the commandeering of state officials, the compulsion of

individuals to enter into commercial contracts is so unconventional and inconsistent with the “spirit of the Constitution” that it cannot be considered a natural or “proper” incident to the exercise of Congress’s enumerated powers.

Anglo-American law reflects an ancient distinction between prohibitions of and conditions on conduct, which were considered normal incidents of government, and affirmative requirements to act, which required special justification. Indeed, this was a “premise[ ] inherent in the common law.” *See Note, Failure to Rescue: A Comparative Study*, 52 Colum. L. Rev. 631, 632 (1952) (“Judicial reluctance to require positive action was a concomitant of the individualistic premises inherent in the common law . . .”). As Blackstone put it in the famous first chapter of his *Commentaries*: “Let a man, therefore, 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.” St. George Tucker, 2 *Blackstone’s Commentaries* \*124 (1803) (photo. reprint 1996).

To be sure, the broad police power of the States has always included some authority to require affirmative action—but such duties were *of the citizen to the state and rooted in custom and tradition*. Thus, on the basis of “ancient usage and the unanimity of judicial opinion,” the Supreme Court upheld under the Thirteenth Amendment a state law requiring the yearly labor of able-bodied adult males to

maintain *public* roads in their counties. *Butler v. Perry*, 240 U.S. 328, 330-31 (1916).

Conversely, the imposition of an affirmative duty on *private* parties raises constitutional concerns even where that duty is voluntarily assumed. *See, e.g., Bailey v. Alabama*, 219 U.S. 219 (1911) (holding that it would violate the Thirteenth Amendment to criminalize breaching an employment contract, regardless whether the contract was voluntary.) Given the sharply limited ability of state *police* power to compel private contracts, the Founders could not have envisaged this power as incidental to Congress's *enumerated* powers.

Indeed, the Supreme Court has emphasized the serious constitutional concerns raised by compelled contracting as far back as *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which recognized that “[i]t is against all reason and justice” to presume that the legislature has been entrusted with the power to enact “a law that takes property from A. and gives it to B.” *Id.* at 388 (opinion of Chase, J.). More recently, the Court relied upon similar principles in invalidating a Minnesota law that imposed pension obligations on certain large employers that they had not contractually committed to provide. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 238-39 (1978). The Court reasoned that the law violated the Contracts Clause by “impos[ing] a completely unexpected liability in potentially disabling amounts” on a narrow class of employers. *Id.* at 247.

The Court again applied the *Calder* principle when invalidating a Congressional mandate that coal companies had to pay for certain health benefits of former coal miners. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 522-23, 529-37 (1998) (plurality opinion). There, Congress required wealthy coal companies to pay health-care benefits to retired coal workers, although the companies had never contracted to provide such benefits. The Court found that requiring the companies to cover health-care costs “unrelated to any commitment that the employers made or to any injury they caused . . . implicates fundamental principles of fairness underlying the Takings Clause,” and therefore invalidated the law. *Id.* at 537; *see also id.* at 549-50 (Kennedy, J., concurring in the judgment) (similar, under Due Process Clause).

Thus, *Spannaus* and *Eastern Enterprises* both demonstrate that compelling even wealthy employers to effectively enter into pension and health-care contracts they have eschewed, even to benefit current or former employees, is at least potentially at odds with the “fundamental principles of fairness” and personal autonomy underlying the Takings, Due Process and Contract Clauses. *Spannaus*, 438 U.S. at 247; *Eastern Enters.*, 524 U.S. at 537 (plurality opinion).

Consequently, forcing health-care contracts on relatively under-funded individuals cannot be “proper,” particularly since those contracts are often disadvantageous, are designed to benefit wealthy insurance companies, and are required in order to

offset burdens on those companies “unrelated to . . . any injury [the compelled private contractors] caused.” *Eastern Enters.*, 524 U.S. at 537.

It is therefore not surprising that the federal government has never before compelled individuals to enter into private commercial contracts. The affirmative obligations on private parties cited by the Government, U.S. SJ Mem. 36-37 & n.6; U.S.Br. 49-50, are not remotely analogous, and the distance between these examples and the mandate is telling. Each one either involves a traditional duty of a citizen to the state or is merely a *condition* on government *benefits* or *participation* in an underlying market. *See, e.g., Selective Draft Law Cases*, 245 U.S. 366, 386-88 (1918) (noting that the draft is “sanctioned . . . by the text of the Constitution” and historical practice); 49 U.S.C. § 13906(a)(1) (conditioning registration of a federal motor carrier on purchase of liability insurance); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992) (explaining that CERCLA imposes liability “for ownership of [a] facility at a time that hazardous waste was ‘spilling’ or ‘leaking’”).

By contrast, the individual mandate places a novel obligation based solely on an individual’s residence in the United States. As in *Printz*, the “utter lack of statutes” exercising the sort of power claimed “suggests an assumed *absence* of such power.” 521 U.S. at 907-08. Indeed, the “almost two centuries of apparent congressional avoidance of the practice” is all the more remarkable given “the

attractiveness of that course to Congress.” *Id.* at 918, 908. To take *Wickard* as an example, it seemingly did not occur to anyone in the 1930s that the government might have supported wheat prices simply by commanding all Americans to buy it, even though that would be a quite direct way of accomplishing Congress’s goal. 317 U.S. at 129.

Like the commandeering of state officers in *Printz*, the commandeering of individuals to subsidize health-care providers to drive down the overall price of health insurance cannot be a “proper” means of implementing the Commerce Clause.

#### **IV. THE GOVERNMENT’S ATTEMPTS TO DEFEND A HYPOTHETICAL LAW CANNOT SAVE THE MANDATE.**

Apparently recognizing that the Act as written is indefensible, the Government on appeal has abandoned its prior characterization of the Act’s purpose and effect, and instead attempts to defend a hypothesized regulation that cannot be found anywhere in the Act. In the district court, the Government acknowledged the reality that the commerce at issue was purchasing health *insurance* and argued that overriding the “economic decision” of individuals not to buy *insurance* was needed, primarily to offset the burden imposed by the preexisting condition ban. U.S. SJ Mem. 18-30, 33-39. Now the Government focuses on a *different* “class of economic activities that substantially affects interstate commerce”—payment for “health care *services*”—and claims that the

individual mandate somehow constitutes regulation connected to that separate economic transaction. U.S.Br. 31-57.

The dispositive response to this eleventh-hour shift is that the commerce regulated here is plainly *not* payment for health-care *services*. The Act does not restrict or regulate, in any form, the manner in which individuals pay for health care. It does not penalize or regulate the failure to pay for health-care *services*, only the failure to buy health *insurance*. And Congress cannot burden a class defined by failing to buy health insurance on the grounds that many (or most) members of that class will use and fail to pay for health-care services, any more than it can penalize gun possession near schools on the (statistically supported) grounds that most such guns move through interstate commerce. *Cf. Lopez*, 514 U. S. at 561.

Supreme Court precedent confirms the obvious point that the Government cannot save a law exceeding its enumerated powers by arguing that Congress did have authority to pass a *different* law accomplishing a similar result. Even under the most expansive view of the Necessary and Proper Clause, that Clause enhances Congress' ability to reach non-economic activity only with respect to regulations constituting an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U. S. at 561. Thus, this expansive view applies at most to

*actual* “parts” of a congressional regulatory scheme; it cannot be tied to a *different*, hypothesized link in a regulatory regime that Congress has never enacted.

Similarly, the Gun-Free School Zones Act in *Lopez* would have been constitutional with a “jurisdictional element . . . that the firearm possession in question affects interstate commerce”—and Congress did subsequently enact such a law. 514 U.S. at 561. *See* 18 U.S.C. § 922(q). Under the Government’s logic here, however, the Court should have upheld the original law as a *de facto* regulation of guns moving in interstate commerce. Likewise, the Government’s argument here resembles that of the *dissent* in *Morrison*, which contended that the Violence Against Women Act 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 (Breyer, J., dissenting).

In any event, the decision to not buy *insurance* is even *further* removed from the interstate market for health-care *services* than it is from the interstate *insurance* market, so it has even less “effect” on that market, and overriding that decision through the individual mandate is even less “plainly adapted” to regulating interstate commerce. Moreover, overriding the decision to not buy insurance, in order to ensure that the citizen has sufficient funds to pay for health-care services

when the bill comes due, is no more within Congress's power than overriding state taxes to ensure that the citizen has sufficient funds to pay federal taxes when they come due. *See* p. 17, *infra*.

Finally, as with all its other prior arguments, the Government's new Necessary and Proper theory would grant Congress plenary power and "create a completely centralized government." *Morrison*, 529 U.S. at 608 (internal quotation marks omitted). This new theory would equally justify the compelled purchase of transportation, shelter, fire insurance, or myriad other goods and services, all on the theory that an individual will eventually participate in the relevant market, and will need money to do so.

**CONCLUSION**

For the foregoing reasons, as well as those provided by the Commonwealth, this Court should affirm the District Court's judgment.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,936 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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April 4, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of April, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. All counsel of record are registered on the CM/ECF system. I also hereby certify that I have caused eight (8) copies to be delivered to the Court by Federal Express.

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