No. 11-398

In the Supreme Court of the United States

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

v.

STATE OF FLORIDA, ET AL.,
Respondents.

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

BRIEF OF THOMAS MORE LAW CENTER, JANN DEMARS, JOHN CECI, STEVEN HYDER, AND SALINA HYDER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

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QUESTION PRESENTED

This case challenges Congress's authority to require private citizens to purchase and maintain "minimum essential" healthcare insurance coverage under penalty of federal law (hereinafter "individual mandate" or "minimum coverage provision") pursuant to the Patient Protection and Affordable Care Act.[*] *Amici Curiae*, who are subject to the individual mandate, request that the Court hold that Congress exceeded its constitutional authority by enacting the mandate. Moreover, in addition to the facial challenge presented, *Amici* request that the Court decide whether the mandate is unconstitutional as applied to individuals who reside in States without state-mandated healthcare insurance, who do not have healthcare insurance, and who do not want to purchase healthcare insurance.

The ultimate question before the Court and addressed in this brief is whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

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[*] Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (hereinafter "Affordable Care Act" or "Act").

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae* Thomas More Law Center, Jann DeMars, John Ceci, Steven Hyder, and Salina Hyder respectfully submit this brief requesting that the Court hold that the individual mandate provision of the Act is unconstitutional.[1]

Amici were all parties to the constitutional challenge to the individual mandate that was presented to the United States Court of Appeals for the Sixth Circuit. That case is reported as *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011).

Amici also filed a petition for a writ of certiorari to this Court, requesting review of the Sixth Circuit's divided opinion, which upheld the individual mandate against a facial challenge but declined to address whether it was constitutional as applied to an individual without healthcare insurance. That petition, which was filed as No. 11-117, remains pending with this Court.

Amici Thomas More Law Center ("TMLC") is a national public interest law firm based in Ann Arbor,

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Michigan. TMLC's employees receive healthcare through an employer healthcare plan sponsored and contributed to by TMLC. TMLC's healthcare plan is subject to the provisions and regulations of the Act. TMLC objects, through its members, which include *Amici* DeMars and Steven Hyder, to being forced to purchase and maintain "minimum essential" healthcare insurance coverage under penalty of federal law.

Amici DeMars, Ceci, Steven Hyder, and Salina Hyder are United States citizens, Michigan residents, and federal taxpayers. *Amici* Ceci, Steven Hyder, and Salina Hyder do not have private healthcare insurance, and they object to being compelled by the federal government to purchase and maintain "minimum essential" healthcare coverage pursuant to the Act.

Amici have arranged their personal affairs such that it will be a hardship for them to have to either pay for health insurance that is not necessary or desirable or face penalties under the Act.

STATEMENT

This case challenges the constitutionality of the individual mandate provision of the Affordable Care Act, which requires private citizens, including *Amici*, to purchase and maintain "minimum essential" healthcare insurance coverage under penalty of federal law.[2] *Amici* contend that Congress exceeded its authority under the Constitution by enacting this mandate.[3]

At its core, this case is about the constitutional limits of the federal government.[4] When Congress acts beyond those limits, as here, the judicial branch should exercise its authority as the guardian of our Constitution and enjoin the *ultra vires* acts.[5]

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[2] *See* Affordable Care Act at § 1501 (codified at 26 U.S.C. § 5000A(a)). Individuals who fail to satisfy the "individual responsibility requirement" must pay a monetary penalty. *See* 26 U.S.C. § 5000A(b)(1).

[3] The Sixth Circuit correctly held that the Act was not an exercise of Congress's taxing power and thus could not be upheld on that basis. *Thomas More Law Center*, 651 F.3d at 550-54.

[4] A ruling that the individual mandate is unconstitutional does not mean that Congress is without power to "fix" the national healthcare system. Such a ruling would simply reaffirm the fundamental notion that when the government acts, it must do so consistent with the Constitution.

[5] As Senior District Judge Graham, sitting by designation, observed in his dissenting opinion in *Thomas More Law Ctr. v. Obama*:

> To the fatalistic view that Congress will always prevail and courts should step back and let the people, if offended, speak through their political representatives, I say that

Amici request that the Court strike down the individual mandate to "prove" that a meaningful limit on Congress's commerce powers exists. *See Thomas More Law Ctr.,* 651 F.3d at 573 (dissent).

President Obama signed the Affordable Care Act into law on March 23, 2010. An essential provision of the Act requires private citizens, including *Amici*, to purchase and maintain "minimum essential" healthcare coverage under penalty of federal law.[6] 26 U.S.C. § 5000A(a). What is considered an acceptable or "minimum essential" level of healthcare coverage is

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> "courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *The Federalist* No. 78 (A. Hamilton). In this arena, the "public force" is entrusted to the courts. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1897). "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *The Federalist* No. 78.

Thomas More Law Ctr., 651 F.3d at 572.

[6] The individual mandate provision requires each "applicable individual" to purchase health insurance or be subject to what the Act calls appropriately a "penalty," and at times euphemistically a "Shared Responsibility Payment." 26 U.S.C. § 5000A(b). The definition of an "applicable individual," which triggers this exercise of Congress's Commerce Clause power, is mere existence because the definition begins with any "individual" and then provides three exclusions: (1) religious objectors who oppose health insurance in principle; (2) non-residents or illegal residents; and (3) incarcerated individuals. 26 U.S.C. § 5000A(d)(2), (3), & (4).

determined by the federal government.[7] *See* 42 U.S.C. § 18022(b)(1). If a private citizen chooses not to purchase and maintain an acceptable level of healthcare coverage, the Act imposes monetary penalties. 26 U.S.C. § 5000A(b)(1).

ARGUMENT

This Court should strike down the individual mandate and establish a meaningful limitation on congressional power under the Commerce Clause.

In *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011), Circuit Judge Sutton and Senior District Judge Graham, sitting by designation, both noted in their respective opinions the need for this Court to address the limits of Congress's Commerce Clause authority in the context of this constitutional challenge to the Act—a challenge which has national importance.

In his concurring opinion, Judge Sutton made the following relevant observation:

> At one level, past is precedent, and one tilts at hopeless causes in proposing new categorical limits on the commerce power. But there is

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[7] Simply having insurance is not enough. To avoid a penalty, the health insurance plan must include, at a minimum, ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance abuse treatment, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventative services, wellness services, chronic disease management, pediatric services, and dental and vision care for children. *See* 42 U.S.C. § 18022(b)(1).

> another way to look at these precedents—that the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so. The stakes of identifying such a limit are high because the congressional power to regulate is the power to preempt, a power not just to regulate a subject co-extensively with the States but also to wipe out any contrary state laws on the subject. U.S. Const. art. VI, cl. 2. The plaintiffs present a plausible limiting principle, claiming that a mandate to buy medical insurance crosses a line between regulating action and inaction, between regulating those who have entered a market and those who have not, one that the Court and Congress have never crossed before.[8]

Thomas More Law Ctr., 651 F.3d at 555.

In his dissenting opinion, Judge Graham stated,

> Notwithstanding *Raich*, I believe the Court remains committed to the path laid down by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas to establish a framework of meaningful limitations on congressional power under the Commerce Clause. The current case is an opportunity to prove it so.

Thomas More Law Ctr., 651 F.3d at 573 (dissent).

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[8] In his opinion, Circuit Judge Martin stated that "the Constitution imposes no categorical bar on regulating inactivity." *Thomas More Law Ctr.*, 651 F.3d at 549.

Judge Graham concluded his dissenting opinion with a cogent explanation for why the Court should strike down the individual mandate:

> If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power? The ultimate issue in this case is this: Does the notion of federalism still have vitality? To approve the exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit (within boundaries like the First Amendment and Due Process Clause), as long as the regulation concerns an activity or decision that, when aggregated, can be said to have some loose, but-for-type of economic connection, which nearly all human activity does. . . . Such a power feels very much like the general police power that the Tenth Amendment reserves to the States and the people. A structural shift of that magnitude can be accomplished legitimately only through constitutional amendment.

Id. (dissent).

Indeed, this Court has referred to the principles that establish the fundamental structure of our government embodied in the Constitution, which limits the powers of the federal government to those expressly enumerated, as "first principles":

> We start with first principles. The Constitution creates a Federal Government of enumerated

> powers. As James Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority was "adopted by the Framers to ensure protection of our fundamental liberties." Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

United States v. Lopez, 514 U.S. 549, 552 (1995) (internal citations and quotations omitted).

The first of the discreet enumerated powers of the federal government are set out in Article I, section 8 of the Constitution. The third of this first grouping of powers is the Commerce Clause, which grants Congress the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

From the early days of our Republic until the present, the Court has confronted and grappled with the meaning and scope of the phrase "commerce . . . among the several States." In the first of these cases, *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Court held that "commerce" included more than just the "traffic" of goods from one state to another; it also included the regulation of commercial "intercourse," such as navigation on the country's waterways. *Id.* at 189-90.

Over the course of the Commerce Clause's long and storied jurisprudence, the Court has mapped out a three-prong analysis to determine if a federal law (or a regulatory regime promulgated pursuant to it) properly falls within this enumerated grant of authority. *See Lopez*, 514 U.S. at 552-57, 568-74, 583 (Kennedy, J., concurring); *id*. at 593-99 (Thomas, J., concurring) (reviewing the history of Commerce Clause jurisprudence).

Beginning with *Perez v. United States,* 402 U.S. 146 (1971), every important Commerce Clause opinion has expressly adopted a three-prong analysis to test whether legislation falls within the bounds of permissibly regulated activities.[9] *Id.* at 150. This inquiry presumes that Congress may regulate: (1) "the use of the channels of interstate commerce," such as regulations covering the interstate shipment of stolen goods; (2) to protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce," such as legislation criminalizing the destruction of aircraft and theft from interstate commerce; and (3) "those activities that substantially affect interstate commerce." *Lopez*, 514 at 558-59; *see also Perez*, 402 U.S. at 150.

While the first two categories are rather straightforward because they touch upon interstate commerce directly, it is the last category that has so vexed the Court. Notwithstanding the vexation

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[9] *See also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276-77 (1981).

quotient of this prong, its rationale is manifestly plausible. That is, while there are some local commercial activities that in themselves do not participate whatsoever in interstate commerce, they are nonetheless quite obviously commercial activities that "substantially affect" interstate commerce.

Two civil rights era cases of this sort are *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and its companion case, *Katzenbach v. McClung,* 379 U.S. 294 (1964). These cases involved a challenge to the then-recently enacted civil rights legislation, which prevented motel-hotel owners and restaurateurs, respectively, from discriminating against their minority consumers. The Court in those cases made clear that a purely local activity that substantially affects interstate commerce, such as providing lodging accommodations or food to customers traveling interstate and dealing in and consuming goods that were very much a part of interstate commerce, is properly within the reach of the Commerce Clause because the local activity substantially and directly affects interstate commerce. Thus, in both cases, the plaintiffs had made an affirmative choice to engage in commercial activity—activity that Congress could regulate.[10]

This third prong begins to vex, however, when the Court expands its reach to include a purely local, non-commercial activity, which may or may not ever affect interstate commerce, simply because it is an integral

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[10] Similarly, the plaintiffs in *Heart of Atlanta Motel* and *Katzenbach* could opt out of the motel and restaurant markets and thus place themselves beyond the reach of Congress.

part of a broader statutory scheme that permissibly regulates interstate commerce. The two model cases of this sort—bookends separated by more than 60 years—are *Wickard v. Filburn,* 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005).

In *Wickard*, the Court held that a regulatory scheme permissibly regulating commercial, interstate agricultural activity could properly capture the non-commercial, economic activity of individual wheat farmers growing wheat for their own personal consumption precisely because this activity could have an adverse affect on the regulatory scheme's price control mechanisms. Similarly, in *Raich,* the Court concluded, relying in large part on *Wickard*, that non-commercial, home-grown, medicinal marijuana was permissibly captured by the legislative regulatory scheme because Congress could rationally conclude that some of this marijuana would leak into the illegal interstate commercial market, which was the central target of the statutory scheme.

Vexation is inescapable, however, because nestled in between *Wickard* and *Raich* are two modern cases which are widely understood to cabin the Commerce Clause's reach by prohibiting the federal regulation of purely local, non-commercial activity. Both *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), invalidated federal statutes which sought to impermissibly regulate purely local, non-commercial activity—activity that Congress had concluded quite rationally could affect interstate commerce. Specifically, in *Lopez,* the Court confronted the Gun-Free School Zone Act of 1990, which criminalized possession of a gun within a statutorily defined school zone. It is worth a moment's

pause here to follow the Court's reasoning in rejecting the Commerce Clause's reach into this domain of non-commercial activity:

> The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, *through the mechanism of insurance*, those costs are spread throughout the population. [*United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991)]. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. [*Cf. Heart of Atlanta Motel, Inc.*, 379 U.S. at 253]. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could *rationally* have concluded that § 922(q) substantially affects interstate commerce.
>
> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning,

> that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 563-64 (1995) (internal citations and references omitted) (emphasis added).

What is striking about *Lopez* is that it can hardly be argued that it was irrational for Congress to have concluded that possessing guns near schools would affect interstate commerce. It is no less of an "effect" than the possible leakage of private, homegrown, medicinal marijuana fully regulated by California. But what is apparent from the lengthy quote above is that the *Lopez* Court understood that if the multi-tiered inference required to move from gun possession to an "effect" on interstate commerce was an appropriate nexus for upholding the constitutionality of a regulation, that inference would obliterate the Constitution's enumeration of powers.

Morrison's result was similar and no less vexatious for the older *Wickard* and the yet to be rendered *Raich*. This is especially true because in *Morrison*, unlike in *Lopez*, Congress had made a host of explicit findings supporting its legislation allowing a federal private right of action for a woman violently assaulted in a "gender-based" crime. There the Court held:

> In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."
>
> In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in

> interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." Given these findings and Petitioners arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that Petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, Petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison, 529 U.S. at 614-15 (internal quotations and citations omitted).

Ultimately, the majority opinion in *Raich* struggled mightily with the third prong of the Commerce Clause. This struggle was necessitated by the incongruity and inconsistency of the Court's own jurisprudence. One

version of the Commerce Clause forbade federal regulation to reach non-economic, local activity even if that activity in the aggregate might very well materially impact interstate commerce (per *Lopez* and *Morrison*). The other version of the Commerce Clause was understood to reach wholly private, non-commercial activity, like growing your own wheat or cultivating your own personal marijuana for medicinal purposes, neither of which might ever actually affect interstate commerce (per *Wickard* and *Raich*). But, thankfully, *Raich* does not leave the vexing problem unattended.

The Court in *Raich* suggested how to reconcile the differences between these two pairs of Commerce Clause decisions. This reconciliation rests in the distinction between *economic activities* and *non-economic activities*. The legislation at issue in *Lopez* and *Morrison* impermissibly dealt with local criminal behavior that was rooted in violence, but which had no necessary economic nexus as an activity. That is, the carrying of a gun or violence against a woman is not economic activity in any generic way. *Wickard* and *Raich*, however, permissibly regulated local, non-commercial activity because the cultivation of an agricultural product and a regulated drug were intrinsically *economic* activities. In the Court's own words:

> Despite congressional findings that such crimes [violence against women in *Morrison*] had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was

> central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." [*Morrison*, 529 U.S. at 610].
>
> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act ("CSA"), which criminalized even private, medicinal marijuana,] are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." *Webster's Third New International Dictionary* 720 (1966). The CSA is a statute that regulates the *production, distribution,* and *consumption* of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

Raich, 545 U.S. at 25-26 (emphasis added).

The point of this Commerce Clause analysis, whether in the expansive rulings of *Wickard* and *Raich*

or the more careful federalism-sensitive rulings of *Lopez* and *Morrison*, is that these cases and every single other Commerce Clause decision since this Nation's founding unanimously and explicitly hold that congressional power under this clause is strictly and absolutely limited to some kind of affirmative behavior or activity. Whether it's the "economic activity" of the non-commercial growing of wheat (*Wickard*) or marijuana (*Raich*) within the broad permissible legislative scheme or the commercial activity of providing lodging and food services to interstate travelers in *Heart of Atlanta Motel* or *Katzenbach*, before Congress can impose regulations upon an individual's activity through the Commerce Clause, the individual must be engaged in some activity.

Moreover, as confirmed by *Lopez, Morrison*, and *Raich*, activity alone (like possessing a gun or assaulting a woman)—even if it will affect interstate commerce in the aggregate over time—is not enough to cross the Commerce Clause Rubicon. The activity must be *economic*. But this means, at the very least, that there must be *some activity* to apply the Commerce Clause analysis. And, as *Lopez*, *Morrison*, and *Raich* make clear, that activity must in and of itself be economic even if it need not be commercial.

Here, the Act does not regulate economic *activity*, but rather the *decision* to not engage in commercial or economic activity. Consequently, the Act does not even pretend to fit within any of the Court's previous Commerce Clause rulings. The individual mandate attaches to a legal resident of the United States who chooses to sit at home and do nothing. This resident, quite literally, merely exists. He or she is neither

engaged in economic activity nor in any other activity that would bring him or her within the reach of even a legitimate regulatory scheme. *Lopez*, 514 U.S. at 561 (holding that the non-commercial *activity* must be an "*essential* part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated") (emphasis added). In this case, we have neither economics nor activities.

The Act purports to provide legislative findings to support Congress's authority to enact the individual mandate under the Commerce Clause. According to the Act: "The individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)." 42 U.S.C. § 18091(1). Paragraph (2) sets forth various "[e]ffects on the national economy and interstate commerce" to support mandating the "individual responsibility requirement." These findings make statements about the general economic and commercial impact healthcare and healthcare insurance has on the national economy and how much of that impact is harmful to healthcare generally and to the individual specifically. The legislative findings conclude by suggesting that the proposed legislation ameliorates these deleterious effects of the current system. *See* 42 U.S.C. § 18091(2).

But none of these legislative findings are at all relevant to the issue this lawsuit raises as a matter of law: whether the federal government has authority under the Commerce Clause *to force Amici* and other similarly situated persons *to purchase* and maintain a

required level of insurance coverage or suffer the consequences of a federally-imposed penalty.

Indisputably, individuals without healthcare insurance, such as the individual *amicus*—as volitionally uninsured legal residents of the United States—are not now engaged in any commercial or economic activity that affects in any way interstate commerce. This is because, unlike *Wickard* and *Raich*, or *Heart of Atlanta Motel* and *Katzenbach*, these *amici* are not engaged in any economic activity whatsoever relative to the legislative findings of the Act or the regulatory scheme of the Act—essential or otherwise.

As the Court forcefully pointed out in both *Lopez* and *Morrison*, the national government is restrained and constrained by federalism not to go beyond its discreet and enumerated powers. This fundamental requirement of our federal government, which is and remains the law of the land, was described by the Court as a "first principle." Under the Commerce Clause, Congress is limited to regulating *at the far reaches of its authority* only local *economic* activity that it rationally determines is an "essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." *See Lopez*, 514 U.S. at 561 (emphasis added).

But these *far reaches* of congressional authority fall *far short* of this case because the regulatory scheme of the Act seeks to reach not just economic activity, but mere existence and inactivity. Thus, the Act seeks to mandate that *Amici* and other private citizens cease their inactivity, and it further designs a penalty scheme to deprive these citizens of their liberty to

choose *not* to engage in a private commercial transaction.[11]

If the Act is understood to fall within Congress's Commerce Clause authority, the federal government will have the absolute and unfettered power to create complex regulatory schemes to fix every perceived problem imaginable and to do so by ordering private citizens to engage in affirmative acts, under penalty of

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[11] In *Bond v. United States*, 131 S. Ct. 2355 (2011), the Court forcefully reemphasized the important role federalism plays in protecting the integrity of government and the freedom of individuals. The Court stated as follows:

> The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived. . . .
>
> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . .
>
> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

Id. at 2364; *see also id.* at 2368 (Ginsburg, J., concurring) ("In short, a law beyond the power of Congress, for any reason, is no law at all.") (quotations and citation omitted).

law, such as eating certain foods, taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy,[12] among others. Consequently, Congress will be incentivized to create intrusive regulatory schemes as constitutional cover for naked power grabs, thereby turning the Constitution on its head.

Moreover, it is a mistake to conclude that Congress had Commerce Clause authority to enact the individual mandate because the healthcare market is unlike other markets. The government repeatedly argued throughout this litigation that the Act properly regulates the economic activity of healthcare because, according to the argument, everyone will at some point in their lives engage the healthcare market with economic activity; therefore, decisions made today could have future economic effects. Thus, the government's argument is that the Act properly creates a regulatory scheme and penalty based on presumed future economic activity—activity that has not yet occurred and, indeed, may never occur. But this effort to make "healthcare" a kind of *sui generis* economic activity based on presumed future behavior is not justified by the Court's Commerce Clause jurisprudence nor does it provide a cogent brake to or principled limitation upon the federal government's claim of unrestrained plenary power to mandate all sorts of behavior, present and future, to curb

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[12] If Congress has the power to force private citizens to purchase healthcare insurance, then it would certainly have the power to mandate the purchase of "minimum essential" life insurance. Everyone is going to die, and death certainly has economic consequences that affect interstate commerce, such as loss of earning power of the deceased, burial costs, etc.

healthcare costs. Simply because a particular market might be unique in some fashion can't be a basis for extending Congress's Commerce Clause authority to include regulating *decisions* (and even *indecision*) affecting that market. Indeed, the same could be said about the "food" market since every living, breathing person must participate in that market at some level or else they would perish. Does the Constitution permit Congress to force private citizens to purchase "health" foods which they wouldn't otherwise purchase under penalty of federal law? Moreover, precisely because the healthcare market is *unlike* any other market in that a person's health is arguably affected by almost every *decision* made on a daily basis, including whether to take vitamins, to exercise, to maintain a certain body weight, etc., permitting Congress to regulate *decisions* affecting a person's health gives Congress unbridled power and thus obliterates the very structure of our constitutional Republic.

Aside from the facial invalidity of the individual mandate, the mandate is unconstitutional *as applied* to *Amici* and other private citizens who do not have "minimum essential" healthcare coverage. Indeed, this case challenges the *authority* of Congress to enact the individual mandate provision. It challenges Congress's authority to force *Amici* and other similarly situated individuals—private citizens who are not by any measure engaged in any relevant commerce—to purchase "minimum essential" healthcare insurance coverage as a matter of federal law. While this challenge could properly be viewed as an "as-applied" challenge, by their very nature, almost all challenges to the specific exercise of an enumerated power, such as the Commerce Clause, are facial challenges. Thus,

if Congress lacked the authority to enact certain legislation, such as the individual mandate, that legislation adversely affects everyone in every application. In light of this reality, it does not appear that the "no set of circumstances" language of *United States v. Salerno*, 481 U.S. 739, 745 (1987), has any practical impact on the resolution of this case. As the Court stated in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court stated,

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

As *Salerno* itself suggests, if Congress lacked enumerated authority to pass legislation at its inception, as in this case, then there would be "no set of circumstances . . . under which the Act would be valid." Thus, there would be no "conceivable set of circumstances" under which the Act could be enforced because there was no authority to enact the legislation in the first instance—the law is "legally stillborn." *See*

Commonwealth of Va. v. Sebelius, 728 F. Supp. 2d 768, 773-74 (E.D. Va. 2010). *See also Thomas More Law Ctr.*, 651 at 566 (dissent).

Indeed, the Court did not cite *Salerno*, let alone apply it, in either *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison,* 529 U.S. 598 (2000), cases in which the Court held that Congress exceeded its Commerce Clause authority by enacting certain legislation. Nor did the Court cite to *Salerno* in the more recent Commerce Clause case of *Gonzales v. Raich*, 545 U.S. 1 (2005).

In his concurring opinion, which provided the narrowest grounds for upholding the individual mandate in the Sixth Circuit, Judge Sutton held that the challenge to the individual mandate was essentially "undone by *United States v. Salerno*, 481 U.S. 739, 745 (1987)." *Thomas More Law Ctr*, 651 at 566 (dissent). That is, Judge Sutton viewed the constitutional question of Congress's authority to force private citizens to purchase and maintain minimum essential healthcare insurance coverage through the "no set of circumstances" prism of *Salerno*—a view that "favor[ed] the government." *Id*. at 556. In doing so, Judge Sutton essentially rewrote the individual mandate by placing limits on the challenged authority of Congress that Congress itself did not impose under the challenged Act. *See id.* at 559-64 (concluding that the individual mandate was constitutional as applied to (1) individuals who voluntarily purchased insurance and wanted to maintain it, but not at the "minimum essential" coverage limits, (2) individuals who voluntarily purchased insurance, but who did not want to be forced to maintain it at any level of coverage, (3) individuals living in States that already required

them to purchase insurance, and (4) individuals under 30 who can satisfy the requirement by purchasing catastrophic-care coverage). Indeed, Congress granted itself much greater authority to regulate private citizens because that was its intent: to increase the pool of insured by requiring those with no insurance to purchase "minimum essential" coverage or pay a penalty. *See* 42 U.S.C. § 18091(C) (finding that the individual mandate "will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured"). Aside from Judge Sutton's fourth example of "catastrophic-care coverage" not yet purchased, every application of Congress's Commerce Clause power cited by him involved a hypothetical in which the citizen was actually engaged in commerce (*i.e.*, the citizen purchased insurance and/or was covered by an existing insurance plan). Consequently, Judge Sutton's opinion should carry little weight.

In sum, as demonstrated here, this Court should not permit Congress to aggrandize its own power under the Constitution. Consequently, the Court should hold that Congress lacked authority to pass the individual mandate. Moreover, because the mandate is an essential component of the Act, it cannot be severed. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) ("After finding an application or portion of a statute unconstitutional, [the court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"). Therefore, the entire statute must be struck down.

CONCLUSION

The Court should hold that Congress lacked the power under Article I of the Constitution to enact the minimum coverage provision and strike down the entire Act.

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