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No. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

STATE OF FLORIDA, *et al.*

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

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AMERICAN CIVIL LIBERTIES UNION, AND THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF PETITIONERS (Minimum Coverage Provision)

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INTERESTS OF AMICI[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that for more than seven decades has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has worked to support and provide equal treatment and high-quality medical services, care, and opportunities to African Americans. *E.g.*, *Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp.*, 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community). LDF has a substantial inter-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

est in this case because of its continuing commitment to promoting opportunity for African Americans, including access to affordable health insurance and health care.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, nonprofit organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since it was founded in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as amicus curiae. The ACLU has a substantial interest in the proper resolution of this case because of its potential impact on the ability of millions of uninsured Americans to participate more fully in the economic, political, and social life of the Nation.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is as good as its ideals, and toward this end, supports the authority of Congress to enact legislation, such as the Patient Protection and Affordable Care Act, which provides for the general welfare of the nation. Access to quality health care is a fundamental civil and human right, but the current system of health care in the United States denies this right to the

most vulnerable segments of society, including low-income families, people of color, women, seniors, and people with disabilities. By addressing the huge disparities in both access to and quality of care, the Patient Protection and Affordable Care Act takes a momentous step toward ensuring that all Americans can benefit from affordable, high-quality health care.

SUMMARY OF THE ARGUMENT

In our modern, integrated, and dynamic health care system, personal choices have consequences that extend far beyond the individual. The economic decision to forego health insurance, therefore, is not neutral. Rather, such a decision, when aggregated across our national population, both limits the personal liberty of others to choose health insurance and has the effect of reinforcing harsh economic and social disparities that threaten our country's democratic foundation and the cohesion of our society.

The minimum essential coverage provision of the Patient Protection and Affordable Care Act ("ACA" or "the Affordable Care Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010),[2] promotes opportunity for millions of uninsured persons to participate in the life of our nation. It achieves this objective by making health insurance and, ultimately, health care itself more affordable. This, in turn, alleviates the severe financial burdens that fall on the uninsured, which have a disproportionate negative impact on disadvantaged populations. By reducing the exclusionary, harmful effects of the current system, the minimum

[2] As amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

coverage provision, 26 U.S.C. § 5000A – the cornerstone of ACA – enables covered persons to lead healthier, freer, and more productive lives, thereby advancing the twin goals of liberty and equal opportunity. Respondents, therefore, go too far in suggesting that the provision trenches on individual liberty in ways that require this Court to curtail federal power.

Amici support the position of the United States that the Eleventh Circuit erred in its analysis of Congress's power to enact the minimum coverage provision under both the Commerce and Necessary and Proper Clauses. Pet. Br. 17-20. Congress acted well within its constitutional authority in seeking to regulate "'economic and financial decisions about how and when health care is paid for, and when health insurance is purchased"[3] in order to prevent the severe economic and social upheaval that occurs when significant portions of the national population are uninsured.[4] *See* 42 U.S.C. § 18091(a)(2)(A).

Amici write separately to address the Eleventh Circuit's mischaracterization of the liberty interests that are at stake in this case and to emphasize the positive role the minimum coverage provision plays in advancing equal opportunity. Amici additionally demonstrate that the Necessary and Proper Clause

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[3] *See* Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 Const. Comment. 591, 596-99 (2011) (describing economic nature of decision to self-insure).

[4] In 2009, the number of uninsured persons totaled approximately 50 million. Pet. Br. 7.

supports Congress's authority to enact the minimum coverage provision.

ARGUMENT

I. The minimum coverage provision enhances the ability of individuals to participate in the economic, social, and civic life of our nation, thereby advancing equal opportunity and personal liberty.

Across our country, uninsured persons experience significant hardship that has a profound cumulative impact on our nation. Because they are less likely to obtain adequate, stable health care, the uninsured suffer many lost opportunities, which depresses both the quality and the longevity of their lives. These burdens are disproportionately borne by racial and ethnic minorities, lower-income persons, and other disadvantaged persons. For many individuals, being uninsured is not a choice, but rather is a *consequence* that is imposed on them due to circumstances largely beyond their control. *See* Pet. Br. 6 ("The coverage gaps [the uninsured] experience result for the most part from the high cost of insurance and employment changes – not a belief that coverage is unnecessary.").

Yet, although they lack steady access to health care, uninsured persons are not completely precluded from using medical services. *Id.* at 7. Unforeseen crises can lead to costly emergency room visits and hospitalizations that, while not covered by the uninsured, are still paid for by the health care system as a whole, eventually leading to higher insurance premiums for everyone. *Id.* at 7-8. By requiring non-exempt individuals to bear some of the

cost of their otherwise uncompensated[5] care, the minimum coverage provision has the effect of lowering the cost of health insurance and making health care more affordable and accessible. It is an essential component of the Affordable Care Act's comprehensive regulatory framework, *id.* at 24-32, that ultimately helps to protect and to improve the lives of uninsured persons and to reduce the severe inequities of our current system.

A. The uninsured are more likely to experience conditions that inhibit the quality of life.

From cradle to grave, lack of insurance can (and often does) result in life-inhibiting and personally catastrophic conditions that threaten the very core of a person's ability to function. Because of the high cost of health care under our current system, the uninsured must often choose between paying directly for health care services and other, basic life necessities. Kaiser Comm'n on Medicaid and the Uninsured, *The Uninsured: A Primer, Key Facts About Americans Without Health Insurance* (hereinafter *Primer on Uninsured*) (Kaiser Family Found., Wash., D.C.), Oct. 2007, at 9. Faced with these difficult tradeoffs, the uninsured are far more likely to accumulate significant debt and to experience the life-altering effects of severe financial hardship. *See* Inst. of Med., Comm. on the Consequences of Uninsurance, *Health Insurance Is a Family Matter* (hereinafter *Family Matter*) 77 (2002). Those who cannot

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[5] "Uncompensated care" refers to "care received by uninsured patients but not paid for by them or by a third party on their behalf." Pet. Br. 8.

endure the financial burdens of non-covered health care services may simply decide to forego them.

It is unsurprising, therefore, that the uninsured have higher rates of illness, *see Primer on Uninsured* at 7-8, and suffer the effects of lost educational, employment, and other social and civic opportunities. Over time, this lost human capital degrades their lives and isolates them from the rest of the population. As multiple studies show, those without insurance often lead chaotic lives. They are less likely to receive preventative care for treatable illnesses, resulting in serious and even life-threatening conditions. *See Family Matter* at 87-88; Jack Hadley, *Sicker and Poorer: The Consequences of Being Uninsured* (hereinafter *Sicker and Poorer*) (Kaiser Family Found., Wash., D.C.), May 10, 2002, at 5-9. Children with untreated health problems are less likely to attend and to perform well in school. *Family Matter* at 122-24; *Sicker and Poorer* at 15. Being uninsured also correlates with other poor educational outcomes, such as failing to graduate from high school or to enroll in college. *See* Robin A. Cohen et al., *Health Insurance Coverage: Early Release of Estimates from the National Health Interview Survey, 2010* (hereinafter *Health Insurance Coverage*) (Nat'l Ctr. for Health Statistics), June 2011, at 4; *Primer on Uninsured* at 5. The uninsured often amass significant debt as a result of unforeseen medical expenses, leading to a downward, destabilizing financial spiral, including poor credit, *Primer on Uninsured* at 9; bankruptcy, 42 U.S.C. § 18091(a)(2)(G); lost wages; lower annual earnings, *Sicker and Poorer* at 13-14; and unemployment, James A. Baker III Inst. for Public Policy of Rice Univ., *The Economic Impact of*

Uninsured Children on America (Houston, Tex.), June 2009, at 5-6. These consequences are often cumulative and self-perpetuating and can create a vicious cycle of poor health and reduced opportunity that further diminishes the quality of life. *See Family Matter* at 76; *see also* 42 U.S.C. § 18091(a)(2)(E); Catherine Hoffman & Julia Paradise, *Health Insurance and Access to Health in the United States*, 1136 Annals N.Y. Acad. Sci. 149, 150-51 (2008); Kristen Suthers, *Evaluating the Economic Causes and Consequences of Racial and Ethnic Health Disparities* (hereinafter *Racial and Ethnic Disparities*) (Am. Pub. Health Ass'n, Wash., D.C.), Nov. 2008, at 2.

Congress reasonably concluded that lowering the cost of health insurance was vital to the strength and stability of our nation. Pet. App. 216a (Marcus, J., dissenting) ("Congress has wide regulatory latitude to address the extent of financial risk-taking in the health care services market, which in its view is a threat to a national market." (citations and internal quotation marks omitted)). The minimum coverage provision is the cornerstone of Congress's efforts to reduce health insurance costs. It accomplishes this objective by regulating "how health care consumption is financed," Pet. Br. 17, in order to disrupt the cost-shifting that occurs when uninsured individuals use uncompensated care. As noted above, because many uninsured are unable to pay in full for the services they receive, medical providers shift the cost of their uncompensated services – totaling $43 billion in 2008 – to insurers in the form of higher charges. Pet. App. 11a. Insurers then shift these costs to insured persons in the form of higher premiums. *Id.* at 11a-12a; *see also* 42 U.S.C.

§ 18091(a)(2)(F) (congressional finding that average premium increases for insured families by more than $1000 annually). By requiring individuals to purchase insurance (or risk incurring a financial penalty), the minimum coverage provision eliminates this cost-shifting problem, thereby lowering insurance premiums for all. Pet. App. 11a-12a (citing 42 U.S.C. § 18091(a)(2)(F)).

The minimum coverage provision also helps to effectuate the guaranteed issue provision of the Act, 42 U.S.C. § 300gg-1, which requires insurers to enroll all applicants. In the absence of a minimum coverage requirement, the guaranteed issue provision would reinforce the incentive for healthy people to wait until they were sick to obtain health insurance. This would increase the underwriting and administrative costs that have historically contributed to high premiums. Congress rationally concluded that such a result would frustrate its reform effort and included the minimum coverage provision to help ensure that insurance would be affordable. *See id.* § 18091(a)(2)(I). It did so based on the recognition that steady access to health care enables individuals to lead ordered, stable, and productive lives – the effects of which benefit our entire country. The provision enhances individual liberty to participate in and contribute to the life of our nation, alongside those who already have insurance.

B. The minimum coverage provision promotes equal opportunity.

The burdens of costly health care are not distributed evenly. Rather, they fall disproportionately on disadvantaged populations which are more likely to

experience higher rates of unemployment, to have jobs that do not offer health insurance, and to have lower incomes that put higher insurance premiums out of their financial reach. *See Primer on Uninsured* at 4-5.

Although more than half of all uninsured persons are non-Hispanic whites, Inst. of Med., Comm. on the Consequences of Uninsurance, *Coverage Matters: Insurance and Health Care* (hereinafter *Coverage Matters*) 12 (2001), racial minorities are "much more likely to be uninsured than whites."[6] *Primer on Uninsured* at 5. Latinos are the most likely to be uninsured, followed by African Americans. *Coverage Matters* at 12. These racial and ethnic disparities predictably lead to higher mortality rates compared to the insured population. *See Racial and Ethnic Disparities* at 2. Other associated effects of being uninsured – including the prolonged duration of otherwise treatable illnesses, depressed educational outcomes, and fewer employment opportunities – are more likely to affect racial minorities. *Id.* at 2-4.[7]

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[6] In a recent periodic review, the United Nations Committee on the Elimination of Racial Discrimination noted its concern "that a large number of persons belonging to racial, ethnic and national minorities still remain without health insurance and face numerous obstacles to access to adequate health care and services." U.N. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Art. 9 of the Convention, Concluding Observations of the Comm. on the Elimination of Racial Discrimination, United States of America ¶ 32 (May 2, 2008), *available at* http://www.state.gov/documents/organization/107361.pdf (last visited Jan. 10, 2012).

[7] Gender is also correlated with less stable forms of insurance. Although men in general are more likely to be uninsured,

By facilitating affordable health care, the minimum coverage provision integrates the uninsured more fully into the life of our nation and helps them to participate on a more equal footing with the rest of society. The provision therefore promotes equal opportunity, in addition to personal liberty. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (observing that equal protection and "substantive guarantee of liberty are linked in important respects"). Congress's desire to promote equal opportunity, of course, is not dispositive of the question presented in this case. But in exercising its Commerce Clause powers, Congress certainly may consider the impact such legislation will have on those who are otherwise disadvantaged by market distortions beyond their control. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring in part and concurring in judgment) (noting "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race"); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

"women are more likely to obtain coverage through individual policies and public programs" and, therefore, are more likely to experience gaps in coverage. *Coverage Matters* at 12. For a fuller discussion of the difficulties women have in obtaining and maintaining health insurance, see Amici Br. of National Women's Law Center et al.

C. The ability to self-insure is not analogous to any liberty interests recognized by this Court.

In rejecting Congress's authority to enact the minimum coverage provision, the court of appeals suggested that individual preferences to self-insure should override Congress's decision to require near-universal[8] insurance coverage. The Eleventh Circuit emphasized the liberty of individuals to forego health insurance. But it disregarded the countervailing liberty interests of individuals whose access to health insurance will be constrained in the absence of such a provision due to cost-shifting from the uninsured to the insured. This dynamic has the effect of placing affordable, stable health care out of financial reach for many people. Pet. App. 11a (describing inability of some uninsured to purchase coverage "because of higher premiums").

Respondents abandoned their substantive due process claim on appeal below. *Id.* at 112a n.93. Therefore, the question whether the minimum coverage provision unconstitutionally infringes their liberty interests was not squarely before the court of appeals. *See id.* Nonetheless, the Eleventh Circuit's concerns about the provision's effects on liberty

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[8] The statute contains several exemptions to the minimum coverage provision. These include exemptions on the basis of religion; for persons not lawfully present in the country; for incarcerated persons; for those who fail to meet certain threshold income requirements; for those who have short-term gaps in their coverage; for "hardship" cases, as determined by the Department of Health and Human Services; and for members of Native American tribes. Pet. App. 43a.

plainly animated its conclusion that Congress "depart[ed] from commerce power norms." *Id.* at 112a. The court of appeals objected that the provision leaves persons "no choice" but "to purchase insurance," which "strikes at the heart of whether Congress has acted within its enumerated power." *Id.* It further concluded that Congress may only regulate individuals once they "actually enter the stream of commerce and consume health care." *Id.* at 118a.

As this Court has recognized, structural limitations on Congress's authority can serve the important function of protecting individuals against abuse of government power. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("[F]ederalism protects the liberty of the individual from arbitrary power."). The Eleventh Circuit, however, misconceived the liberty interests at stake in this case. While it is true that those who do not purchase insurance are subject to a tax penalty beginning in 2014, Pet. Br. 11, this Court long ago repudiated the notion that private economic decisions are beyond government regulations designed to serve the larger good.

At bottom, the challenge to the minimum coverage provision echoes arguments made during the *Lochner* era about laws that purported to interfere with the right to contract. *See Lochner v. New York*, 198 U.S. 45 (1905) (striking down state labor law establishing maximum number of hours for bakers). The Court has long since abandoned such a notion. In *West Coast Hotel Co. v. Parrish*, for example, the Court rejected a challenge to a state minimum wage law on substantive due process grounds. 300 U.S. 379, 392-93 (1937) (collecting cases). The Court

observed the now familiar principle that the government may reasonably regulate private economic decisions to advance the public interest. *Id.* at 392; *see also Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring) (describing repudiated economic due process cases); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937) (upholding federal law, enacted under Congress's Commerce power, that prohibited discharging employees based on union membership).

1. *The provision imposes minimal burdens on liberty.*

Although the minimum coverage provision is commonly described as a "mandate," it is worth clarifying first that the provision does *not* require individuals to purchase any particular insurance product or service. *See* Pet. App. 25a-26a (citing 26 U.S.C. § 5000A(f)(1)). Instead, covered persons may elect to pay a financial penalty that is enforced by an "offset [of] any tax refund owed the uninsured taxpayer." *Id.* at 45a. Thus, the practical compulsory effect on an individual's personal choice whether to buy insurance is minimal. For these reasons, the ability to self-insure is not analogous to any liberty interests that the Court has determined are constitutionally cognizable.

A few examples illustrate this point. *Cf. Glucksberg*, 521 U.S. at 722 (observing utility of "concrete examples" for determining outlines of protected liberty interests). The provision does not infringe on bodily integrity; as already mentioned, it does not require individuals to undergo any form of treatment or to use any form of health care. *See Cruzan v. Dir.,*

Mo. Dep't of Health, 497 U.S. 261, 269-79 (1990) (discussing right of competent individual to refuse unwanted medical treatment); *see also Rochin v. California*, 342 U.S. 165 (1952).[9] Nor does the provision intrude on "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," *Lawrence*, 539 U.S. at 574; involve the regulation of intimate, private relationships inside the home, *id.* at 567; affect marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); or implicate the right to decide whether to carry a pregnancy to term, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

Finally, the provision comfortably falls within the ambit of other kinds of regulations imposed by States that require persons, under penalty of law, to purchase insurance. Therefore, the provision does not implicate the kind of liberty interest that is "objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720-21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). Most States, for example, require individuals to purchase car insurance as a condition of vehicle registration (presumably even if they never drive their car). *See, e.g.*, *Delaware v.*

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[9] Notably, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court repudiated the assertion that a compulsory smallpox vaccination was "hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best." *Id.* at 26. Observing "the fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state," *id.* (internal quotation marks omitted), the Court upheld the law on the grounds that it promoted public health and safety, *id.* at 31.

Prouse, 440 U.S. 648, 658-59 (1979); *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247-48 (11th Cir. 2008). Similarly, States may condition a professional license on obtaining malpractice insurance. *See, e.g.*, *Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998). Thus, as Judge Sutton observed in his opinion in *Thomas More Law Center v. Obama*, the provision does little more than is required by States in analogous contexts. *See* 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring) (describing State laws that require individuals to buy medical insurance and car insurance).

2. *Under the Court's Commerce Clause jurisprudence, individuals must sometimes yield economic liberty to advance the collective good.*

The Court's Commerce Clause cases acknowledge that government's economic regulation may limit individual liberty to serve the common good. *Wickard v. Filburn*, 317 U.S. 111 (1942), is a clear example. Contrary to the conclusion of the Eleventh Circuit, *Wickard* supports the authority of Congress to enact the minimum coverage provision under its Commerce Clause power. In light of the court of appeals's extensive treatment of *Wickard*, Pet. App. 65a-68a, 111a-115a, and its close relationship to the liberty interest suggested in this case, it deserves close scrutiny.

In *Wickard*, this Court considered the constitutionality of a penalty imposed on a small commercial farmer who produced wheat in excess of his allotted acreage under the federal Agricultural Adjustment Act. The purpose of the law was to regulate the sup-

ply and demand for wheat in order to prevent price fluctuations and to stabilize the interstate market. 317 U.S. at 115. *Wickard* is significant because the farmer (Filburn) grew more than his quota not for the purpose of selling it on the interstate market, but for his own private consumption at home. *Id.* at 114. This fact did not matter under the law, however. Any wheat grown in excess of the prescribed allotment was subject to penalty and did "not depend upon whether any part of the wheat either within or without the quota [was] sold or intended to be sold." *Id.* at 119.

The court of appeals distinguished the liberty interests implicated by Congress's wheat regulation in *Wickard* on two grounds. First, Filburn was a commercial farmer and, therefore, had already chosen to place himself "in commerce" as opposed to individuals here who are – under Respondents' view – "compel[led]" to enter commerce to purchase individual health insurance. Pet. App. 98a. Second, the court observed that the Agricultural Adjustment Act "did not require him to purchase more wheat." *Id.* at 111a. Rather, Filburn retained a number of other options: "He could have decided to make do with the amount of wheat he was allowed to grow. He could have redirected his efforts to agricultural endeavors that required less wheat. He could have even ceased part of his farming operations." *Id.* at 111a-112a. In other words, Filburn was still free to exercise some choice, an option that the court of appeals concluded is lost as a result of the minimum coverage provision. *Id.* at 112a.

The Eleventh Circuit's analysis overstates the significance of Filburn's farming operation and rests

on a false characterization of the nature of the choice that was at issue in *Wickard*. Although Filburn technically was a commercial farmer, this Court did not treat the activity in question – "cultivation of wheat for home consumption" – "as part of his commercial farming operation." *Gonzales v. Raich*, 545 U.S. 1, 20 (2005). More important, there is no question that Filburn could not choose to grow wheat – even for his own private consumption – beyond the amount allotted to him under the Agricultural Adjustment Act. If he wanted to sell all of his prescribed share, he would be required to *purchase* any additional wheat for his personal use. As with individuals who prefer to self-insure, Filburn preferred to grow more wheat precisely so that he could avoid having to buy it. Yet, as the Court expressly acknowledged, the law "forc[ed] some farmers into the market to buy what they could provide for themselves." *Wickard*, 317 U.S. at 129. Filburn, in other words, was "compelled" to enter the stream of commerce to purchase a product that he would have otherwise chosen to cultivate himself. *See Thomas More Law Ctr.*, 651 F.3d at 560-61 (Sutton, J., concurring).

To meet its objective of stabilizing the wheat market, Congress needed to regulate Filburn, just as it now needs to regulate the willfully uninsured to stabilize the market for health insurance and health care. As the *Wickard* Court noted, it is simply the nature of regulation "that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others." 317 U.S. at 129.[10] This is a common theme of the

[10] The Court further observed that these legislative choices "are wisely left under our system to resolution by the Congress

Court's commerce cases. *See United States v. Darby*, 312 U.S. 100, 114-15 (1941); *Jones & Laughlin Steel*, 301 U.S. at 31-32*; see also Raich*, 545 U.S. 1 (concluding that application of federal law that criminalized possession and use of marijuana for medical purposes to intrastate growers and users did not violate Commerce Clause).

Like the law challenged in *Wickard*, and as with other federal programs that depend on individual participation to be viable, the minimum coverage provision requires nearly all persons, subject to important exceptions,[11] to make a financial contribution. In *United States v. Lee*, 455 U.S. 252 (1982), the Court upheld a similar financial "mandate" in the context of social security after factoring in the size and importance of the government program. The Court rejected an as-applied challenge to the constitutionality of a social security tax[12] under the Free Exercise Clause. A member of the Old Order Amish challenged the mandate on the grounds that both contributions to the social security system and receipt of any benefits constitutionally infringed his religious beliefs. *Id*. at 255. Accepting the contentions that "both payment and receipt of social security benefits is forbidden by the Amish faith" and that "compulsory participation in the social security

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under its more flexible and responsible legislative process," particularly where such flexibility is needed to adapt legislation to the changing practical realities of our modern, integrated economy. 317 U.S. at 129.

[11] *See supra* note 8.

[12] Amici do not take any position on whether the minimum coverage provision's financial penalty is a "tax."

system interfere[d] with their free exercise rights," *id.* at 257, the Court nonetheless concluded that the government's interest "in assuring mandatory and continuous participation in and contribution to the social security system [was] very high." *Id.* at 258-59.[13] While not a case about the scope of Congress's Commerce power, *Lee* raises analogous concerns about the balance between individual liberty and government regulations designed to advance the common good. This Court rested its *Lee* decision in part on the role that social security played in "serv[ing] the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.* at 258. As with the provision challenged here, which is an essential part of ACA's regulatory framework, Congress directed individuals to contribute financial resources on the ground that "mandatory participation is indispensable to the fiscal vitality of the . . . system." *Id.*

These cases demonstrate that the Court need not privilege the economic choice of a subset of individuals to self-insure, while disregarding the effect such decisions have on the ability of persons who *want* insurance to choose it. The minimum coverage pro-

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[13] The Court reached this conclusion in *Lee* even though it applied heightened scrutiny. 455 U.S. at 257-60. The Court subsequently ruled, in *Employment Division v. Smith*, 494 U.S. 872 (1990), that heightened scrutiny does not apply to claims of religious exemption from a neutral and generally applicable law. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, 556 U.S. ___ (2012), slip op. at 15 (Jan. 11, 2012) (discussing *Smith*).

vision's limitations on individual liberty are fully consistent with the Constitution.

II. The Necessary and Proper Clause further supports the constitutionality of the minimum coverage provision.

The principle that Congress may enact laws "necessary and proper" to the execution of its enumerated powers has been firmly established for nearly 200 years, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), and repeatedly reaffirmed by this Court as an essential ingredient of our constitutional system, including most recently in *United States v. Comstock*, 130 S. Ct. 1949 (2010). The minimum coverage provision easily satisfies the constitutional standards set forth in this Court's cases interpreting the Necessary and Proper Clause and should be upheld for that reason, as well.

The minimum coverage provision does not exist in legislative isolation. It is part of a comprehensive legislative scheme and its validity under the Necessary and Proper Clause must be evaluated in light of that scheme. In particular, the minimum coverage provision is closely tied to two other provisions of the health care law: one prohibits insurance companies from denying health care coverage to individuals based on pre-existing conditions or medical history, 42 U.S.C. §§ 300gg-1(a), 300gg-3(a), the other prohibits insurance companies from charging such individuals a higher premium, *id.* § 300gg. Together, these provisions are designed to address a free rider problem that currently distorts the national health care market, increasing the cost of insurance and decreasing the numbers insured.

The authority of Congress to enact the latter two provisions under the Commerce Clause has not been seriously questioned, *see Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011), and for good reason. Insurance companies are indisputably engaged in economic activity and that economic activity undeniably has a substantial effect on interstate commerce. As the legislative findings that were incorporated in ACA specifically note:

> The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year.

42 U.S.C. § 18091(a)(2)(F).

Congress further found that the minimum coverage provision was "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.* § 18091(a)(2)(I). The provision "broaden[s] the health insurance risk pool to include healthy individuals" who might otherwise choose to remain uninsured or defer insurance coverage. *Id.* This expanded pool, in turn, enables insurance companies to provide insurance coverage to everyone at lower premiums. *Id.* § 18091(a)(2)(F).

"[W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make the regulation effective.'" *Raich*, 545 U.S. at 36 (Scalia, J., dissenting) (quoting

United States v. Wrightwood Dairy Co., 315 U.S. 110, 118-19 (1942)). That is precisely what the minimum coverage provision does in this case. Moreover, Congress is generally granted broad discretion in determining what legislation is necessary and proper to effectuate its enumerated powers. *See Sabri v. United States*, 541 U.S. 600, 605 (2004).

To be sure, the Necessary and Proper Clause is not an unlimited license for Congress to enact any legislation it chooses. In *Comstock*, Justice Kennedy and the majority debated about whether the link to an enumerated power must be one that is rationally conceivable or empirically rooted. But that debate has no relevance here. Even accepting Justice Kennedy's view that "[t]he rational basis referred to in the Commerce Clause context is a demonstrated link in fact," 130 S. Ct. at 1967 (Kennedy J., concurring), that "link in fact" is amply "demonstrated" by the legislative findings supporting enactment of the Affordable Care Act.

Nor does it matter for purposes of the Necessary and Proper Clause whether the minimum coverage provision is independently supported by the Commerce Clause, although amici believe that it is for the reasons stated above. *See supra* Part I. It is enough, as this Court has noted, that the provision is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the . . . activity [at issue] were regulated." *United States v. Lopez*, 514 U.S. 549, 561 (1995).

Finally, in exercising its powers under the Necessary and Proper Clause, Congress cannot abridge

fundamental rights any more than it may in the exercise of its enumerated powers. *See Comstock*, 130 S. Ct. at 1957. As noted, *supra* Part I.C, however, the economic liberty interests suggested here in opposition to the minimum coverage provision do not rise to that level.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Eleventh Circuit striking down the minimum coverage provision.

Respectfully submitted,

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