No. 11-117

In the Supreme Court of the United States

THOMAS MORE LAW CENTER, ET AL., PETITIONERS

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. 5000A. The question presented is:

1. Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

In the event the petition is granted, respondents also suggest that the Court direct the parties to address the following question:

2. Whether the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-89a) is not yet reported but is available at 2011 WL 2556039. The opinion of the district court (Pet. App. 97a-120a) is reported at 720 F. Supp. 2d 882.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-91a) was entered on June 29, 2011. The petition for a writ of certiorari was filed on July 26, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119

(Affordable Care Act or Act),[1] to address a profound and enduring crisis in the market for health care that accounts for more than 17% of the Nation's gross domestic product. Millions of people do not have health insurance, yet actively participate in the health care market. They consume health care services for which they do not pay, and thus shift billions of dollars of health care costs to other market participants. The result is higher insurance premiums that, in turn, make insurance unaffordable to even greater numbers of people. At the same time, insurance companies use restrictive underwriting practices to deny coverage or charge more to millions of people because of pre-existing medical conditions.

a. In the Affordable Care Act, Congress addressed these problems through a comprehensive program of economic regulation and tax measures. The Act includes provisions designed to make affordable health insurance more widely available, to protect consumers from restrictive insurance underwriting practices, and to reduce the uncompensated costs of medical care obtained by the uninsured.

First, the Act builds upon the existing nationwide system of employer-based health insurance that is the principal private mechanism for financing health care. The Act establishes new tax incentives for small businesses to purchase health insurance for their employees, 26 U.S.C.A. 45R,[2] and, under certain circumstances, prescribes tax penalties for large employers that do not

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[1] Amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] Because the Affordable Care Act has not yet been codified in the United States Code, this brief will cite to the United States Code Annotated (U.S.C.A.) for ease of reference. All such citations are either to the 2011 Edition or the 2011 Supplement of the U.S.C.A.

offer adequate coverage to full-time employees, 26 U.S.C.A. 4980H (employer responsibility provision).

Second, the Act provides for the creation of health insurance exchanges to allow individuals, families, and small businesses to leverage their collective buying power to obtain health insurance at rates that are competitive with those of typical employer group plans. 42 U.S.C.A. 18031.

Third, the Act establishes federal tax credits to assist eligible households with incomes from 133% to 400% of the federal poverty level to purchase insurance through the exchanges. 26 U.S.C.A. 36B. In addition, the Act expands eligibility for Medicaid to cover individuals with income below 133% of the federal poverty level. 42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII).

Fourth, the Act regulates insurers to prohibit industry practices that have prevented individuals from obtaining and maintaining health insurance. The Act will bar insurers from refusing coverage because of a pre-existing medical condition, 42 U.S.C.A. 300gg-1(a), 300gg-3(a) (the guaranteed-issue provision), thereby guaranteeing insurance to many previously unable to obtain it. The Act also bars insurers from charging higher premiums based on a person's medical history, 42 U.S.C.A. 300gg (the community-rating provision), requiring instead that premiums generally be based on community-wide criteria.

Fifth, the Act amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of health insurance must pay a tax penalty. 26 U.S.C.A. 5000A (the minimum coverage provision). That insurance requirement, which takes effect in 2014, 26 U.S.C.A. 5000A(a), may be satisfied through enrollment in an employer-sponsored in-

surance plan; an individual plan, including one offered through a new health insurance exchange; a grandfathered health plan; a government-sponsored program such as Medicare or Medicaid; or similar federally-recognized coverage, 26 U.S.C.A. 5000A(f).

The amount of the tax penalty owed under the minimum coverage provision is calculated as a percentage of household income, subject to a floor and capped at the price of forgone insurance coverage. The penalty is reported on the individual's federal income tax return for the taxable year and is assessed and collected in the same manner as certain other assessable tax penalties under the Internal Revenue Code. Individuals who are not required to file income tax returns for a given year are not required to pay the tax penalty. 26 U.S.C.A. 5000A(b)(2), (c)(1) and (2), (e)(2) and (g).

The Congressional Budget Office (CBO) has projected that, by 2017, the Affordable Care Act will reduce the number of non-elderly individuals without insurance by about 33 million. *CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained in the Patient Protection and Affordable Care Act* 1 (Mar. 18, 2011). The CBO has attributed approximately half of the projected decrease in the number of non-elderly uninsured—16 million people—to the minimum coverage provision. CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010).

b. Congress expressly found that the minimum coverage provision "regulates activity that is commercial and economic in nature," namely "how and when health care is paid for, and when health insurance is purchased." 42 U.S.C.A. 18091(a)(2)(A). That assessment

reflects a number of realities about the health care market.

First, participation in the market for health care is virtually universal. Nearly everyone obtains health care services at some point, and most do so each year. Moreover, every individual is always at risk of requiring health care, and the need for particularly expensive services is unpredictable. "Most medical expenses for people under 65" result "from the 'bolt-from-the-blue' event of an accident, a stroke, or a complication of pregnancy that we know will happen on average but whose victim we cannot (and they cannot) predict well in advance." *Expanding Consumer Choice and Addressing "Adverse Selection" Concerns in Health Insurance: Hearing Before the Joint Economic Comm.*, 108th Cong., 2d Sess. 32 (2004) (Prof. Mark V. Pauly, Wharton Sch., Univ. of Pa.). Costs can mount rapidly for even the most common medical procedures, making it difficult for all, and impossible for many, to budget for such contingencies.

Because the timing and magnitude of health care expenses are so difficult to predict and thus give rise to an ever-present risk, health insurance is the customary means of financing health care purchases and protecting against the attendant risks. In 2009, payments by private and government insurers constituted 71% of national health care spending. See Centers for Medicare & Medicaid Servs., *2009 National Health Expenditure Data*, Tbl. 3 (2011).

Yet millions of Americans do not have health insurance, either public or private, and instead attempt to self-insure. They actively participate in the health care market regardless of their ability to pay. When people "forego health insurance coverage and attempt to self-insure," they typically fail to pay the full cost of the ser-

vices they consume, and they shift the costs of their uncompensated care—totaling $43 billion in 2008—to health care providers. 42 U.S.C.A. 18091(a)(2)(A) and (F). Congress found that providers in turn pass on a significant portion of those costs "to private insurers, which pass on the cost to families," increasing the average premium for insured families by "over $1,000 a year." 42 U.S.C.A. 18091(a)(2)(F).

This cost-shifting occurs in large part because, unlike in other markets, those who cannot afford to pay for emergency health care from commercial providers receive it anyway. Numerous state legislatures and courts have concluded that hospitals cannot properly turn away people in need of emergency treatment. See H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 3, at 5 (1985); *Florida* v. *United States Dep't of Health & Human Servs.*, No. 11-11021, 2011 WL 3519178, at *111 (11th Cir. Aug. 12, 2011) (Marcus, J., dissenting), petition for cert. pending, No. 11-398 (filed Sept. 28, 2011). Reflecting the same moral judgment, the federal Emergency Medical Treatment and Labor Act requires hospitals that participate in the Medicare program and offer emergency services to stabilize any patient who arrives with an emergency condition, regardless of whether the person has insurance or otherwise can pay. 42 U.S.C. 1395dd.

In addition to finding that the minimum coverage provision regulates economic activity having a substantial effect on interstate commerce, 42 U.S.C.A. 18091(a)(2)(A), Congress found that the provision is necessary to achieving the goals of the Act's guaranteed-issue and community-rating insurance reforms. Those provisions will require that insurers provide coverage and charge premiums without regard to a person's medical history. Evidence from economists, insurers, and

state regulators established that, absent an ongoing requirement to maintain a minimum amount of coverage, that new ability to obtain insurance regardless of medical history, and at rates independent of health status, would enable "many individuals [to] wait to purchase health insurance until they needed care." 42 U.S.C.A. 18091(a)(2)(I). That dynamic would undermine the effective functioning of insurance markets. Accordingly, Congress found the minimum coverage requirement "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." *Ibid.*

2. a. Petitioners are four individuals who did not have health insurance at the time this suit was filed and the Thomas More Law Center, of which two of the individual petitioners are members. Pet. App. 100a-101a, 102a. The individual petitioners acknowledged below that they participate in the health care services market but declared that they "pay for health care expenses as [they] need them." *E.g.*, Mot. for Prelim. Inj. Exh. 5, Para. 3, at 2 (E.D. Mich. filed Apr. 6, 2010) (Hyder Decl.). Petitioners contend that Congress may not override their preferred means of financing health care costs, asserting that the minimum coverage provision exceeds Congress's commerce and taxing powers. The district court concluded that the individual plaintiffs had standing to challenge the minimum coverage provision, Pet. App. 101a-106a, but upheld that provision as a valid exercise of Congress's power under the Commerce Clause. *Id.* at 109a-118a.[3]

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[3] The district court did not decide whether the minimum coverage provision is also independently authorized by Congress's taxing power.

b. The court of appeals affirmed. Pet. App. 1a-89a. Although the government had originally conceded in the court of appeals that petitioner DeMars had standing, she later notified that court that she had obtained employer-provided health insurance. *Id.* at 9a; Pet. C.A. Supp. Letter Br. 2 (filed May 25, 2011). The government then moved to dismiss petitioners' appeal for lack of standing, and, in response, petitioners filed new declarations in the court of appeals on behalf of petitioners Ceci and Steven Hyder. Pet. App. 9a. The court of appeals accepted those declarations and concluded that they established the standing of those two petitioners. *Id.* at 9a-15a.

The court of appeals noted that the parties agreed that the Anti-Injunction Act, 26 U.S.C. 7421(a), did not bar this litigation, but explained that "because this limitation goes to the subject matter jurisdiction of the federal courts, the parties' agreement by itself [did] not permit [the court] to review this challenge." Pet. App. 15a. The court went on to conclude, however, that the Anti-Injunction Act did not apply. *Id.* at 15a-19a.

As the court noted, the Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Pet. App. 15a (quoting 26 U.S.C. 7421(a)). The court observed that Congress denominated the assessment for failure to comply with the minimum coverage provision a "penalty" and that separate provisions of the Internal Revenue Code "show that *some* 'penalties' amount to 'taxes' for purposes of the Anti-Injunction Act." *Id.* at 15a-16a. For example, Section 6671(a) of the Internal Revenue Code provides that "any reference

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Pet. App. 118a.

in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter," *i.e.*, Subchapter B of Chapter 68. 26 U.S.C. 6671(a); see also 26 U.S.C. 6665(a)(2) ("[A]ny reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter," *i.e.*, Chapter 68). But the court noted that the tax penalty established by the minimum coverage provision "is not a penalty 'provided by' chapter 68 of the [Internal] Revenue Code." Pet. App. 17a. "Congress placed the penalty in chapter 48 of the [Internal] Revenue Code, and it did not include a provision treating the penalty as a 'tax' in the title, as it did with penalties provided in chapter 68." *Ibid.* "Distinct words have distinct meanings," the court reasoned. *Ibid.* "Congress said one thing in sections 6665(a)(2) and 6671(a), and something else in section 5000A, and we should respect the difference." *Ibid.*

Turning to the merits, the court of appeals, in separate opinions by Judge Martin and Judge Sutton, rejected petitioners' contention that the minimum coverage provision was beyond Congress's power under the Commerce Clause. Both opinions rejected the premise of petitioners' argument, which is that the minimum coverage provision regulates "inactivity." See Pet. App. 24a (opinion of Martin, J.); *id.* at 63a (Sutton, J., concurring in the judgment). Judge Martin observed that "[v]irtually everyone participates in the market for health care delivery, and they finance these services by either purchasing an insurance policy or by self-insuring." *Id.* at 24a. He explained that people without insurance are not "inactiv[e]," because they actively participate in the market for health care services and shift substantial

costs to other market participants. *Id.* at 26a-28a, 34a-36a.

Judge Martin further explained that the minimum coverage provision also forms an essential part of the Affordable Care Act's broader scheme of economic regulation, which requires insurers to offer coverage and set premiums without regard to an individual's medical history or condition. Pet. App. 28a-32a. Judge Martin noted Congress's finding that, "without the minimum coverage provision, the guaranteed issue and community rating provisions would increase existing incentives for individuals to delay purchasing health insurance until they needed care." *Id.* at 32a (citing 42 U.S.C.A. 18091(a)(2)(I)).

Judge Martin explained that "[t]he legislative record demonstrated that the seven states that had enacted guaranteed issue reforms without minimum coverage provisions suffered detrimental effects to their insurance markets, such as escalating costs and insurance companies exiting the market." Pet. App. 32a. Accordingly, Judge Martin concluded that Congress "rationally found that the minimum coverage provision 'is 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.'" *Ibid.* (quoting 42 U.S.C.A. 18091(a)(2)(I)).

Concurring in the judgment, Judge Sutton stressed that "[n]o one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk." Pet. App. 63a. Indeed, he noted that, "[i]f done responsibly, the former requires more action (affirmatively saving money on a regular basis and managing the assets over

time) than the latter (writing a check once or twice a year or never writing one at all if the employer withholds the premiums)." *Id.* at 62a-63a.

Judge Sutton further explained that attempts to "self-insure" substantially affect interstate commerce. Pet. App. 53a-54a. "Faced with $43 billion in uncompensated care, Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available to pay for *all* care as it arises." *Id.* at 54a. Judge Sutton rejected petitioners' contention that the minimum coverage provision shares "the central defect in the laws at issue in" *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000). Pet. App. 55a. He reasoned that "[h]ealth care and the means of paying for it are 'quintessentially economic' in a way that possessing guns near schools and domestic violence are not." *Ibid.* (citing *Lopez*, *supra*, and *Morrison*, *supra*).

Judge Sutton also concluded that petitioners' proposed "action/inaction" dichotomy is neither workable nor consistent with Commerce Clause doctrine. Pet. App. 60a-68a. He noted that "[t]he power to regulate includes the power to prescribe and proscribe," *id.* at 62a (citing *Lottery Case*, 188 U.S. 321, 359-360 (1903)), and that "[l]egislative prescriptions set forth rules of conduct, some of which require action.'" *Ibid.* (citing, *e.g.*, 18 U.S.C. 2250 (requiring sex-offender registration); 18 U.S.C. 228 (requiring child-support payments)). Judge Sutton explained that an "enforceable line is even more difficult to discern when it comes to buying health insurance and the point of buying it: financial risk." *Ibid.* "Saving to buy insurance or to self-insure, as [petitioners'] affidavits attest, involves action." *Id.* at 63a.

Judge Sutton therefore concluded that petitioners' "action/inaction" dichotomy would, at a minimum, provide no basis to invalidate the minimum coverage provision on its face, because that dichotomy would not establish that "no set of circumstances exists under which the Act would be valid." Pet. App. 52a, 72a-73a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). He explained that, even assuming that there was a category of "inactivity" unreachable by Congress's commerce power and that the uninsured were properly characterized as "inactive," the minimum coverage provision could constitutionally apply to individuals who have insurance but object to maintaining it, such as petitioner DeMars. See *id.* at 61a. Petitioners' theory of protected "inactivity" would likewise have no application to individuals who live in states that require, or will in the future require, that individuals have health insurance or to individuals with insurance that does not meet minimum standards. *Id.* at 64a-65a. Thus, Judge Sutton reasoned, on its own terms, petitioners' "activity/inactivity dichotomy does not work with respect to health insurance in many settings, if any of them" and thus could not be the basis for a facial constitutional challenge to the statute. *Id.* at 71a-72a.

The court of appeals (per Judge Sutton, joined by Judge Graham) held that the minimum coverage provision is not independently authorized by Congress's taxing power. Pet. App. 39a-47a. In the court's view, "[t]he individual mandate is a regulatory penalty, not a revenue-raising tax." *Id.* at 40a. The court acknowledged that "the constitutionality of a law 'does not depend on recitals of the power which it undertakes to exercise,'" *id.* at 44a (quoting *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)), but nonetheless thought

it constitutionally significant that Congress used the word "penalty" rather than "tax" in Section 5000A and that the legislative findings "invoked [Congress's] commerce power, not its taxing authority," *id.* at 40a. The court also acknowledged that taxes "shape behavior" and that "every tax penalizes people by imposing an 'economic impediment' on one person 'as compared with others not taxed.'" *Id.* at 45a (quoting *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937)). It nonetheless concluded that Section 5000A could not be supported by the taxing power because Congress had a "regulatory motive" rather than a revenue-raising one when enacting it. *Id.* at 41a-42a.

Judge Graham (sitting by designation) dissented on the Commerce Clause issue, concluding that Congress lacked power under the Commerce Clause to enact the minimum coverage provision. He agreed that petitioners' action/inaction "distinction would suffer from the same failings as the 'direct' and 'indirect' effects test of prior Commerce Clause jurisprudence." Pet. App. 79a (citing cases). He also recognized that people who attempt to finance their health care costs out-of-pocket collectively shift billions of dollars of uncompensated costs to other market participants. *Id.* at 82a (citing 42 U.S.C.A. 18091(F)). Judge Graham nonetheless concluded that the minimum coverage provision is not a proper means of regulating interstate commerce because the requirement to maintain minimum coverage is not "conditioned on the failure to pay for health care services, or, for that matter, conditioned on the consumption of health care." *Id.* at 84a. He observed that, in the absence of the minimum coverage provision, individuals would "have the right to decide how to finance medical expenses," and concluded that the commerce

power does not permit Congress to "extinguish[] that right." *Id.* at 86a.

ARGUMENT

The Affordable Care Act represents the considered judgment of the elected Branches of Government—after years of study and deliberation—on how to address a crisis in the national health care market. That crisis has put the cost of health insurance beyond the reach of millions of Americans, and has denied coverage entirely to millions more. The Act is a comprehensive statute that builds on the system of private and public insurance to finance health care. It utilizes various regulatory and tax measures to reform insurance practices, extend coverage, and address other problems in the health care market.

The Act requires that non-exempted individuals finance their health care consumption through insurance, rather than rely on a combination of attempted self-insurance and the back-stop of care paid for by other market participants. The minimum coverage provision, like the Act as a whole, thus regulates economic conduct that substantially affects interstate commerce. The provision is also integral to the rules Congress prescribed to end discriminatory insurance practices that deny coverage to or increase rates for millions of Americans with preexisting medical conditions. Further, the minimum coverage provision is effectuated by means of a penalty that operates as a tax, payable only by those who are required to file income tax returns and based on their adjusted gross income. For these reasons, the minimum coverage provision is squarely within Congress's power to regulate interstate commerce, to lay and collect taxes,

and to enact legislation that is necessary and proper to effectuate its enumerated powers.

The question presented in this case is clearly important, and, after the decision below, the Eleventh Circuit held (contrary to the Sixth Circuit in this case) that the minimum coverage provision was not within Congress's commerce power. See *Florida* v. *United States Dep't of Health & Human Servs.*, No. 11-11021, 2011 WL 3519178, at *24-*68 (11th Cir. Aug. 12, 2011), petition for cert. pending, No. 11-398 (filed Sept. 28, 2011). The federal government is today filing a petition for a writ of certiorari challenging the judgment in the *Florida* case, and it believes the Court should hold this petition pending a decision in *Florida*.

1. The Constitution confers on Congress the power to "regulate Commerce * * * among the several States." Art. I, § 8, Cl. 3. That power includes the authority to regulate intrastate conduct that has "a substantial effect on interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). In reviewing the validity of Commerce Clause legislation, a court's task "is a modest one." *Id.* at 22. The court "need not determine" whether the regulated conduct, "taken in the aggregate, substantially affect[s] interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Ibid.* (quoting *United States* v. *Lopez*, 514 U.S. 549, 557 (1995)). In addition, by virtue of the Necessary and Proper Clause, Art. I, § 8, Cl. 18, "the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)). These princi-

ples reinforce the "presumption of constitutionality" this Court applies "when examining the scope of Congressional power." *Id.* at 1957 (quoting *United States* v. *Morrison*, 529 U.S. 598, 607 (2000)).

The minimum coverage provision is a valid exercise of Congress's commerce power. It prescribes a rule that governs the manner in which individuals finance their participation in the health care market, and it does so through the predominant means of financing in that market—insurance. It directly addresses the consequences of economic conduct that distorts the interstate markets for health care and health insurance—namely the attempt by millions of Americans to self-insure or rely on the back-stop of free care, and the billions of dollars in cost-shifting that conduct produces each year when the uninsured do not pay for the care they inevitably need and receive. See *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). And the minimum coverage provision is necessary to make effective the insurance market reforms (guaranteed issue and community rating) that all agree Congress has the authority to impose.

Congress's enactment of the minimum coverage provision thus rests upon direct, tangible, and well-documented economic effects on interstate commerce (reflected in specific congressional findings), not effects "so indirect and remote that to embrace them * * * would effectively obliterate the distinction between what is national and what is local." *Lopez,* 514 U.S. at 556-557 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). As Judge Sutton explained, "[n]o one must 'pile inference upon inference,' *Lopez*, 514 U.S. at 567, to recognize that the national regulation of a $2.5

trillion industry, much of it financed through 'health insurance . . . sold by national or regional health insurance companies,' 42 U.S.C. 18091(a)(2)(B), is economic in nature." Pet. App. 55a. The provision does not intrude on the sovereignty of the States; it regulates private conduct, operating on individuals, not States. Cf. *Printz* v. *United States*, 521 U.S. 898, 904-933 (1997). It addresses a problem individual States have had difficulty solving on their own in the absence of a nationally uniform insurance requirement. *Florida*, 2011 WL 3519178, at *103 (Marcus, J., dissenting); see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-282 (1981). It is an integral part of a comprehensive regulatory scheme that the commerce power plainly authorizes Congress to enact. *Raich*, 545 U.S. at 15-22. And it violates no other substantive constitutional limitation. The minimum coverage provision therefore falls well within Congress's commerce power.

2. Congress's constitutional power "[t]o lay and collect Taxes, Duties, Imposts and Excises," Art. I, § 8, Cl. 1, provides an independent basis to uphold the Act's minimum coverage provision. The taxing power is "comprehensive," *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 581-582 (1937), and, in "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (quoting *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 280 (1932)).

The "practical operation" of the minimum coverage provision is as a tax. *Nelson*, 312 U.S. at 363; accord *Liberty University, Inc.* v. *Geithner*, No. 10-2347, 2011 WL 3962915, at *16-*22 (4th Cir. Sept. 8, 2011)

(Wynn, J., concurring) (*Liberty University*). The provision amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of coverage shall pay a tax penalty for each month that he fails to maintain that coverage. 26 U.S.C.A. 5000A. The amount of the penalty is calculated as a percentage of household income for federal income tax purposes, subject to a floor and a cap. 26 U.S.C.A. 5000A(c). The penalty is reported on the individual's federal income tax return for the taxable year, and is "assessed and collected in the same manner as" other assessable tax penalties under the Internal Revenue Code. 26 U.S.C.A. 5000A(b)(2) and (g). Individuals who are not required to file income tax returns for a given year are not required to pay the penalty. 26 U.S.C.A. 5000A(e)(2). A taxpayer's responsibility for family members depends on their status as dependents under the Internal Revenue Code. 26 U.S.C.A. 5000A(a) and (b)(3). Taxpayers filing a joint tax return are jointly liable for the penalty. 26 U.S.C.A. 5000A(b)(3)(B). And the Secretary of the Treasury is empowered to enforce the penalty provision. 26 U.S.C.A. 5000A(g).

It is undisputed that the minimum coverage provision will be "productive of some revenue." *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937). The CBO found that it will raise at least $4 billion a year in revenues for the general treasury. See Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Reps., Tbl. 4 (Mar. 20, 2010). The provision unquestionably bears "some reasonable relation" to the "raising of revenue," *United States* v. *Doremus*, 249 U.S. 86, 93-94 (1919), and it is therefore within Congress's taxing power.

3. The court of appeals properly applied well-settled principles in concluding that the minimum coverage provision was a proper exercise of Congress's commerce power. After that decision, a divided panel of the Eleventh Circuit declared the minimum coverage provision unconstitutional. See *Florida*, 2011 WL 3519178, at *24-*68. The federal government is today filing a petition for a writ of certiorari seeking review of the Eleventh Circuit's judgment in the *Florida* case. For the reasons stated in that petition (at 14-25), the Eleventh Circuit's conclusion that the minimum coverage provision is beyond Congress's commerce power was based on significant errors about the scope of Congress's constitutional authority and the nature of the health care market. Moreover, as explained above, the minimum coverage is independently authorized by Congress's power to "lay and collect Taxes." U.S. Const. Art. I, § 8, Cl. 1; see pp. 17-18, *supra*. That separate constitutional authority provides an alternative ground for affirmance of the court of appeals' judgment in this case.

In the federal government's view, the Court should grant the federal government's petition in *Florida* and hold this petition pending a decision in *Florida*. Like this case, *Florida* presents a court of appeals decision analyzing the constitutionality of the minimum coverage provision under both the tax and commerce power, so it provides a vehicle for the Court to address both questions if necessary.

The Sixth Circuit in this case expressly addressed the applicability of the Anti-Injunction Act, 26 U.S.C. 7421(a), to petitioners' challenge to the minimum coverage provision, agreeing with the government that the statutory bar is inapplicable. See Pet. App. 15a-19a. After the Sixth Circuit rendered its decision, a divided

panel of the Fourth Circuit reached a contrary conclusion on the applicability of the Anti-Injunction Act. See *Liberty University*, 2011 WL 3962915, at *4-*16. Although the Eleventh Circuit did not address the Anti-Injunction Act, we do not believe that provides a reason to grant plenary review in this case, rather than in *Florida*. As the government explains in its *Florida* petition (at 32-34 & n.7), the Court can consider the applicability of the Anti-Injunction Act in the context of the *Florida* case by requesting the parties to brief the issue and appointing an amicus if necessary to file a brief taking the position that the Anti-Injunction Act bars suits such as this, or it can grant review in *Liberty University* in the event a petition for a writ of certiorari is filed there.

In sum, it does not appear necessary to grant review in this case, given the federal government's pending petition in *Florida*, and petitioners here would be free to file an amicus brief on the relevant issues in the *Florida* case. While the Court could also grant this petition and consolidate the cases, that course could complicate the briefing and presentation of the arguments to the Court, without a sufficient corresponding benefit. If, however, the Court concludes that it would benefit from a presentation of the views of petitioners in this case as parties, it should grant the petition in this case, consolidate it with *United States Dep't of Health & Human Services* v. *Florida*, petition for cert. pending, No. 11-398 (filed Sept. 28, 2011), and direct the parties to address the applicability of the Anti-Injunction Act.

CONCLUSION

The Court should hold the petition in this case pending the disposition of the federal government's petition for a writ of certiorari in *United States Dep't of Health & Human Services* v. *Florida*, No. 11-398 (filed Sept. 28, 2011).

Respectfully submitted.

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