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.

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

PETITION FOR A WRIT OF CERTIORARI

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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.

Petitioners 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).

PARTIES TO THE PROCEEDING

Petitioners are the United States Department of Health and Human Services, the Secretary of the United States Department of Health and Human Services, the United States Department of the Treasury, the Secretary of the United States Department of Treasury, the United States Department of Labor, and the Secretary of the United States Department of Labor.

Respondents are Kaj Ahlburg; Terry E. Branstad, Governor of the State of Iowa, on behalf of the people of Iowa; Mary Brown; Commonwealth of Pennsylvania, by and through Thomas W. Corbett, Jr., Governor, and William H. Ryan, Jr., Acting Attorney General; National Federation of Independent Business; Bill Schuette, Attorney General of the State of Michigan, on behalf of the people of Michigan, State of Alabama, by and through Luther Strange, Attorney General; State of Alaska, by and through John J. Burns, Attorney General; State of Arizona, by and through Janice K. Brewer, Governor, and Thomas C. Horne, Attorney General; State of Colorado, by and through John W. Suthers, Attorney General; State of Florida, by and through Pam Bondi, Attorney General; State of Georgia, by and through Samuel S. Olens, Attorney General; State of Idaho, by and through Lawrence G. Wasden, Attorney General; State of Indiana, by and through Gregory F. Zoeller, Attorney General; State of Kansas, by and through Derek Schmidt, Attorney General; State of Louisiana, by and through James D. "Buddy" Caldwell, Attorney General; State of Maine, by and through William J. Schneider, Attorney General; State of Mississippi, by and through Haley Barbour, Governor; State of Nebraska, by and through Jon Bruning, Attorney General; State of Nevada, by and through Brian Sandoval, Governor; State

of North Dakota, by and through Wayne Stenejham, Attorney General; State of Ohio, by and through Michael DeWine, Attorney General; State of South Carolina, by and through Alan Wilson, Attorney General; State of South Dakota, by and through Marty J. Jackley, Attorney General; State of Texas, by and through Greg Abbott, Attorney General; State of Utah, by and through Mark L. Shurtleff, Attorney General; State of Washington, by and through Robert M. McKenna, Attorney General; State of Wisconsin, by and through J.B. Van Hollen, Attorney General; State of Wyoming, by and through Matthew H. Mead, Governor.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Health and Human Services, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-273a) is not yet reported but is available at 2011 WL 3519178. The district court's opinion on the federal government's motion to dismiss (App. 394a-475a) is reported at 716 F. Supp. 2d 1120. The district court's opinion on the parties' cross-motions for summary judgment (App. 274a-368a) is reported at 780 F. Supp. 2d 1256. The district court's opinion entering a stay of its declaratory judgment (App. 369a-393a) is reported at 780 F. Supp. 2d 1307.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App. 476a-503a.

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 re-

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

strictive 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 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). The Act provides that the federal government will pay 100% of the expenditures required to cover these newly eligible Medicaid recipients through 2016. 42 U.S.C.A.1396d(y)(1). The federal government's share will then decline slightly and

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[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.

level off at 90% in 2020 and beyond—far above the usual federal matching rates under Medicaid. *Ibid*.

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 insurance 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 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 in-

come 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) (*Eliminating Individual Mandate*).

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 Be-*

fore the Joint Economic Comm., 108th Cong., 2d Sess. 32 (2004) (Prof. Mark V. Pauly). 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. 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 services 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, including those in a number of respondent States, 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); App. 248a (Marcus, J., dissenting). 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. Respondents are two individuals, Mary Brown and Kaj Ahlburg; the National Federation of Independ-

ent Business (NFIB), of which Brown is a member; and 26 States. They filed suit in the Northern District of Florida, challenging the constitutionality of several provisions of the Affordable Care Act.

The district court determined that at least one individual respondent, Brown, has standing to challenge the minimum coverage provision because she does not currently have health insurance and must "make financial arrangements now to ensure compliance" with the minimum coverage provision in 2014. App. 292a. The court also held that two respondent States, Idaho and Utah, have standing to challenge the minimum coverage provision because they enacted statutes purporting to exempt their residents from it. App. 293a-295a. The district court also concluded that the Anti-Injunction Act, 26 U.S.C. 7421(a), does not bar this suit. App. 401a-425a.

Addressing the merits, the district court held that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. App. 278a n.4, 296a-350a, 401a-424a. The court rejected, however, the individual respondents' contention that the minimum coverage provision also violates substantive due process, App. 465a-468a, as well as the state respondents' challenges to the Medicaid eligibility expansion, App. 280a-288a, the provisions for establishing health insurance exchanges, App. 452a-455a, and, as applied to them as employers, the employer responsibility provision, App. 445a-451a. The court nonetheless held the entire Act invalid because it concluded that the minimum coverage provision could not be severed from any other provision in the statute. App. 350a-364a. The court stayed its declaratory judgment pending appellate review. App. 387a-392a.

3. a. A divided court of appeals affirmed in part and reversed in part. As a threshold matter, the court held that respondent Brown has standing to challenge the minimum coverage provision, but declined to decide whether the respondent States also have standing to challenge it, calling that a "difficult" question. App. 9a. On the merits, the court rejected the respondent States' challenge to the constitutionality of the expansion of Medicaid eligibility, App. 50a-63a, but held that the minimum coverage provision is not a valid exercise of Congress's commerce power, App. 63a-156a, or taxing power, App. 157a-172a. The court reversed the district court's conclusion that the entire Act is inseverable from the minimum coverage provision and held that the remainder of the Act could stand. App. 172a-186a.

The majority recognized that individuals without insurance participate in the health care market, and that, as a class, they annually consume billions of dollars of health care services for which they do not pay. App. 11a. The majority also recognized that the consumption of such uncompensated health care imposes a substantial burden on interstate commerce: health care providers shift the costs of uncompensated care to insurers, which in turn shift those costs to other consumers in the form of higher premiums. App. 11a-12a.

The majority further acknowledged (as respondents had conceded) that the Commerce Clause would plainly permit Congress to regulate the way people pay for health care services at the time that they obtain such services. App. 118a. The majority took issue only with the timing of the insurance requirement in the minimum coverage provision, declaring that provision invalid because it "does *not* regulate behavior at the point of consumption." *Ibid*. The majority declared that the mini-

mum coverage provision is "overinclusive in *when* it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future." App. 119a.

In addition, the majority opined, Congress could have achieved its regulatory objectives without the minimum coverage provision. App. 127a-128a. In the majority's view, other provisions of the Act, such as the guaranteed-issue and community-rating requirements, will significantly reduce the number of uninsured persons and the costs they shift to other market participants. App. 127a-128a. The majority acknowledged Congress's finding that the minimum coverage provision is "essential" to the success of those other provisions. App. 148a (quoting 42 U.S.C.A. 18091a(2)(I)). And it also did not dispute the experience of state regulators, which demonstrated that, in the absence of a minimum-coverage requirement, individuals would often "delay purchasing private insurance until an acute medical need arises," thereby rendering their guaranteed-issue and community-rating reforms ineffective. App. 148a; see App. 230a-231a (Marcus, J., dissenting). The court nonetheless declined to uphold the minimum coverage provision as part of a "broader regulation of the insurance market." App. 148a.

The court of appeals also held that the minimum coverage provision is not a proper exercise of Congress's Article I taxing power. The court acknowledged that the provision amends the Internal Revenue Code to provide that non-exempted individuals who fail to maintain minimum coverage shall pay a penalty that is calculated as a percentage of their household incomes (above a flat dollar amount and below a cap), reported on their individual federal income tax returns, and assessed and col-

lected by the Internal Revenue Service. App. 38a, 44a-45a. And the court did not question projections that the minimum coverage provision will generate billions in revenue each year. App. 168a. The court nonetheless held that Congress's taxing power did not provide a constitutional basis for the provision because the Act uses the term "penalty," not "tax," to describe the assessment. App. 169a.

The court declared the minimum coverage provision severable from the rest of the Act. App. 186a. It concluded that the guaranteed-issue and community-rating provisions were capable of functioning independently and (together with the other provisions of the Act) would sufficiently advance the Act's "basic objective * * * to make health insurance coverage accessible and thereby to reduce the number of uninsured persons." App. 180a-186a.

b. Judge Marcus dissented from the majority's Commerce Clause ruling. His analysis relied in part on the Sixth Circuit's decision in *Thomas More Law Ctr.* v. *Obama*, No. 10-2388, 2011 WL 2556039 (June 29, 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011), and, in particular, on Judge Sutton's concurring opinion in that case. Judge Marcus reasoned that the minimum coverage provision regulates "quintessentially economic conduct"—the timing and method by which individuals pay for health care. App. 189a, 194a-195a. He observed that "substantial numbers of uninsured Americans are currently active participants in the health care services market, and that many of these uninsured currently consume health care services for which they cannot or do not pay." App. 213a. He explained that "[t]his is, in every real and meaningful sense, classic economic *activity*, which, as Congress'

findings tell us, has a profound effect on commerce." *Ibid.*

Judge Marcus further explained that the minimum coverage provision is essential to the Act's guaranteed-issue and community-rating reforms because, without a requirement to obtain insurance, those new protections would allow people to delay the purchase of insurance until they develop acute medical needs. App. 196a, 230a-231a. Judge Marcus therefore reasoned that "Congress had more than 'a rational basis for concluding'" that the requirement was "essential to the success of the Act's concededly valid and quintessentially economic insurer reforms." App. 241a (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 19 (2005)).

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional a central provision of the Affordable Care Act, which 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, lay and collect taxes, and enact legislation that is necessary and proper to effectuate its enumerated powers.

The court of appeals' contrary decision is fundamentally flawed and denies Congress the broad deference it is due in enacting laws to address the Nation's most pressing economic problems and set tax policy. The importance of the decision below—which strikes down "a central piece of a comprehensive economic regulatory scheme enacted by Congress," App. 189a (Marcus, J., dissenting), on a ground that has no basis in the Constitution's text or this Court's precedents—is manifest. Moreover, the court of appeals' conclusion that the minimum coverage provision lies outside Congress's commerce authority directly conflicts with a recent decision of the Sixth Circuit. See *Thomas More Law Ctr.* v. *Obama*, No. 10-2388, 2011 WL 2556039, at *8-*15 (June 29, 2011) (opinion of Martin, J.), *21-*33 (Sutton, J., concurring in the judgment) (*Thomas More*), petition for cert. pending, No. 11-117 (filed July 26, 2011). Review by this Court is plainly warranted.

A. The Court of Appeals' Conclusion That The Minimum Coverage Provision Is Beyond Congress's Article I Power Warrants This Court's Review

1. The decision below misconstrues Congress's Commerce Clause authority and disregards the nature of the health care market

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 principles 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 it 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 effectually 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 recognized, "[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." *Thomas More*, 2011 WL 2556039, at *25 (Sutton, J., concurring in the judgment). 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. App. 231a (Marcus, J., dissenting); see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 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.

Indeed, the court of appeals, like respondents, did not dispute that the Constitution provides Congress with the authority to pursue the ends the minimum coverage provision seeks to achieve. The objection was to the particular means Congress has chosen—the decision to prescribe a general insurance requirement rather than regulating "at the point of consumption" by denying care to (or imposing a financial penalty on) individuals without insurance. App. 118a; App. 207a (Marcus, J., dissenting). But respondents have identified nothing in this Court's precedents that would deny Congress the authority to effectuate its objectives through the means of a minimum coverage provision, one that is appropriate and plainly adapted to Congress's concededly legitimate ends. See *McCulloch*, 17 U.S. (4 Wheat.) at 421. As this Court has repeatedly held, the Constitution "'addresse[s]' the 'choice of means' 'primarily . . . to the judgment of Congress.'" *Comstock*, 130 S. Ct. at 1957 (brackets in original) (quoting *Burroughs* v. *United States,* 290 U.S. 534, 547-548 (1934)); see also *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) ("[W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'") (quoting

United States v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-119 (1942)). Accordingly, there is no basis for concluding that the minimum coverage provision exceeds Congress's commerce power.

a. Participation in the health care market is virtually universal, and individuals (including the uninsured) are always at risk of needing unanticipated care. That participation may be paid for (and that risk covered) in one of two ways—either through insurance, or through attempted self-insurance with the back-stop of uncompensated care. *Thomas More*, 2011 WL 2556039, at *29 (Sutton, J., concurring in the judgment). The minimum coverage provision thus regulates the way participants in the health care market finance the services they consume. App. 213a-214a (Marcus, J., dissenting). And it does so in an entirely ordinary and appropriate way; because "health care costs are inevitable, unpredictable, and often staggeringly high," services in the health care market, "unlike other markets, [are] paid for predominantly through the mechanism of insurance." App. 246a (Marcus, J., dissenting); cf. *McCulloch*, 17 U.S. (4 Wheat.) at 409 ("[T]he powers given to the government imply the ordinary means of execution.").

Congress had far more than a rational basis for concluding that the economic conduct it was regulating had a substantial effect on interstate commerce. Individuals without insurance actively participate in the health care market, but they pay only a fraction of the cost of the services they consume. App. 193a-194a, 211a-213a (Marcus, J., dissenting). On average, the uninsured pay only 37% of their health care costs out of pocket, and third parties, such as government programs and charities, pay another 26% on their behalf. App. 193a (Marcus, J., dis-

senting). "The remaining costs are uncompensated—they are borne by health care providers and are passed on in the form of increased premiums to individuals who already participate in the insurance market." App. 193a-194a (Marcus, J., dissenting). In 2008, the uninsured consumed approximately $116 billion in health care services, including $43 billion worth of care for which the providers were not compensated. App. 194a, 212a (Marcus, J., dissenting) (citing 42 U.S.C.A. 18091(a)(2)(F)). Congress found that providers pass some of those costs on to insurers, which pass them on to insured consumers, raising average family premiums by $1000 in 2008. App. 194a (Marcus, J., dissenting) (citing 42 U.S.C.A. 18091(a)(2)(F)). "This cost shifting does not occur in other markets, even those in which we all participate." App. 251a (Marcus, J., dissenting).

b. Respondents contend that the minimum coverage provision is an impermissible means of addressing these substantial effects on interstate commerce because it regulates "inactivity," *e.g.*, States' C.A. Br. 20-21. No court of appeals has accepted that proposition, which lacks any foundation in the Constitution's text or this Court's precedents. See *Lopez*, 514 U.S. at 569-571 (Kennedy, J., concurring) (noting that the Court's commerce cases have rejected "semantic or formalistic categories" in favor of "broad principles of economic practicality"). As Judge Sutton explained in *Thomas More*, "[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." 2011 WL 2556039, at *29. Even the majority below was "not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case." App. 100a.

The court of appeals nevertheless invalidated the minimum coverage provision, based on a supposed constitutional rule about timing. The court explicitly recognized (and respondents expressly conceded below) that when the uninsured "consume health care, Congress may regulate their activity at the point of consumption." App. 118a; see App. 207a-208a (Marcus, J., dissenting). But the majority then went on to conclude that a requirement to obtain insurance could apply no earlier. App. 115a-119a. The majority thus essentially adopted the position urged by respondents, *i.e.*, that in lieu of the minimum coverage provision, Congress should have addressed the problem of cost-shifting in the interstate health care market by "imposing restrictions or penalties on individuals who attempt to consume health care services without insurance." App. 207a-208a (Marcus, J., dissenting) (quoting States C.A. Br. 31-32).[3]

The court of appeals' reasoning reflects both a serious departure from the appropriate deference due Congress in its choice of means and a basic misunderstanding of the way health insurance works. Even assuming

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[3] The majority also declared the minimum coverage provision overinclusive because it "regulates those who have not entered the health care market at all." App. 119a. Congress is permitted to regulate categorically, without making exceptions for atypical individuals. *Raich*, 545 U.S. at 23. Assuming *arguendo* that there are individuals who go "from cradle to grave" without consuming health care, the group is "surely minuscule." App. 216a, 218a (Marcus, J., dissenting) (quoting States C.A. Br. 29). The two individual plaintiffs in this case (Brown and Ahlburg) do not disavow participation in the health care market; they simply state that they have not had health insurance for several years. Resp.'s Mot. for Summ. J. Exh. 25, Paras. 1, 5; *id.* Exh. 26, Paras. 1, 4. The theoretical existence of individuals who never obtain health care would not in any event furnish a basis for invalidating the minimum coverage provision on its face.

that respondents or the court of appeals could identify a preferable regulatory alternative, that would provide no basis to invalidate the one that Congress chose. "The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment) (citation omitted); see *McCulloch*, 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

In *Thomas More*, Judge Sutton explained why the timing of the minimum coverage provision's application (which the court of appeals here viewed as dispositive) is in fact immaterial from a constitutional perspective. 2011 WL 2556039, at *30. "Requiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind, and not the sort of policy differences removed from the political branches by the word 'proper' or for that matter 'necessary' or 'regulate' or 'commerce.'" *Ibid.* Moreover, respondents' preferred scheme "would impose a federal condition (ability to pay) on the consumption of a service bound up in federal commerce (medical care)." *Ibid.* Such a condition "would be at least as coercive as the individual mandate, and arguably more so." *Ibid.*

It has long been settled that the "exertion of federal power" under the Commerce Clause need not "await the disruption of * * * commerce." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 222 (1938). Instead, "Congress [is] entitled to provide reasonable preventive measures." *Ibid.* The Court applied that principle in *Raich*.

Like respondents here, the plaintiff in that case (a grower of homegrown marijuana for personal medical consumption) claimed that Congress could not regulate her because she was "entirely separated from the market." 545 U.S. at 30 (citation omitted). The Court rejected that artificial limit on Congress's commerce power, see *id.* at 25-33, because "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market," *id.* at 40 (Scalia, J., concurring in the judgment). The same principle applies here. Because of human susceptibility to disease and accident, we are all "never more than an instant" (*ibid.*) from the "point of consumption" of health care (App. 118a). Nothing in the Commerce Clause requires Congress to withhold federal regulation until that moment. App. 210a (Marcus, J., dissenting) (Commerce Clause does not "requir[e] Congress to wait until the cost-shifting problem materializes for each uninsured person before it may regulate the uninsured as a class."); see *Liberty University, Inc.* v. *Geithner*, No. 10-2347, 2011 WL 3962915, at *41 (4th Cir. Sept. 8, 2011) (Davis, J., dissenting) (*Liberty University*).

Indeed, the court of appeals' focus on the point of "consumption" disregards the economic rationale for insurance, which, by its nature, must be obtained before medical care is needed. "Health insurance is a mechanism for spreading the costs of that medical care across people or over time, from a period when the cost would be overwhelming to periods when costs are more manageable." App. 197a (Marcus, J., dissenting) (quoting C.A. Econ. Scholars Amicus Br. Supporting the Federal Government 12). Common sense, experience, and economic analysis show that a "health insurance market could never survive or even form if people could buy

their insurance on the way to the hospital." *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance*, 110th Cong., 2d Sess. 52 (2008) (Prof. Mark A. Hall).

The court of appeals' exclusive focus on the point of future consumption also ignores the reality that insurance rates are calculated on the basis of the *present* risk that such future expenses will occur. The risk of substantial medical expenses is universal, and few who attempt to self-insure can come close to covering the full expenses they would incur if the risk were to materialize. As a result, the present premiums others pay must cover the risk of the uninsured. The uninsured thus externalize the cost of their present medical risk to others every day, not at some indeterminate future time, and they similarly externalize the cost of maintaining the medical infrastructure that will be available to them when needed. The minimum coverage provision simply ensures that individuals who can afford insurance (and are otherwise non-exempted) will pay for the health care services they consume and the risks to which they are exposed, rather than shift those costs and risks to others, now and in the future. See *Thomas More*, 2011 WL 2556039, at *24 (Sutton, J., concurring in the judgment) ("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 later to pay for *all* care as the need arises.").

The fact that some of the uninsured may not generate uncompensated costs in a particular month or year provides no basis for invalidating the statute. "When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Raich*, 545 U.S. at 17 (quoting *Perez* v.

United States, 402 U.S. 146, 154 (1971)). Accordingly, Congress was not required to predict, person-by-person, who among the uninsured will receive uncompensated medical services in a given month or year, and it would be infeasible to do so. App. 215a (Marcus, J., dissenting). It is, rather, the very nature of insurance—the customary means of financing health care—to address such risks in the aggregate.

c. Instead of deferring to Congress's policy judgments, the court of appeals majority made its own independent judgment that the minimum coverage provision will not adequately accomplish Congress's objective of reducing cost-shifting because of its exemptions and enforcement mechanisms. App. 151a-152a. That analysis "looks startlingly like strict scrutiny review," App. 218a (Marcus, J., dissenting), even though "[t]he courts do not apply strict scrutiny to commerce clause legislation and require only an 'appropriate' or 'reasonable' 'fit' between means and ends," *Thomas More*, 2011 WL 2556039, at *31 (Sutton, J., concurring in the judgment).

Based on an extensive legislative record, Congress reasonably concluded that the minimum coverage provision will mitigate the problem of cost-shifting in the health care market. Indeed, the CBO has estimated that, without the minimum coverage provision, there would be 16 million more people without insurance in 2019. *Eliminating the Individual Mandate* 2; see Matthew Buettgens, et al., Urban Inst., *Why the Individual Mandate Matters* 1 (Dec. 2010) (concluding that uncompensated care would decline by only $14.7 billion if the Act contained no minimum coverage provision). At the very least, the CBO's analysis demonstrates that Congress's determination that the minimum coverage provision will effectively reduce the number of uninsured in-

dividuals was reasonable. The court of appeals should not have substituted its judgment for that of Congress. See *Thomas More*, 2011 WL 2556039, at *33 (Sutton, J., concurring in the judgment) ("Time assuredly will bring to light the policy strengths and weaknesses of using the [minimum coverage provision] as part of this national legislation, allowing the peoples' political representatives, rather than their judges, to have the primary say over its utility."); see also *Preseault* v. *ICC*, 494 U.S. 1, 18-19 (1990).

d. The minimum coverage provision is also "necessary and proper for the regulation of interstate commerce"—and distinguishable from the statutes in *Lopez* and *Morrison*—because it 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." *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 561); see App. 229a-232a (Marcus, J. dissenting); *Thomas More*, 2011 WL 2556039, at *12-*14 (Martin, J.). "Health care and the means of paying for it are 'quintessentially economic' in a way that possessing guns near schools and domestic violence are not." *Id.* at *25 (Sutton, J., concurring in the judgment) (citing *Lopez*, *supra*, and *Morrison*, *supra*). Moreover, Congress found that the minimum coverage provision was "essential" to the success of the measures it adopted to end insurance discrimination against those with pre-existing conditions. 42 U.S.C.A. 18091(a)(2)(I). Those insurance reforms are unquestionably within Congress's powers under the Commerce Clause. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539-553 (1944). The soundness of Congress's judgment about what was required for its insurance reforms to

succeed is supported by the experience of States that tried—and failed—to effectively end such practices without an insurance requirement. See App. 230a-231a (Marcus, J., dissenting). Indeed, no party to this case has suggested that the guaranteed-issue and community-rating requirements could function effectively without the minimum coverage provision.

The court of appeals thought that the minimum coverage provision could not be upheld as an essential part of a larger regulatory program because that constitutional rationale is inapplicable to "facial" challenges, such as the one at issue in this case and in *Lopez*. App. 144a-145a. *Lopez* itself, however, suggested just the opposite. "Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulatory activity, in which the regulatory scheme could be undercut unless the intrastate activity was regulated.'" *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 561). The court of appeals also stated that *Raich* was "the only instance in which a statute has been sustained by the larger regulatory scheme doctrine," and it perceived that the doctrine was limited to that case's facts, *i.e.*, when "Congress [seeks] to eliminate *all* interstate traffic in [a] commodity." App. 146a. That is doubly incorrect. The Court relied on this doctrine to uphold statutes well before *Raich*, and it did so in a variety of regulatory contexts not involving the prohibition of trade in a commodity. See, *e.g.*, 545 U.S. at 37-38 (Scalia, J., concurring in the judgment) (discussing *United States* v. *Darby*, 312 U.S. 100, 125 (1941)); *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981).

2. *Congress's taxing power provides independent authority for the enactment of the minimum coverage provision*

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*, 2011 WL 3962915, at *16-*22 (Wynn, J., concurring). 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.

This conclusion is reinforced by examining the broader statutory context. The minimum coverage provision is just one of numerous ways in which the Affordable Care Act amends the Internal Revenue Code to expand insurance coverage. The Act will provide tax credits for many individuals who purchase coverage through an exchange, see 26 U.S.C.A. 36B, and for eligible small businesses that provide coverage to their employees, 26 U.S.C.A. 45R. Under certain circumstances, it also provides for tax penalties for large employers that do not offer adequate coverage to full-time employees. 26 U.S.C.A. 4980H. Those provisions in turn build upon numerous pre-existing provisions of the Internal Revenue Code related to health insurance coverage.[4]

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[4] Unlike most other forms of employee compensation, employer payments of health insurance premiums are generally excluded from

Each of those measures is unquestionably a proper exercise of the taxing power, and, in their practical effect, they are equivalent to the minimum coverage provision—they all use the tax code to provide financial incentives that favor health insurance coverage.

Indeed, just as deductions, exemptions, and credits operate to reduce a taxpayer's income tax liability based on the individual circumstances of the taxpayer, the minimum coverage penalty simply has the effect of increasing the taxpayer's total liability on his income tax return based on his own individual circumstances. In its practical operation, the minimum coverage provision is thus the mirror image of statutory provisions of the sort that have long been regarded as within Congress's broad discretion to determine the amount of tax owed, and falls equally within Congress's broad taxing power.

The court of appeals concluded that Congress did not intend to exercise its taxing power in enacting the minimum coverage provision because it referred to the assessment as a "penalty." App. 157a-172a; accord *Thomas More*, 2011 WL 3692915, at *17-*21. There is no such magic words test. See *Liberty University*, 2011 WL 3962915, at *17 (Wynn, J., concurring); see also *United States* v. *Sotelo*, 436 U.S. 268, 275 (1978) (funds owed by operation of Internal Revenue Code had "essential character as taxes" despite statutory label as "penalt[ies]"); *Nelson*, 312 U.S. at 363. Moreover, if Section 5000A can reasonably be interpreted as a valid exercise of the tax power—and it surely can be because it is fully integrated into the Internal Revenue Code, and is an ad-

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an employee's income for purposes of both federal income tax and payroll taxes. See 26 U.S.C. 106. In addition, employers can deduct such premium payments as business expenses. 26 U.S.C. 162 (2006 & Supp. III 2009).

junct to the income tax—then the courts must adopt that interpretation, even if other interpretations of congressional intent are also reasonable. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The court of appeals noted that the goal of the minimum coverage provision is not to raise revenue, but to reduce the number of people who are uninsured. App. 164a. It is settled, however, that a tax "does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950); see *Liberty University*, 2011 WL 3962916, at *17-*18 (Wynn, J., concurring). "Every tax is in some measure regulatory" in that "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*, 300 U.S. at 513. So long as a statute is "productive of some revenue," Congress may exercise its taxing powers irrespective of any "collateral inquiry as to the measure of the regulatory effect of a tax." *Id.* at 514.

3. The court of appeals' decision conflicts with a decision of the Sixth Circuit and involves a question of fundamental importance

The court of appeals' conclusion that the minimum coverage provision exceeds Congress's power under the Commerce Clause conflicts with a contrary holding of the Sixth Circuit. See *Thomas More*, 2011 WL 2556039, at *1.[5] Although the Sixth Circuit issued its decision

[5] The court of appeals' Commerce Clause holding also conflicts with the views expressed by two members of the Fourth Circuit panel in *Liberty University*. Although that court found a constitutional challenge to the minimum coverage provision barred by the Anti-Injunction

approximately six weeks before the court of appeals' decision in this case, the majority here did not mention the Sixth Circuit's contrary view, much less respond to it.

Writing for himself in *Thomas More*, Judge Martin concluded that "the minimum coverage provision is facially constitutional under the Commerce Clause" because it regulates economic activity—"the financing of health care services, and specifically the practice of self-insuring for the cost of care"—with a substantial effect on interstate commerce—"driving up the cost of health care as well as * * * shifting costs to third parties." 2011 WL 2556039, at *11-*12. Judge Martin further concluded that "even if self-insuring for the cost of health care were not economic activity with a substantial effect on interstate commerce, Congress could still properly regulate the practice because the failure to do so would undercut its regulation of the larger interstate markets in health care delivery and health insurance." *Id*. at *12.

Judge Sutton, concurring in the judgment, concluded that the minimum coverage provision regulates the practice of self-insurance against health risk and observed that "[t]here are two ways to self-insure, and both, when aggregated, substantially affect interstate commerce." *Thomas More*, 2011 WL 2556039, at *24. "One option is to save money so that it is there when the need for health care arises. The other is to save nothing and to rely on something else—good fortune or the good graces

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Act, see 2011 WL 3962915, at *4-*16, two members of the panel addressed the merits as well. See *id*. at *35-*47 (Davis, J., dissenting) (finding minimum coverage within commerce authority); *id.* at *16 (Wynn, J., concurring) ("I think that [Judge Davis's] position on the Commerce Clause is persuasive.").

of others—when the need arises." *Ibid*. In his view, "Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available later to pay for *all* care as the need arises." *Ibid*.

Judge Sutton also rejected the contention that "the Commerce Clause contain[s] an action/inaction dichotomy that limits congressional power" but, in any event, found the distinction immaterial in this context because "[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. Each requires affirmative choices; one is no less active than the other." *Thomas More*, 2011 WL 2556039, at *27, *29. In sum, Judge Sutton concluded that "[i]f Congress has the power to regulate the national healthcare market, as all seem to agree, it is difficult to see why it lacks authority to regulate a unique feature of that market by requiring all to pay now in affordable premiums for what virtually none can pay later in the form of, say, $100,000 (or more) of medical bills prompted by a medical emergency." *Id*. at *30.

This Court's review is warranted to resolve the conflict in the circuits.[6] Review is especially appropriate

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[6] One other case pending in a court of appeals squarely presents a constitutional challenge to the minimum coverage provision. See *Mead* v. *Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), appeal pending *sub nom. Seven-Sky* v. *Holder*, No. 11-5047 (D.C. Cir. argued Sept. 23, 2011). In several other cases, courts of appeals have concluded that plaintiffs lacked standing to challenge the minimum coverage provision. See *Virginia ex rel. Cuccinelli* v. *Sebelius*, No. 11-1057, 2011 WL 3925617 (4th Cir. Sept. 8, 2011); *Baldwin* v. *Sebelius*, No. 10-56374, 2011 WL 3524287 (9th Cir. Aug. 12, 2011); *New Jersey Physicians, Inc.* v. *President of the United States*, No. 10-4600, 2011 WL 3366340 (3d Cir. Aug. 3, 2011); see also *Kinder* v. *Geithner*, No. 10-cv-00101, 2011 WL

because the court of appeals "str[uck] down as unconstitutional a central piece of a comprehensive economic regulatory scheme enacted by Congress" to address a matter of grave national importance. App. 189a (Marcus, J., dissenting).

B. The Court Should Address Whether The Anti-Injunction Act Bars This Pre-Enforcement Challenge To The Minimum Coverage Provision

We respectfully suggest that the Court direct the parties to address the applicability of the Anti-Injunction Act, 26 U.S.C. 7421(a), to respondents' challenge to the minimum coverage provision. Subject to certain exceptions, 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 by any person, whether or not such person is the person against whom such tax was assessed." *Ibid.*

In the district court, the federal government moved to dismiss respondents' challenge to the minimum coverage provision on the ground that the Anti-Injunction Act barred it. The district court declined to dismiss on that basis, see App. 401a-425a, and the federal government did not challenge that ruling on appeal. In a supplemental brief requested by the Fourth Circuit, the federal government explained that it had reconsidered its position on this question and had "concluded that the [Anti-Injunction Act] does not foreclose the exercise of jurisdiction in these cases." Fed. Gov't Supplemental Br. at 2, *Liberty University*, *supra* (No. 10-2347). The govern-

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1576721 (E.D. Mo. Apr. 26, 2011) (dismissing on standing grounds), appeal pending, No. 11-1973 (8th Cir. oral argument scheduled for Oct. 20, 2011).

ment also set out the legal basis for its position that the Anti-Injunction Act does not apply. See *id.* at 2-9.

The court of appeals in this case did not address the Anti-Injunction Act, but in two other cases circuit courts did so, reaching conflicting results. In *Thomas More*, the Sixth Circuit, consistent with the position of the United States on appeal in that case, unanimously held that "the Anti-Injunction Act d[id] not remove [its] jurisdiction to consider this claim." 2011 WL 2556039, at *8. In *Liberty University*, however, a divided panel of the Fourth Circuit held that the challenge before it was barred by the Anti-Injunction Act. See 2011 WL 3962915, at *4-*16.

The United States continues to believe that the Anti-Injunction Act does not bar these challenges to the minimum coverage provision. But the courts of appeals are now divided on the question. This Court has stated that "the object of [the Anti-Injunction Act] is to withdraw jurisdiction from the state and federal courts." *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962); see *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 749 (1974); but cf. *Helvering* v. *Davis*, 301 U.S. 619, 639-640 (1937) (accepting express waiver of Anti-Injunction Act by the United States). Under these circumstances, we believe the Court should consider the applicability of the Anti-Injunction Act along with the constitutional issues in this case. If, as we anticipate, respondents take the position that the Anti-Injunction Act does not bar this suit, the Court should also consider appointing an amicus to file a brief defending the position that the Anti-Injunction Act does bar this suit, as the majority held in

Liberty University.[7] In the event the Court finds the Anti-Injunction Act inapplicable, it can then decide the constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[7] If the Court grants a certiorari petition filed by the plaintiffs in *Liberty University* to challenge the Fourth Circuit's holding in that case, the Court could instead rely on briefing in that case to address the Anti-Injunction Act issue, perhaps appointing an amicus to defend the Fourth Circuit's judgment in that case. The respondents in this case could then file amicus briefs on the Anti-Injunction Act in *Liberty University*.