Nos. 11-057 & 11-1058

IN THE

United States Court of Appeals for the Fourth Circuit

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

Plaintiff-Appellee/Cross-Appellant,

v.

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

Defendant-Appellant/Cross-Appellee,

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF APPELLANT AND REVERSAL

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STATEMENT REGARDING CONSENT TO FILE

Both parties have consented to the filing of Constitutional Accountability Center's brief *amicus curiae*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it is not a publicly-held corporation, does not issue stock and does not have a parent corporation. *Amicus* Constitutional Accountability Center is a non-profit 501(c)(3) organization.

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INTEREST OF THE AMICUS CURIAE

The Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our charter guarantees.

Constitutional Accountability Center has written extensively on the constitutional basis for the Patient Protection and Affordable Care Act[1] and has submitted testimony to the U.S. Senate Judiciary Committee regarding the constitutionality of the Act under Congress's Com-

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[1] *See, e.g.*, Elizabeth B. Wydra, *The States, Health Care Reform and the Constitution*, available at http://www.theusconstitution.org/upoad/fck/file/File_storage/The%20States,%20Health%20Care%20Reform,%20and%20the%20Constitution%281%29.pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bxe; Elizabeth B. Wydra, *Strange Brew: The Tea Party's Errant Constitutional Attacks on Health Care Reform*, available at http://theusconstitution.org/blog.history/?p=1829; Iowa Sen. Jack Hatch & Elizabeth B. Wydra, *Dismiss the Florida Lawsuit: Health Care Reform Law Preserves Constitutional Federalism*, available at http://www.huffingtonpost.com/elizabeth-b-wydra/dismiss-the-florida-lawsu_b_614846.html.

merce Clause and Necessary and Proper Clause powers.[2] CAC also represents a bipartisan group of state legislators from across the country in *Florida, et al. v. U.S. Dep't of Health & Human Services, et al.*[3]

This brief draws heavily on the University of Virginia's landmark project, *The Papers of George Washington*. The researchers involved in this massive project in historical scholarship have worked for decades to produce the largest available collection of correspondence to and from George Washington and to make digitized copies of these documents available to the public, greatly improving our understanding of the views of Washington and other important Founders on critical topics such as the constitutional powers of the federal government.

SUMMARY OF ARGUMENT

The lower court's vision of a federal government without the power to address a national problem such as the health care crisis has no basis whatsoever in the Constitution's text and history. The Father of our Nation, George Washington, and the other delegates to the Consti-

[2] http://theusconstitution.org/blog.history/wp-content/uploads/2011/02/Testimony-for-SJC-Hearing-on-ACA.pdf.

[3] The brief CAC filed on behalf of this group of legislators is available at http://www.theusconstitution.org/blog.history/wpcontent/uploads/2010/11/State-Legislators-Amicus-Brief.pdf.

tutional Convention shared a conviction that the Constitution must establish a national government of substantial power. In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966).

Tasked with translating the principle of Resolution VI into specific provisions, the Committee of Detail drafted Article I to grant Congress the broad power to, among other things, "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art I, § 8, cl. 3. While the concept of "commerce" in this Clause has always referred to economic activity or trade, the original meaning of "commerce" in the Constitution carried "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005). As Chief

Justice John Marshall explained, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). Thus, the lower court's vision of a Commerce Clause power strictly curtailed by tests of self-initiated activity and economic subject matter cannot be squared with the Clause's original meaning. Congress's regulation of the decision not to buy health insurance under the Commerce Clause is plainly constitutional.

The lower court's interpretation of the Necessary and Proper Clause is similarly unsupported by constitutional text and history. Far from the cramped vision of the Clause used by the court below, which would permit Congress to regulate only by using means that are themselves covered by the Commerce Clause (effectively rendering the Necessary and Proper Clause a nullity), the grant of power to "make all Laws which shall be necessary and proper for carrying into execution" constitutionally granted powers was intended to be sweeping. U.S. CONST. art. I, §8, cl. 18. As Alexander Hamilton explained to President Washington, "[t]he means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there

must of necessity be great latitude of discretion in the selection and application of those means." THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (Theodore J. Crackel, ed. 2008) (Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791). As recognized by our first President, the rest of the Framers, and the Supreme Court from the Founding to the present, the Necessary and Proper Clause grants Congress the power to use means outside the enumerated list of Article I powers to achieve the ends contemplated in the Constitution.

Under a faithful reading of the Constitution, the minimum coverage provision of the Affordable Care Act is a valid exercise of Congress's Commerce Clause and Necessary and Proper Clause powers. If the Court finds that the Commonwealth has standing to challenge the minimum coverage provision, the ruling below should be reversed on the merits.

ARGUMENT

I. The Framers Wrote The Constitution To Give The Federal Government Broad Legislative Power To Address National Concerns.

Our Constitution was drafted in 1787 "in Order to form a more perfect Union"—both more perfect than the British tyranny against which the founding generation had revolted and more perfect than the flawed Articles of Confederation under which Americans had lived for a decade since declaring independence. The result was a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative policy solutions reflecting the diversity of America's people, places, and ideas.

While some have portrayed the Constitution as a document that is all about limiting government, particularly during the legal and political debate over the constitutionality of health care reform, the historical context shows that the Founders were just as, if not more, concerned with creating an empowered, effective national government than with setting stark limits on federal power.

By the time our Founders took up the task of drafting the Constitution in 1787, they had lived for nearly a decade under the dysfunctional Articles of Confederation. The Articles of Confederation, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built merely on a "firm league of friendship" between thirteen independent states. ARTICLES OF CONFEDERATION (1781), art. III. There was only a single branch of national government, the Congress, which was made up of state delegations. ARTICLES OF CONFEDERATION, art. V. Congress under the Articles of Confederation had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it had no express power to make laws that would be binding in the states' courts and no general power to establish national courts, and it could raise money only by making requests to the states.

This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War. In the midst of several American setbacks during the war, Washington lamented that, "unless Congress speaks with a more decisive tone; unless they are vested with powers by the several States

competent to the great purposes of War . . . our Cause is lost." 18 THE WRITINGS OF GEORGE WASHINGTON 453 (John C. Fitzpatrick, ed. 1931) (Letter to Joseph Jones, May 31, 1780). *See also* WASHINGTON: WRITINGS 393 (John Rhodehamel, ed. 1997) (Circular to State Governments, Oct. 18, 1780). Washington believed that the inability of the central government to address common concerns such as the maintenance of an army could bring disaster: "The sufferings of a complaining army, on the one hand, and the inability of Congress and tardiness of the States on the other, are the forebodings of evil." *Id.* at 488 (Letter to Alexander Hamilton, March 4, 1783).

Washington favored strong federal power not just for military matters, but also in other general issues of national concern. Shortly after the Revolutionary War was won, Washington wrote to Alexander Hamilton stating plainly that "[n]o man in the United States is, or can be more deeply impressed with the necessity of a reform in our present Confederation than myself." *Id.* at 505 (Letter to Alexander Hamilton, March 31, 1783). Washington explained that, "unless Congress have powers competent to all *general* purposes, that the distresses we have encountered, the expences we have incurred, and the blood we have

spilt in the course of an Eight years war, will avail us nothing." *Id.* at 490 (Letter to Alexander Hamilton, March 4, 1783) (emphasis in original). [4] *See also id.* at 519 (Circular to State Governments, June 8, 1783) ("[I]t is indispensible to the happiness of the individual States, that there should be lodged somewhere, a Supreme Power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of long duration.").

The difficulty Massachusetts had in quelling Shay's Rebellion in 1786 further convinced Washington of the great need for improving upon the Articles of Confederation: "What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man of life,

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[4] Indeed, it is indicative of the shift from revolution to statecraft that the Constitution's first Article gives Congress the power to impose a broad range of "Taxes, Duties, Imposts and Excises." U.S. CONST. art. I, § 8, cl. 1. "Thus, only a decade after they revolted against imperial taxes, Americans were being asked to authorize a sweeping regime of continental taxes, with the decisive difference that these new taxes would be decided on by public servants chosen by the American people themselves—taxation *with* representation." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005). Suggestions that the legitimate complaints of the "Boston Tea Party" in 1775 animated the Founders during the Constitutional Convention in 1787 are thus deeply flawed. *E.g.*, *Florida et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV, Order Granting Summary Judgment, Jan. 31, 2011.

liberty, or property?" 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 332 (W.W. Abbot et al., eds. 1992) (Letter to James Madison, Nov. 5, 1786).

After the Revolutionary War was won, the Founders turned their focus on creating a new, better form of government with a sufficiently strong federal power. The delegates to the Constitutional Convention shared Washington's conviction that the Constitution must establish a government of sufficient power. In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 108 (2005); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-12 (2010). The delegates then passed Resolution VI on to the Committee of Detail, which was responsible for drafting the enumerated powers of Congress in Article I, to transform this general

principle into an enumerated list of powers in the Constitution. *Id.* at 10.

As constitutional scholar Jack Balkin explains, Resolution VI established a structural constitutional principle with "its focus on state competencies and the general interests of the Union." *Id.* Translating this principle into specific provisions, the Committee of Detail drafted Article I to grant Congress the broad power to, among other things, regulate interstate commerce and tax and spend to "provide for the . . . general Welfare of the United States." U.S. CONST. art I, § 8, cl. 1. These enumerated powers were intended to capture the idea that "whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 424 (Jonathan Elliot ed., 2d ed. 1836) (hereinafter ELLIOT'S DEBATES) (Statement of James Wilson).

The enumeration of powers was not intended to displace the general principle of Resolution VI that Congress should have the general

ability to legislate in matters of national concern. As James Wilson, a member of the Committee of Detail who was also "America's leading lawyer and one of only six men to have signed both the Declaration of Independence and the Constitution,"[5] explained:

> [T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, *an enumeration of particular instances, in which the application of the principle ought to take place,* has been attempted with much industry and care.

2 ELLIOT'S DEBATES 424-25 (emphasis added). The drafters of the Constitution thus made clear that in each enumerated instance in Article I—whether regulating "commerce" or levying taxes—the understanding was that Congress would exercise the enumerated power while applying the general principle that Congress has power to regulate in cases of national concern.[6] This list of enumerated powers was not an attempt

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[5] AMAR, AMERICA'S CONSTITUTION, at 7.

[6] Some scholars have suggested that the Committee of Detail rejected Resolution VI or that the Convention repudiated it because the precise language of the Resolution was not written into the Constitution. *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004). But after the delegates passed Resolution VI,

to limit the federal government for its own sake, but rather "[t]he list of enumerated powers was designed so that the new federal government would have power to pass laws on subjects and concerning problems that are federal by nature." Balkin, *Commerce*, at 12.

II. Focused On More Than Just Trade or Economic Transactions, The Framers Included The Commerce Clause In The Constitution To Allow The Federal Government To Legislate Affairs Among The Several States That Require A Federal Response.

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Given that the Committee of Detail drafted the Commerce Clause to manifest the principle of Resolution VI that Congress should have power to regu-

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the Committee of Detail had no power to reject it, and, as Wilson's comments make clear, the Committee embraced the Resolution's principle and attempted to implement it in Article I. *See* Balkin, *Commerce*, at 10-11. While some today may prefer not to have a government of such broad power, a faithful reading of the Constitution's text and history, as even conservative scholars have acknowledged, leads to the conclusion "that the powers conferred on the national government are huge, sweeping, overlapping, and, when taken together, very nearly comprehensive." Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 991-92 (2008). *See also id.* at 992 (noting that even if one believes that, "politically, the full exercise of such powers might be unpopular or constitute bad public policy does not mean that the Constitution did not, in fact, confer such broad powers").

late matters of national concern, the Commerce Clause's "text looks the way it does because a basic structural principle underlies the text, and in fact, the text was written precisely to articulate that general principle." Balkin, *Commerce*, at 7. In other words, "Congress's power to regulate commerce 'among the several states' is closely linked to the general structural purpose of Congress's enumerated powers as articulated by the Framers: to give Congress power to legislate in all cases where states are separately incompetent or where the interest of the nation might be undermined by unilateral or conflicting state action." *Id*. at 6.

While commerce has always referred to economic activity or trade, the original meaning of "commerce" in the Constitution carried "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." AMAR, AMERICA'S CONSTITUTION, at 107. *See also* Balkin, *Commerce*, at 15-17. "The concept of 'commerce' in the eighteenth century had strong social connotations which are almost the opposite of our modern focus on commodities." *Id.* at 16. To demonstrate, constitutional scholar Akhil Amar cites Bolingbroke's famous mid-eighteenth-century tract, *The*

Idea of a Patriot King, which spoke of the "free and easy commerce of social life," and the Oxford English Dictionary, which referred to "our Lord's commerce with his disciples." AMAR, AMERICA'S CONSTITUTION, at 107.

Only if "commerce" is read in light of this broader dictionary definition and usage does the Commerce Clause effectuate the Framers' direction that Congress should have authority to "legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131-32; *see supra* Section I. Particularly as related to the Commerce Clause, federal issues may generally be described as problems that single states cannot solve on their own, either because a matter has spillover effects in other states or because there is a collective action problem in which states are unwilling or unable to act effectively. *Cf.* AMAR, AMERICA'S CONSTITUTION, at 107 (noting that reading interstate and international "commerce" broadly in the Commerce Clause fits with "the framers' general goals by enabling Congress to regulate . . . interactions that, if

improperly handled by a single state acting on its own, might lead to needless wars or otherwise compromise the interests of sister states"). Indeed, before the Constitutional Convention, George Washington noted the dangers of a lack of federal power to act uniformly in areas of commerce, predicting that if states tried to regulate trade, "a many-headed monster would be the issue." 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 423 (Letter to David Stuart, Nov. 30, 1785).

As Chief Justice John Marshall observed in *Gibbons v. Ogden*, if commerce were limited merely to active trade of goods, Congress would not be able to regulate in areas of keen federal interest, such as navigation to and from foreign nations. 22 U.S. (9 Wheat.) 1, 194 (1824). In *Gibbons*, Marshall explained that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse." *Id.* *See generally* Balkin, *Commerce*, at 21 ("When people like George Washington, John Marshall, and Joseph Story use the words 'commerce' and 'intercourse' interchangeably, perhaps we should listen to them.").

National power to regulate commerce, broadly defined, was so high on the Founders' agenda that George Washington, on his way to his first inauguration as President, stopped to declare to a Delaware

crowd that, "The promotion of domestic manufactures will, in my conception, be among the first consequences which may naturally be expected to flow from an energetic government." 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 78 (W.W. Abbot et al., eds. 1987). ("To the Delaware Soc'y for Promoting Domestic Manufacturers," April 19-20, 1789). Washington believed in "a liberal construction of the national powers," 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 396, and his Delaware speech indicates that he considered the promotion of commerce as an appropriate function of "an energetic government," 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 78.

While the meaning of commerce in the Constitution was certainly intended to be broad, the text of the Commerce Clause places significant limits on federal regulation: Congress can only act if a given problem genuinely spills across state or national lines. As Chief Justice Marshall explained in *Gibbons*, the Commerce Clause uses the word "among" to mean "intermingled with" and that "commerce among the States" means "commerce which concerns more States than one." 22 U.S. (9 Wheat.) at 194. If commerce within a single state has external

effects on other states or on the Nation as a whole then it falls under Congress's constitutional regulatory authority; if commerce is "completely internal" to a state, then Congress has no power to regulate. *Id.* at 194. The "among" requirement of the Commerce Clause thus allows Congress to regulate interactions or affairs among the several states, including matters "that are mingled among the states or affect more than one state, because they cross state borders, because they produce collective action problems among the states, or because they involve activity in one state that has spillover effects in other states." Balkin, *Commerce*, at 23. *See also United States v. Lopez*, 514 U.S. 549 (1995). In other words, the Commerce Clause contains an important limiting principle—but it is derived more from the word "among" than from an improperly narrow reading of "commerce."

Reading the Commerce Clause with the broad understanding of "commerce" as "intercourse," and the limitation that such "intercourse" must be truly federal in nature in that it affects national interests or involves a matter that states cannot effectively address on their own, connects the text of the Clause to the principle in Resolution VI that

animated the drafting of Congress's enumerated powers in Article I. As Chief Justice Marshall explained in interpreting the Commerce Clause:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Gibbons, 22 U.S. (9 Wheat.) at 195.

III. Under The Text And Original Meaning Of The Necessary And Proper Clause, Congress Has Broad Latitude To Employ Legislative Means Naturally Related To The Lawful Objects Or Ends Of The Federal Government.

As discussed above in Sections I and II, the drafters of the Constitution were mindful of Resolution VI's general principle—that Congress should have the ability to respond to matters of national concern—in wording the enumerated powers broadly. In the Federalist Papers, Alexander Hamilton exhorted the nation that

> we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. . . . Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a *capacity* to provide for

> future exigencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.

THE FEDERALIST PAPERS No. 34, at 203 (emphasis in original).

Perhaps nowhere in the Constitution is the goal to provide Congress with discretion to address matters both now and in the future more manifest than in the Necessary and Proper Clause. The Necessary and Proper Clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. As Hamilton explained to President Washington, "[t]he means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means." THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (Theodore J. Crackel, ed. 2008) (Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791).

The congressional powers written into the Constitution by the Founders are even stronger when coupled with Article I, section 8's sweeping grant of authority to Congress to make laws that are "necessary and proper" for carrying out the other federal powers granted by the Constitution. As Hamilton explained to President Washington, "[t]he whole turn of the [Necessary and Proper Clause] indicates that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers." Letter from Hamilton to Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791. While the government obviously has no right "to do merely what it pleases," Hamilton explained the broad discretion given to Congress under the Necessary and Proper Clause as follows: "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution; it may safely be deemed to come within the compass of the national authority." *Id.*

President Washington agreed with Hamilton's exegesis of the constitutional powers of the federal government, approving the bill to establish a national bank over the objections of other members of his cab-

inet, including Secretary of State Thomas Jefferson, and hailing Hamilton's vision of federal power. 8 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 359 (Letter to David Humphreys, July 20, 1791).

The Supreme Court, from the Founding-era to the present, has also agreed with Hamilton's view of federal power under the Necessary and Proper Clause. Chief Justice John Marshall explained in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), that Congress should be shown significant deference regarding what laws it considers to be appropriate in carrying out its constitutional duties. In language very similar to Hamilton's, the Court in *McCulloch* explained, "[l]et 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." 17 U.S. (4 Wheat.) at 421. Just last Term, the Supreme Court affirmed that so long as Congress does not run afoul of any other constitutional provision, the Necessary and Proper Clause affords Congress the power to use any "means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010). As the

Supreme Court has long held, "the Necessary and Proper Clause makes clear that 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.'" *Id.* at 1956 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 413, 418, 421).

To be sure, the powers of the federal government under our Constitution are not unlimited. As the Tenth Amendment affirms, U.S. CONST. amend. X, the Constitution establishes a central government of enumerated powers, and the States play a vital role in our federalist system. But the powers our charter *does* grant to the federal government are broad and substantial.[7] And, since the Founding, the American people have amended the Constitution to ensure that Congress has all the tools it needs to address national problems and protect the constitutional rights of all Americans. *E.g.*, U.S. CONST. amends. XIII, XIV, XV, XVI, XIX. Through particular enumerated powers, as well as

[7] See Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791 (discussing "the variety and extent of public exigencies, a far greater proportion of which, and of a far more critical kind, are objects of National than of State—administration").

through sweeping enforcement clauses such as Article I's Necessary and Proper Clause, the Constitution realizes the Framers' design for a federal government able "to legislate in all Cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32.

IV. The Constitution's Text And History Support The Constitutionality Of The Affordable Care Act's Minimum Coverage Provision.

Congress's authority to pass legislation to fix problems in the health care industry is firmly rooted in Congress's constitutional power to regulate interstate commerce and to enact laws that are necessary and proper to exercise that power.[8] Since the health care industry comprises nearly 20 percent of the U.S. economy, no one can seriously dispute that Congress has the authority to regulate health care and the health insurance industries under its Commerce Clause power. The Commonwealth thus aims more narrowly at whether Congress has the

[8] This brief focuses on the Commerce Clause and the Necessary and Proper Clause; it does not address other potential sources of constitutional power to enact the Affordable Care Act.

power to enact the minimum coverage provision, which generally requires individuals who can afford it to purchase health insurance or pay a tax penalty if they refuse to do so. Through a fundamentally flawed reading of the Constitution, the court below held that Congress did not have the power to enact the minimum coverage provision.

A. Commerce Clause

The Supreme Court has held that Congress has the authority to regulate the channels of interstate commerce, the instrumentalities of interstate commerce and persons or things in interstate commerce, and matters that substantially affect interstate commerce. *E.g.*, *Perez v. United States*, 402 U.S. 146, 150 (1971); *see also Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Under Supreme Court precedent and the Constitution's text and history, the minimum coverage provision is a valid exercise of Congress's power under the Commerce Clause.

According to an extensive record of data compiled by Congress, the decision not to buy health insurance substantially affects interstate commerce. *See, e.g.*, Br. of U.S. at 10-11; 31-34. This is true even under a narrow, economics-based understanding of "commerce." For example, in *Gonzales v. Raich*, the Supreme Court ruled that Congress, as part of

its regulation of interstate commerce in illegal drugs, could prohibit a person from growing marijuana in her own backyard for personal, medicinal use (in a State where doing so was legal under local law). Certainly if backyard, medicinal marijuana cultivation for personal use falls under Congress's Commerce Clause power, Congress can regulate the decision to be uninsured when it comes to health care.

Looking at Congress's Commerce Clause power based on the text and history of the Constitution, Congress's power to enact the minimum coverage provision is even clearer. Under Resolution VI, the principle behind enumerated powers such as the Commerce Clause is to give Congress the ability "to legislate in all Cases for the general interests of the Union, and also in those to which the States are separately incompetent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32. Here, the spillover effects caused by individuals' decisions to remain uninsured affect the nation as a whole. *See, e.g.*, Br. of U.S. at 10-11; 31-39; 44-48. Even if, like the lower court, this Court conceived of the decision to remain uninsured as a non-economic matter, this would be irrelevant: under the original meaning of the Commerce Clause, the real question is whether such a decision causes spillover effects, which

may themselves be economic in nature, creating a problem for more than a single state. *See* Balkin, *Commerce*, at 44. In addition, the minimum coverage provision addresses collective action problems in the States: there is the distinct possibility that "[p]eople with health problems will have incentives to move to a state where they cannot be turned down, raising health care costs for everyone, while insurers will prefer to do business in states where they can avoid more expensive patients with pre-existing conditions, and younger and healthier people may leave for jurisdictions where they can avoid paying for health insurance." *Id.* at 46. The minimum coverage provision falls squarely within Congress's ability to regulate "commerce" "for the general interests of the Union," and also in those instances in "which the States are separately incompetent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32.

B. Necessary & Proper Clause

For the reasons discussed above, this Court can and should uphold the minimum coverage provision as a constitutional exercise of Congress's Commerce Clause authority. However, the Court could also uphold the provision as a law that is "necessary and proper for carrying

into execution" [9] Congress's power to regulate commerce among the several States. The Affordable Care Act is designed to make health care coverage affordable to all Americans and to prohibit certain insurance practices, such as the denial of coverage to individuals with pre-existing conditions. *See, e.g.*, Br. of U.S. at 13-15. Among many other reasons, if Americans can go uninsured until they get sick and then impose these costs on those who already have health insurance policies, the ban on pre-existing conditions will be prohibitively expensive and the cost of insurance will increase across the board. *Id.* at 41-48. Congress determined that the minimum coverage provision was the appropriate means of regulating the health care and insurance markets. Since the Act does not run afoul of any other constitutional provision—there is no constitutional right to inflict uninsured health care costs on the American taxpayers—health care reform falls squarely within Congress's power to regulate commerce and enact necessary and proper legislation to carry out this power.

The lower court rejected the Secretary's necessary and proper argument based on a blatant misreading of the Necessary and Proper

[9] U.S. CONST. art. I, § 8.

Clause. The court stated that "[i]f a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution." *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 779 (E.D. Va. 2010). This is neither logical nor correct.

The court below appears to have read the Necessary and Proper Clause to allow only those means of execution that are absolutely indispensable to the power being executed. But this interpretation of the Clause was soundly rejected more than two hundred years ago. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) at 413 (rejecting the argument that the Necessary and Proper Clause allows Congress to pass only those laws "such as are indispensable, and without which the power would be nugatory"). *See also id.* at 406, 408 (explaining that the framers of the Constitution did not intend to impede the exercise of enumerated powers "by withholding a choice of means," noting that, unlike the Articles of Confederation, the Constitution does not "require[] that everything granted shall be expressly and minutely described"). As Al-

exander Hamilton wrote to President Washington, the idea that the Clause allows only means of execution that are so necessary that without them "the grant of the power *would be nugatory*," is so potentially detrimental to constitutional government that "[i]t is essential to the *being* of the National Government that so erroneous a conception of the word *necessary*, shou'd be exploded." Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791 (emphasis in original). "Necessary" in the Clause "means no more than *needful, requisite, incidental, useful*, or *conducive* to" the enumerated grant of power. *Id.* (emphasis in original). *See also United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (holding that the Necessary and Proper Clause affords Congress the power to use any "means that is rationally related to the implementation of a constitutionally enumerated power").

Moreover, requiring individuals to obtain or purchase particular items is not as unprecedented as some critics claim. As Professor Adam Winkler has explained,[10] just five years after the Constitution was

[10] Adam Winkler, *The Founders' 'Individual Mandate*,' available at http://www.huffingtonpost.com/adam-winkler/the-founding-fathers-indi_b_523001.html.

drafted, in the second 1792 Militia Act,[11] Congress required male citizens to obtain certain weapons and other items, such as a "knapsack," ammunition, and, in some cases, "a serviceable horse." This was a necessary and proper regulation to effectuate Congress's power to raise armies. U.S. CONST. art. I, § 8, cl. 12 (granting Congress power to "raise and support Armies"). In the modern day case of health care, the individual responsibility provision's requirement to obtain health insurance if one can afford it is a necessary and proper regulation effectuating Congress's power to regulate interstate commerce.

C. Principles of Federalism

Given the lower court's suggestion that this case in some way "implicat[es] the Tenth Amendment," 728 F. Supp. 2d at 771, it bears noting that neither the Affordable Care Act generally, nor the minimum coverage provision specifically, infringes upon the reserved sovereignty of the States or principles of federalism. States historically have been leaders in policy innovations that better protect their citizens, resources, and environment. *See* Exec. Order on Federalism No. 13132, 64 Fed. Reg. 43255, § 2(e) (Aug. 4, 1999) ("States possess unique author-

[11] Text available at http://www.constitution.org/mil/mil_act_1792.htm.

ities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy."). The States have a long history of leadership on health care reform—indeed, the Affordable Care Act incorporated the valuable lessons learned from the experience of health care reform practices by state and local governments, and preserves the role of the States as laboratories of democracy by giving States considerable policy flexibility. The Affordable Care Act is appropriately respectful of constitutional principles of vibrant federalism.

For example, States have the discretion to form their own insurance exchange or join with other States to form a regional exchange. *See* ACA § 1321, 42 U.S.C. 18041. A State may also choose not to operate an exchange at all, in which case the federal government will administer a statewide insurance exchange for the benefit of the State's citizens. *Id.* at § 1321(c). While States must provide the opportunity to buy four levels of health care plans on the exchange—platinum, gold, silver, and bronze plans, at declining expense—they have significant discretion with respect to other aspects of the plans. *See* ACA § 1331, 42 U.S.C. 18051. States can also set up their own programs—with or without an individual responsibility provision, or with a public option—

under what has been called the Empowering States to Be Innovative provision. ACA § 1332, 42 U.S.C. 18052. States can obtain a waiver from the federal government if they set up a system that meets the coverage and cost containment requirements in the Act. *Id.* The Affordable Care Act thus regulates health care to the extent necessary to solve the national problem, while allowing for the diversity and innovation that is the hallmark of the States. *See generally New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that, under our federalism, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

* * *

From the broad and substantial powers granted to Congress in the 1787 Constitution, to the sweeping enforcement powers added to the Constitution through the amendment process in the last two centuries, our Constitution establishes a federal government that is strong enough to act when the national interest requires a national solution.

Congress has the power to regulate the nearly 20 percent of the U.S. economy that is the health care industry, and, when faced with a

national health care crisis where millions are uninsured and cannot afford decent health care, is empowered to act to reform the health care industry. The Affordable Care Act's minimum coverage provision fits within Congress's Commerce Clause power and is also a necessary and proper means of effectuating Congress's regulation of the health care industry. Far from offending constitutional principles of federalism, the Act reflects how the federal and state governments can work together to protect their citizens and resources.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that, if the Court finds that the Commonwealth has standing, the Court reverse the ruling of the district court on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,793 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Century Schoolbook font.

Executed this 7th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on March 7, 2011.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 7th day of March, 2011.

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