No. 11-398

IN THE

Supreme Court of the United States

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

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

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici curiae address the following issue only:

Whether the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliations Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, is a valid exercise of Congress's power under the Necessary and Proper Clause.

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. WLF routinely litigates in support of efforts to ensure a strict separation of powers—both among the three branches of the federal government and between federal and state governments—as a means of preventing too much power from being concentrated within a single governmental body.

The remaining *amici* are all legal scholars specializing in constitutional law and related fields. Based on their substantial legal expertise, they believe that Section 1501 of the Patient Protection and Affordable Care Act exceeds the bounds of Congress's constitutional authority. *Amici* include Jonathan H. Adler, Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation, Case Western Reserve University School of Law; Steven G. Calabresi, George C. Dix Professor of Constitutional Law, Northwestern University School of Law; James W. Ely, Jr., Milton R. Underwood Professor of Law

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and standing letters of consent have been lodged with the Court.

Emeritus, Vanderbilt University Law School; Elizabeth Price Foley, Institute for Justice Chair in Constitutional Litigation and Professor of Law, Florida International University College of Law; David N. Mayer, Professor of Law and History, Capital University Law School; Andrew Morriss, D. Paul Jones, Jr. & Charlene Angelich Jones Chairholder of Law, University of Alabama Law School; Leonard J. Nelson III, Professor of Law, Samford University's Cumberland School of Law; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Robert J. Pushaw, James Wilson Endowed Professor of Law, Pepperdine University School of Law; Ronald J. Rychlak, Associate Dean for Academic Affairs and MDLA Professor of Law, University of Mississippi School of Law; and Todd J. Zywicki, Foundation Professor of Law, George Mason University School of Law.

Amici are concerned that Section 1501 of the Patient Protection and Affordable Care Act, which seeks to compel most Americans to purchase health insurance by 2014, goes beyond the bounds of Congress's power under the Necessary and Proper Clause. *See* §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliations Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("PPACA"). Simply put, the Necessary and Proper Clause does not give Congress the authority to force Americans to purchase a product they do not want. Such a law is unconstitutional because it is not "proper."

SUMMARY OF ARGUMENT

In asking this Court to reverse the Eleventh Circuit's invalidation of the individual mandate, Petitioners rely in part on the Necessary and Proper Clause, which gives Congress the authority to "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. *Amici* contend here that even if the mandate may be "necessary," it is not a "proper" exercise of federal authority. *Id.*[2]

The "first principles" of the Constitution are that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist* No. 45). As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* The federal government, Madison emphasized, is not granted "an indefinite supremacy over all persons and things." *The Federalist* No. 39.

[2] We agree with Respondents that the mandate is not authorized by either the Commerce Clause or the Tax Clause, the two other bases of authority claimed by Petitioners. We will not repeat those arguments here, though we addressed the Commerce Clause issue at length in our *amicus curiae* brief in the appeals court below. *See* Br. of the Wash. Legal Found. and Constitutional Law Scholars as *Amici Curiae* in Support of Appellees, Urging Affirmance, *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, Nos. 11-11021 & 11-11067, 2011 WL 2530501 (11th Cir. May 11, 2011).

Unfortunately, the Necessary and Proper Clause has become "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States,* 521 U.S. 898, 923 (1997). To prevent the Clause from becoming a back door to unconstrained federal power, it is essential for this Court to enforce its precedents establishing that legislation authorized by the Necessary and Proper Clause must meet the requirements of both necessity *and* propriety. *See id.* at 923-24 (holding that a law that is not "proper" exceeds the scope of Congress's power under the Necessary and Proper Clause, even if necessary).

This Court's Necessary and Proper Clause jurisprudence gives Congress wide latitude to determine what kinds of regulations are "necessary" to the implementation of Congress's other enumerated powers. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-15 (1819) (ruling that such measures need not be "absolutely necessary," but merely "useful" or "convenient" to the execution of other powers). But even if the individual mandate somehow satisfies the requirements of necessity,[3] it still fails the test of propriety.

The rule that propriety is a separate and distinct requirement from necessity is deeply rooted in the text and original meaning of the Constitution, as well as this Court's precedents going back to *McCulloch v. Maryland*. *See id.* It is also required

[3] For purposes of this brief, *amici* take no position on whether the individual mandate is "necessary" for the congressional exercise of an enumerated power.

by the longstanding "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton v. Moore*, 178 U.S. 41, 87 (1900). If any federal statute that is "necessary" is automatically also "proper," then the latter word would be rendered completely superfluous.

Although this Court has never provided a definitive statement of the meaning of "proper" as used in the Necessary and Proper Clause, the Constitution's text and original meaning, as well as this Court's precedents, show that the individual mandate violates the requirements of propriety in at least three ways. First, a statute is "improper" if it can only be supported by a logic that would give Congress virtually unlimited power. As James Madison emphasized in a 1791 speech on the Necessary and Proper Clause, "[w]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress." James Madison, *Speech on the Bank Bill*, House of Representatives, Feb. 2, 1791, in James Madison, *Writings* 480, 484 (Jack N. Rakove, ed. 1999).

Petitioners' various arguments for the mandate do exactly that. As the Eleventh Circuit panel below recognized, "[t]he government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce" and is therefore subject to federal regulation under the Commerce Clause and Necessary and Proper Clause. Pet. App. at 119a.

The mandate is also "improper" because Petitioners' argument supporting it would render

many of Congress's other Article I powers completely redundant, including the power to regulate foreign commerce, the power to regulate the militia, and even the power to "make rules for the Government and regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 3, 14, 16. All of these powers become superfluous under Petitioners' interpretation of the Necessary and Proper Clause. Such an approach violates the longstanding requirement that a statute authorized by the Clause must "consist with the letter and spirit of the constitution," *McCulloch*, 17 U.S. at 421, a rule that is best understood as an element of propriety rather than of necessity.

Finally, the individual mandate runs afoul of at least three of the five criteria for evaluating claims of authority under the Necessary and Proper Clause, as recently utilized by this Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010). In justifying its decision to uphold a claim of congressional power under the Necessary and Proper Clause, *Comstock* cited five factors: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965. In this case, a majority of these criteria weigh against the individual mandate. Although the Court did not specify whether these criteria are elements of necessity or propriety, they are more logically understood as the latter.

Because the individual mandate is inconsistent with a limited federal government of enumerated powers, it is not a "proper" exercise of congressional power and cannot possibly be authorized by the Necessary and Proper Clause. The holding of the Eleventh Circuit declaring the individual mandate unconstitutional should be affirmed.

ARGUMENT

I. PROPRIETY AND NECESSITY ARE WHOLLY SEPARATE AND DISTINCT REQUIREMENTS, BOTH OF WHICH MUST BE MET BY THE INDIVIDUAL MANDATE

A federal law authorized by the Necessary and Proper Clause must meet two distinct requirements—it has to be both "necessary" *and* "proper." Both of these requirements are essential under the text and original meaning of the Clause, as well as this Court's precedents.

A. The Text of the Necessary and Proper Clause Imposes a Distinct Requirement of Propriety.

The text of the Necessary and Proper Clause clearly authorizes only laws that are "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 (emphasis added). To reduce this to a simple requirement of necessity would be to read the word "proper" out of the

Constitution, rendering it completely superfluous.

Such a result conflicts with both a common sense reading of the text and this Court's longstanding insistence that "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning" and that "[n]o word in the instrument . . . can be rejected as superfluous or unmeaning." *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840). The Court has described this rule as an "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton*, 178 U.S. at 87; *see also Dep't of Revenue v. Ass'n of Wash. Stevedoring Companies*, 435 U.S. 734, 759 (1978) (rejecting the claim that "'Imposts or Duties' encompasses all taxes [because it] makes superfluous several of the terms of Art. I, § 8, cl. 1 of the Constitution, which grants Congress the 'Power To lay and collect Taxes, Duties, Imposts and Excises'"); *Powell v. Alabama*, 287 U.S. 45, 66 (1932) (holding that "no part of this important amendment [the Fifth Amendment] could be regarded as superfluous").

The text of the Constitution, coupled with this Court's longstanding canon of construction, requires that "proper" be given a meaning that is separate and distinct from "necessary." Otherwise, the Necessary and Proper Clause would be transformed into a mere "Necessary Clause."

B. The Clause's Original Meaning Also Supports the Enforcement of a Distinct Requirement of Propriety.

The original meaning of the Necessary and

Proper Clause requires a rule of propriety distinct from necessity. At the 1787 Constitutional Convention, the Committee of Detail deliberately inserted the word "proper" into a previous draft of the Clause that included only the word "necessary." *See* Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause, in* Gary Lawson, *et al.*, *The Origins of the Necessary and Proper Clause,* 84, 88-90 (2010); *cf.* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 215 (2003) ("One thing that stands out from the records of the Constitutional Convention is how frequently the term 'necessary' was paired with 'proper' (or 'unnecessary' with 'improper') in contexts suggesting that each term has a distinct meaning."). This suggests a deliberate effort on the part of the Framers to insert the term "proper" in order to change the meaning the Clause would otherwise have had.

In *Federalist* 33, Alexander Hamilton, one of the strongest supporters of federal power among the Framers, insists that we "judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union." *The Federalist* No. 33. This clearly implies that "necessity" and "propriety" are two separate requirements. Hamilton goes on to state that "[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded," and then gives several examples of improper federal legislation, including an "attempt to vary the law of descent in any State" and a statute that

"undertake[s] to abrogate a land tax imposed by the authority of a State." *Id.*[4] Obviously, federal laws that alter state inheritance laws or abrogate state land taxes may be necessary (in the broad sense of "useful" or "convenient") for the execution of other enumerated powers. *See McCulloch*, 17 U.S. at 413-15. For example, both inheritance laws and state land taxes surely have an impact on interstate commerce. A federal law overriding or altering them therefore could be a "useful" or "convenient" means for changing patterns of interstate commerce, just as Petitioners claim that the individual mandate is a useful or convenient means for regulating the health insurance market. But such a law, as Hamilton rightly explains, would undoubtedly be *improper*.

Many other Framers, political leaders, and legal commentators of the Founding era also recognized that propriety and necessity are separate and distinct requirements. For example, the first U.S. Attorney General, Edmund Randolph, argued that "no power is to be assumed under the [Necessary and Proper] clause, but such as is not only necessary, but proper, or perhaps expedient also." Opinion of Edmund Randolph (Feb. 12, 1791), *quoted in* Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 Duke L.J.

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[4] Alexander Hamilton was probably the originator of this broad interpretation of necessity. *See* Alexander Hamilton, *Opinion on the Constitutionality of the Bank*, Feb. 23, 1791, in 3 *The Founders' Constitution* 247-49 (Philip B. Kurland & Ralph Lerner, eds.) (1987) (arguing that "necessary" should be interpreted to mean "no more *than needful, requisite, incidental, useful*, or *conducive to*").

267, 290 (1993). Numerous others have held similar views. *See id.* at 290-308 (citing many examples).

The Clause's original meaning therefore requires a standard of propriety distinct from necessity. And this Court follows the text and original meaning of a constitutional provision in cases where, as here, "nothing in our precedents forecloses . . . adoption of the original understanding." *Dist. of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

C. This Court's Precedents Further Support Enforcing A Distinct Requirement of Propriety.

Like the text and original meaning of the Constitution, this Court's precedents support enforcement of a requirement of propriety distinct from that of necessity. In *Printz v. United States,* the Court held that "[w]hen a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . .[,] it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923-24 (quoting *The Federalist* No. 33); *cf. New York v. United States*, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). The law invalidated in *Printz,* requiring "state and local law enforcement officers to conduct background checks

on prospective handgun purchasers," was quite clearly "useful" or "convenient" to carrying into execution Congress's power to regulate commerce in handguns. *Printz,* 521 U.S. at 902. Yet this Court concluded that it exceeded the bounds of congressional power because it was improper, not because it violated the requirement of necessity. And while *Printz*'s holding relied in part on the concept of "state sovereignty" embedded in the Tenth Amendment, *id.* at 923-24, it emphasized that "[w]hat destroys the dissent's Necessary and Proper Clause argument . . . is not the Tenth Amendment but the Necessary and Proper Clause itself." *Id.* at 923.

Because "States are not the sole intended beneficiaries of federalism," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), the propriety restriction does not protect state governments alone. Rather, constitutional limitations on federal power also "protect . . . the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.*

Other precedents also support the notion that necessity and propriety are separate requirements. In its famous ruling in *McCulloch v. Maryland,* this Court outlined several limitations on Congress's power under the Necessary and Proper Clause: "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." *McCulloch*, 17 U.S. at 421. This passage lists four constraints on

the range of statutes authorized by the Necessary and Proper Clause: (1) the "end" pursued must be "legitimate" and "within the scope of the constitution"; (2) the means must be "appropriate" and "plainly adapted to that end"; (3) the means must "not [be] prohibited" elsewhere in the Constitution; and, finally (4) the means must be "consist[ent] with the letter and spirit of the Constitution." While the first and second of these requirements might potentially be considered elements of necessity, the third and fourth clearly cannot. A statute "prohibited" elsewhere in the Constitution, or one that is inconsistent "with the letter and spirit of the Constitution," might still be a "useful" or "convenient" means of enforcing one of Congress's enumerated powers. *Id.* at 413-15. Accordingly, if a statute exceeds the scope of the Necessary and Proper Clause for either of these reasons, it must be because it is not "proper."

As Justice Scalia has explained, "there are other restraints upon the Necessary and Proper Clause authority," besides merely the requirement of a necessary connection to an enumerated power. "[E]ven when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end. Moreover, they may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (quoting *McCulloch*, 17 U.S. at 421)). As an example of these additional "restraints," Justice Scalia cites "cases such as *Printz v. United States* . . ., [which] affirm that a law is not '*proper* for carrying into Execution the Commerce Clause' '[w]hen [it] violates [a constitutional] principle of state

sovereignty.'" *Id.* (quoting *Printz,* 517 U.S. at 923-924). The "other restraints" in question obviously include those mandated by "propriety."

This Court would later rely on *Printz*'s definition of proper in deciding *Alden v. Maine*, 527 U.S. 706, 733 (1999). In *Alden*, the Court concluded that states enjoy a constitutionally protected immunity from suit that is not limited by the express terms of the Eleventh Amendment, but applies in state court as well as federal court. *Alden* held that the Necessary and Proper Clause does not give Congress "the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers," because such authority is not "proper." *Id.*[5]

This Court's most recent Necessary and Proper Clause case, *United States v. Comstock,* 130 S. Ct. 1949 (2010), reiterates the rule that Congress has broad discretion in determining necessity. *See id.* at 1956 (holding that necessity only requires "a means that is rationally related to the implementation of a constitutionally enumerated power"). But it also based its decision on five other considerations, most of which are best understood as interpretations of "proper" rather than "necessary" (even though the Court did not clearly specify this distinction). *See* Part IV, *infra.*

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[5] At least one federal circuit court has also concluded that "proper" and "necessary" are separate requirements. *See United States v. Sabri* 326 F.3d 937, 949n. 6 (2003), *aff'd* 541 U.S. 600 (2004) (holding that a statute is "proper" for reasons independent of its necessity).

II. THE INDIVIDUAL MANDATE IS "IMPROPER" BECAUSE UPHOLDING IT WOULD GIVE CONGRESS VIRTUALLY UNLIMITED POWER.

Perhaps the most basic element of "propriety" under the Necessary and Proper Clause is that it excludes arguments that would give Congress virtually unlimited power. In this case, the various rationales offered by the federal government in support of the individual mandate all would require that result.

A. The Propriety Requirement Protects the States Against Limitless Assertions of Federal Power.

One of the main functions of the propriety requirement is to prevent the Necessary and Proper Clause from becoming a back door to unconstrained federal power. Evidence from the Founding era suggests that a proper statute must, at the very least, not depend on a constitutional rationale that would give Congress virtually unlimited power to legislate in areas traditionally reserved to the states.[6] As James Madison explained in *Federalist*

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[6] *See, e.g.,* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 215-20 (2003) (discussing the relevant evidence); Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 Duke L.J. 267, 297 (1993) (explaining that the evidence shows that "proper" means that laws "must be consistent with principles of separation of powers, principles of federalism, and individual rights"); Kurt T. Lash, *A Textual-Historical Theory of the Ninth*

39, the Constitution does not give the federal government "an indefinite supremacy over all persons and things." *The Federalist* No. 39. Indeed, "[t]he Constitution requires a distinction between what is truly national and what is truly local," and the propriety requirement under the Necessary and Proper Clause helps to enforce that line. *United States v. Morrison,* 529 U.S. 598, 617-18 (2000); *cf. NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 29 (1937) (noting "[t]hat the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system").

Founding-era jurists and other commentators in the nineteenth century concluded that the word "proper" prevented the federal government from using the Necessary and Proper Clause from intruding on the powers of the states. Chief Justice John Marshall, St. George Tucker, and Andrew Jackson were all among those who interpreted the term in that way. *See* Lawson & Granger*, supra*, at 301-08. In *Federalist* 33, Alexander Hamilton wrote that the propriety restriction would serve to protect such state prerogatives as the power to establish inheritance laws and taxes on land from federal interference, a clear indication that the term "proper" was intended to protect the states. *The Federalist* No. 33; *see also* § I.B, *supra* (discussing Hamilton's argument).

Amendment, 60 Stan. L. Rev. 895, 921 (2008) (citing evidence that the original meaning of the Constitution precludes any reading of the Necessary and Proper Clause that has "the effect of completely obliterating the people's retained right to local self-government").

While the Court has never expounded on the exact scope of the reserved state authority that is protected from federal interference by the requirement of propriety, it is safe to say that a virtually unlimited federal power to impose a mandate goes beyond what is permissible. This is particularly so in light of the fact that the power to impose a mandate on the general public is traditionally a prerogative of the state governments and the people themselves. Before the instant case, the federal government imposed mandates on the general population only for narrowly specified purposes related to traditional obligations of citizenship, such as service in the militia. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional,* 5 NYU J.L. & Liberty 581, 627-34 (2010).

Some have argued that the word "proper" does not protect principles of federalism, but merely requires an "appropriate relationship between congressional ends and means" under the Necessary and Proper Clause. *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause,* 2002 U. Ill. L. Rev. 581, 581 (2002). But this approach would interpret "proper" as serving much the same purpose as "necessary," thereby requiring this Court to overrule its interpretation of the meaning of proper in cases such as *Printz* and *Alden*. *See id.* (claiming that these cases interpreted the Necessary and Proper Clause incorrectly); § I.C, *supra* (discussing these cases).

B. Petitioners' Rationales for the Mandate Would Give Congress Unconstrained Authority to Impose Other Mandates.

Petitioners contend that the individual mandate is permissible under the Necessary and Proper Clause because it is needed to help effectuate the PPACA's requirement that insurance companies accept customers with preexisting health conditions, which in turn is a valid exercise of Congress's authority under the Commerce Clause. Pet. Br. at 21-33. But the Necessary and Proper Clause cannot bear the constitutional weight that Petitioners seek to heap upon it without granting Congress *carte blanche* to impose other mandates. Even the most recent court of appeals decision upholding the mandate acknowledges "the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce." *Seven-Sky v. Holder*, 661 F.3d 1,18 (D.C. Cir. 2011).

1. Petitioners' interpretation of the Necessary and Proper Clause lacks meaningful constraints and reads the word "proper" out of the Constitution.

Petitioners' interpretation of the Necessary and Proper Clause would give Congress virtually unlimited power to impose a mandate or implement almost any other regulation. It gives an "unlimited discretion to Congress" of exactly the kind that James Madison warned against. *See* James

Madison, *Speech on the Bank Bill*, House of Representatives, Feb. 2, 1791, in James Madison, *Writings* 480, 484 (Jack N. Rakove, ed. 1999).

Remarkably, the Government completely ignores the issue of whether the mandate is "proper" and instead asserts that any statute is permissible under the Necessary and Proper Clause so long as it is "useful" or "convenient" for the implementation of an enumerated power. Pet. Br. at 22-23 (quoting *McCulloch,* 17 U.S. (4 Wheat.) at 413, 418). But virtually *any* imaginable regulatory measure is useful or convenient for implementing some enumerated power in some way. For example, a federal statute requiring citizens to exercise every day is "rationally related" (*Comstock,* 130 S. Ct. at 1956) to Congress's power to raise and support armies. *See* U.S. Const. art. I, § 8, cl. 12. Citizens who exercise regularly will likely make much more effective soldiers. Similarly, a statute requiring individuals to awaken at dawn might increase their economic productivity by ensuring that they accomplish more each day, and would therefore be "rationally related" to Congress's power to regulate interstate commerce. But no one can seriously doubt that such statutes would nevertheless be "improper" given the Constitution's emphasis on a limited federal government of enumerated powers.

In the same way, Congress has used its commerce power to forbid the sale of human organs. *See* 42 U.S.C. § 274e. Yet it does not follow that Congress therefore has the authority to mandate kidney donations, even though such a mandate would clearly have an impact on illegal organ markets and other commerce in health care services.

Ultimately, there is no logical limit to the range of mandates that would be permitted under the government's approach. *See* Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives From Law,* Nomos (forthcoming) at 30, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902971 (describing many other mandates that the government's logic would authorize and explaining that interest groups would be likely to lobby successfully for at least some).

The lack of meaningful constraints in Petitioners' interpretation of the Necessary and Proper Clause is especially glaring when considered in the light of this Court's relatively broad interpretation of the Commerce Clause. The Court has held that the Commerce Clause gives Congress nearly unlimited power to regulate "economic activity," defined as any activity that involves "'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting *Webster's Third New International Dictionary* 720 (1966)). Virtually any mandate might be useful, convenient, or rationally related to a regulation of economic activity defined in this way—if we ignore the requirement of propriety, as Petitioners urge.

As the district court recognized below, under the Government's logic "Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and . . . put less of a strain on the health care system." Pet. App. at 329a. Mandating the purchase of broccoli would surely be a useful or

convenient means of regulating the interstate market in food. And it might also increase interstate commerce by ensuring that the work force has a healthier diet and is therefore more productive. Yet the constitutional inquiry cannot simply end there.

In sum, Petitioners' interpretation of the Necessary and Proper Clause essentially reads the word "proper" out of the Constitution. By concluding that a statute is authorized so long as it is "necessary" under a very broad definition of that word, Petitioners would transform the Necessary and Proper Clause into simply the "Necessary Clause," thereby ignoring the "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton*, 178 U.S. at 87.

This Court recently emphasized that "[f]ederalism secures the freedom of the individual" as well as the prerogatives of state governments. *Bond*, 131 S.Ct. at 2364. Little will remain of that protection for freedom, however, if the Court endorses the Petitioners' view that Congress has virtually unlimited power to impose mandates under the Necessary and Proper Clause.

Petitioners curiously claim that such a sweeping interpretation was adopted by this Court in *Comstock*. *See* Pet. Br. at 22-23 (quoting *Comstock*, 130 S. Ct. at 1956). But while *Comstock* indicated that "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the

implementation of a constitutionally enumerated power," *Comstock*, 130 S. Ct. at 1956-57, the mere fact that courts must "look to" the presence or absence of a "rational relationship" does not mean that this is both the beginning and end of the constitutional inquiry. Indeed, this Court also indicated that assertions of federal power under the Necessary and Proper Clause are subject to a five-factor test that is best understood as an interpretation of the requirement of propriety. *See* Part IV, *infra*. If a rational relationship were sufficient in and of itself, Congress would have "a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566. As this Court recognized in *Lopez*, however, the Constitution does not create such an untethered power.

2. Petitioners' position cannot be salvaged by claiming that health insurance presents a special case.

During the course of this litigation, Petitioners have presented a variety of creative arguments claiming that health insurance is a special case, thereby suggesting that upholding the individual mandate would not give Congress unconstrained authority to impose other mandates. *See* Pet. App. at 120a (noting that "the government submits that health care and health insurance are factually unique and not susceptible of replication due to: (1) the inevitability of health care need; (2) the unpredictability of need; (3) the high costs of health care; (4) the federal requirement that hospitals treat, until stabilized, individuals with

emergency medical conditions, regardless of their ability to pay; (5) and associated cost-shifting"). Unfortunately, all of these claims break down under close inspection.[7]

The most common argument for the supposed uniqueness of the PPACA's individual mandate is the claim that everyone eventually uses health care in some form. This point has been made in virtually every lower court decision upholding the mandate.[8]

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[7] For a more detailed critique of these arguments, see Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Mandate Case a Slippery Slope,* Law & Contemporary Problems (forthcoming), at 14-23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960641.

[8] *See Seven-Sky v. Holder,* 661 F.3d 1, 18 (D.C. Cir. 2011) (emphasizing that "the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services"); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 544 (6th Cir. 2011) (emphasizing that "[v]irtually everyone requires health care services at some point"); *Mead v. Holder,* 766 F. Supp. 2d 16, 37 (D.D.C. 2011), *aff'd Seven-Sky v. Holder,* 661 F.3d 1 (D.C. Cir. 2011) (emphasizing "the inevitability of individuals' entrance into th[e health care] market"); *Liberty Univ. v. Geithner,* 753 F. Supp. 2d 611, 633-34 (W.D. Va., 2010), *vacated* __ F.3d __, 2011 WL 3962915 (4th Cir. Sep. 8, 2011) ("Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care."); *Thomas More Law Ctr. v. Obama ,* 720 F. Supp. 2d 882, 94 (E.D. Mich. 2010), *aff'd* 651 F.3d 529 (6th Cir. 2011) ("The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market . . . . The plaintiffs have not opted out of the

Yet the claim that most people eventually use health care does nothing to differentiate health insurance from almost any other market. If one defines the relevant "market" broadly enough, it is easy to characterize any decision not to purchase a good or service exactly the same way. Tellingly, the Government does not argue that everyone will inevitably use health *insurance*. Instead, Petitioners define the relevant market as "health *care*." The same frame-shifting works for virtually any other mandate. As Judge Henry Hudson correctly pointed out, "the same reasoning could apply to transportation, housing, or nutritional decisions." *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010), *vacated on other grounds*, 656 F.3d 253 (4th Cir. 2011); *see also* Pet. App. at 329a (noting that "there are lots of markets—especially if defined broadly enough—that people cannot 'opt out' of. For example, everyone must participate in the food market."); *Seven-Sky*, 661 F.3d at 51-52 (Kavanaugh, J., dissenting) (noting that this theory "extend[s] as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example").

Consider the memorable example of the broccoli mandate raised by the district court below. *See* Pet. App. at 329a. Not everyone eats broccoli. But everyone inevitably participates in the market for food. Therefore, a mandate requiring everyone to

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health care services market because, as living, breathing beings . . . they cannot opt out of this market.")

purchase and eat broccoli would be permissible under the federal government's argument. The same holds true for a mandate requiring everyone to purchase General Motors cars in order to help the auto industry. Of course, there are many people who do not participate in the market for cars. But nearly everyone does participate in the market for "transportation."

The government's logic could also easily be used to justify numerous other mandates within the health care field itself. Every time a healthy person fails to donate a kidney there is an adverse health effect on those dying of kidney failure, and a foregone economic opportunity for health care providers. It may be useful or convenient to the regulation of health care, therefore, to impose a federal kidney-donation mandate. Yet it would still be improper to do so.

Petitioners also contend that the present case is special because medical providers are required to render emergency services to the uninsured, which is not true of most other markets. *See* Pet. Br. at 40; *Mead*, 766 F. Supp. 2d at 36-37 (emphasizing this point). But it is difficult to see why this distinction is constitutionally relevant. The suggestion seems to be that failure to purchase a given good or service has an adverse economic effect on the producers. Pet. Br. at 40. In that respect, however, failure to purchase health insurance turns out to be no different from failure to purchase any other product. Every time someone fails to purchase a product—be it cars, movie tickets, or broccoli—the producers of these goods and services are made economically worse off than they would be if the potential buyer

had made a different decision. This is true regardless whether the producers must provide goods and services to some consumers for free. At most, the latter condition exacerbates the negative impact on producers. Numerous other market conditions and government regulations can negatively affect producers as well. But it is far from clear why a free service mandate has a special constitutional status denied to other conditions that also reduce producer profits.

Petitioners' other reasons for claiming that this is a special case are equally unpersuasive. For example, they emphasize the fact that health care is a large part of the American economy, that the need for health care is difficult to predict in advance, and that the use of health care by the uninsured imposes costs on others. *See* Pet. Br. at 34-36. But almost any product can be described as part of a larger market that constitutes a major sector of the economy. For example, a broccoli-purchase mandate could be defended on the basis that broccoli is part of the food market, and food is a major part of the economy.

Unpredictability of need is also common in a market economy. It applies, for example, to virtually every other type of insurance, including homeowners' insurance, life insurance, property insurance, and auto insurance. Even with respect to most ordinary consumer products, there are occasional needs that arise suddenly. For example, an individual's car might break down unexpectedly, necessitating an unforeseen purchase of a new car. Health care needs may be unpredictable more often than some of these other examples. But courts

cannot attach constitutional distinctions to such matters of degree because there is no non-arbitrary way to determine how much unpredictability is enough to make any given market a special case.

Likewise, in an interdependent economy, failure to purchase almost any product has economic ripple effects that impact other sectors. For example, failure to purchase healthy foods such as broccoli might reduce the health of the work force, thereby reducing overall economic productivity. *See* Pet. App. at 389a.

Petitioners also cannot prevail on the basis that some combination of these and other factors makes health care a unique case. Any sector of the economy has certain unique attributes. But, as the Court of Appeals noted, Petitioners fail to explain why this particular combination is "constitutional[ly] relevan[t]" in a way that does not apply to a host of other markets, all of which have unique combinations of attributes of their own. Pet. App. at 120a.[9]

Finally, even if the health insurance market is unique in some ways, such factual considerations cannot provide meaningful constraints on the scope of federal power. In Commerce Clause and Necessary and Proper cases, this Court applies a highly deferential "rational basis" test to most of the federal government's factual claims. *See Comstock,*

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[9] For a more complete critique of the claim that the mandate is a unique case because of a combination of factors, see Somin, *A Mandate for Mandates, supra*, at 16-18.

130 S. Ct. at 1956 (exercise of the Necessary and Proper Clause power need only be "rationally related to the implementation of a constitutionally enumerated power"); *Raich,* 545 U.S. at 22 (applying the rational basis test in the Commerce Clause context to claims that activities have a substantial aggregate effect on interstate commerce). Whenever it wishes to impose a future mandate, the federal government could always claim that the situation was factually similar to the health insurance market, and the rational basis standard would require courts to defer to such assertions.

III. THE INDIVIDUAL MANDATE IS "IMPROPER," AS UPHOLDING IT WOULD RENDER MANY OF CONGRESS'S OTHER ARTICLE I POWERS REDUNDANT.

A decision upholding the individual mandate would unavoidably render many of Congress's other Article I powers redundant. This in turn would violate the requirements of propriety because a proper statute must "consist with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. The "letter and spirit of the Constitution" surely include respect for the Constitution's "careful enumeration of federal powers," which would be undermined by a decision rendering many of them superfluous. *See Morrison,* 529 U.S. at 618 n.8.

A decision upholding the mandate would give the federal government the power to impose personal mandates of virtually any kind, so long as they were useful or convenient for the purpose of regulating economic activity, defined broadly as any activity

that involves "'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting *Webster's Third New International Dictionary* 720 (1966)). Thus, the combination of the Commerce Clause and the Necessary and Proper Clause would be sufficient to justify any mandate or regulation that has some sort of effect on the economy. *See* § II.B.1, *supra* (developing this point).

This result would render many of Congress's other powers completely superfluous. For example, the very same Clause that gives Congress the authority to regulate interstate commerce also gives it the power to regulate commerce with "Foreign nations" and "with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. But foreign trade and Indian commerce clearly have effects on interstate commerce and the overall economy more generally. Regulating these forms of commerce is surely a useful or convenient way to affect interstate commerce. So these powers become redundant under the Petitioners' approach.

Similarly, Congress would no longer have any need of its powers to organize and regulate the state Militia, nor to "make rules for the Government and regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 14, 16. After all, the militia and the armed forces clearly affect economic activity in numerous ways, and virtually any regulations imposed on them would have at least some impact on the economy. The same reasoning applies even to the power to "declare War," since a state of war necessarily affects economic activity enormously. Thus, a declaration of war could be justified under Petitioners' reasoning as a useful or convenient

mechanism for regulating the flow of commerce.

Obviously, some overlap between powers is inevitable. But allowing Congress to impose mandates based on "the mere fact [that] an individual's existence substantially affects interstate commerce" would render many of Congress's powers completely redundant, as opposed to merely overlapping. Pet. App. at 119a.

IV. THE INDIVIDUAL MANDATE FAILS THE TEST APPLIED BY THIS COURT IN *UNITED STATES V. COMSTOCK*.

In *United States v. Comstock*, this Court held that Section 4248 of the Adam Walsh Act was valid under the Necessary and Proper Clause. *See Comstock,* 130 S. Ct. at 1956-67. That provision gave federal prison officials the power to detain "sexually dangerous" federal prisoners after the completion of their sentences. *See* 42 U.S.C. § 4248. The Court cited five factors justifying its decision to uphold Section 4248: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965. Although the Court did not specify whether these criteria relate to necessity or propriety, at least the last four are best interpreted as elements of propriety.

A majority of these criteria weigh against the

individual mandate: the lack of a deep history of federal involvement, the failure of the PPACA to accommodate state interests, and the statute's extraordinarily broad scope. A fourth factor (the possible lack of "sound reasons" for the statute's enactment) is potentially ambiguous. The fifth—"the breadth of the Necessary and Proper Clause"—is a constant that does not vary from case to case. *See* Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power,* 2009-10 Cato Sup. Ct. Rev. 239, 260-67 (assessing implications of *Comstock* for the present case).

A. The *Comstock* Factors Are Elements of Propriety.

Comstock does not indicate whether the five factors the Court announced are elements of necessity or propriety. But it is more logical to consider them as related to the latter. Whether a long history of federal involvement exists in the relevant area, whether "sound reasons" support a statute's enactment, whether the statute has a "narrow scope," and whether a federal law accommodates state interests all have little to do with the issue of necessity. Indeed, a statute that intrudes into a new area, that fails to accommodate state interests, or has a relatively broad scope can still be a "useful" or "convenient" means of executing one of Congress's enumerated powers. Even a statute that lacks "sound reasons" for its enactment could still be useful or convenient in the sense that it is "rationally related to the implementation of a constitutionally enumerated power." *Comstock,* 130 S. Ct. at 1956. On the other hand, each of these

factors *is* relevant to propriety, in the sense that a "proper" statute must show respect for principles of federalism. *See* § II.A, *supra*. Accordingly, a statute that extends federal power into a new area, fails to accommodate state interests, and has an overly broad scope is more likely to run afoul of federalism principles than one that does not.

B. The Individual Mandate Runs Afoul of at Least Three of the *Comstock* Criteria.

1. The individual mandate is not backed by a long history of federal involvement.

As the district court emphasized below, "the notion of Congress having power under the Commerce Clause to directly impose an individual mandate to purchase health insurance is 'novel' and 'unprecedented.'" Pet. App. at 319a. There is no history of comparable federal regulation. Although in recent years the federal government has adopted numerous statutes regulating health care, it has never compelled ordinary citizens to purchase health insurance or other health care products, nor has it mandated donations of kidneys or blood. It has never forced citizens to purchase products of any kind merely as a consequence of their status as residents of the United States. *See id.* ("Never before has Congress required everyone to buy a product from a private company (essentially for life) just for being alive and residing in the United States."). Prior to the litigation inspired by the PPACA, no court had ever sustained such a power.

Comstock relied on a 155-year history of federal involvement in the relevant field. *See Comstock*, 130 S. Ct. at 1958-59 (tracing the relevant history of federal involvement in establishing a prison system back to 1855). In contrast, there is no similarly extensive history of previous federal regulation remotely comparable to the individual mandate. Indeed, the Supreme Court denied Congress the power to regulate insurance policies (for health care or otherwise) until 1944, when it overruled longstanding precedents forbidding such regulation. *See United States v. S.E. Underwriters*, 322 U.S. 533 (1944).

Until the last few decades, there was very little federal regulation of health care of any kind. Unlike the lengthy history of federal involvement at issue in *Comstock*, "[f]ederal involvement in health is *a fairly new occurrence in U.S. history*." Jennie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy* 67 (1997) (emphasis added). "While a few laws and special concerns were passed prior to the twentieth century, the bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years." *Id.* Indeed, modern health care in the United States "occupies a completely different place in the economy, in the mind of the public, and in its impact on the government at all levels than it did 100 years ago, at the beginning of the twentieth century, or at the beginning of the country in the late 1700s, when the U.S. Constitution was adopted." *Id.* at 1.

2. The individual mandate does not accommodate state interests.

As this Court explained, Section 4248 of the Adam Walsh Act accommodated state interests by giving states the option of confining the "sexually dangerous" former prisoners themselves. *Comstock*, 130 S. Ct. at 1962-63. Indeed, it even allowed the states themselves to assume custody of the former prisoners. *Id.* at 1963. The federal government could confine a "sexually dangerous" former federal inmate only if the state government consented to it. And the state could, if it wished, assume custody of the inmate in question and immediately set him free. *Id.*

In stark contrast, the PPACA's individual mandate applies throughout the country, even in the many areas where elected state governments oppose it and would prefer a different system of health insurance regulation. Moreover, states are not given any right to avoid the mandate or exempt any of their citizens from it. Significantly, twenty-eight states[10] have challenged the constitutionality of the individual mandate, a strong indication that many state governments believe that the PPACA runs directly counter to their interests. Far from "requir[ing] *accommodation* of state interests," the individual mandate runs roughshod over them. *Comstock*, 130 S. Ct. at 1962 (emphasis in the original).

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[10] These include the twenty-six state plaintiffs in the instant case, as well as the Commonwealth of Virginia and the State of Oklahoma, both of which have filed separate lawsuits challenging the mandate. See *Virginia v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Pruitt v. Sebelius*, No. 6:11-cv-30-RAW (E.D. Okla. Jan. 21, 2011).

3. The individual mandate is extremely broad in scope.

Comstock upheld Section 4248 of the Adam Walsh Act in large part because of its "narrow scope." *Id.* at 1965. It emphasized the fact that the statute "has been applied to only a small fraction of federal prisoners." *Id.* at 1964. By comparison, the individual mandate is extraordinarily broad. It forces millions of people to purchase insurance products against their will. As the text of the PPACA indicates, "[t]he requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market." PPACA § 1501(a)(2)(C).

The individual mandate clearly fails at least three prongs of the five-part test laid out in *Comstock*. The other two do little to strengthen it. Whether Congress had legitimately "sound reasons" for enacting the mandate is at best debatable. Many economists believe that it is possible to provide coverage for preexisting conditions without resorting to compulsion on the massive scale undertaken by the PPACA. *See, e.g.,* John H. Cochrane, *What to Do About Preexisting Conditions*, Wall St. J., Aug. 14, 2009. At the very least, the "sound reasons" underlying the mandate are not nearly as strong as those supporting Section 4248 in *Comstock*.

The final consideration outlined in *Comstock* is the "breadth of the Necessary and Proper Clause." *Comstock*, 130 S. Ct. at 1965. This factor, however, is identical in every case. It cannot by itself justify upholding a statute. If it could, the other four considerations would be superfluous.

In sum, a majority of the factors embodied in the five-part *Comstock* test weigh heavily against the mandate. A fourth is ambiguous at best. And the final factor never varies from case to case, and therefore cannot be the basis for upholding legislation on its own. Taken together, these factors are best understood as elements of propriety under the Necessary and Proper Clause that support the conclusion that the individual mandate is not "proper."

CONCLUSION

For the foregoing reasons, the Court should affirm the holding of the Eleventh Circuit that the individual mandate is unconstitutional.

Respectfully submitted,

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