Committee on the Judiciary
United States Senate

Hearing

"The Constitutionality of the Affordable Care Act"

Prepared Statement of
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Senator Durbin and Members of the Committee –

As part of the comprehensive health care legislation enacted in 2010, Congress prohibited insurance companies from denying health insurance coverage to those with pre-existing conditions. Congress made this important step feasible by adopting a companion provision requiring individuals to have adequate health insurance. The assertion that the national Congress lacks the constitutional authority to adopt these regulations of the national commercial markets in health care and health insurance is a truly astonishing proposition. When these lawsuits reach their final conclusion, that novel claim will be rejected.

The lawsuits that have been brought in federal courts around the country do not simply challenge the new law's minimum coverage requirement. They necessarily call in question as well the provisions prohibiting insurance companies from denying coverage to those with pre-existing conditions. Because the two provisions are linked, both are at stake. The outcome of this litigation will thus determine whether Americans must continue to fear being denied health insurance because of their prior or current medical condition; will continue to be concerned about losing health insurance if they change jobs; and will once again be subject to having coverage denied to a child born with a serious medical condition. Those provisions are absolutely at risk in this litigation.

Fortunately, there are so many ways that the minimum coverage requirement is an appropriate exercise of Congress's power to regulate the national economy that it is difficult to know where to begin. Let me start with the undoubted proposition that Congress can regulate the terms and conditions upon which health insurance is bought and sold, making it indisputable that Congress can prohibit insurance companies from denying coverage to those with pre-existing conditions. To make this obviously valid regulation of the national insurance market

workable, Congress found it necessary to include as well a financial incentive for individuals to maintain minimum insurance coverage. That is the so-called individual mandate. Without this mandate -- this minimum coverage provision -- there would an incentive for people who are now guaranteed coverage to postpone purchasing health insurance until they already sick. That critical fact about the interstate market in health insurance provides a full and sufficient basis for Congress to provide a financial incentive for individuals to maintain adequate health insurance coverage.

As Justice Scalia observed in his concurring opinion in *Gonzales v. Raich*, "where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'" 545 U.S. 1 at 36 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)). "[T]he relevant inquiry is simply 'whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power' … ." United States v. Comstock, 130 S. Ct. 1949, 1957 (2010) (quoting Raich, 545 U.S. at 37 (Scalia, J., concurring in the judgment)).

That foundational principle, so aptly stated by Justice Scalia, should be dispositive of this constitutional issue. The minimum

coverage requirement requires certain taxpayers to pay a penalty of not more than 2.5% of adjusted gross income if they fail to maintain adequate insurance coverage. (The requirement does not apply, among other exceptions, to those who are eligible for Medicare or Medicaid, to those who have employment based health insurance, to those for whom purchase of insurance would be a financial hardship and those who have certain religious objections.) Because the minimum coverage provision is reasonably adapted to the attainment of a legitimate end under the Commerce Power it is plainly constitutional.

The truly novel contention put forth in this litigation, however, is that even matters vital to the national economy may not be regulated if they fall within an artificial category that the challengers label as "inactivity." This is descriptively inaccurate, because (1) the penalty for failing to maintain minimum coverage applies only to those who participate in the economy by earning sufficient taxable income that they are otherwise required to file federal income tax returns and (2) virtually everyone subject to the penalty participates in some way in the health care market.

There is nothing unprecedented about Congress imposing affirmative requirements on citizens who would prefer to be left alone,

when those regulations are necessary to accomplish an objective wholly within the powers assigned to Congress. So why carve out this proposed new judicial exception to Congress's power to regulate commerce? There is nothing so surprising or severe about the provision in question to justify the suggestion that it must be judicially excised from what is otherwise a valid exercise of an enumerated power. The minimum coverage requirement is no more intrusive than Social Security or Medicare.

The Social Security Act requires individuals to make payments to provide for old age retirement. Medicare requires individuals to make payments to provide for health coverage after they are 65 years of age. The Affordable Care Act requires individuals to make payments to provide for health coverage before they are 65.

Under Social Security and Medicare, there is one predominant payer, the government. Under the Affordable Care Act, individuals are given an option to choose among a larger number of insurers in the private market. Neither Social Security nor Medicare nor the Affordable Care Act is such a novel intrusion into liberty that judges would be justified in overriding the considered judgment of the elected branches that adopted those laws.

Litigants who are urging the courts to carve out a novel exception from Congress's authority to regulate interstate commerce have no precedent upon which to rely. To be sure, they cite to the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison,* 529 U.S. 598 (2000). Those decisions, however, offer no support to these challenges. Those cases involved an attempt to regulate local crime (guns near schools and violence against women) because of a presumed ultimate effect on interstate commerce. The minimum coverage requirement, in contrast, is itself a regulation of interstate commerce; it regulates the provision of health insurance that is itself critical to the national health care market in which virtually every American participates. As the Supreme Court said in *Gonzales v. Raich,* 545 U.S. 1, 16 (2005), "where [the act under review] is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality."

The minimum coverage provision of the Affordable Care Act tests no limits and approaches no slippery slope.[1] Notwithstanding the

[1] Slippery slope arguments are themselves often slippery. Where the issue is simply whether something falls within the scope of a subject matter over which Congress is given jurisdiction to legislate, the parade of horribles marches all too easily. If it is within the scope of regulating commerce to set a minimum wage, one might argue, then Congress could set the minimum wage at $5000 an hour. Would that force us

improbable hypotheticals put forth by those bringing these lawsuits, Congress never has and never would require Americans to exercise or eat certain foods. Were Congress ever to consider laws of that kind infringing on personal autonomy, the judiciary would have ample tools under the liberty clause of the Fifth Amendment to identify and enforce constitutional limits. See Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990). What the Affordable Care Act regulates is not personal autonomy, but commercial transactions.

Suggestions that sustaining the minimum coverage provision would mean that Congress could mandate the purchase of cars or comparable items are also disingenuous. The provision requiring minimum health insurance cannot be viewed in isolation. It is an integral part of regulating a health care market in which virtually everyone participates. No one can be certain he or she will never receive medical treatment. Health care can involve very expensive medical treatments that are often provided without regard to one's ability to pay and whose cost for treating the uninsured is often

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to conclude that Congress therefore cannot set any minimum wage at all? Were Congress to legislate the extreme hypotheticals envisioned by those bringing these challenges, there will be ample constitutional doctrines available for the judiciary to use for the imposition of limits..

transferred to other Americans. These qualities are found in no other markets.

For an extended period of time, Congress debated how best to regulate the two vitally important, inextricably intertwined national markets in health care and health insurance. Many different proposals were put forth, criticized and defended. But what seems most clear is that in our constitutional tradition these sharply contested questions of national economic regulation are the kinds of issues that are more appropriately resolved by political debate than by judicial decree.