Nos. 19-840 & 19-1019

IN THE
Supreme Court of the United States

CALIFORNIA, ET AL.,
Petitioners,
v.
TEXAS, ET AL.,
Respondents.

TEXAS, ET AL.,
Petitioners,
v.
CALIFORNIA, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENTS IN NO. 19-840 AND IN SUPPORT OF PETITIONERS IN NO. 19-1019

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers, including the system of federalism whereby powers not delegated to the federal government by the Constitution are reserved to the states.

The Foundation has an interest in this case because it believes that the Affordable Care Act cannot be justified as a valid exercise of Congressional power and is therefore an unconstitutional encroachment on the rights of the States and of the People.

SUMMARY OF ARGUMENT

In implementing the Patient Protection Affordable Care Act (the "ACA"), states were expected to set up State-Based Exchanges (the "SBE") or a State-Based Exchanges using the Federal Plan (the "SBE-FP"). If a state does not elect to implement either, the federal government will establish Federally Facilitated Exchanges (the "FFE") in the state.

This is an unconstitutional encroachment upon

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[1] Pursuant to Rule 37, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

the powers reserved to the states by the Tenth Amendment, because it forces the states to either (1) establish SBEs and operate them according to strict federal regulations, thus being commandeered into federal service; or (2) surrender their constitutional power to regulate health insurance by consenting to the establishment of an FFE.

Exchanges are an essential tool in implementing the ACA throughout the country. This vital part of the ACA violates the Tenth Amendment by invading state sovereignty.

The District and Fifth Circuit Courts below have held that, because the individual mandate has been removed, the ACA is no longer a tax under Article I Section 8. If this Court reverses and holds that the ACA is still a tax, the ACA is then *ab initio* unconstitutional because it violates the Origination Clause of Article I Section 7 because it originated in the Senate rather than the House.

ARGUMENT

I. ANTI-COMMANDEERING DOCTRINE IS BASED UPON A CHERISHED CONCEPT OF "DUAL SOVEREIGNTY"

In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court identified five potential restraints upon Congress' use of conditional federal spending. One of those limitations is "coercion," which includes commandeering states to perform functions dictated by the federal government. The Court noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point

at which 'pressure turns into compulsion.'" *Id*. at 211. *Dole* involved a federal statute that directed the Secretary of Transportation to withhold a percentage of highway funds from states that did not raise the legal drinking age to 21. South Dakota contended that this amounted to unconstitutional federal coercion, because setting the drinking age was a power reserved to the states by the Tenth Amendment. Secretary Dole argued that the states still had the power to set the drinking age; they would merely lose some federal funding if they set it lower than age 21. This Court concluded at 211 that "When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified grant programs, the argument as to coercion is shown to be more rhetoric than fact." The Court also said, "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion" (quoting from *Steward Machine Co. v. Davis*, 301 U.S. 548 at 590). However, the Court did not delineate at what point compulsion would begin.[2]

This Court recognized the anti-commandeering doctrine in *New York v. U.S.*, 505 U.S. 144 (1992), in which the State of New York sued the federal government asserting that provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 were coercive and violated state sovereignty

[2] See also, the dissenting opinion of Justice O'Connor in *Dole.*

under the Tenth Amendment. *Id*. The Court held that "The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the *Tenth Amendment*, the provision is inconsistent with the federal structure of our Government established by the *Constitution*." *Id*. at 177.

Justice O'Connor stated that Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," (q*uoting from Hodel v. Virginia Surface Min. & Reclamation Association, Inc.*, 452 U.S. 264, 288 (1981)). But commandeering is not limited to direct compulsion. J. O'Connor added that "a choice between two unconstitutionally coercive regulatory techniques is no choice at all." *(New York, supra).* Either way, she wrote, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," (quoting from *Hodel, supra*).

The Court expanded the anti-commandeering doctrine in *Printz v. U.S.*, 521 U.S. 898 (1997). A provision in the Brady Gun Bill required chief law enforcement officers (the "CLEO") to administer part of the background check program. *Id*. at 903. Sheriffs Jay Printz and Richard Mack sued, arguing these provisions unconstitutionally forced them to

administer a federal program. *Id*. at 904. This Court held that "it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." *Id*. Citing the *New York* case, the Court at 935 held this provision of the Brady Gun Bill unconstitutional, expanding the reach of the anti-commandeering doctrine:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we held that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to minister or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), this Court recognized the anti-commandeering doctrine again with the Congress's use of the spending condition. Although the Court upheld most provisions of the ACA, it struck down another provision of the ACA that expanded Medicaid and coerced the states to either accept the expansion or risk losing existing Medicaid funding. The Court ruled that the federal

government cannot force the states to act against their will by withholding funds in a coercive manner. *Id*. at 588. The Court held that the federal government cannot compel states to expand Medicaid by threatening to withhold funding or Medicaid programs already in place. *Id*. Justice Roberts contended that allowing Congress to punish states that refused to follow violates the separation of powers which the Framers created. *Id*.

II. THE ACA VIOLATES THE TENTH AMENDMENT BY USURPING THE POWERS OF THE STATES.

The ACA and its implementation drastically changed the traditional relationship between the federal government and states in health care. If a state does not set up an SBE or if the federal government determines that the SBE established by a state does not meet the SBE-FB standard, the federal government will establish a Federally Facilitated Exchange (the "FFE") in the state.

The coercion and commandeering in this system is obvious. This "Hobson's choice" forces the state to either (1) comply with the federal mandate by setting up an SBE, or (2) forfeit to the federal government its power to regulate the health insurance market, a power reserved to the states by the Tenth Amendment.

A. Creation of Health Benefit Exchanges Exceeds the Bounds of "Cooperative Federalism" and Violates the Tenth Amendment.

A. Creation of Health Benefit Exchanges Exceeds the Bounds of "Cooperative Federalism" and Violates the Tenth Amendment.

The Federal District Court for the Northern District of Florida rejected a challenge to the creation of health benefit exchanges under the ACA in *Fla. ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010). Relying on *Hodel v. Virginia Surface Min. & Reclamation Association, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), the District Court rejected that challenge because "The Act gives the states the choice to establish the exchanges, and is therefore the type of cooperative federalism that was authorized in *Hodel*." *Id*. at 1156.

The Foundation believes the Florida District Court's reliance on *Hodel* was misplaced. In *Hodel*, the plaintiffs challenged the Surface Mining Control and Reclamation Act, which was a comprehensive statute designed to "'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *McCollum*, at 1155 (citing *Hodel*, at 268). The statute provides that "any State wishing to assume permanent regulatory authority over the surface coal mining operations" must submit a "proposed permanent program" demonstrating compliance with federal regulations. *Id*. The Supreme Court said the statute merely established "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact

and administer their own regulatory programs, structured to meet their own particular needs." *Id.* (citing *Hodel*, at 289, 101 S. Ct. 2352). The Supreme Court further stated that:

> "...Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role."

Fla. ex rel. McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1155 (N.D. Fla. 2010) (quoting *Hodel*, 452 U.S. at 290).

Hodel and this case involve contrasting subjects. The federal law at issue in *Hodel* was the Surface Mining Act regulating mining, and the law here at issue is the ACA regulating health insurance. Federal preemption over the mining industry has been historically recognized, whereas the state police power has been recognized concerning the health insurance industry so that health insurance regulation is the subject of cooperative federalism with a presumption against federal preemption.

The Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 2399, 115 L. Ed. 2d 410 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792, 795, 107 L. Ed. 2d 887 (1990). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and

inviolable sovereignty.'" *Printz,* at 918-19 (citing *The Federalist* No. 39, at 245 (J. Madison)). Under dual sovereignty, state governments retain a plenary police power that empowers them to protect public health, safety, welfare, and morals. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).[3] This federalism structure supports a general presumption that "any given policy question should be addressed by state governments." Therefore, health care policy choices should be presumptively left at state hands.[4]

For regulations involving health, safety, and welfare, the areas of historic state police powers, this Court should presume that Congress did not intend to occupy the field and that the burden is on Congress to show its intent to preempt. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). Because it has not preempted the field, Congress must leave the states free to regulate the health insurance market.

The District Court in *McCollum* did not find commandeering in the AFA because "The plaintiffs have not identified any provision in the Act that requires the states to enact a particular law or regulation, as in *New York*, nor have they identified any provision that requires state officials to enforce

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[3] "[T]he structure and limitations of federalism…allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

[4] Adler, Jonathan H., "Cooperation, Commandeering, or Crowding Out? : Federal Intervention and State Choices in Health Care Policy" (2011). *Faculty Publications*. 594, pg. 218-9.

federal laws that regulate private individuals, as in *Printz*." *Id*. at 1155. However, the Foundation believes our analysis below will identify provisions of the ACA and regulations adopted pursuant to the ACA that do in fact compel states to enact a particular law or regulation, that do exceed the bounds of "cooperative federalism," that do constitute commandeering, that do violate the Tenth Amendment, and that therefore render the ACA unconstitutional.

1. Forcing the Creation of SBEs Violates Anti-Commandeering Doctrine

The ACA exceeds the bounds of "cooperative federalism" because the option given to states under the ACA amounts to no choice. The federal government extensively regulates SBEs through Title 45 of the Code of Federal Regulation, Part 155 (Exchange Establishment Standards and Other Related Standards Under the Affordable Care Act).

Under 45 C.F.R. §155.100, each State may elect to establish its own State-Based Exchange (SBE) "that facilitates the purchase of health insurance coverage in Qualified Health Plans (QHP) in the individual market and that provides for the establishment of a Small Business Health Options Program (SHOP)."

However, each SBE must be approved by the HHS.[5] The HHS will approve the SBE if it meets the following standards: "(1) The Exchange is able to

[5] 45 C.F.R. §155.105(a)

carry out the required functions of an Exchange consistent with subparts C, D, E, F, G, H, and K of this part…; (2) The Exchange is capable of carrying out the information reporting requirements in accordance with section 36B of the Code…; and (3) The entire geographic area of the State is in the service area of an Exchange, or multiple Exchanges consistent with 155.140(b)." Under these standards, to have its SBE, a State must: "(1) Elect to establish an Exchange by submitting, in a form and manner specified by HHS, an Exchange Blueprint that sets forth how the Exchange meets the standards outlined in paragraph (b) of this section; and (2) Demonstrate operational readiness to execute its Exchange Blueprint through a readiness assessment conducted by HHS." §155.105(c).

The SBE must function consistent with subparts C, D, E, F, G, H, and K of this [regulation]…."[6] Those subparts mostly regulate the functions of the Exchange in the individual insurance market and the SHOP, including payment of premiums, eligibility standards and process, enrollment periods, eligibility appeals requirements, standards and process for QHPs, and the service area of a QHP. This implementation of the ACA is not "cooperative federalism" because, states are compelled to enforce the ACA, expend state funds in establishing SBE, and participate in the program as specified in the regulations above – or the federal government will take over and establish an FFE.

This implementation of the ACA, which reduces

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[6] 45 C.F.R. 155.105(a).

the states to mere pawns of the federal government, is prohibited under *Printz*. In *Printz*, the Government tried to distinguish *New York v. U.S.* on the ground that, unlike the "take title" provisions invalidated in *New York*, the background-check provision of the Brady Act did not require state legislative or executive officials to make policy, but instead issued a final directive to state CLEOs. *Id.* at 926. The Government further asserted that "it is permissible for Congress to command state or local officials to assist in the implementation of federal law so long as 'Congress itself devises a clear legislative solution that regulates private conduct' and requires state or local officers to provide only 'limited, non-policy making help in enforcing that law." *Id.* at 926-27. The Court, however, rejected these arguments, stating that "executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's CLEO." *Id.* at 927. The Court further stated that "how much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one." *Id.* at 928.

More importantly, the Court further stated that "even assuming, moreover, that the Brady Act leaves no 'policymaking' discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty." *Id.* at 928. "Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than by 'reducing them to puppets of a ventriloquist Congress.'" *Id.* (citing *Brown v. EPA*,

521 F. 2d, at 839).

2. Federally Facilitated Exchanges Usurp State Authority Over Intrastate Insurance Regulation

States also may have state-based exchanges using federal platforms ("SBE-FP"), meaning they have SBEs but use federally facilitated information technology (IT) platform (i.e., HealthCare.gov). For the 2020 plan year, 32 states have FFEs, 13 states have SBEs, and six states have SBE-FPs.[7] In many states with FFEs, the exchange is wholly operated and administered by HHS.[8] Clearly, these states concluded that the requirement to establish an SBE is so onerous that they instead surrendered to the federal government their constitutional right to regulate health insurance.

After the adoption of Medicare in 1965, the states remained the primary regulators in health care until the ACA. This decentralized system undoubtedly enhanced political accountability and fostered innovation through competition among states.[9] Failures of the ACA during the past decade prove that uniform standards in health care by the federal government are ineffective. For example, in the

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[7]https://www.kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D

[8] Vanessa C. Forsberg, "Overview of Health Insurance Exchanges" (2018), CRS Report. R44065, pg. 2.

[9] Adler, Jonathan H., "Cooperation, Commandeering, or Crowding Out?: Federal Intervention and State Choices in Health Care Policy" (2011). *Faculty Publications*. 594, pg. 219.

March 8, 2018 letter to Governor C.L. "Butch" Otter from CMS Administrator Seema Verma, Verma admitted that the ACA "is failing to deliver quality health care options to the American people and has damaged health insurance markets across the nation." The Administrator further stated that "Most Idahoans who did not receive federal premium subsidies have been exposed to large premium rate increases since 2014." Also, Administrator Verma mentioned that "premium rates for coverage sold through the Exchange in Idaho have increased by 91.4 percent from 2014 to 2018" and that "Idaho health insurance issuers have been incurring significant losses in the individual market since 2014—collectively over $400 million since 2014."[10]

This Court's recent ruling in *Maine Cmty. Health Options v. United States*, No. 18-1023, 2020 WL 1978706, (U.S. Apr. 27, 2020) also demonstrates the failure of the ACA. Although this case does not directly involve Exchanges, the fact that the insurer's losses significantly outpaced gains and the federal government failed to make up such difference as required in the ACA, further demonstrates that centralization of health care is ineffective.[11] Health care should be decentralized to "take into account

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[10] Seema Verma, Department of Health and Human Services, Letter to Idaho Governor C.L. "Butch" Otter and State of Idaho Department of Insurance Director Dean L. Cameron, March 8,2018, https://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Otter.pdf

[11] https://www.nytimes.com/2020/04/27/us/supreme-court-obamacare-insurance.html; https://www.supremecourt.gov/opinions/19pdf/18-1023_m64o.pdf

local conditions, tastes, preferences, and economic conditions" of each state.[12]

The Tenth Amendment guarantees that state governments, as "dual sovereigns," retain a plenary police power that empowers them to protect public health, safety, welfare, and morals. Therefore, the federal government should not invade states' authority over health care regulation as the Tenth Amendment guarantees.

The ACA imposes huge responsibilities *without the meaningful consent of the States*. There is no genuine consent when the states' only choices are (1) set up SBEs and run them as the federal government requires; or (2) surrender their constitutional authority to regulate health insurance. This is the same as no choice at all.

B. Section 1332 Waiver Does Not Cure the ACA's Violation of the Tenth Amendment

Although the Section 1332 Waiver provision of the ACA allows states to seek waivers from some ACA requirements, those waivers are limited to individual and employer mandates, essential health benefits, limits on cost-sharing for covered benefits, metal tiers of coverage, standards for health insurance marketplaces, premium tax credits and cost-sharing

[12]Adler, Jonathan H., "Cooperation, Commandeering, or Crowding Out?: Federal Intervention and State Choices in Health Care Policy" (2011). *Faculty Publications*. 594, pg. 220.

reductions.[13] Section 1332 does not allow waivers for key provisions, including guaranteed issue, age rating, and prohibitions on health status and gender rating.[14]

Also, the process of waiver application and report is problematic. The ACA requires that states must enact laws authorizing actions to be taken under the waiver in order for the waiver to be approved.[15] This process violates the anti-commandeering doctrine since the federal government is commandeering states to enact a state law in order to implement the federal waiver program, which is expressly prohibited in *New York*. Further, the operation of the waiver seems problematic since the ACA requires states to report and evaluate annually how they are exercising the waiver program. 45 C.F.R. § 155.1300.

For the foregoing reasons, Section 1332 Waiver does not cure the violation of the Tenth Amendment.

C. Creation of Exchanges Diminishes Accountability

The ACA also compromises the system of federalism by diminishing accountability. In *Printz*, arguing the mandatory obligation imposed on CLEOs to perform background checks was constitutional, the Government argued that requiring state officers to

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[13] 42 U.S. Code § 18052; https://www.kff.org/health-reform/fact-sheet/tracking-section-1332-state-innovation-waivers/

[14] https://www.kff.org/health-reform/fact-sheet/tracking-section-1332-state-innovation-waivers/

[15] https://www.kff.org/health-reform/issue-brief/new-rules-for-section-1332-waivers-changes-and-implications/

perform discrete, ministerial tasks specified by Congress does not violate the principle of *New York v. U.S.* because it does not diminish the accountability of state or federal officials. *Printz*. at 929-30, 933. The Court rejected that argument by reasoning that "by forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id*. at 930. The Court further stated that "even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Id*. The Court, thus, concluded that under the Brady Act, "it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error … that causes a purchaser to be mistakenly rejected." *Id*.

SBE provisions undermine accountability in two ways. First, in SBE states, by forcing state governments to absorb the financial burden of establishing Exchanges, Congress can take credit for solving problems without compelling their constituents to pay for the solutions with higher federal taxes. In SBE states, the federal government does not impose a federal tax on state insurers, but the state tax on insurers will increase to implement SBE. For example, when the state of Oregon tried to establish its own exchange, the state wasted $300 million federal taxpayer dollars and finally decided to

use the SBE-FP.[16] Also, in the State of Maine, under an SBE-FP arrangement, the federal government was to collect 2.5 percent, and the State of Maine was to collect the remaining 0.5 percent from insurers to support state-specific marketing and outreach.[17] If the state decides to establish an SBE, insurers in that state would not have to pay a fee to the federal government. However, the fee levied by the state would likely increase because the state would assume the cost of running the entire exchange.[18] Therefore, state governments will likely be blamed for an increase in state tax and any errors in implementing and performing SBE. Such a structure will diminish accountability.

Second, in FFE states, states are not forced to absorb the costs of implementing. Instead, the ACA requires state insurers to pay the federal user fee, 3.5% as of 2020.[19] This structure imposing the financial burden on state insurers still diminishes the accountability since those states are put in positions of taking the blame for not adopting SBE, thereby imposing financial burdens of high federal user fees on state insurers.

Therefore, the ACA diminishes the accountability of state or federal officials and compromises the

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[16] https://www.themainewire.com/2019/09/what-does-state-based-health-insurance-exchange-mean-for-maine/

[17] https://www.themainewire.com/2019/09/what-does-state-based-health-insurance-exchange-mean-for-maine/

[18] https://www.themainewire.com/2019/09/what-does-state-based-health-insurance-exchange-mean-for-maine/

[19] https://www.cms.gov/newsroom/press-releases/cms-issues-final-rule-2020-annual-notice-benefit-and-payment-parameters

system of federalism.

D. Qualified Health Plans Violate the Tenth Amendment by Substantially Invading Traditional State Authority to Regulate Health Care.

The ACA generally requires that health insurance plans offered through an exchange are Qualified Health Plans ("QHPs").[20] The ACA also requires every plan—on or off the exchange—to be a QHP.[21] To be certified as a QHP, a plan must be offered by a state-licensed issuer and must meet specified requirements of the ACA, including providing guaranteed issue, following federally established cost-sharing limits, and covering the ten essential health benefits (EHB).[22] QHPs must comply with the same state and federal requirements that apply to QHPs and other health plans offered outside the exchanges in the individual and small-group markets.[23]

SBE or SBE-FP states are required to check whether their plan is a QHP in order to be approved as the SBE. This requirement is tantamount to indirect commandeering to states and state executives. In states in which the HHS established FEEs, the same problem arises that the ACA, including QHP requirements, usurps or significantly curtails states' traditional authority over health care regulation. The ACA's uniform standards over types

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[20] 42 U.S.C. §18031(d)(2)(B).
[21] 42 U.S.C. §18031(d)(2)(B).
[22] 42 U.S. Code §§§ 18021, 18031(c), 18022(a)
[23] 42 U.S. Code § 18021

of health benefits, eligibility of policy issuance, and cost-sharing limits fundamentally change the profit structure of intrastate insurance companies, which previously were state responsibilities. Again, the ACA violates the Tenth Amendment.

E. Penalties on Intrastate Insurers Diminish Accountability.

If a state does not follow any part of the ACA or federal regulations enacted by the HHS, the HHS imposes a penalty on state insurers which violate the ACA or federal regulations.

For example, the State of Idaho enacted regulations to ease the ACA's requirements for intrastate insurance companies. In response, CMS Administrator Seema Verma notified Idaho Governor Otter of the federal concern that, based on their review of Idaho Bulletin No. 18-01, Idaho would fail to substantially enforce federal law. Administrator Verma warned that "if any health insurance issuer that is subject to CMS's enforcement authority fails to comply with the PHS Act requirements, it may be subject to civil money penalties, as described in 45 C.F.R. § 150.301 through § 150.347." Verma further stated that "if any issuer does not comply with the cease and desist letter by, for example, selling non-compliance plans in the State, CMS, as the primary enforcer, could initiate an investigation of the potential violation and based on the outcome, could impose a penalty for each violation of up to $100 each day, for each responsible entity, for each individual affected by the violation, in accordance with 45

C.F.R. § 150.315."[24]

To summarize, if a state enacts state regulations to ease the ACA requirements, and if intrastate insurers follow those regulations, the federal government will impose civil penalties on the insurers. This structure is problematic since it diminishes accountability. The states which established SBEs are not only forced to absorb the costs of implementing the ACA but also must take the blame for such civil penalties imposed on state insurers which relied on state regulations. Therefore, this implementation of the ACA diminishes accountability and thus compromises the system of federalism.

III. THE SUPREMACY CLAUSE DOES NOT APPLY TO WHICH ARE NOT MADE PURSUANT TO THE CONSTITUTION

The Foundation urges this Court to reject the argument that the Supremacy Clause of Article VI, Sec. 2 authorizes the Affordable Care Act. The Supremacy Clause does not make all federal statutes the supreme law of the land, but only those "Laws of the United States which shall be made in Pursuance thereof [that is, pursuant to the Constitution]." See *Printz* 924-25.

Article VI, Section 2 says "This Constitution ... shall be the supreme Law of the Land." This means the entire Constitution, including its amendments

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[24] Verma, op. cit. fn. Pg 3, https://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Otter.pdf.

which when ratified are "valid to all Intents and Purposes, as Part of this Constitution." That includes the Tenth Amendment which reserves "to the States, respectively, or to the People," all "powers not delegated to the United States by the Constitution." Congress may adopt laws authorized by the Constitution, for that is the supreme law of the land. Congress may not adopt laws not authorized by the Constitution, for that is equally the supreme law of the land. The Supremacy Clause gives the federal government no more powers than those that are already delegated to it by the Constitution.

So the Supremacy Clause merely brings us back to the question, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution." *Printz,* at 924-925. As discussed above, the ACA and implementing regulations violate the Tenth Amendment by commandeering states and substantially usurping states' long-held regulatory authority over health care. Because the ACA invades powers reserved to the states by the Tenth Amendment, it violates the Tenth Amendment, which is part of the Supreme Law of the Land. The Supremacy Clause does not authorize this kind of commandeering; rather, it forbids it.

IV. IF THE ACA IS A TAX, IT VIOLATES THE ORIGINATION CLAUSE OF ARTICLE I SECTION 7 AND IS VOID *AB INITIO* BECAUSE IT ORIGINATED IN THE SENATE RATHER THAN THE HOUSE.

In *NFIB v. Sebelius,* this Court ruled 5-4 that most of the provisions of the ACA were constitutional

because the ACA constituted a tax pursuant to Article I Section 8.

In the case before us, the District Court and the Fifth Circuit below both ruled that, because the Tax Cuts and Jobs Acts of 2017 eliminated the individual mandate from the ACA, the ACA is no longer a tax if indeed it ever was a tax. and it therefore is no longer authorized by Article I Section 8.

If this Court agrees with the lower courts that the ACA is no longer a tax, the ACA is unconstitutional because it is no longer authorized by Article I, Section 8.

However, if this Court reverses the lower court rulings and concludes that the ACA is still a tax, another issue arises: Does the ACA violate the Origination Clause of Article I Section 7, because even though it is a bill for raising revenue it did not originate in the House of Representatives?

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Article I, Section 7, Clause 1

The Origination Clause is not a mere technicality to be circumvented whenever convenient. Rather, it is based upon a cherished principle of the common law that Americans argued for in the Declaration of Independence, fought for in the War for Independence, and enshrined in the Constitution: *No taxation without representation.*

Let us look to history:

A. The Practice in England

Parliament developed in medieval times from the Great Council (Magnum Concilium, also called the Curia Regis) which consisted of clergy, nobles, and "knights of the shire" who represented the various counties. Their duty was to approve taxes proposed by the Crown.[25]

The House of Commons developed into an legislative body distinct from the House of Lords in the late 1200s or early 1300s, when the "knights of the shire" who represented the counties and the burgesses chosen to represent the towns began sitting in a separate chamber (later called the House of Commons) from that used by the nobles and high clergy (later called the House of Lords). According to the *Oxford Dictionary of Politics*, "House of Commons," "The 1689 Bill of Rights established for the Commons the sole right to authorize taxation and the level of financial supply to the Crown." The basic principle that underlay this concern was that the people who pay the taxes should have a voice in the adoption of those taxes.

B. The Concerns of the American Colonists

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[25] Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time* (Houghton Mifflin 1946) 47, 143-49. The Magnum Concilium may have been an outgrowth of the earlier Anglo-Saxon witanagemot.

The American colonists shared the view of the Commons that there should be no taxation without representation and argued that because they had no representatives in Parliament, Parliament had no authority to tax them. As early as 1640-41 members of Parliament urged the Massachusetts Bay Colony to send delegates to Parliament, but the colonists refused, saying "if we should put ourselves under the protection of the Parliament, we must be then subject to such laws as they should make...[which] might prove very prejudicial to us."[26]

In the 1760s the taxation issue was fanned into flame with the Stamp Act of 1765, the Townshend Acts of 1767, the Tea Act of 1773, and the Intolerable Acts. Their opposition was based not on the amount of the taxes, but on the principle that Parliament had no authority to tax the colonists because the colonists had no representatives in Parliament. In 1765 the Virginia House of Burgesses adopted a resolution introduced by Patrick Henry which asserted that taxation without representation is tyranny:

> Resolved, that the taxation of the people by themselves, or by the persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, or the easiest method of raising them, and must themselves be affected by every tax laid on the people, is the only security against a burdensome taxation, and the distinguishing

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[26] John Winthrop, *the Journal of John Winthrop 1630-1649* ed. Richard S. Dunn and Laetitia Yeandle (Harvard University Press 1996) 182-83.

> characteristic of British freedom, without which the ancient constitution cannot exist.[27]

Taxes comprised one of the major grievances raised by the colonists in the Declaration of Independence ("For imposing Taxes on us without our Consent"). And the colonists took up arms to defend this principle.

C. The Decisions of the Constitutional Convention of 1787

Taxes were a major concern of the delegates to the Constitutional Convention. When the delegates adopted the Sherman Compromise by which they established a two-house legislature, many wanted to be sure that only the house that represented the people who would pay taxes be allowed to initiate taxes. Elbridge Gerry of Massachusetts declared,

> Taxes and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses.[28]

Ben Franklin said,

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[27] Patrick Henry, *Virginia Resolves on the Stamp Act*, 1765.

[28] Elbridge Gerry, quoted in Max Farrand, ed., *The Records of the Federal Convention of 1787* (Yale University Press 1937) II:278.James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America, ed. Gaillard Hunt and James Brown Scott (Oxford University Press, 1920)* 391.

> ...[I]t was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim that those who feel, can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people.[29]

On August 15 Caleb Strong of Massachusetts proposed that only the House of Representatives could initiate revenue bills but that the Senate could "propose or concur with amendments as in other cases."[30] On September 8 Strong's proposal was accepted with revised language, and the Origination Clause in its present form was adopted 9-2.[31]

As James Madison explained in Federalist No. 58,

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse....[32]

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[29] Benjamin Franklin, quoted in James Madison, *Notes of Debates in the Feeral Convention of 1787 Reported by James Madison* (Ohio University Press 1984) 251.

[30] Caleb Strong, quoted in Farrand II:298.

[31] Farrand II:552.

[32] James Madison, *Federalist No. 58, The Federalist* ed. Michael Loyd Chadwick (Global Affairs 1987) 317 (original spelling retained).

The Framers placed the Origination Clause in the Constitution for a very important reason: The maxim "no taxation without representation" means the legislative body which originates taxes should be the body that most directly represents the people.

D. The Effect of the Seventeenth Amendment

The Seventeenth Amendment did not change the meaning of the Origination Clause. It provides that the States shall choose their U.S. Senators by popular elections rather than by the state legislators. But the Senators still represent the States, and they still serve six-year rather than two-year terms. The House of Representatives remains the body that most directly represents the people and that can be most quickly turned out of office by the people.

If the Framers of the Seventeenth Amendment had intended to repeal or modify the Origination Clause, they could have done so. But they left it intact. From this we must infer that they intended that its meaning and effect remain unchanged.

E. The Courts' Interpretation of the Origination Clause

Court cases involving the Origination Clause are few, but from them several principles can be drawn.

First, although the House of Representatives can enforce the Origination Clause by "blue-slipping"

a bill and sending it back to the Senate, or simply by refusing to pass it, the House's failure to do so does not mean the Court should refuse to exercise judicial review:

> Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments .... Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review.

United States v. Munoz-Flores, 495 U.S. 385, 392 (1990).[33]

Other Supreme Court cases are distinguishable. *United States v. Munoz-Flores,* 495 U.S. 385 (1990), involved an assessment on persons convicted of federal misdemeanors which went to the Crime Victims Fund established by the Victims of Crime Act. The Court ruled that the assessment did not violate the Origination Clause because the assessments were not placed in the general treasury but rather were used to compensate crime victims.

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[33] For an excellent discussion of Congress's own enforcement of the Origination Clause, see James V. Saturno, "The Origination Clause of the U.S. Constitution: Interpretation and Enforcement," (Congressional Research Service, The Library of Congress, 2002) CRS-6.

By contrast, taxes collected under the Affordable Care Act go directly to the general treasury.

Millard v. Roberts, 202 U.S. 429 (1906), involved a law for the elimination of grade crossings and for a railway station in the District of Columbia. To finance this, the bill instituted a property tax in the District of Columbia. The primary issue was whether the law appropriated public funds for private purposes, but the Court dismissed an Origination Clause challenge on the ground that the funds raised were not for the general fund but for a specific project and were incidental to that project.

F. The Use of a "Shell Bill"

Some will claim that, in fact, the Affordable Care Act did originate in the House, noting that Senate Majority Leader Harry Reid (D-NV) took a bill that had been passed by the House, struck out all of its language, and inserted what became the Affordable Care Act in its place.

Amicus contends that the "shell game" of using a "shell bill" does not satisfy the Origination Clause, for the following reasons:

(1) The Affordable Care Act is completely unrelated to the original House bill. The House bill was House Resolution 3590, titled the Service Members Home Ownership Tax Act of 2009. The purpose of the bill was to grant tax credits to military personnel seeking to purchase their first homes and to increase corporate estimated taxes for certain corporations by 0.5%. It had nothing whatsoever to do with health care. The Senate's "amendment"

deleted the House Resolution in its entirety and substituted the Affordable Care Act in its place. H.R. 3590 was a six-page, double-spaced bill. Senator Reid's "amendment" was a 906-page, single-spaced bill that bore no relationship to the original House Bill whatsoever.

(2) A basic principle of parliamentary law is that an amendment must be germane to the main measure. According to *Robert's Rules of Order, Newly Revised,* "An amendment must always be *germane* -- that is, closely related to or having bearing on the subject of the motion to be amended. this means that no new subject can be introduced under pretext of being an amendment (*see* pp. 129-31)."[34] *Robert's* further states on pp. 129-31:

> DETERMINING THE GERMANENESS OF AN AMENDMENT. As already stated, an amendment must be *germane* to be in order. To be *germane,* an amendment must *in some way involve* the same question that is raised by the motion to which it is applied.

Amicus cites *Robert's,* not necessarily because the Senate is strictly bound thereby, but because *Robert's* sets forth universal principles of fairness and orderliness by which deliberative bodies conduct business.

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[34] General Henry M. Robert, 1876; rev. Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thoms J. Balch, *Robert's Rules of Order, Newly Revised* (Perseus Publishing 2000) Art. VI, § 12, p. 125.

Close to the founding era, Samuel Johnson's *A Dictionary of the English Language* (1768) defined "amendment" as "in law, a correction of an error committed in a process."[35] Deleting a 6-page bill about tax credits for military personnel purchasing homes and inserting in its place a 906-page bill about health care hardly constitutes "correcting an error committed in a process." Noah Webster's *An American Dictionary of the English Language* (1828) uses a definition similar to Samuel Johnson's but adds an additional definition, "A word, clause or paragraph, added or proposed to be added to a bill before a legislature."[36] Clearly, the common understanding of the term "amendment" did not include substitution of a totally unrelated bill. The original House bill had absolutely nothing to do with health care. The amended Affordable Care Act had absolutely nothing to do with veterans' housing exemptions. They are not in the slightest way germane to one another.

The assertion that the Origination Clause itself does not require 'germaneness'" would reduce the Clause to a nullity. If the Senate is empowered to take a House bill, strip it entirely of its content, and substitute a revenue bill in its place, then the

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[35] Samuel Johnson, *A Dictionary of the English Language 3rd. Ed.* (Dublin: W.G. Jones, 1768), "Amendment."

[36] Noah Webster, *1828 An American Dictionary of the English Language* (1828; reprinted Foundation for American Christian Education 1995), "Amendment." Webster was younger than most of the Framers of the Constitution, but he knew many of them personally, sometimes dined with them during the Convention of 1787, and was commissioned by them to write a defense of the Constitution.

Framers wasted time, paper, and ink by placing the Origination Clause in Article I Section 7. Clearly, they adopted the Origination Clause for a very important reason: to ensure that taxes originate with the House that represents the people who pay the taxes. This Court should give effect to the Framers' purpose.

Likewise, the argument that the Origination Clause applies only when the bill's primary purpose is to raise revenue is utterly without merit. Article I Sec. 7 does not say "Bills the primary purpose of which is raising revenue shall originate in the House of Representatives," or "Bills the overarching purpose of which is to raise revenue shall originate...." Rather, its language is explicit and clear: "All Bills for raising Revenue shall originate in the House of Representatives."

One could just as easily argue that a law is not a tax for purposes of the Taxing and Spending Clause of Article I Sec. 8, unless raising revenue was its "primary" or "overarching" purpose. Had the Chief Justice employed this reasoning in *NFIB,* he could not have justified the Affordable Care Act as a tax. But again: Because of the importance the Framers placed on the principle of no taxation without representation, to the extent a bill can be authorized as a tax under the Taxing and Spending Clause, to the same extent that bill must be subject to the limitations of the Origination Clause.

The Framers were deeply concerned that the power to tax must be carefully limited to the legislative body that represents the people who pay the taxes. They would not have been impressed by

the argument that a "shell bill" fulfills the requirements of the Origination Clause. They would have recognized that allowing Senate to initiate a tax by gutting a House "shell bill" and substituting its own tax bill would eviscerate the Origination Clause and render it utterly ineffective. An Origination Clause without a "germaneness" requirement is the same as no Origination Clause at all.

Either the ACA is a tax, or it isn't. If it is, it is unconstitutional because it is not authorized by the Taxing and Spending Clause of Article I, Section 8. If it isn't, it is *ab initio*[37] unconstitutional because it was adopted in violation of the Origination Clause of Article I, Section 7.

This Court need consider the Origination Clause issue only if the Court reverses the District and Fifth Circuit decisions and holds that the ACA is a tax. By affirming the lower courts, this Court can avoid the Origination Clause issue entirely.

CONCLUSION

In *United States v. Darby,* 312 U.S. 100, 124 (1941), this Court said the Tenth Amendment "states but a truism that all is retained which has not been surrendered." True, the Tenth Amendment merely sets in concrete what the Founders always assumed was correct. But as Thomas Jefferson wrote,

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[37]*Norton v. Shelby County,* 118 U.S. 425, 442 (1886): "a[n] unconstitutional act is not a law; ...it is, in legal contemplation, as inoperative as though it had never been passed."

> I consider the foundation of the Constitution as laid on this ground: that "all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, reserved to the states or to the people." ...To take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition.[38]

Jefferson also wrote,

> On every question of construction, [let us] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning maybe squeezed out of the text, or invented against it, conform to the probable one in which it was passed.[39]

Can it be doubted that if the Framers of the Constitution, or Madison and the members of the First Congress, had read the Affordable Care Act, they would have shaken their heads in disbelief that anyone could believe the Constitution could authorize a gargantuan federal program like this?

The Foundation urges this Court to rule in the

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[38] Thomas Jefferson, 1791, quoted in Bergh 3:146, *The Real Thomas Jefferson,* National Center for Constitutional Studies, 1983, p. 380.

[39] Thomas Jefferson, 1823, quoted in Bergh 15:449, *The Real Thomas Jefferson,* p. 382.

spirit of the Framers of the Constitution and affirm the decision of the Fifth Circuit.

Respectfully submitted,

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