No. 11-398

In The Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

FLORIDA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS BRIEF ON BEHALF OF CITIZENS AND LEGISLATORS IN THE FOURTEEN HEALTH CARE FREEDOM STATES IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

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INTRODUCTION

Fourteen states have enacted or adopted "Health Care Freedom Laws" that protect individual freedom of choice in health care plans. In these "Health Care Freedom States," the Minimum Coverage provision of the Patient Protection and Affordable Care Act ("Individual Mandate") threatens to quash a traditional exercise of state sovereignty that directly serves the structural purpose of federalism in our compound republic – the protection of individual liberty and decentralized local governance guaranteed by the Bill of Rights. Such federal overreaching must be rejected if the vertical separation of powers established by our Constitution means anything at all.

INTEREST OF AMICI CURIAE[1]

The undersigned Health Care Freedom Amici agree that the Individual Mandate poses a grave threat to the principle of state sovereignty. Indeed, the very existence of the Individual Mandate proves that Congress too often forgets that the federal government's powers are limited and enumerated, not plenary. Fortunately, the existence of Health Care

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Freedom Laws in fourteen states brings the Individual Mandate's unconstitutionality into stark relief.

This brief is joined by 101 legislators from various Health Care Freedom states, including Arizona,[2] Kansas,[3] Missouri,[4] New Hampshire,[5] Ohio,[6] Tennessee,[7]

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[2] State Senate Majority Whip Frank Antenori, Senators Ron Gould, Judy Burges, Al Melvin, Nancy Barto, and John McComish, and Speaker of the House Andy Tobin, Representatives Nancy McLain, Cecil Ash, and Jack Harper.

[3] Representatives Greg Smith and Terri Lois Gregory.

[4] Senator Jane Cunningham and State Representatives Cary Smith and Keith Frederick.

[5] Representatives Andrew Manuse, Jordan Ulery, Kevin Avard, Daniel Itse, Seth Cohn, and Spec Bowers.

[6] Representatives Andrew Thompson and Barbara Spears.

[7] Lt. Gov. and Speaker of the Senate Ronald Ramsey, Majority Leader Senator Mark Norris, Speaker Pro Tem Senator Bo Watson, Republican Caucus Chair Senator Bill Ketron, Senators Mae Beavers, Mike Bell, Stacey Campfield, Michael Faulk, Dolores Gresham, Jack Johnson, Brian Kelsey, Becky Massey, Randy McNally, Doug Overbey, Kerry Roberts, Steve Southerland, Jim Summerville, Jim Tracy and Ken Yager; Speaker of the House Beth Harwell, Majority Leader Representative Gerald McCormick, Speaker Pro Tem Representative Judd Matheny, Republican Caucus Chair Representative Debra Young Maggart, and Representatives David Alexander, Harry Brooks, Kevin Brooks, Sheila Butt, Scotty Campbell, Glen Casada, Jim Cobb, Vince Dean, Vance Dennis, Bill Dunn, Linda C. Elam, Jimmy Eldridge, Joshua Evans, Jeremy Faison, Richard Floyd, John Forgety, Jim Gotto, Curtis Halford, Steve Hall, Michael Harrison, Ryan Haynes, Joey Hensley, M.D., Matthew Hill, Andy Holt, Julia Hurley, Curtis G. Johnson, Phillip Johnson, Kelly Keisling, Ron Lollar, Jon Lundberg, Pat Marsh, Jimmy Matlock, Steve McDaniel, Don Miller, Richard Montgomery, Frank Niceley, Mark Pody, Dennis Powers, John

(Continued on following page)

and Utah.[8] They have heard from constituents throughout their respective states, have studied and weighed the relevant issues and factors, including the burdens imposed upon States and their citizens by the Individual Mandate. Consequently, they are in a unique position to have determined that their respective state's Health Care Freedom law represents a deliberative and legitimate exercise of powers reserved to the states or the people under the Tenth Amendment. Speaking for themselves and the citizens they represent, these legislators condemn the Individual Mandate's usurpation of power from the states and the people.

The Goldwater Institute filed this brief because it is committed to advancing the principles of limited government, economic freedom, and individual responsibility, all of which are threatened by the Individual Mandate. The Scharf-Norton Center for Constitutional Litigation seeks to enforce the features of our state and federal constitutions that protect individual rights, including the principle of state sovereignty. The defense of Health Care Freedom Laws is at the core of this mission. The Institute not only represents thousands of members residing in all fourteen Health Care Freedom States, the Institute's

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Ragan, Barrett Rich, Bill Sanderson, Charles Sargent, Cameron Sexton, Tony Shipley, Mike Sparks, Art Swann, Curry Todd, Eric Watson, Terri Lynn Weaver, Mark White, Kent Williams, Ryan Williams, Tim Wirgau and Rick Womick.

[8] Representative Ken Ivory.

litigation director, Clint D. Bolick, is also the author of the original Health Care Freedom Act model legislation. The Goldwater Institute recently appeared before the United States Supreme Court in *McComish v. Bennett* (No. 10-239).

Finally, the Idaho Freedom Foundation ("IFF") joins this brief. IFF advocates for free market solutions, private property rights, individual responsibility, and transparent, limited government. IFF has an interest in protecting the rights of the people of Idaho individually, as well as the rights of the State of Idaho as a whole. Because Idaho passed the Idaho Health Freedom Act to protect the right of its citizens to purchase as much or as little health insurance as they choose, and because Idaho is the state that will arguably be most dramatically affected by the Patient Protection and Affordable Care Act and its Individual Mandate, IFF has an interest in supporting Idaho and the other Health Care Freedom States in this case.

The Goldwater Institute and IFF are both nonpartisan, tax exempt educational foundations under Section 501(c)(3) of the Internal Revenue Code. They have no parent corporation. They have issued no stock. They certify that they have no parents, trusts, subsidiaries and/or affiliates that have issued shares or debt securities to the public. All parties have been given timely notice of the filing of this brief.

SUMMARY OF ARGUMENT

The citizens and states of Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, North Dakota, New Hampshire, Ohio, Oklahoma, Tennessee, Utah, and Virginia have codified guarantees of the fundamental freedom not to be commandeered into purchasing a private insurance product known as a "health plan." Ariz. Const. Art. XXVII, § 2 (2011); A.R.S. § 36-1301 (2011); O.C.G.A. § 31-1-11 (2011); Idaho Code § 39-9001 (2011); Ind. Code § 4-1-12-3 (2011); 2011 Kan. ALS 114 (2011); La. R.S. § 22:1018 (2011); § 1.330 R.S. Mo. (2011); N.D. Cent. Code § 26.1-36-45 (2011); N.H. Rev. Stat. § 420-N:1 (2011); Oh. Const. Art. I, § 21 (2011); Okl. Const. Art. II, § 37 (2011); Tenn. Code Ann. § 56-7-1016 (2011); Utah Code Ann. § 63M-1-2505.5 (2012); Va. Code Ann. § 38.2-3430.1:1 (2011). The enactment of such laws is fully within the powers traditionally reserved to the states and the people under the Tenth Amendment. Moreover, the freedom guaranteed by Health Care Freedom Laws falls squarely within the traditional conception of ordered liberty protected from federal overreach by the Fifth and Ninth Amendments.

From the vantage point of the fourteen Health Care Freedom States, the unconstitutionality of the Individual Mandate is clearly compelled by the principle of state sovereignty. This is because the division of power between the states and the federal government is ultimately aimed at protecting individual liberty through decentralized local governance. The Individual Mandate clashes directly with this principle in Health Care Freedom states because it is

premised on the notion that the federal government has implied power to override state sovereignty even when such sovereignty is exercised in service of the very purpose for which our system of dual sovereignty exists.

As illustrated by its threat to the integrity of Health Care Freedom Laws, the Individual Mandate completely disregards the principle that hard questions regarding the boundary between state sovereignty and implied federal power must be resolved in favor of the division of power that diffuses, rather than concentrates, power; that sustains individual liberty; and that preserves, rather than negates, state sovereignty over essentially local matters. In short, the Individual Mandate threatens to disrupt the proper functioning of a viable vertical separation of powers.

For this reason, as well as those advanced by Respondents and other allied amici, the Individual Mandate is utterly inconsistent with the letter and spirit of the Constitution. The lower court decisions should be affirmed because the Individual Mandate must be struck down even as a claimed exercise of implied federal power under the Necessary and Proper Clause. Alternatively, the Court should reject any claim by the federal government that the Individual Mandate lawfully preempts Health Care Freedom Laws. Instead, to avoid the serious constitutional questions spotlighted by the lower court decisions, the Individual Mandate must not be construed to displace Health Care Freedom Laws.

ARGUMENT

Any connection between the Individual Mandate and the regulation of interstate commerce rests upon a chain of reasoning that is so extraordinarily attenuated and unprecedented that it defies logic. One line of argument, for example, claims that commerce "among" the states is substantially affected by the aggregated "mental activity" of individuals choosing not to engage in intrastate health insurance transactions. *Mead v. Holder*, 766 F. Supp. 2d 16, 36 (D.D.C. 2011). This argument expands the Commerce Clause's reach into the regulation of the individual mind, which is perhaps the most private and intrastate of jurisdictions. It thereby exceeds *even the grasp of the police power* in a republican form of government, which has been traditionally limited to matters that are "affected with a public interest." *See, e.g., Munn v. People of State of Illinois*, 94 U.S. 113, 139-40 (1876) (Field, J., dissenting); *Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 470 (Pa. 1948); Robert Moffit, *Revitalizing Federalism: The High Road Back to Health Care Independence*, Heritage Foundation Backgrounder no. 2432, 3 (June 30, 2010) (observing that "[i]n the classical sense, a republic means limited government; it underscores a sharp distinction between *res publica* (public affairs) and *res privata* (private affairs)").

Another line of argument by the federal government contends that the Individual Mandate is an essential element of PPACA's comprehensive regulation of coverage standards in health insurance, just

as the prohibition of local marijuana cultivation and consumption in *Raich* was regarded as necessary to the comprehensive prohibition of interstate trade in illicit drugs. *Gonzales v. Raich*, 545 U.S. 1 (2005). But *Raich* upheld a ban on medical marijuana as being necessary to a comprehensive regulatory regime that itself *directly* regulated interstate commerce in illicit drugs. By contrast, the Individual Mandate is not necessary to any comprehensive regulation regime imposed by PPACA *directly* on interstate commerce. Instead, the Individual Mandate's connection to the Commerce Clause is based entirely on a "House that Jack Built" rationale to which no limiting principle can be applied.[9]

In short, the Individual Mandate clearly does not *itself* regulate "the use of the channels of interstate commerce" or "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Quoting United States v. Lopez*, 514 U.S. 549, 558-59 (1995). It commandeers individuals, who are otherwise economically inactive, to engage in

[9] The claim that the Commerce Clause authorizes the Individual Mandate boils down to the three step argument that the regulation of intrastate health insurance decisions (1) is necessary to ensure the feasibility of PPACA's *coverage standards*, which (2) regulate *intrastate* health insurance commerce (given the current structure of state-centric health insurance markets), which (3) is necessary to the regulation of interstate commerce. Even if the difference between inactivity and economic activity were somehow immaterial, the connection between the Individual Mandate and interstate commerce is one step beyond the connection upheld in *Raich*.

intrastate health insurance transactions. The Mandate thus has nothing to do with directly regulating *actual* interstate commerce. Its constitutionality hinges entirely upon it being swept by the Necessary and Proper Clause impliedly into the Commerce and the Supremacy Clause. *Cf. Raich*, 545 U.S. at 5, 22 (citing U.S. Const. art. I, § 8, clause 18; *Wickard v. Filburn*, 317 U.S. 111 (1942)); *id.* at 34-35, 38-39 (Scalia, J., concurring).

However, as underscored in *The Federalist* No. 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the state governments are numerous and indefinite." *Id.* at 57. (James Madison) (Gideon ed., 1818). The so-called "sweeping clause" does not have an unlimited ability to sweep every conceivable federal law into the scope of Congress' delegated powers by implication. To the contrary, the Court should not hesitate to strike down or limit the reach of federal laws, such as the Individual Mandate, that rest upon expansive and tenuous claims of implied power when the principle of state sovereignty is at stake, as is clearly the case in Health Care Freedom States.

I. Because the Individual Mandate violates the principle of state sovereignty, Courts should not hesitate to strike it down or limit its reach.

With respect to claims of implied federal power, the Court has effectively reversed its aberrational

holding in *Garcia v. San Antonio Metropolitan Transit Authority* that the defense of state sovereignty should be mounted from within the political process at the federal level – in Congress – not within the court system. 469 U.S. 528, 554 (1985). Instead, when enforcing state sovereignty's limitation on claims of implied federal power, the Court has revived the fully-engaged form of judicial review exhibited in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In fact, jurists and academics across the jurisprudential spectrum agree that the Court has thereby effectively overruled *Garcia*. *See, e.g.*, *Massachusetts v. Sebelius*, 698 F. Supp. 2d 234, 249 n. 142, 252 n. 154 (D. Mass 2010) (citing *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *Z.B. v. Ammonoosuc Cmty. Health Servs.*, 2004 U.S. Dist. LEXIS 13058, at *15 (D. Me. July 13, 2004)); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1283, 1299 (June 2000). Moreover, the deferential framework of *Garcia* has not been revived through the expansive view of implied federal power enforced in *Raich* or *Comstock* because the Court was careful to emphasize that the principle of state sovereignty was not implicated by either case. *United States v. Comstock*, 130 S.Ct. 1949, 1962-63 (2010); *id.* at 1968 (Kennedy, J., Alito, J., concurring); *Raich*, 545 U.S. at 41 (Scalia, J., concurring).

As explained in *Alden v. Maine*, the Court is now committed to enforcing the principle of state

sovereignty that "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" 527 U.S. 706, 714 (1999) (citations omitted). The principal claim of *Garcia* – that judicial enforcement of this principle is unworkable – has been fully repudiated by the Court's own jurisprudential record.

In *New York v. U.S.*, 505 U.S. 144 (1992), for example, the Supreme Court held that Congress may not "commandeer" state legislatures by requiring them to legislate as directed by the federal government. *United States v. Lopez*, 514 U.S. 549 (1995), held that Congress does not have implied power to regulate wholly intrastate noneconomic activities. *Printz v. U.S.*, 521 U.S. 898 (1997), held that Congress may not evade separation of powers and "commandeer" state executive officials by ordering them to conduct background checks of purchases of firearms under the Brady Bill. *City of Boerne v. Flores*, 521 U.S. 507 (1997), ruled that a remedial civil rights law that invades state sovereignty must be closely drawn to remedy actual civil rights violations – it cannot effectively manufacture new civil rights. *Alden*, 527 U.S. at 713-14, ruled that states could not exist as autonomous sovereign governments subject to the risk that the federal government could subject them to damages claims in their own courts for failing to pay overtime to their employees. And in *United States v. Morrison*, 529 U.S. 598 (2000), the Court held

Congress may not regulate and criminalize wholly intrastate criminal activities with no economic aspect.

Under current precedent, the Court properly patrols the boundaries between state sovereignty and implied federal power without deferring to Congress. *See, e.g., Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 895-97 (4th Cir. 1999), *aff'd*, *Morrison*, 529 U.S. 598. Such fully-engaged judicial review has been further buttressed by cases that have repeatedly applied heightened scrutiny even to federal actions that have invoked the 14th Amendment's Enforcement Clause to override state sovereignty (where, if anything, the principle of state sovereignty is less secure). *See, e.g., Horne v. Flores*, 129 S.Ct. 2579, 2595-96 (2009); *City of Boerne*, 521 U.S. at 527-36.[10]

The current rule of law is the correct one. It is entirely appropriate for the Court to continue to review claims of implied federal power independently and without deference to Congress when the principle of state sovereignty is at stake. The judicial disengagement embraced by the *Garcia* majority in favor of political action cannot be reconciled with the fact

[10] The Enforcement Clause under the Fourteenth Amendment has long been analogized to the Necessary and Proper Clause. *Katzenbach v. Morgan*, 383 U.S. 641, 648 (1966) (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880); *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 311 (1880)).

that states *as states* have not been represented in Congress since the ratification of the 17th Amendment. Nor can it be reconciled with the public record of obvious congressional disregard for constitutional responsibilities in passing the PPACA.

On March 9, 2010, for example, Speaker of the House Nancy Pelosi famously justified the passage of PPACA with the observation: "But we have to pass the bill so that you can find out what is in it." *See* Fox News Video (March 9, 2010), http://www.breitbart.tv/nancy-pelosi-we-need-to-pass-health-care-bill-to-find-out-whats-in-it/ (last visited February 9, 2012). Likewise, during his speech at a National Press Club luncheon, House Judiciary Chairman John Conyers (D-Mich.), questioned the point of lawmakers reading the health care bill, stating: "What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?" Michael Krebs, *Conyers: 'What good is reading the bill if it's a thousand pages'*, Digital Journal (July 29, 2009), http://digitaljournal.com/article/276659 (last visited February 9, 2012). Similarly, when pressed about the constitutionality of PPACA, Representative Phil Hare said, "I don't worry about the Constitution on this, to be honest." Youtube video, http://biggovernment.com/publius/2010/04/01/rep-phil-hare-d-il-i-dont-worry-about-the-constitution/ (last visited February 9, 2012).

As these statements illustrate, Congress simply cannot be entrusted with exclusive authority to protect our system of dual sovereignty. Nor should it

be entrusted with such power. As passionately emphasized by Justice Powell in his dissent to the holding of *Garcia*:

> The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. . . . [F]ederal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

Garcia, 469 at 571-72 (Powell, J., dissenting). In short, federal courts must engage congressional overreach when state sovereignty is at issue *because the Constitution commands it*.

II. The federal government does not have unlimited implied power under the "letter and spirit" of the Constitution.

The federal government does not have unlimited implied power. The Necessary and Proper Clause entails more than a means-end test. "Necessary and proper" is a term of art meant to confirm that the federal government, as agent for the states and the people, has implied incidental power to implement appropriately its expressly granted powers. Robert G. Natelson, *Tempering the Commerce Power*, 68 Mont. L. Rev. 95, 99-102 (Winter 2007). In agency law, a grant of "authority to do whatever acts or use

whatever means are reasonably *necessary and proper* to the accomplishment of the purposes for which the agency was created" means that "an agent has implied authority to do that which *the nature of the business would demand in its due and regular course*." *Merrell v. Joe Bullard Oldsmobile, Inc.*, 529 So.2d 943, 947 (Ala. 1988) (emphasis added). Thus, the federal government's implied power is circumscribed by the agency principle that the clause authorizes only those actions that the "nature" of the political system established by the Constitution would "demand in its due and regular course." In other words, the "letter and spirit" of the Constitution is the standard against which a claim to implied power is measured. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3167 (2010) (Breyer, J., dissenting).

The principle of state sovereignty must be taken into account in an intellectually honest assessment of the "letter and spirit" of the Constitution. *Printz*, 521 U.S. at 918-19 ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' This is reflected throughout the Constitution's text") (citing U.S. Const. art. I, § 4 (granting power to state legislatures over congressional elections); *id*. art. IV, § 4 (guaranteeing states a republican form of government); *id*. art. V (incorporating states into the amendment process); *id*. amend. X (reserving to states powers not delegated); *id*. amend.

XI (making states immune to suit in federal court). To avoid the threat to liberty posed by concentrated power, the Constitution established a system "of complete decentralization." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 1, 189, 195-97 (Little, Brown & Co. 1878). Such "complete decentralization" was not meant to be purely formalistic, structural or passive.

As held in *New York*, "States are not mere political subdivisions of the United States." 505 U.S. at 161-66, 186. Instead, federalism was meant to establish a dynamic "constitutional equilibrium" that would preserve liberty by (1) diffusing power and thereby preventing the abuse of concentrated power, and (2) enabling the people to leverage the sovereignty of the states or the federal government, as needed, to protect their rights and keep the other government in check. *New York*, 505 U.S. at 181-82, 187-88; *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J. dissenting)); *see also The Federalist* Nos. 28, 31, 51 (Alexander Hamilton, James Madison) (Gideon ed., 1818).

By its nature, therefore, the political system established by the Constitution *cannot* "demand in its *due and regular* course" the enactment of federal laws that dangerously concentrate all power in the federal government. *New York*, 505 U.S. at 181, 187-88 (1992) (observing the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution

to the crisis of the day"). Any claim by the federal government to such implied authority, as entailed by the "House that Jack Built" rationale underpinning the Individual Mandate, is inconsistent with the "letter and spirit" of the Constitution and, therefore, cannot be rooted in the implied power confirmed by the Necessary and Proper Clause.

III. The principle of state sovereignty limits federal power and guarantees states an exclusive area of *substantive* legal authority, in addition to structural autonomy under the "letter and spirit" of the Constitution.

Current Supreme Court precedent confirms that the principle of state sovereignty limits the scope of implied federal power under the "letter and spirit" of the Constitution. As held in *Printz*:

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty . . . it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of *The Federalist*, "merely [an] act of usurpation" which "deserves to be treated as such."

521 U.S. at 923-24 (emphasis added) (citing *The Federalist* No. 33 (Alexander Hamilton) (Gideon ed., 1818); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297-326, 330-33 (1993)). Put differently, as more

recently held in *Bond v. United States*, "Impermissible interference with state sovereignty is not within the National Government's enumerated powers, and action that exceeds the National Government's enumerated powers undermines the State's sovereign interests." 131 S.Ct. 2355 (2011).

In *Bond v. United States*, the Court unanimously ruled, "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity . . . Federalism secures the freedom of the individual." *Bond*, 131 S.Ct. at 2365. Accordingly, our system of dual sovereignty denies "any one government complete jurisdiction over all the concerns of public life." *Id.* at 2364. It empowers "[s]tates to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id*. *Bond* thus clearly recognizes that the principle of state sovereignty guarantees an exclusive area of *substantive* jurisdiction for the states, in addition to structural autonomy. This rule of law is compelled by the reasoning of the Court's prior precedent and the "letter and spirit" of the Constitution.

After all, the Court's prohibition on "commandeering" in *New York* and *Printz* is not a standalone constitutional axiom. It is an extension of the first principle that the Constitution is designed to prevent the dangerous concentration of power in any one government to "reduce the risk of tyranny and abuse." *New York*, 505 U.S. at 181-82, 187-88. *Printz*

specifically emphasized that "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States." *Id.* at 922. That rationale logically extends beyond the specific holdings in *New York* and *Printz* because a prohibition on federal commandeering is necessary, *but not sufficient*, for a meaningful division of power within our system of federalism.

To ensure our system of dual sovereignty can effectively protect individual liberty from a dangerous concentration of power in the federal government, the principle of state sovereignty must impose *both* structural *and* substantive limits on the federal government's claims of implied power to displace state laws. *Lopez*, 514 U.S. at 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."). As recognized in *Bond*, tyranny and abuse is threatened if "any one government" is able to seize "complete jurisdiction over all the concerns of public life." Allowing the federal government to exclusively occupy the entire field of substantive law within a state's jurisdiction, while prohibiting "commandeering," would transform states into nothing more than glorified student governments.

That is not the vision of state sovereignty held by the Framers or Ratifiers of the Constitution – as directly evidenced by the fact that the Constitution textually restricted Congress' "exclusive" legislative authority only to areas ceded to the federal government by consent of the states. U.S. Const. art. I, § 8. As explained by Thomas Jefferson,

> The way to have good and safe governments is not to trust all to one, but to divide it among the many, distributing to everyone exactly the functions he is competent to. Let the national government be entrusted with the defence [*sic*] of the nation and its foreign and federal relations; the state governments with the civil rights, laws, police and administration of what concerns the state generally. . . . What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or of France or of the aristocrats of a Venetian Senate.

Letter from Thomas Jefferson to Joseph C. Cabell (May 1816), in *The Jeffersonian Cyclopedia* 131 (J. Foley 1900).

In short, the Founders intended for the principle of state sovereignty to guarantee decentralization of power over *substantive* fields of law, not just the structures of government. To fulfill its fundamental purpose of preventing the concentration of power and tyranny, such decentralization necessarily includes

the reservation of an exclusive area of substantive legal authority to the states. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (observing "citizens . . . have two political capacities, one state and one federal, each protected from incursion by the other" and the states and federal governments each have their "own set of mutual rights and obligations to the people").

IV. The exclusive fields of law reserved to the states under the principle of state sovereignty include laws, such as Health Care Freedom Laws, which check and balance claims of implied federal power by protecting constitutional liberty.

The Constitution's reservation of exclusive substantive legal authority to the states was not meant to be merely passive. As suggested in *Bond*, the Founders fully anticipated that the people would be able to resist federal usurpation through affirmatively exerting state sovereignty to protect their constitutional liberty through "positive law," such as the Health Care Freedom Act. The Constitution established a dynamic decentralized system of governance that was meant to passively *and* actively balance power against power over time, both horizontally, between the departments of the federal government, and vertically, between the states and the federal government.

Alexander Hamilton – hardly the champion of state sovereignty among the Founders – said it best in *The Federalist* No. 28:

> In a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and those will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either*, *they can make use of the other as the instrument of redress*.

Id. 28 (Alexander Hamilton) (Gideon ed., 1818) (emphasis added). Likewise, in *The Federalist* No. 51, James Madison underscored, "[i]n the compound republic of America . . . [t]he different governments will control *each other*."

In other words, our system of dual sovereignty was not designed to allow the federal government to claim implied power to bypass state sovereignty, occupy the state's entire jurisdiction within the scope of its reserved powers, and deprive the people of their liberty without any active check or balance from the states. As understood by the Founders and the Ratifiers, the principle of state sovereignty recognizes that a state *as a state* has the constitutional authority to exercise its reserved powers substantively and

actively to secure constitutional liberty both for purposes of local governance and, if necessary, to resist federal overreach. This point is not the same as the long-rejected contention that the state has *parens patriae* standing to enforce the rights of its citizenry – *i.e.*, that the state can stand in the shoes of its citizens and enforce *their* rights. Instead, the point is that "the promise of liberty" lies in the "tension between federal and state power." *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991). When states enact positive laws to protect constitutional liberty, such as Health Care Freedom Laws, they are creating the tension *states were meant to create as states* to ensure a constitutional equilibrium. This principle of state sovereignty clearly stands against the constitutionality of the Individual Mandate, especially in Health Care Freedom States.

V. Especially in Health Care Freedom States, the Individual Mandate clearly violates the principle of state sovereignty.

One of the clearest substantive limits on implied federal power arises from the fact that Tenth Amendment's guarantee of state sovereignty was originally meant to work "in tandem" with the substantive guarantees of individual liberty found in the Bill of Rights. Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 Am. Crim. L. Rev. 1261, 1302 (1989). Far from being an ink blot, the whole

point of the Ninth Amendment was to ensure that the scope of delegated federal power was – at the very least – bounded by fundamental liberties guaranteed by state law. Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229, 1232 (1990). James Madison, for example, clearly expected state legislatures and constitutions to furnish the substance of the rights reserved under the Ninth Amendment. *Wilmarth*, 26 Am. Crim. L. Rev. at 1293.

Based on this original understanding of the Constitution, state law guarantees of individual freedom should limit the reach of *implied* federal power so long as the state law (1) is within the scope of the traditionally reserved powers of the states, and (2) arises from the same conception of fundamental rights and ordered liberty that is guaranteed by the Bill of Rights. *Cf. Wilmarth*, 26 Am. Crim. L. Rev. at 1302. Under this test, which workably draws upon categories already defined by precedent, the Individual Mandate clearly violates the principle of state sovereignty in Health Care Freedom States.

First of all, the protection of individual rights, as well as the regulation of health insurance contracts, clearly fall within the traditionally reserved sovereign powers of the states. *See, e.g.*, Robert G. Natelson, *The Enumerated Powers of the States*, 3 Nev. L.J. 469, 483-88 (Spring 2003); *Gonzalez v. Oregon*, 546 U.S. 243, 375 (2006); *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *PruneYard Shopping*

Center v. Robins, 447 U.S. 74, 83 (1980) (holding a state may exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution); *Lambert v. Yellowly*, 272 U.S. 581, 589 (1926); *Linder v. United States*, 268 U.S. 5, 18 (1925); *Paul v. Virginia*, 75 U.S. 168, 182 (1869).

Secondly, Health Care Freedom Laws facilitate the exercise of Fifth and Ninth Amendment rights because the personal right under state law to purchase or not purchase health insurance is among the continuum of liberty interests protected by the Fifth and Ninth Amendments. *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., concurring) (observing that Ninth Amendment protects rights recognized under state law); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964); *id.* at 486-87 (Goldberg, J., concurring) (contending the freedom to prescribe and sell contraceptive devices has been regarded as within the continuum of liberty interests protected by the Fourteenth Amendment's incorporation of the Ninth Amendment); *Acme, Inc. v. Besson*, 10 F. Supp. 1, 6 (D. N.J. 1935) (indicating the "local, intimate, and close relationships of persons and property" are protected by the Ninth Amendment); *Magill v. Brown*, 16 F. Cas. 408, 428 (E.D. Pa. 1833) (observing "personal rights are protected by . . . the 9th amendment").

Taken together, the Individual Mandate not only threatens to displace state sovereignty reserved

under the Tenth Amendment, it threatens the violation of constitutional liberty protected by the Fifth and Ninth Amendments. The "letter and spirit" of the Constitution thus condemns the Individual Mandate to the extent that it is premised on the implied power confirmed by the Necessary and Proper Clause. The principle of state sovereignty therefore protects Health Care Freedom Laws from displacement by the Individual Mandate.

This does not mean, as contended by the losing party in *Hodel v. Virginia Surface Mining & Recl. Assn.*, that all federal laws necessarily violate the principle of state sovereignty whenever they seek to override state laws. 452 U.S. 264, 287-90 (1981). Rather, the principle of state sovereignty protects state laws from claims of *implied* federal power that dangerously concentrate power and prevent our system of dual sovereignty from fulfilling its function of protecting constitutional liberty and decentralized local governance. *Printz*, 521 U.S. at 924; *National League of Cities*, 426 U.S. at 845, 852-54. The bottom line is that it is not "proper" for the federal government to claim implied power to frustrate the very purpose of our system of federalism. Therefore, in view of its threat to Health Care Freedom Laws in fourteen states, the Individual Mandate is unconstitutional.

VI. Alternatively, the Individual Mandate should be ruled unenforceable in Health Care Freedom States because of the constitutional limitations imposed by this Court on the doctrine of implied preemption.

Because PPACA does not expressly preempt state law guarantees of individual freedom of choice in health plans, the Individual Mandate's displacement of Health Care Freedom Laws under the Supremacy Clause hinges upon the doctrine of implied preemption. The principles of implied preemption, however, are not mere rules of construction. They were developed by the Court with an explicit awareness of the need to preserve state sovereignty from federal overreach to protect liberty; and they serve a substantive purpose. They ensure that state sovereignty is protected against federal preemption if at all possible. As emphasized in *Gregory*:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.

Gregory, 501 U.S. at 458-459. As more recently explained in *Chamber of Commerce of the United States v. Whiting*:

> Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.' Our precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'

131 S.Ct. 1968, 1985 (2011). In short, when the principle of state sovereignty is at issue, the doctrine of implied preemption assumes constitutional dimensions.

In light of the federalism factors at issue in this case, it is simply impossible to construe the Individual Mandate as impliedly preempting Health Care Freedom Laws. First of all, it is well-established that preemption of the states' police powers is not presumed even where the federal government comprehensively regulates a field of law. *DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976). To the contrary, where, as here, a federal law conflicts with the traditional police powers of the states, the Court will presume Congress did not intend to preempt state law. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009); *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992). To overcome this presumption, Congressional intent to preempt state law must *at the very least* be "clear." *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715-16 (1985).

Secondly, federal laws that encroach on state laws exerting traditional sovereign powers, even if within the federal government's enumerated powers, must be shown to unequivocally displace contrary state law and policy; otherwise, state law and policy will stand and be carved out from the federal legal scheme. In *Gonzalez v. Oregon*, for example, the Court refused to recognize the federal government's claim of supremacy over a state law that would allow euthanasia, because control over health care decisions fall within a traditional area of state sovereignty. 546 U.S. 243 (2006). The Court held that congressional intent to "effect a radical shift of authority from the States to the Federal Government" must be unequivocal, otherwise the court would not permit preemption. This ruling reflected the earlier holding in *Gregory*, which rejected an effort to preempt a provision of the Missouri Constitution setting mandatory retirement ages for state judges, asserting that core state functions cannot be preempted unless the intrusion is stated in "unmistakably clear" terms. *Id*. at 460.

In the present case, it is far from "clear," much less "unequivocal" or "unmistakably clear" that Congress intended for the Individual Mandate to preempt state laws that guarantee freedom of choice

in health plans.[11] This is because PPACA broadly guarantees that:

> No individual, company, business, nonprofit entity, or health insurance issuer offering group or individual health insurance coverage shall be required to participate in any Federal health insurance program created under this Act (or any amendments made by this Act), or in any Federal health insurance program expanded by this Act (or any such amendments), and there shall be no penalty or fine imposed upon any such issuer for choosing not to participate in such programs.

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[11] In fact, regardless of the expressed beliefs of Congress, enforcing the Individual Mandate in Health Care Freedom States is likely counterproductive to PPACA's asserted goals of health care cost containment. This is because increased participation in health insurance, without including measures such as high deductibles and expanded health savings accounts, causes health care costs to spiral upward because individuals tend to demand more services and to be less cost conscious when a third party pays their bill. Byron Schlomach, *Removing the Middleman: What States Can Do to Make Health Care More Responsive to Patients*, Goldwater Institute Policy Report no. 230 (Jan. 13, 2009), http://goldwaterinstitute.org/article/removing-middleman-what-states-can-do-make-health-care-more-responsive-patients-0. Consequently, mandating the purchase of health insurance meeting one-size-fits-all coverage criteria devised in Washington, D.C. (regardless of whether it is useful or appropriate for the needs and desires of the people of any particular state) is anticipated to generate excessive demand and competition for scarce medical services. This will increase health care costs and diminish access to health care from what it would otherwise be the case in many, if not most, states.

42 U.S.C. § 18115. PPACA can thus be construed as intended to accommodate, rather than displace, state laws that guarantee freedom of choice in health care plans as against the "comprehensive" federal health insurance program of which the Individual Mandate is a part. Indeed, the foregoing provision is akin to the provision of IRCA in *Whiting*, 131 S.Ct. at 1985, that expressly reserved to "the States the authority to impose sanctions on employers hiring unauthorized workers," thus precluding any claim by the federal government of implied preemption.

Taken together, the Individual Mandate *does not* clearly and unequivocally displace Health Care Freedom Laws. Following *Whiting*, *Oregon*, and *Gregory*, the federalism factors that give rise to the serious constitutional concerns discussed in the preceding sections and in the lower courts' decisions preclude any claim that the Individual Mandate impliedly preempts Health Care Freedom Laws. Accordingly, it would be unlawful, if not unconstitutional, to enforce the Individual Mandate within Health Care Freedom States.

CONCLUSION

Above and beyond the "great latitude" the states enjoy in the exercise of their police powers over public health and safety, *Oregon*, 546 U.S. at 270, our federalist system guarantees the states (and the people) decentralized autonomy to experiment with

heightened protections of individual liberty. *Gregory*, 501 U.S. at 458; *see generally* William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). From this perspective, it is obviously never "proper" for the federal government to frustrate the purpose of federalism by displacing state sovereignty when it serves to protect individual liberty. The Health Care Freedom Laws of Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, North Dakota, New Hampshire, Ohio, Oklahoma, Tennessee, Utah, and Virginia unequivocally reveal that the Individual Mandate dangerously concentrates power in the federal government beyond anything contemplated by the drafters of the Constitution or the state legislatures that ratified it.

Respectfully submitted on this 13th day of February, 2012, by:

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