NO. 11-398

In the Supreme Court of the United States

Department of Health and Human Services, et al.,
Petitioners,

v.

State of Florida, et al.,
Respondents.

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

BRIEF ON BEHALF OF THE 1851 CENTER FOR CONSTITUTIONAL LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

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AMICUS CURIAE BRIEF OF 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, 1851 Center for Constitutional Law respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondents.[1]

STATEMENT OF AMICUS INTERESTS

Amicus 1851 Center for Constitutional Law is Ohio's premier advocate for advancement of the human condition through protection of constitutional liberties. The 1851 Center has developed particular expertise in Ohio constitutional law and the proper role of state constitutional liberties in our federalist system of government. Through this expertise, the 1851 Center has published research, achieved favorable results for Ohioans in numerous state constitutional law cases, and utilized core features of Ohio's sovereignty, the state's constitutionally-enshrined initiative process, to protect Ohioans liberties through Ohio's Bill of Rights.

Of particular importance in this matter, the 1851 Center drafted the 21st Section of Ohio's Bill of Rights ("preservation of freedom to choose health care and health care coverage"), and represented citizen-initiated efforts to enact that constitutional liberty

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[1] Counsel for 1851 Center affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than 1851 Center made a monetary contribution to the preparation or submission of this brief. Parties have consented to the filing of amicus briefs.

through popular vote. This Amendment which carried 66 percent of the popular vote statewide, provides that no "law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system." This expression of constitutional liberty and sovereignty stands in tension with the "minimum essential coverage requirement." This brief is offered on behalf of the 2,268,470 Ohioans who voted to preserve that liberty and sovereignty.

SUMMARY OF ARGUMENT

The imposition of the Minimum Essential Coverage requirement ("the mandate") on the people of each state is not "proper" for carrying into execution Congressional Commerce Power. First, it impermissibly transgresses state sovereignty, where states have almost universally rejected individual health insurance mandates, many unmistakably so, in favor of protecting the freedom to choose one's own path in financing health care. Second, the mandate is not proper because it violates the "spirit and letter" of the Constitution by thwarting the purpose of federalism - - limitation of federal power and state protection of liberty - - and ignoring the intended influence of the Ninth and Tenth Amendments.

In *Maryland v. Wirtz,* the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce.[2] And these limits are predicated on the

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[2] *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

sovereignty of the states to protect the liberties of their citizens, particularly in areas of traditionally local concern such as health care. As James Madison put it: [t]he powers delegated by the proposed Constitution to the federal government are few and defined . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people. . .'"[3]

ARGUMENT

I. The mandate is not "proper" for carrying into execution Congressional Commerce Power because it impermissibly transgresses state sovereignty, where states have almost universally rejected individual health insurance mandates in favor of freedom of choice.

A. To be upheld, the mandate must be "proper."

The Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce.[4] The

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[3] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465, citing The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).

[4] *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (2005) (Scalia, concurring), citing *United States v. Morrison*, 529 U.S. 598, 608-609, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); *United States v.*

abstention from buying health insurance, if an "activity" at all, is neither interstate nor commerce. Consequently, this case turns on application of this Court's "substantially affects" test. "[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least 1838, Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."[5]

B. A federal enactment is not "proper" where it violates the constitutional principles of state sovereignty.

The outward boundary of authority asserted under the Necessary and Proper Clause is limited by inquiry into whether that authority displaces state laws protecting liberty. Cases such as *Printz v. United States*, and *New York v. United States*, affirm that a law is not " ' *proper* for carrying into Execution the

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Lopez, 514 U.S. 549, 558-559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

[5] *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004 (1838)*;* See also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-585, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (O'CONNOR, J., dissenting) (explaining that it is through the Necessary and Proper Clause that "an intrastate activity 'affecting' interstate commerce can be reached through the commerce power").

Commerce Clause' " "[w]hen [it] violates [a constitutional] principle of state sovereignty."[6] Accordingly, something more than mere assertion is required when Congress purports to have power over even local *activity*, much less inactivity, whose connection to an interstate market is not self-evident -- otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation.[7]

This state sovereignty test demands that this Court enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment, thereby maintaining the distribution of power fundamental to our federalist system of government.[8] For this reason, "fundamental structural concerns about dual sovereignty animate *** Commerce Clause cases,"[9] and "state autonomy is a relevant factor in assessing the means by which

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[6] *Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[7] *Printz*, *supra*, at 923 (the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action").

[8] *United States v. Lopez*, 514 U.S. 549, 557, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

[9] *Lopez*, *supra*, *at 583, 115 S.Ct. 1624 (KENNEDY, J., concurring); see also Morrison, supra, at 617-619, 120 S.Ct. 1740.*

Congress exercises its powers" under the Commerce Clause.[10]

In *Printz,* this Court affirmed that Congress cannot properly claim an *incidental* power to reach wholly *intrastate* activity under the Necessary and Proper Clause when doing so would interfere with the exercise of state sovereign powers.[11] *Printz* held that, although the Commerce Clause authorized Congress to *enact* legislation concerning handgun registration, the Brady Act's *direction of the actions of state executive officials* was not constitutionally valid as a law "necessary and proper" to the execution of Congress's Commerce Clause power to regulate handgun sales, because when "a 'La[w] ... for carrying into Execution' the Commerce Clause violates the principle of state sovereignty *** it is not a 'La[w] ... *proper* for carrying into Execution the Commerce Clause.'"[12]

Later, in *Lopez,* this Court affirmed the principle that exercise of commerce power is judged by whether it may "displace state policy choices."[13] Thus, several years later in *Morrison,* this Court has "emphasized" that "Congress' regulatory authority" under the Commerce Clause "is not without effective bounds,", and "'may not be extended … [to] effectually obliterate

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[10] *Garcia*, 469 U.S., at 586, 105 S.Ct. 1005 (O'CONNOR, J., dissenting).

[11] *Printz*, *supra*, at 937.

[12] *Printz*, *supra*, at pp. 923–924, 117 S.Ct. 2365.

[13] *Lopez*, 514 U.S. at 561 n.3 (internal quotations and citation omitted).

the distinction between what is national and what is local and create a completely centralized government,'"[14] In both *Lopez* and *Morrison*, the Court took account of principles of federalism and State sovereignty in holding that the federal laws at issue exceeded Congress' Commerce Power.[15] This case likewise "requires [the Court] … to appreciate the significance of federalism in the whole structure of the Constitution."[16]

More recently, in *United States v. Comstock*, it was observed that "[i]t is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. *But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place."*[17] Thus, the test for this

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[14] *United States v. Morrison,* 529 U.S. 598, 608 (2000), citing *Lopez,* 514 U.S. at 556-57 (1995).

[15] *See Lopez*, 514 U.S. at 564 (rejecting Commerce Clause theories that would extend federal power to areas "where States historically have been sovereign"); *id.* at 567 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern … the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."); *Morrison*, 529 U.S. at 618 (VAWA concerned "the police power, which the Founders denied the National Government and reposed in the States").

[16] *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

[17] *United States v. Comstock*, 130 S.Ct. 1949, Justice KENNEDY, concurring in the judgment, citing *Lopez*, 514 U.S., at 580–581, 115 S.Ct. 1624 (KENNEDY, J., concurring).

Court to apply is *"whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause*; if so, that is a factor suggesting that *the power is not one properly within the reach of federal power*."[18]

This test reaffirms the principles of *Gregory v. Ashcroft,* where this Court affirmed that Congressional interference with the decision of the people of Missouri, defining their constitutional officers, even within the context federal age discrimination prohibitions, "would upset the usual constitutional balance of federal and state powers."[19] The *Gregory* Court reaffirmed "the unique nature of state decisions that "go to the heart of representative government."[20]

If this power of the State applies to the sovereignty to elect and otherwise control "officers who participate directly in the formulation, execution, or review of broad public policy" because they "perform functions that go to the heart of representative government," then it must also apply to the public policies themselves, whether promulgated by these elected leaders, or even moreso, by the people themselves by amending their own state's constitution:

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[18] *Id.*, at 1968.

[19] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465.

[20] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465, citing *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973), observing the understanding that "[s]uch power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.'"

> Not only * * * can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[21]

But upholding the mandate would yield eminently *destructible* states: states with little or nothing to say regarding health insurance and health care contracting within their states, or whether their citizens may be forced to buy private health care products, jog on a treadmill, or visit a physician.

Thus, even when applying the explicit guarantees of *the Equal Protection Clause*, which clearly provides a check on state authority, this Court has throttled its reading of federal power in favor of state autonomy: "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[22] If this rule of construction respects state sovereignty even within the context of the Fourteenth Amendment which (1) secures liberty; and (2) was "designed as an intrusion on state sovereignty," then it must respect state

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[21] *Id.*

[22] *Id.*, at 648.

sovereignty even more where the exercise of *implied* powers under the Necessary and Proper Clause are invoked.[23] Where implied powers are wielded to eviscerate state sovereignty and our dual system of government, their exercise is anything but "proper."

C. The mandate destroys state sovereignty by displacing a right that nearly every state protects.

Federalism analysis may not be the same in every case, "for it depends on the regulatory scheme at issue and the federalism concerns implicated."[24] These federalism considerations are most poignant where the states have clearly spoken.[25] Thus, current practices of the states are significant.[26]

When the extent of federal protection of rights as against state power becomes unclear, this Court often turns to patterns and practices of the states for guidance. In Eighth Amendment cases, for instance, the Court has been guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to

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[23] *Id.*

[24] See generally *Lopez,* 514 U.S., at 567, 115 S.Ct. 1624; *id.,* at 579, 115 S.Ct. 1624 (KENNEDY, J., concurring).

[25] *Lawrence v. Texas,* 123 S. Ct. 2472, 2480 (2003).

[26] *Lawrence*, 123 S. Ct. at 2480. *See* App. B, *infra* (describing State laws).

executions."[27] Elsewhere, the *Lawrence* Court noted that, when the Court had decided *Bowers v. Hardwick*, 478 U.S. 186 (1986), "[twenty-four] States and the District of Columbia had sodomy laws."[28] By the time a similar challenge to sodomy laws arose in *Lawrence* in 2004, only thirteen states had maintained their sodomy laws, and there was a noted "pattern of nonenforcement."[29] The Court observed that "laws once thought 'necessary and proper' in fact serve only to oppress."[30]

Principles of state sovereignty and federalism demand that when the situation above is inverted, i.e. when state protection of rights is weighed against federal power possibly implied under the Necessary and Proper Clause, the patterns and practices of the states similarly cannot be ignored. Just as the *Lopez* Court considered the displacement of state policy choices and the *Lawrence* Court considered the number of states that retained laws that prohibited sodomy, so too this Court cannot ignore the number of state that have expressly protected or deliberated abstained from violating the freedom to choose whether to purchase government-defined private health insurance.

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[27] See *Roper v. Simmons*, 43 U.S. 551, 125 S.Ct. 1183.

[28] *Lawrence*, *supra*, at 572, citing 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

[29] *Id.* at 573.

[30] *Id.* at 579.

Here, exercising powers cutting to the core of their sovereignty - - protecting fundamental rights, the state have, one way or another, universally come to their own conclusions about the difficult and sensitive question of whether their citizens should be compelled to buy private health care insurance. Most prominently, in 2011, 66 percent of voters in the quintessential bellwether state of Ohio[31] added a 21st Section to Ohio's Bill of Rights,[32] explicitly affirming that no "law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system."[33] The measure, clearly in tension with a federal mandate to purchase government-defined health insurance, was approved overwhelmingly in each of Ohio's 88 counties. In approving this state constitutional amendment, Ohioans reviewed and approved of the following language, which appeared on their ballots: "The freedom *to not be forced* to purchase government-defined private health insurance is a fundamental right, implicit in the concept of ordered liberty and deeply rooted in our history and tradition."[34] Moreover, in approving this Amendment, Ohio and its citizens exercised a power central to its sovereignty:

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[31] See http://www.governing.com/blogs/politics/Move-Over-Missouri-Iowa.html, last checked on February 1, 2012.

[32] See http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue3.aspx.

[33] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-fulltext.pdf.

[34] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-argument-for.pdf.

the protection of fundamental rights through a citizen-initiated constitutional amendment - - a procedure preserved in its state constitution since 1851.

In 2010, the people of Arizona and Oklahoma, also through appeal to the sovereign powers enshrined in the states' respective constitutions, placed similar protections of their citizens' rights in their states' constitutions. That same year, in the bellwether state of Missouri,[35] over 70 percent of citizens approved a similar safeguard, also through statewide vote. Since just March of 2010, nine other states - - Virginia, Georgia, Idaho, Tennessee, Utah, New Hampshire, North Dakota, Kansas, and Louisiana - - have enacted similar statutory protections of the liberty of their citizens to not be compelled to purchase private government-defined health care insurance.

Meanwhile, people of 36 of the remaining 37 states have preserved this liberty through resisting a mandate, rather than through affirmative legislation. The failure of these states to enact a mandate cannot be explained away as mere oversight or happenstance: these states have abstained from instituted a mandate since their admission to the union, despite (1) widespread belief that states may enact nearly any such regulation under the auspices of their police powers;[36] (2) 105 years of Supreme Court precedent

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[35] See http://www.governing.com/blogs/politics/Move-Over-Missouri-Iowa.html.

[36] See Randy Barnett, Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional, December 9, 2009 (observing that the states maintain "an effectively unlimited police power").

affirming that states may compel vaccination, i.e. health care, and thus *a fortiori* the purchase of health care insurance;[37] and (3) over 70 years of robust debate since California originally proposed that his state compel all personal earning less than $3,000 per year (then 90 percent of population) to purchase private health insurance.[38]

Moreover, the concept of a health insurance mandate has been *vigorously* debated nationwide for at least 22 years: "the concept of the individual health insurance mandate originated [sic] in 1989 at the conservative Heritage Foundation * * *."[39] Despite this, in this nation's history, no state other than Massachusetts has enacted an individual health insurance mandate. And since Massachusetts enacted a model in 2006, setting forth a blue print and perhaps heightening awareness of the capacity to impose a

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[37] See *Jacobson v. Commonwealth of Massachusetts* (1905), 197 U.S. 11, 25 S.Ct. 358 (affirming the power of Massachusetts to compel its citizen to receive vaccines against their will, as against any federal constitutional right).

[38] See http://www.ncbi.nlm.nih.gov/pmc/articles/PMC 1780842/?page=1.

[39] See http://healthcarereform.procon.org/view.resource.php?resourceID=004182, last checked on November 28, 2011 (also noting that On October 2, 1989, the Heritage Foundation, extensively discussed the notion that a state government may wish to compel the purchase of health insurance, proclaiming "neither the federal government *nor any state* requires households to protect themselves from the potentially catastrophic costs of a serious accident or illness. Under the Heritage plan, there would be such a requirement," citing *Assuring Affordable Health Care for All Americans*, by Stuart M. Butler, published October 2, 1989.

mandate, no state has followed suit. This abstention in the face of over 100 years of Supreme Court permission, 70 years of vigorous public dialogue, and the Massachusetts "blueprint" demonstrates that 49 states *deliberately* refused to institute a private health insurance mandate (legislation introduced in many of these states has been consistently rejected).

Even further evidence that this refusal is deliberate is illustrated by the fact that several states, such as Vermont (the "Health Care Affordability Act") and Maine (the "Dirigo Health Reform Act") have enacted the equivalent of universal health care since 2006, without imposing an individual health insurance mandate. Meanwhile even in California, the state that originally proposed an individual mandate in 1939, voters expressly rejected this deprivation of their liberty in 1992, with 69 percent of Californians voting "no" on Proposition 166, a ballot measure that would have imposed an individual health insurance mandate.[40]

Thus, the states have overwhelmingly spoken on the propriety of forced purchase of government-defined health insurance. These exercises of sovereignty would be displaced if the mandate were imposed, and if federalism is to play its proper role in this constitutional analysis, the displacement of these policy choices cannot be ignored as this Court considers whether imposition of the mandate is "proper."

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[40] See http://ballotpedia.org/wiki/index.php/California_Proposition_166,_Mandatory_Health_Insurance_(1992), last checked February 1, 2012.

Furthermore, upholding the mandate would disable the key auxiliary benefit of federalism is disabled. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[41] The mandate displaces state policy choices and precludes states from serving as 50 laboratories for social and economic experiments without risk to the rest of the county, instead adopting the experiment of only *one state* on a highly-contentious issue where vastly different views prevail amongst the citizens of the states. And this even though many consider the Massachusetts experiment to be a failure: Massachusetts health care premiums continue to be the highest in the country, and government health care spending continues to sky-rocket. Yet the mandate forces Oklahomans, Ohioans, and Arizonans, very much against their will and better judgment, all under Massachusetts' health care policy. Because "state autonomy is a relevant factor in assessing the means by which Congress exercises its powers" under the Commerce Clause,[42] the mandate may not stand.

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[41] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371 (1932) (Brandeis, J., dissenting).

[42] *Garcia*, 469 U.S., at 586, 105 S.Ct. 1005 (O'CONNOR, J., dissenting).

D. The mandate displaces liberties protected by the states in an area where states have historically been sovereign.

In considering the breadth of permissible Commerce power by way of the Necessary and Proper Clause, courts must "inquire whether the exercise of national power seeks to intrude upon an area of state concern,"[43] and be mindful of "traditional aspects of state sovereignty.'"[44] Accordingly, when adjudicating the outward boundaries of Congressional commerce power, *Lopez* found relevance in the finding that "it is well established that education is a traditional concern of the States."[45]

i. Health care, health insurance, and insurance contracts are traditional concerns of the states.

Likewise, regulation, or resistance to overregulation, of health care insurance, insurance contracts, and mandated insurance are all within the protected sphere of state sovereignty. States have "primary authority" in defining and enforcing laws

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[43] *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

[44] See *National League of Cities v. Usery*, 426 U.S. 833, 841, 849, 96 S.Ct. 2465, 2469, 2473(1976); see also *New York v. United States*, *supra*, at 156-157.

[45] *Lopez*, at 581.

that protect the health, safety, and medical treatment of their citizens.[46]

In *Jacobson v. Massachusetts*, the Supreme Court rejected a constitutional challenge to a Massachusetts law requiring compulsory vaccinations, confirming that States may enact wholly intrastate measures to protect public health.[47] In *Jacobson*, the Supreme Court specifically recognized "the authority of a state to enact quarantine laws and '*health laws of every description*;'" alongside "all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states."[48]

It would be a perverse outcome, given that the purpose of federalism is to secure liberty (see *infra*), if this authority were to now be limited to only those laws which impose state power upon its citizens, rather than also recognizing those which protect the

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[46] *Washington v. Glucksberg*, 521 U.S. 702 (1977) (the State has an " 'unqualified interest in the preservation of human life' "); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 281 (1990) ("choice between life and death is a deeply personal decision [and] the State may legitimately seek to safeguard the personal element of this choice"); *Roe v. Wade*, 410 U.S. 113, 156 (1973) ("responsibility for the health of the community" lies with the States); *Whalen*, 429 U.S. at 602-603 (State has inherent "interests in protecting health and potential life"); *Linder v. United States*, 268 U.S. 5, 18 (1925) ("direct control of medical practice in the states is beyond the power of the federal government").

[47] *Jacobson v. Massachusetts*, 197 U.S. 11(1905).

[48] *Id.*

public by ensuring the health care freedom of its citizens. And if "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety," then some deference must be given to a state's determination that the public health is best protected by ensuring the health care freedom and choice of citizens of the state.[49] Indeed, when the purpose of government is to "safeguard the public health," this Court holds that "the mode or manner in which those results are to be accomplished is within the discretion of the state."[50]

Thus, "because fundamental structural concerns about dual sovereignty animate Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas * * * where 'states lay claim by right of history and expertise.'"[51] Consequently, any doubts regarding the extent of congressional commerce power within the domain of health care regulation must be resolved in favor of preserving state sovereignty and limiting federal intrusion.

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[49] See *Lawson* v. *Stecle*, 152 U. S. 133, 38 L.Ed. 385, 14 Sup. Ct. Rep. 499.

[50] *Id.*

[51] *Lopez*, *supra*, at 583, 115 S.Ct. 1624 (KENNEDY, J., concurring); see also *Morrison*, *supra*, at 617-619, 120 S.Ct. 1740.

ii. Protection of ordered liberty is a traditional concern of the states.

Further, were this court to imply federal power so as to override state protections of negative liberties, it would interfere with core state sovereignty. For instance, the independence of the state constitutions would be undermined, as that independence is currently understood within the states. Take Ohio, for instance, where the state supreme court affirms:

> [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are *unrestricted* in according greater civil liberties and protections to individuals and groups.[52]

The Ohio Supreme Court's 1941 ruling in *Direct Plumbing Supply v. City of Dayton* evidences the aforementioned tradition. In that case, the Court lauded the protections of the Ohio Constitution as central to the state's sovereignty in our federalist structure: "*** Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have

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[52] *Arnold v. Cleveland* (1993), 67 Ohio St.3d 335.

undiminished vitality. Decision here may be and is bottomed on those guaranties.[53]

However, if this Court upholds imposition of the federal mandate, displacing state policy, the result will be a state bill of rights that has vastly *diminished* rather than *un*diminished vitality - - one that leaves as an open question the seemingly axiomatic principle that "Ohio is a sovereign state." And the same is true of at least 12 other states.

In *United States v. Comstock*, this Court reiterated the limits of the Necessary and Proper Clause, referencing factors including: "the long history of federal involvement" and "the statute's accommodation of state interests."[54] The utter failure to accommodate state interest in an area of traditional state authority[55] requires this Court must strike the mandate and avoid displacing state guarantees of health care freedom.

II. "The spirit and letter of the constitution" is undermined where implied federal powers eviscerate state law that secures liberty.

The use of implied federal power to contravene state protections of fundamental liberties within the

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[53] *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70.

[54] *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010).

[55] These factors distinguish this case from *Raich*, where the statute under review was not an enumeration of fundamental liberty under a state constitution, and where illicit drug regulation originated at the federal level.

domain of health care is inconsistent with the purpose of the federal Constitution: the preservation of ordered liberty. As Chief Justice Marshall wrote, congressional enactments premised on the Necessary and Proper Clause, to be "proper," must be "consistent with the letter and spirit of the constitution."[56] Thus, Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles: when regulating through reliance on the attenuated "substantial effects" test, "the end chosen by Congress must not contravene the spirit of the Constitution."[57] And as Justice Scalia recognizes, "***that authority must be used in a manner consistent with the notion of enumerated powers-a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command."[58]

Thus, in assessing the propriety of implied federal power, this Court must take account of "the significance of federalism in the whole structure of the Constitution"[59] and our "dual system of government," which "*secures to citizens the liberties that derive from*

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[56] *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).

[57] *Garcia*, *supra*, 469 U.S., at 585, 105 S.Ct. 1005 (O'CONNOR, J., dissenting) ("It is not enough that the 'end be legitimate'; the means to that *end* chosen by Congress must not contravene the spirit of the Constitution").

[58] *Gonzales v. Raich*, at 2218-2219 (opinion concurring in judgment).

[59] *Lopez*, *supra*.

the diffusion of sovereign power."[60] This system of dual sovereignty denies "any one government complete jurisdiction over all the concerns of public life."[61] Instead, 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."[62] Because the mandate displaces 49 state policies that clearly *protect* ordered liberty, many expressly so, the mandate would frustrate the very purpose for which federalism was devised.

A. The Constitution and its Federalist design exist to secure liberty.

"[T]he Constitution divides authority between federal and state governments *for the protection of individuals*. State sovereignty is not just an end in itself: '[r]ather, *federalism secures to citizens the liberties that derive from the diffusion of sovereign power.*'"[63] Put another way, "[t]he 'constitutionally mandated balance of power' between the States and

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[60] *New York v. United States*, *supra*; *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

[61] *Bond v. United States*, 131 S.Ct. 2355 (2011).

[62] *Id*.

[63] *New York v. United States*, *supra*.

the Federal Government was adopted by the Framers *to ensure the protection of 'our fundamental liberties*.'"[64]

Accordingly, an interpretation of federal power that implies that which is not expressly granted, so as to swallow express state protections of ordered liberty, is antithetical to the reason this balance of power. This reason has been further expressed as follows "[j]ust 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."[65] With respect to these fronts, Alexander Hamilton explained to the people of New York that the new federalist system would suppress completely "the attempts of the government to establish a tyranny": "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 *these 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."*[66]

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[64] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147 (1985), quoting *Garcia*, *supra*.

[65] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465.

[66] The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961). (Emphasis added).

James Madison reverberated this principle, observing "In the compound republic of America, *** a *double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself*."[67] If this "double security to the rights of the people" is to be anything other than pyrrhic, "there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. *In the tension between federal and state power lies the promise of liberty*."[68]

This past term, in *Bond v. United States*, the Court unanimously reiterated this principle, explaining, "[f]ederalism 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*."[69] If federalism exists to secure the freedom of the individual, than it must, at minimum as a rule of construction, favor state protections of liberty, and particularly those enshrined in state constitutions, when determining the extent of implied federal power that would eviscerate those rights.

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[67] *Id.*, No. 51, p. 323.

[68] *Gregory v. Ashcroft*, *supra*.

[69] *Bond*, *supra*.

B. Freedom from compulsion to purchase "minimum essential coverage" is the type of liberty federalism is designed to protect.

Even amongst the normative overtones of our modern day, the word "liberty," retains readily ascertainable meaning when invoked in our constitutional calculations: state and federal courts have recognized "[t]he word 'liberty,' * * * does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, * * *."[70] This "freedom from" view of liberty is consistent with federal courts' recognition that the federal Constitution is "a charter of negative rather than positive liberties."[71] And a "negative liberty" is freedom from state interference or intrusion -- in effect, "being let alone by the state."[72] Thus, the brand of federalism embraced by the spirit and letter of the federal constitution is oriented toward *advancing* the cause of "being let alone by the state;" and an expansive interpretation of federal power that shreds state law advancing this cause is antithetical to that spirit and letter.

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[70] *Palmer v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313, citing *People v. Marx*, 99 N. Y. 377, 2 N. E. 29. (Emphasis added.)

[71] *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir.1983), citing *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982).

[72] *Jackson*, 715 F.2d at 1204.

And there can be no doubt that express state protections of the right to be free from forced purchase of private government-qualified health insurance is in the spirit of this view of the constitution as a "charter of negative liberties." First, referring to the protected "substantive sphere of liberty," Justice Stephens wrote: "[w]hatever the outer limits of the concept may be, it definitely includes protection for matters 'central to personal dignity and autonomy.' It includes the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny." It is difficult to imagine a decision more important to one's destiny then that of how one will allocate a limited health care budget to provide for his or her health care needs, and perhaps that of his or her family. Indeed, forced health care expenditures in one arena necessarily limit the financial capacity, and thus disallow the dignity and autonomy, to obtain health care in another arena (even if that alternative arena may be more appropriate in protecting one's life, health, or welfare).

Second, if the less specific Due Process Clause protects "the traditional right of an individual to refuse unwanted lifesaving medical treatment,"[73] then an explicit state right protecting a citizen from having to pre-purchase that same medical treatment, at the risk of not being able to afford a preferential type or method of treatment, or even outcome, must also be protected. This protection of choice as against uniformity has already been upheld in the educational context: *Pierce v. Society of Sisters* struck a statute stating "those who fail or neglect or refuse to send

[73] *Cruzan*, *supra*, at 278-279.

their children to a public school. . . shall be guilty of a misdemeanor." Similarly here, the mandate imposes a one-size fits all solution in a sphere of life, health care, where choice is no less important. Indeed, The Supreme Court has acknowledged the sanctity of the physician-patient relationship in numerous substantive due process cases, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Thus, Section 21 of Ohio's Bill of Rights, just like the other 12 explicit state protections, protects precisely the type of negative liberties federalism was designed to protect: it provides "No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system."[74] Clearly, protection from the compulsion to participate in a health care system, by virtue of a government mandate to purchase private health care insurance is a "freedom from state interference," with the effect of advancing the cause of "being let alone by the state." To reinforce this that this they type of liberty federalism exists to protect, Ohioans, in approving this state constitutional amendment, reviewed and affirmed the following: "The freedom *to not be forced* to purchase government-defined private health insurance is a fundamental right, implicit in the concept of ordered liberty and deeply rooted in our history and tradition."[75] Other state protections of this

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[74] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-fulltext.pdf.

[75] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-argument-for.pdf

liberty share the key features of Ohio's constitutional safeguards.

Affirmation of the federal mandate's constitutionality would shred these safeguards, even though the very purpose of our federalist design would be obliterated were it to result in the thwarting, rather than recognition, of state attempts to preserve liberty. Indeed, this Court recognizes that federalism means that the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens.[76] The understanding recognizes that while "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution, there is no prohibition against granting individuals or groups *greater or broader protections*."[77] Yet if this Court to uphold the federal mandate, it would impose the very thing that federalism exists to guard against: "a prohibition against granting individuals or groups greater or broader protections" under state constitutions. This, although the United States Supreme Court has repeatedly reminded states that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.[78]

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[76] *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741.

[77] Brennan, *State Constitutions and the Protection of Individual Rights* (1977).

[78] *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, *e.g.*, *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may

And states have responded by doing so, observing that "state courts are *unrestricted* in according greater civil liberties and protections to individuals and groups.[79] Consequently, this Court must avoid a construction of federal power that displaces state guarantees, constitutional and otherwise, of negative liberties.

C. The "Spirit and Letter" of the Constitution embraces a recognition that the Ninth Amendment favors state protection of ordered liberty over federal exercise of implied powers.

This Court recognizes that liberties not enumerated in the federal Constitution can be as fundamental as those enumerated.[80] Use of the Necessary and Proper Clause to transgress these fundamental unenumerated rights is inconsistent with the "spirit and letter" of the constitution, and not "proper." If the Ninth Amendment is to have *any* meaning, it protects "unenumerated" rights that are *actually enumerated* in state constitutions, such as Ohio's Health Care Freedom Amendment, alongside those of other states,

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surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.").

[79] *Arnold*, *supra*.

[80] See, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right of parents to educate their children in the German language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send their children to private Catholic school); *United States v. Troxel*, 530 U.S. 57 (2000) (right of parents to make decisions concerning care).

and prevents a construction of federal power that eviscerates these rights.

First, this court acknowledges the historic role of states and their constitutions as guardians of fundamental rights. In *Morisson,* this Court cited Rufus King's explanation during the ratification debates of the commonly-held view that "the fundamental rights of individuals are secured by express provisions in the state constitutions."[81] Indeed, constitutionally-protected liberty interests "may arise from two sources-the Due Process Clause itself and the laws of the States.'"[82] Meanwhile, "cases demonstrate that a State *creates* a protected liberty interest by placing substantive limitations on official discretion."[83] Lastly, this Court has cited the Ninth Amendment in support of the proposition that there is a "substantive sphere of liberty," entitled to protection, that extends beyond "the Bill of Rights [or] the specific practices of States at the time of the adoption of the Fourteenth Amendment."

Secondly, historical evidence supports a construction of the Ninth Amendment as a bulwark for protecting liberties enumerated under state law from an expansive interpretation of the Necessary and Proper Clause. Madison explained that, while the Tenth Amendment "exclude[s] every source of power

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[81] *Morrison*, citing 1 Farrand 493.

[82] *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989).

[83] *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747 (1983).

not within the Constitution itself," the Ninth Amendment "guard[s] against a latitude of interpretation" of those enumerated powers.[84] Thus, whereas the Tenth Amendment limits Congress to its delegated powers, the Ninth Amendment prohibits an unduly broad interpretation of these powers. To this end, Madison explained the Ninth Amendment in terms that connect it directly with Federalist objections to the Bill of Rights:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, *that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against.* I have attempted it, as gentlemen may see by turning to the [Ninth Amendment].[85]

Thus, the Ninth Amendment exists to guard against "rights not singled out" in the federal Bill of Rights, such as health care freedom.

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[84] 2 Annals of Cong. 1951 (1791) (referring to the 11th and 12th articles proposed to the States for ratification).

[85] James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in James Madison, Writings, *infra* note 32, at 437, 439. (Emphasis added.)

Further, state conventions that insisted on adding a Bill of Rights specifically suggested the addition of two separate amendments: one declaring the principle of enumerated federal power with all nondelegated power being reserved to the states, and the second declaring a rule of construction *limiting the interpretation of enumerated federal power*.[86] In fact, the Virginia Assembly was not convinced that federal power would be sufficiently limited, and delayed its ratification of the Bill of Rights due to its concern that the demand for a rule limiting the interpretation of enumerated federal power had been ignored.[87] While the Bill remained pending in Virginia, James Madison delivered a speech on the floor of the House of Representatives in which he explained the origin and meaning of the Ninth and Tenth Amendments.

According to Madison, these amendments were intended to limit the federal government's ability to interfere with rights protected by the states. The Ninth Amendment in particular, Madison explained, prohibited any *"latitude of interpretation" unduly extending the powers of the federal government into matters retained by the people of the several states.*[88] In response, Virginia abandoned its objections to the Ninth Amendment and ratified what we know as the

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[86] Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEXAS L. REV. 597, 609 (2005).

[87] Lash, *The Lost Original Meaning*, *supra*, at 371-375.

[88] *Id.* at 384-93, citing James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* WRITINGS, *supra* note 11, at 489.

Bill of Rights.[89] Thus the Ninth Amendment is a tool for limiting federal intrusion into matters believed best left under local control. Otherwise, enumerated federal power could be so broadly construed as to allow the federal government to regulate all matters not specifically placed out of bounds by the Bill of Rights, including rights protected under state law. The Ninth Amendment addressed this concern by ensuring that neither the language used in delegating powers nor the express rights enumerated in the Bill of Rights would be construed as the *only* limits on federal power. Instead, the intended effect of the Ninth Amendment is to prevent any interpretation of enumerated federal power that would allow federal authority to extend into legitimate rights protected by the states.

Accordingly, in 1803 St. George Tucker, author of the most authoritative treatise just subsequent to the Constitution's enactment, wrote that state governments "retain every power, jurisdiction and right not delegated to the United States, by the constitution, nor prohibited by it to the states."[90] According to Tucker, the principles of the Ninth and Tenth Amendments required that "the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of

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[89] *Id.* at 379-84.

[90] St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA 141 (St. George Tucker ed., Augustus M. Kelley 1969) (1803).

the people, either collectively, or individually, may be drawn in question."[91]

Consequently, Justice Story's opinion in *Houston v. Moore* describes the Ninth Amendment as limiting the interpreted scope of federal power in order to preserve state autonomy.[92] This echoes James Madison's description of the Ninth as "guarding against a latitude of interpretation of federal power to the injury of the people's retained rights."[93]

Thus, "determining the scope of exclusive federal power must be guided by the letter and spirit of the Ninth Amendment."[94] And the Ninth Amendment "like the rest of the Bill of Rights, was in essence a device to ensure that the national government would be disabled from intruding upon the fundamental rights of its citizenry * * * It accomplishes this by endeavoring to preserve * * * rights located in state law (created or preserved by the people in the act of

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[91] *Id*., at 154. (Emphasis added.)

[92] *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 49 (1820) (Story, J., dissenting).

[93] James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* WRITINGS, *supra* note 11, at 489.

[94] Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEXAS L. REV. 597, 609 (2005), citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 712 (Carolina Academic Press 1987) (1833).

state political union."[95] Put another way, "the Ninth Amendment prevents Congress from using its delegated powers to contravene an unenumerated federal right contained within a state constitution."[96]

In fact, the Ninth Amendment, alongside the remainder of the Bill of Rights, came about in response to the concern, raised by George Mason, that "the supremacy clause would [otherwise] render all federal laws paramount to State Bills of Rights."[97] Thus, "[t]he Ninth Amendment was originally intended to allow the people of each state to define unenumerated rights under their own constitution and laws, free from federal interference."[98] To this end, "[t]he Ninth Amendment *incorporates into the federal constitution state constitutional rights*, and secures them against federal invasion in the same way that the Constitution protects other federal constitutional rights."[99] Accordingly, even scholars who favor a highly-constrained application of the Ninth Amendment concede that "the ninth amendment is not a cornucopia of undefined federal rights, but rather . . . is limited to

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[95] Calvin Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229, at 1232.

[96] Massey, *supra*, at 1232.

[97] *Id*.

[98] Wilmarth, *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, 1297-98 (1989).

[99] Massey, *supra*, at 1254.

a specific function, well-understood at the time of its adoption: the maintenance of rights guaranteed by the law of the states."[100]

Scholars acknowledge this "Federalism Model of the Ninth Amendment" as "one that justifies a narrow or strict construction of enumerated federal powers, especially powers implied under the Necessary and Proper Clause."[101] Pursuant to this understanding, "although the Ninth and Tenth Amendments both limited federal power, they did so in different ways. The Tenth insured that the federal government would exercise only those powers enumerated in the Constitution. The Ninth Amendment went further, however, and *prohibited an expanded interpretation* of those enumerated powers."[102] This, at minimum, would "view the Ninth as a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government."[103]

Here, the People of Ohio expressly determined that "The freedom *to not be forced* to purchase government-defined private health insurance is a fundamental right, implicit in the concept of ordered liberty and deeply rooted in our history and tradition." Accordingly, Ohio and numerous other states have

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[100] See Russell Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, at 227, 228 (1983).

[101] See Lash, *Lost Original Meaning*, *supra*, note 10, at 355.

[102] Lash, *supra*, at 399.

[103] Lash, *supra*, at 346.

carefully defined, through sovereign political process established in their state constitutions, the fundamental rights of their citizens as including the right to be free from forced participation in any health care system – a right which clearly includes freedom from individual health insurance mandates. Protection of this right, as against a permissive interpretation of the Necessary and Proper Clause, is *the very thing* that the Ninth Amendment seeks to accomplish. Thus, this Court could not affirm the constitutionality of the mandate and shred these state rights, without ignoring the Ninth Amendment, and thereby ignoring the "spirit and letter" of the constitution in the process. Consequently, the mandate is not "proper."

Finally, the judicial concerns associated with protecting unenumerated rights, i.e., tension with results of the democratic process ("public debate" and "legislative action"), is not present where those rights are *enumerated* by states, which have carefully defined fundamental rights through legislative and public debates, and public elections, and then enshrined those rights in their states' constitutions.[104] In other words, the rationale for avoiding recognition of unenumerated rights, as against federal power, is of no force where states have carefully defined a

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[104] See *Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2258 (stating that the Court must restrain the expansion of substantive due process "because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" and because judicial extension of constitutional protection for an asserted substantive due process right "place[s] the matter outside the arena of public debate and legislative action."

fundamental right as implicit in the concept of ordered liberty.[105]

In his dissent in *Troxel,* Justice Scalia observed that it is "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents' authority over the rearing of their children."[106] But *equally true here*, then, it is "entirely compatible with the commitment to representative democracy" for the People of a State, acting through the initiative process, to declare that a particular liberty - especially one that could not otherwise claim a long tradition of *judicial* protection - is fundamental and for this Court to acknowledge and defer to their judgment. Where the People, or their representatives in state legislatures, act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish rights deserving of Ninth Amendment protection.

Consequently, the "spirit and letter" of the constitution demands that infringements upon fundamental liberties enumerated under state law call for heightened scrutiny of the means by which Congress exercises even its *enumerated* powers. And infringements on these liberties by way of implication of the Necessary and Proper Clause is not "proper" because it violates the purpose for which the Ninth Amendment was drafted – a purpose, in this matter,

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[105] See, *e.g.*, *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).

[106] *Id.*

embodied by the states' protection of health care freedom.

CONCLUSION

Unless this Court wishes to frustrate the purposes of federalism - the protection of liberty and capacity for state experimentation, it must affirm the judgment below.

Respectfully submitted,

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