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 OF AMICUS CURIAE AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC., IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

BERTRAM P. GOLTZ, JR., ESQ.
AMERICAN CATHOLIC
LAWYERS ASSOCIATION, INC.
420 Route 46 East, Suite 7
P.O. Box 10092
Fairfield, New Jersey 07004-6092
(973) 244-9895
skipgoltz@optonline.net
Counsel for Amicus

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE AMICUS CURIAE[1]

As stated in its Statement of Purpose, the amicus curiae American Catholic Lawyers Association is "a non-profit religious organization run by Catholics, to defend the rights of Catholics," which "engage[s] in pro bono, free legal services on behalf of Catholics needing legal defense in matters of faith and conscience." It is dedicated to establishing the Social Kingship of Christ and to "upholding the Divine prerogatives and moral law." http://www.americancatholiclawyers.org/about.htm. The Catholic Church condemns abortion:

> Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law. . . .

[*Catechism of the Catholic Church* (2d Ed.), Art. 5, § 2271 http://www.christusrex.org/www1/CDHN/fifth.html#HUMAN.]

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[1] Counsel for all parties have filed blanket consents for the filing of briefs by amici curiae. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Yet the Patient Protection and Affordable Care Act ("PPACA") and its minimum coverage provision, or individual mandate, force Catholics and others in some health plans to make separate personal payments that will fund abortion and thereby to violate this teaching. The amicus is profoundly troubled by this requirement because of its conflict with Catholic teaching and accordingly is filing this brief in support of the respondents.

SUMMARY OF ARGUMENT

The constitutional question before this Court implicates the very essence of our federalist system: the structural principle that, in the absence of a specified power granted by the Constitution to the Congress, all other powers and rights pertaining to governance and to individual decision-making reside not only in the States, but also and ultimately in the people.[2] The principle is expressed through the Ninth and Tenth Amendments, and it is indeed structural, for if it is disregarded the federalist system will collapse. In the individual mandate – the minimum coverage provision obligating virtually all persons to purchase health insurance – Congress has disregarded the

[2] As a Catholic organization the amicus American Catholic Lawyers Association affirms, however, that God is the source of all political authority. *Cf.* John 19:11 ("Thou shouldst not have any power against me, unless it were given thee from above." Douay Rheims trans.)

federalist principle, for as the Eleventh Circuit below held:

> [The individual mandate] regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so).
>
> [*State of Florida v. United States Dept. of Human Servs.*, 648 F.3d 1235, 1295 (11th Cir. 2011), *cert. granted sub nom.*, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 603 (2011), *Department of Health and Human Services v. Florida*, 132 S.Ct. 604 (2011), *cert. granted in part*, *Florida v. Department of Health and Human Services*, 132 S.Ct. 604 (2011).]

It "is forcing market entry by those outside the market." *Id.* at 1300. And forcing a person into a market – dragging that person, kicking and screaming, into a sphere of activity in which he or she has and wants no involvement whatever – contradicts utterly the deeply-embedded tradition of individual autonomy and self-determination which is a hallmark of our nation.

"Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, ___ U.S. ___, 131 S.Ct. 2355, 2364 (2011). Directing and controlling individual decisions and actions in excess

of delegated governmental authority is precisely what is occurring here. This Court has spoken of "the teachings of history [and] . . . the basic values that underlie our society . . . [to] preserv[e] American freedoms . . . " *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring), and these teachings of history and underlying American social values include a long-standing and still-vibrant tradition of individualism and self-determination regarding one's life and personal affairs. It is a tradition which Congress seeks to radically undermine by demanding that individuals who choose to have no part of health insurance and who willingly accept the potential consequences of that choice nonetheless purchase such a product. The issue is not even one of a fundamental right that can constitutionally be regulated, but only on a compelling governmental interest and in narrowly-tailored fashion; instead, however the right be characterized, Congress has no power *whatever* to inject itself into a particular sphere of human activity – in this instance, health care and insurance for it – to exercise control over a person who has removed himself or herself entirely from that sphere of activity and refuses to enter the market in which the particular product or service is bought and sold.

This Court should declare the minimum coverage provision unconstitutional.

ARGUMENT

CONGRESS HAS DISREGARDED THE FEDERALIST STRUCTURAL PRINCIPLE THAT, ABSENT A SPECIFIED CONSTITUTIONAL POWER GRANTED CONGRESS, ALL OTHER POWERS AND RIGHTS RESIDE IN THE STATES AND, ULTIMATELY, IN THE PEOPLE. CONGRESS HAS NO POWER WHATEVER TO FORCE A PERSON INTO A MARKET INTO WHICH HE OR SHE REFUSES TO ENTER. BY DIRECTING AND CONTROLLING INDIVIDUAL DECISIONS IN EXCESS OF DELEGATED AUTHORITY, THE INDIVIDUAL MANDATE VIOLATES THE FEDERALIST PRINCIPLE AND OUR NATION'S DEEPLY-EMBEDDED TRADITION OF AUTONOMY AND SELF-DETERMINATION. THIS COURT SHOULD DECLARE IT UNCONSTITUTIONAL.

The Congressional mandate that virtually all persons enter the health insurance market to purchase health insurance is not supported by a power granted Congress by the United States Constitution. Not only is the mandate not so supported, but it violates the federalist premise of our system of governance as expressed by the Ninth and Tenth Amendments while infringing on rights of the individual. Preliminarily, it is well to recall the comment of one District Judge who has adjudicated the question:

> One of the benefits of the myriad challenges to the constitutionality of the [Act] . . . is the distillation of relevant issues.

[*Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, ___ F.Supp.2d ___, 2011 WL 4072875 (M.D. Pa. 2011), Slip Opinion at 1.]

As the various District Court and Court of Appeals judges have distilled the individual-mandate issue, even those who have deemed it constitutional – not to mention those holding to the contrary – have often revealed the profound constitutional defects of the provision. Judge Sutton, concurring in part and delivering the opinion of the court in part in *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011), stated the matter well in his summary of the plaintiffs' argument:

> The [Commerce Clause] permits the legislature to "regulate" commerce, not to create it. Put another way, it empowers Congress to regulate economic "activities" and "actions," not inaction – not in other words individuals who have never entered a given market and who prize that most American of freedoms: to be left alone.

[*Id*. at 558.]

"Of all the arguments auditioning to invalidate the individual mandate," Judge Sutton acknowledged, "this is the most compelling." *Ibid.* There is "the lingering intuition – shared by most Americans, I suspect – that Congress should not be able to compel

citizens to buy products they do not want." *Id.* at 564. Indeed.

The constitutional underpinning for this "lingering intuition" was identified both by the District Court in *Goudy-Bachman* and by the Eleventh Circuit below. The *Goudy-Bachman* court observed:

> To date, all exercises of Commerce Clause authority have proscribed or prescribed activity by individuals *already engaged* in commerce who are active in the relevant interstate market.

[Slip Opinion at 14.]

And the Eleventh Circuit said:

> [T]he individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so). It is overinclusive in when it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future. The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in

> which to confine Congress's enumerated power.

[*State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1295.]

The key phrase is this: "It regulates those who have not entered the health care market at all."

> The individual mandate forces healthy and voluntarily uninsured individuals to purchase insurance from private insurers and pay premiums now in order to subsidize the private insurers' costs in covering more unhealthy individuals under the Act's reforms. Congress sought to mitigate its reforms' regulatory costs on private insurers by compelling healthy Americans outside the insurance market to enter the private insurance market and buy the insurers' products.

[*Id.* at 1300 (footnote omitted).]

"This starkly evinces how the Act is forcing market entry by those outside the market." *Ibid.*

This attempt by Congress to force into a particular market individuals who want nothing to do with that market and what is sold there triggers a constitutional deficiency that centers on the absence of Commerce Clause authority and the interest in individual rights embodied in our federalist system and

expressed through the Ninth and Tenth Amendments. We must start with first principles:

> The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."

[*United States v. Lopez*, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 451, 458 (1991).]

One of those enumerated powers is Congressional authority over interstate commerce,[3] "commerce" being "the commercial intercourse between nations, and parts of nations, in all its branches. . . ." *Id.* at 553, quoting *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824). As such, it "is regulated by prescribing rules for carrying on that intercourse." *Ibid.*; *Gibbons v. Ogden*, 22 U.S. at 190. Nevertheless, "limitations on the

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[3] The Commerce Clause grants Congress power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

[U.S. Const. art. I, § 8, cl. 3.]

commerce power are inherent in the very language of the Commerce Clause." *Id.* Enumeration, after all, "presupposes something not enumerated." *Id.* And so the Congressional power is subject to outer limits. *Lopez*, 514 U.S. at 556-57.

The limited scope of the interstate commerce power:

> . . . must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

[*Id.* at 557, quoting *Nat'l Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).]

"[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). And this Court has not hesitated to find overreaching. *See United States v. Lopez*, *supra* (Gun-Free School Zones Act exceeded Congress' Commerce Clause authority because gun possession in local school zone not economic activity substantially affecting interstate commerce); *United States v. Morrison*, 529 U.S. 598 (2000) (Congress lacked Commerce Clause

authority to enact civil remedy provision of Violence Against Women Act because not a regulation of activity substantially affecting interstate commerce); *cf. Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (Commerce Clause granted Congress authority to apply Controlled Substances Act to users and growers of marijuana for medical purposes under California Compassionate Use Act because federal statute *was* one that directly regulated quintessentially economic commercial activity).

Again, it is "our dual system of government" which illuminates how far the authority granted Congress by the Commerce Clause truly extends. *United States v. Lopez*, *supra*, 514 U.S. at 557. Accordingly, whether Congress truly is drawing on the Commerce Clause as authority for the individual mandate has profound implications for the federalism which is the framework of our system of dual governance. The federal system "rests on what might at first seem a counterintuitive insight," that "freedom is enhanced by the creation of two governments, not one." *Bond v. United States*, ___ U.S. ___, 131 S.Ct. 2355, 2364 (2011), quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999). Federalism, furthermore, has more than one dynamic. To be sure, the federal structure grants and delimits the prerogatives and responsibilities of the States and the national government vis-a-vis one another, thereby preserving the integrity, dignity and residual sovereignty of the States and ensuring that States function as political entities in their own right. *Ibid.* This balance is, in part, an end in itself. *Ibid.*

But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. *Ibid.* "State sovereignty is not just an end in itself"; rather, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.*, quoting *New York v. United States*, 505 U.S. 144, 181 (1992); *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). While some of these liberties are of a political character, *ibid.*, federalism also secures the freedom of the individual. *Ibid.*

> It allows States 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.

[*Ibid.*]

Therefore, "the individual liberty secured by federalism is not simply derivative of the rights of the States." *Ibid.*

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. [Citation omitted] By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary

> power. When government acts in excess of its lawful powers, that liberty is at stake.

[*Ibid.*]

States, therefore, are not the sole intended beneficiaries of federalism, *ibid*., and the limitations that federalism entails are not therefore a matter of rights belonging only to the States. *Ibid.*

> An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

[*Ibid.*]

This "direct interest" of the individual and fidelity to the governing principles therefore are inextricably linked. This linkage is extraordinarily important, for while the individual interest certainly is manifest in the final two sections of the Bill of Rights – the Ninth and Tenth Amendments – the wording of those two provisions is less important than the overarching constitutional structural principle that they embody: federalism. With respect to the Ninth Amendment,[4]

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[4] The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

that provision constitutionally recognizes and affirms the sovereignty of the individual by specifying that the enumeration of certain constitutional rights is not to deny or disparage "others retained by the people." With respect to the Tenth Amendment,[5] that provision, to be sure, "states but a truism that all is retained which has not been surrendered." *New York v. United States*, *supra*, 505 U.S. at 156, quoting *United States v. Darby*, 300 U.S. 100, 124 (1941). Nevertheless, Congress still exercises its conferred powers subject to the limitations contained in the Constitution. *Id.* at 156.

> Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.

[*Ibid.*]

> And so:
>
> [t]he Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the

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[5] The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

> Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

[*Id.* at 156-57.]

The Tenth Amendment, comparably to the Ninth Amendment, confirms individual sovereignty through the diffusion of governmental power and its reservation of power to the States "*or to the people*" (emphasis added). Judge Marcus below, dissenting from the Eleventh Circuit invalidation of the individual mandate, referred to the "or to the people" language as "the tail end" of the Tenth Amendment. *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1364 (Marcus, J., concurring in part and dissenting in part). Such dismissive and borderline-pejorative characterization is quite inappropriate, as even he seemingly recognized. To be sure, "the [Supreme] Court has never used the 'people' prong of the Tenth Amendment to invalidate an act of Congress." *Id*. at 1364, n. 25. Yet:

> [i]t may be that in time the law will come to breathe practical life into the Tenth Amendment's reservation of power to the people, but that day has not yet arrived.

[*Id.* at 1365.]

That day, we submit, is at hand.

This amicus is not proposing, it should be emphasized, that either amendment is an independent source of constitutional rights, for that proposition has not been judicially sanctioned. Rather, the Ninth Amendment in particular reflects the framers'

> perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined.

[*Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 n. 15 (1980).]

Accord Charles v. Brown, 495 F.Supp. 862, 863-64 (N.D. Ala. (1980) ("[T]he Ninth Amendment was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution"). The Ninth Amendment is thus a rule of construction, *id.* at 864; *Froehlich v. Wisconsin Dep't of Corr.*, 196 F.3d 800, 801 (7th Cir. 1999); *Rynn v. Jaffe*, 457 F.Supp. 22, 26 (D.D.C. 2006), but a rule of construction which nonetheless does provide a framework for adjudicating matters of great significance. While in contrast to the first eight amendments the Ninth Amendment does not specify any rights of the people, it does serve the critical function of "keep[ing] from lowering, degrading or rejecting

any rights which are not specifically mentioned in the [Constitution] itself." *Charles v. Brown*, *supra*, 495 F.Supp. at 863. The Ninth Amendment does not raise those unmentioned rights to constitutional stature by its own force; it simply takes cognizance of their general existence. *Ibid.* Still:

> [t]his is not to say that no unenumerated rights are constitutional in nature, for some of them may be found in the penumbras of the first eight amendments or in the liberty concept of the Fourteenth Amendment and, thus, rise to constitutional magnitude.

[*Ibid.*]

The "penumbra" metaphor is, of course, an allusion to Justice Douglas' opinion for this Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy), in which he cited various amendments, including the Ninth, and famously opined that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Justice Goldberg in his concurrence particularly emphasized the Ninth Amendment and what he saw as its adjudicative role, pointing out that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Id.* at 490-91, quoting *Marbury v. Madison*, 5 U.S. 137, 174 (1803). He agreed that the Ninth Amendment does not constitute an independent source of protected constitutional rights, *id.* at

492, but it does, he said, show a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included in those provisions not be deemed exhaustive. *Ibid.*

> [T]he Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights . . . protected from state, as well as federal, infringement.

[*Id.* at 493.][6]

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[6] In addition to this Court's citation of the Ninth Amendment in *Griswold v. Connecticut*, a number of lower federal courts have cited it in the context of students' choice of hair styles contrary to public school dress codes. In *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969), for example, the Seventh Circuit characterized the right to wear one's hair at any length or in any desired manner as "an ingredient of personal freedom protected by the United States Constitution."

> Whether this right is designated as within the "penumbras" of the first amendment freedom of speech, [citing *Griswold*], or as encompassed within the ninth amendment as an "additional fundamental right(s) * * * which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments" [citing *Griswold* (Goldberg, J., concurring], it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment.

[*Ibid.*]

(Continued on following page)

The amicus does not agree with the ultimate holding of *Griswold v. Connecticut*[7] nor necessarily with the holdings of the other cases mentioned. But we do agree that there exist unenumerated constitutional rights that should be respected, and we agree with the formulation, stated by Justice Harlan in his *Griswold* concurrence and by this Court elsewhere, *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997), of how unenumerated constitutional rights are to be identified. Writing of how judicial self-restraint is "an indispensable ingredient of sound constitutional adjudication," Justice Harlan said that such will be achieved:

Accord, *e.g.*, *Griffin v. Tatum*, 300 F.Supp. 60, 62 (M.D. Ala. 1969) (freedom protected is "the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification."). *Cf. Miller v. Gillis*, 315 F.Supp. 94, 100 (N.D. Ill. 1969) (dress code violated Fourteenth Amendment equal protection, but Ninth Amendment inapplicable); *contra Davis v. Firment*, 269 F.Supp. 524, 529 (E.D. La. 1967), *aff'd,* 408 F.2d 1085 (5th Cir. 1969) (no constitutional right of any sort to wear hair long in violation of dress code).

[7] The amicus disagrees absolutely with *Griswold*, which made contraception broadly available. The Catholic Church teaches:

> [E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible is intrinsically evil. . . .

[*Catechism of the Catholic Church* (2d Ed.), Art. 6, § 2370 (internal quotation marks omitted) http://www.christusrex.org/www1/CDHN/sixth.html#CREATED.]

> only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

[381 U.S. at 501 (Harlan, J., concurring).]

As will shortly be discussed *infra*, individualism and self-determination are among the foremost values underpinning American culture, and those values generate a right that must be respected. First, however, one must address the character of that right and the comment of Judge Marcus, concurring in part and dissenting in part below, *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1362, that under current precedent only relatively few rights are deemed "fundamental" under substantive due process.[8] That is not the point. The amicus is not proposing that the right advanced here is even necessarily that sort of "fundamental" constitutional right. Saying that an individual right is "fundamental" presupposes that the right in question, however characterized, is generically subject to *some* Government regulation to at least some extent; finding the right "fundamental" simply means tight regulatory

[8] These are "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. . . ." *Washington v. Glucksberg*, *supra*, 521 U.S. at 720.

restrictions: the Government may regulate the right, but only upon a compelling interest and in narrowly-tailored fashion. *E.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Here, by contrast, we submit that Congress has *no* power, under the Commerce Clause or any other source of constitutional authority, to inject itself into a particular sphere of human activity – in this instance, health care and insurance for it – to exercise control over a person who has removed himself or herself entirely from that sphere of activity to force him or her to enter the market in which the particular product or service is bought and sold. And this is a right, however characterized, which is constitutionally protected. *See* Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties*, 64 Fla. L. Rev. (forthcoming 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919272 (pre-publication version, provisionally paginated) at 6, challenging the notion that liberty interests should be "statically catalogued as either fundamental or not" and arguing that

> even for those liberties that ought to remain on the non-fundamental side of the divide, the case for using structural doctrines to protect those liberties should be stronger, not

> weaker, than the case for using structural doctrines to protect fundamental liberties.[9]

[*Ibid.*]

We submit that it is a right constitutionally protected precisely because of, in Justice Harlan's words, the respect to be accorded "the teachings of history [and] . . . the basic values that underlie our society . . . and preserv[e] American freedoms. . . ." *Griswold*, 381 U.S. at 501. Those teachings of history and underlying American social values include a long-standing and still-vibrant tradition of individualism and self-determination regarding one's life and personal affairs. It is a tradition which Congress seeks to radically undermine by demanding that individuals who choose to have no part of health insurance and who willingly accept the potential consequences of that choice nonetheless purchase such a product.

Individualism and self-determination are deeply-woven into the American moral fabric. One can go so far even to characterize this American tradition, shared to an extent by some other Western nations, as "an eccentricity among cultures. . . ." *Individualism*, Wilfred McClay: *Dictionary of American History*,

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[9] While the amicus agrees with the author to the extent that she recognizes the importance of protecting non-fundamental as well as fundamental rights, we do not accept her notion of "semisubstantive review" and all of its quasi-political implications for the adjudicative process. *Id.* at 9-10. The judiciary – this Court – has a task which it is called upon to fulfill irrespective of other considerations.

Charles Scribner's Sons (Gale, Cengage Learning 2009).[10] It arose in part from the ideas and institutions arising out of biblical monotheism, forming "an individualistic ideal [which] plac[es] heavy emphasis upon the infinite value, personal agency, and moral accountability of the individual person." *Ibid.* To be sure, the student of American culture "is likely to find that 'individualism' is first highly praised and then roundly condemned in nearly the same breath," *ibid.*, but in the American context, especially with the social opening that came with the rise of Jacksonian democracy, the word has only rarely taken on pejorative connotations. *Ibid.* Instead:

> [i]t was more likely to refer to the sturdy values of the self-reliant frontiersman or the self-made entrepreneur – or to a broadly libertarian understanding of the relationship between the individual and society or the state, wherein the liberty and dignity of the former are shielded from the grasping hands of the latter.

[*Ibid.*]

> As such:
>
> it pointed toward a view of all political and social groups as mere aggregations of

[10] Available as a digital download from Amazon.com: http://www.amazon.com/INDIVIDUALISM-Charles-scribnersDictionaryAmerican/dp/B001QYIOS/ref=sr_1_4?s=books&ie=UTF8&qid=1324496630&sr=1-4 (the amicus will be pleased to supply a print copy of this article at the request of the Court).

> otherwise naturally self-sufficient individuals, whose social bonds are largely governed by choice and consent.

[*Ibid.*][11]

Even more radically, "individualism" can take the meaning, increasingly pervasive in our own day, that to the maximum degree possible the individual should be regarded as an entirely morally-autonomous creature – accountable to no person and to no higher law, armed with a quiver of inviolable rights, protected by a zone of inviolable privacy, and left free to "grow" and "develop" as the promptings of the self dictate. *Ibid.* This amicus, it should be stressed, does not by

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[11] By the middle of the nineteenth century,

> figures such as Ralph Waldo Emerson and Walt Whitman – romantic American nationalists and prophets of the unconstrained self – were already trumpeting the note that would have the most lasting resonance in the American imagination.

[*Ibid.*]

Quotations from Emerson are illustrative:

> Whoso would be a man must be a nonconformist. He who would gather immortal palms must not be hindered by the name of goodness, but must explore if it be goodness. Nothing is at last sacred but the integrity of your own mind. Absolve you to yourself, and you shall have the suffrage of the world.

[*Self-Reliance*, Ralph Waldo Emerson, Essays: First Series (1841) http://www.emersoncentral.com/selfreliance.htm.]

"Trust thyself: every heart vibrates to that iron string." *Ibid.*

any means endorse this notion of unconstrained moral autonomy. Still:

> there seems little reason to doubt that the dominant view in our own day tends to endorse the highest possible degree of individual liberty and self-development in political, religious, social, and economic affairs.[12]

[*Ibid.*]

Accordingly, when the plaintiffs in various of the cases litigating the Patient Protection and Affordable Care Act contest Congress' constitutional capacity to force them to buy health insurance they do not want, they are expressing "[one] of the basic values that underlie our society. . . ." *Griswold v. Connecticut*, *supra*, 381 U.S. at 501 (Harlan, J., concurring). And they are not alone in not wanting to be insured. Some of those litigating the Act do not want to buy health insurance because – and this is the interest of this amicus – they will thereby be giving involuntary and

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[12] The amicus, needless to say, would not apply this "highest possible degree of individual liberty and self-development in political, religious, social, and economic affairs" to abortion.

> One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus.

[*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., concurring and dissenting).]

The autonomy of swinging one's fist stops at the other person's nose.

governmentally-coerced financial support for abortion. There are other people who do not want to buy health insurance for other reasons – or for no reason at all.[13] That is their right. It is their right because of

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[13] Exemplifying such people is the woman profiled in the two National Public Radio features *Voluntarily Uninsured: A "Calculated Risk"* (Weekend Edition Sunday, October 4, 2009), http://www.npr.org/templates/story/story.php?storyid=113340361, and *The Uninsured And Unconvinced* (Weekend Edition Sunday, December 26, 2009), http://www.npr.org/templates/story/story.php?storyId=121946556&ps=rs (the amicus will be pleased to supply the transcripts of these broadcasts at the request of the Court). Lyn Robinson, an athletic fifty-two-year-old plant nursery owner who does not have health insurance, would

> rather use the $6,000 a year that I would be paying in health insurance premiums and put it toward actual care – pay the doctor directly.

Insurance companies, she believes, interfere in the patient/doctor relationship; she likes the power of deciding where and when to spend her medical dollars. She knows she is taking a calculated risk by not being insured:

> I'm sure that there's people out there that are going to say that's crazy and irresponsible. Maybe it is. Maybe it isn't. Maybe we're just brainwashed into believing that we are supposed to have insurance to be fiscally responsible.

Eight years ago a rollerblading fall cost her $14,000 out of pocket, yet:

> If I have one of those kinds of incidences once in 10 years, I can pay the bill because I haven't paid for worthless insurance premiums. I haven't paid out $6,000 a year for the false security that somebody's going to take care of me if something happens.

As do some of Ms. Robinson's friends, one may question the wisdom of her decision. But it is her right to make it.

the nature of our federalist system – one which grants certain powers to the federal government, but reserves all other powers and rights to the states and, ultimately, to the people. *See* discussion, *supra*.

If Congress, therefore, is to intrude on this right of self-autonomy, it must do so pursuant to "one or more of its powers enumerated in the Constitution." *United States v. Morrison*, *supra*, 529 U.S. at 607. With respect to the purported constitutional source of the individual mandate, this amicus agrees with the holding of the Eleventh Circuit below that Congress plainly intended it to be the Commerce Clause. *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1316. The Commerce Clause, however, does not grant *carte blanche* authority, for the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, *supra*, 514 U.S. at 566. Therefore, if Congress desires to exercise power that is at all analogous to the State police power, it must reach out for an implied power that is supported by the Necessary and Proper Clause.[14] *See generally United States v. Comstock*, ___

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[14] The Necessary and Proper Clause grants Congress power

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

[U.S. Const. art. I, § 8, cl. 18.]

U.S. ___, 130 S. Ct. 1949 (2010). To be sure, under the Commerce Clause Congress does have an implied power "akin to the police power," *United States v. Edwards*, 14 F.Supp. 384, 389 (S.D. Cal. 1936); *see generally Hamilton v. Ky. Distill. & Warehouse Co.*, 251 U.S. 146, 157 (1919), but the regulation must be a true incident of police power. The quasi-police power of the Commerce Clause cannot reach out to an individual quietly minding his or her own business and drag that person, kicking and screaming, into a sphere of activity in which he or she has and wants no involvement whatever.

There are, to be sure, limited circumstances in which a State pursuant to its police power may demand that a person purchase a particular product to thereby protect the public safety and welfare. One such instance that readily springs to mind is the purchase of automobile liability insurance. *See Kesler v. Dept. of Pub. Safety*, 369 U.S. 153, 172 (1962). But in that situation, the nexus between the police power and what the individual is doing is obvious. The individual holds a State license to engage in a hazardous activity – driving – on property owned and controlled by the State – the public highways – where other people can easily be injured, and therefore "[p]rotection in securing redress for injured highway travelers, as well as protection from being injured, is a proper subject of a state's police powers." *Riggle v. State,* 778 S.W.2d 127, 129 (Tex. App. 1989). *Accord State v. Turk*, 197 Mont. 311, 314-15, 643 P.2d 224, 226 (1982); *Reutzel v. State Dep't of Highways*, 290

Minn. 88, 96-97, 186 N.W.2d 521, 524-25 (1971). Another such instance of State-mandated purchase, less well-known and rather rare, is the purchase of workers' compensation by persons hiring full-time domestic workers. Mass. Gen. Laws ch. 152, § 1(4)(g); *see In re Murphy's Case*, 63 Mass. App. Ct. 774, 776-78, 829 N.E.2d 1156, 1159-60 (App. Ct. 2005). There too, the police power is properly exercised because those subject to the mandate are engaged in a sphere of activity subject to governmental control – the hiring of employees to do potentially dangerous work – and within that sphere other persons – the domestic workers – can be injured.

But these instances of *bona fide* State police power regulation are a far cry from what Congress is attempting under the Commerce Clause here. As an apt analogy, one can only imagine how the courts would view a State mandate that *everyone* – including those not licensed to drive a car – buy automobile liability insurance. Or a State mandate that everyone purchase workers' compensation insurance, irrespective of whether he or she in fact employs domestic workers. Needless to say, such legislative mandates would not survive even the least demanding judicial review test, rational basis, *e.g.*, *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955), but that misses the more fundamental point stated earlier. Applying the rational-basis or any of the other judicial review tests presupposes that the individual is subject to some Government regulation to at least some extent, even despite the individual's having

absented himself or herself entirely from the sphere of activity in question. But that is not so. Rational-basis or whatever review standard aside, there simply is no nexus between the purported exercise of governmental power and the activity – actually *non*-activity – in question. And without that nexus, government lacks entirely the power of governmental control.

As discussed, the Eleventh Circuit has clearly identified Congress' violation of individual rights. The individual mandate "regulates those who have not entered the health care market at all." *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1295. It "is forcing market entry by those outside the market." *Id.* at 1300. Forced market entry by those outside the market does indeed evoke what Judge Sutton in the Sixth Circuit called "the lingering intuition – shared by most Americans, I suspect – that Congress should not be able to compel citizens to buy products they do not want." *Thomas More Law Center v. Obama*, *supra*, 651 F.3d at 564. And this forced market entry is unconstitutional. Now it may be the case that a compelled insurance purchase once an individual has in fact entered the market – once he or she has gone to the emergency room and drawn down resources affecting interstate commerce – *is* constitutional. At that point he or she *has* entered the market, and at that point Congress may have the power to impose an insurance-purchase obligation. The plaintiffs in *Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, *supra*, for example, "[did] not contest that they can be regulated once they

receive services and fail to pay for those services. It is the pre-conduct requirement to pay in advance that is at issue." Slip Opinion at 15. As the Eleventh Circuit recognized, "[W]hen the uninsured actually enter the stream of commerce and consume health care, Congress may regulate their activity at the point of consumption." *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1295.

But that is not this case. The constitutional defect here is that "the individual mandate does *not* regulate behavior at the point of consumption." *Ibid.* As said in *Goudy-Bachman*, "It is the pre-conduct requirement to pay in advance that is at issue." Slip Opinion at 15. The District Judge there pointed out the problem:

> Section 1501 of the Act . . . is a mandate in anticipation. It regulates many individuals who have not yet entered the market – whether one defines the market as the broader market for health care services or the market for health insurance – in anticipation of their entrance into the health care services market.

[*Id.* at 14.]

And

> [t]he outcome is the same regardless of whether one considers the relevant market to be the health care services market or health insurance market because the minimum coverage provision seeks to regulate

> conduct prior to an uninsured's entrance into either market. The Commerce Clause simply does not reach this pre-transaction stage.

[*Id.* at 14, n. 12.]

A "mandate in anticipation" therefore is in anticipation of what for any particular individual may never happen and whose governmentally-mandated remedy utterly contradicts and violates that individual's autonomy. Congress has no authority to impose it.

The individual's autonomy: his or her right and freedom to make decisions on matters that involve himself or herself alone. This is the self-reliance, the "iron string," of which Emerson wrote and by which Lyn Robinson, the determinedly-uninsured nursery owner featured in the National Public Radio episodes, n. 13, *supra*, and others live. Those who hold this value have the right to maintain it, and government may not coerce them to surrender it. What the court said in *Griffin v. Tatum*, *supra*, 300 F.Supp. at 62, rings true here as well.

> [T]he freedom here protected is the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification.

Breathing space for the individual. Indeed. The only difference here – and it is a significant difference – is that, in *Griffin v. Tatum* and the other cases mentioned, *supra*, concerning a student availing him- or herself of the services furnished in and by a government-sponsored school, government had at

least *some* basis, subject to judicial review under the applicable review standard, to regulate the student's behavior. Here, by contrast, the plaintiffs litigating this statute and other like-minded people are simply taking no part whatever in the sphere of activity in question – they have not entered the market and have no intention of entering the market for health insurance – and therefore the government has *no* basis – literally no police power or quasi-police power at all – for intruding. Congress has reached far beyond its constitutional authority. The Eleventh Circuit correctly declared the individual mandate unconstitutional, and this Court should affirm.

CONCLUSION

It is respectfully submitted that for these reasons this Court should affirm the final decision of the United States Court of Appeals for the Eleventh Circuit declaring the minimum coverage provision – the individual mandate – unconstitutional.

Respectfully submitted,

BERTRAM P. GOLTZ, JR., ESQ.
AMERICAN CATHOLIC
LAWYERS ASSOCIATION, INC.
420 Route 46 East, Suite 7
P.O. Box 10092
Fairfield, New Jersey 07004-6092
(973) 244-9895
skipgoltz@optonline.net
Counsel for Amicus

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