No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPT. OF HHS, et al.,
***Petitioners*,**

v.

STATES OF FLORIDA, et al.,
***Respondent*s.**

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW, IN SUPPORT OF RESPONDENTS, ADDRESSING MINIMUM COVERAGE PROVISION

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QUESTION PRESENTED FOR REVIEW

1. Whether the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (hereafter the "ACA") violates the Tenth Amendment to the U.S. Constitution by imposing mandates on the states on matters that are reserved to the states.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems.

The Foundation has an interest in this case because it believes the basic framework of our governmental system, as set forth in the Constitution, involves a delegation of limited enumerated powers to the federal government, with all other powers reserved to the states or to the people. Recognizing that the fallibility of human nature results in abuse and corruption of power, the Framers designed this system so that state and federal governments would check each other's power and, in the process, preserve the liberty of the people. The Foundation believes the Patient Protection and Affordable Care Act, Pub. L.

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[1] *Amicus curiae* Foundation for Moral Law, Inc., files this brief with blanket consent from both Petitioners and Respondents. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (hereafter the "ACA"), is an infringement upon the powers reserved to the states or to the people and is therefore dangerous to individual liberty.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation, and properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. The plain meaning of the Constitution's text should also guide the Court in this case.

The Tenth Amendment to the U.S. Constitution sets in concrete what the Framers already intended and assumed that the Constitution meant: that the federal government had only the powers delegated to it by the people through the Constitution, and powers not delegated to the federal government through the Constitution are reserved to the states or to the people. The General Welfare Clause of Article I, § 8 authorizes Congress to tax and spend for the "general" welfare, but the word "general" is a restrictive adjective, meaning Congress may tax and spend for the general welfare of the nation as a whole but not for the "specific" welfare of individuals, regions, or socioeconomic groups. Likewise, the Commerce Clause of Article I § 8 authorizes Congress to regulate interstate commerce, international commerce, and commerce with and among Indian nations, but not intrastate commerce, manufacturing, or production.

The ACA mandate that states must require individuals to purchase medical insurance is not within the enumerated powers delegated to Congress. According to the Tenth Amendment, the powers not delegated to the federal government, nor prohibited to the states, are reserved to the states respectively, or to the people.

The power to give or withhold unlimited benefits, like the power to tax, is the power to destroy. Just as Congress has no authority to force the states to require their citizens to purchase medical insurance, so Congress has no authority to condition receipt of billions of dollars in federal Medicaid payments upon the states imposing such a requirement. Nor, according to *Printz v. United States,* can the Congress "commandeer" the states and require them to perform federal functions.

Finally, by mandating that states require their citizens to purchase medical insurance, Congress may be requiring states to enact legislation that is prohibited by or not authorized by their respective state constitutions.

ARGUMENT

I. THIS COURT SHOULD BE GUIDED IN THIS CASE BY THE ORIGINAL MEANING OF THE CONSTITUTIONAL TEXTS AT ISSUE.

James Madison wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself."

James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison*, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, let alone a constitution. A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just

> and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

"In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). In *Heller* this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 2821.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's amorphous General Welfare Clause and Commerce Clause precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. The Court should return to the words of the United States Constitution in deciding constitutional cases

II. THE CONSTITUTION ESTABLISHES A FEDERAL GOVERNMENT WITH ENUMERATED POWERS DELEGATED TO THIS FEDERAL GOVERNMENT AND ALL OTHER POWERS RESERVED TO THE STATES OR TO THE PEOPLE.

James Madison wrote concerning federal powers,

> 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 former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which last the power of taxation will, for the most part, be connected. 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 and the internal order, improvement, and prosperity of the State.

Federalist No. 45. This Court, while recognizing that the enumerated powers include powers impliedly delegated as well as expressly delegated, nevertheless affirmed in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819), that

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."[2]

Nothing in the enumerated powers of Article I, § 8 or any other portion of the Constitution authorizes

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[2] *McCulloch* is often assumed to stand for a broad interpretation of the Necessary and Proper Clause, but actually *McCulloch* was much more fact-specific. In determining that the creation of a national bank was impliedly authorized by the Necessary and Proper Clause, Chief Justice Marshall noted that the first Congress (1789-91) had established a national bank. *McCulloch* at 401: "The power now contested was exercised by the first congress elected under the present constitution." Therefore, the first Congress understood the Necessary and Proper Clause as authorizing a national bank, and the first Congress had good insight into the intent of the Framers. The impact of *McCulloch* as a precedent, then, should be limited to the issue of the constitutionality of a national bank and should not be interpreted to stand for a broad interpretation of the Necessary and Proper Clause generally.

Congress, expressly or impliedly, to adopt a mandate that states must require their citizens to purchase medical insurance.

III. THE TAXING AND SPENDING POWER, FOUND IN THE GENERAL WELFARE CLAUSE OF ARTICLE I § 8, DOES NOT AUTHORIZE CONGRESS TO MANDATE THAT STATES EXPAND THEIR MED-ICAID PROGRAMS.

James Madison, called by many the Architect or Father of the Constitution, objected in Congress to a bill that would provide aid for French refugees. Madison was sympathetic to the refugees' plight but concerned that the bill was unconstitutional and would set a bad precedent. He declared,

> I cannot undertake to lay my finger on that article of the Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.

Congressional Record, p. 170, Jan. 1794.

In 1854 President Franklin Pierce vetoed a bill to provide federal lands for the treatment of the insane. In his veto message he declared,

> I readily and, I trust, feelingly acknowledge the duty incumbent on us all as men and citizens, and as among the highest and holiest of our duties, to provide for those who, in the mysterious order of Providence, are subject to want and to disease of body or mind; but I can not find any authority in

> the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded.

Franklin Pierce, Veto Message, May 3, 1854. http://www.lonang.com/exlibris/misc/1854-pvm.htm.

In 1887 President Grover Cleveland vetoed a bill that would have appropriated $10,000 to purchase seed and distribute it among farmers who faced hardship because of a drought. In his veto message he stated,

> I can find no warrant for such an appropriation in the Constitution; and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadily resisted, to the end that the lesson should be constantly enforced that, though the people support the Government, the Government should not support the people.

Grover Cleveland, Veto Message, February 16, 1887, *Congressional Record*, 49 Cong., 2d Sess., vol. XVIII, Pt. II, 1887, p. 1875.

Nor does the taxing and spending clause authorize Congress to mandate that states expand their

Medicaid programs or regulate how those programs must be operated. In *Printz v. United States,* 521 U.S. 898 (1997), this Court struck down the provisions of the Brady Handgun Violence Prevention Act that commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers, noting that, as Madison had said in *Federalist No. 39,* when the states delegated certain powers to the federal government they retained "a residuary and inviolable sovereignty."

In *McCulloch v. Maryland* the Court had said that "the power to tax involves the power to destroy," 17 U.S. (4 Wheat.) at 431. And in *U.S. v. Butler,* 297 U.S. 1 (1936), this Court invalidated the Agricultural Adjustment Act of 1933, which provided federal subsidies to farmers who agreed to set aside certain acres from production, holding that just as Congress could not expressly limit the acres a farmer could cultivate, nor could Congress achieve the same end by granting or withholding subsidies. The Court noted that the Act was, at best, "a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." *Id.* at 72. The Court continued, "Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? *The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action*." *Id.* at 73 (emphasis added). Furthermore, the Court said,

> If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing

> and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.

Id. at 75. The Court concluded that

> Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States (which has aptly been termed 'an indestructible Union, composed of indestructible States,') might be served by obliterating the constituent members of the Union.

Id. at 77.

In *South Dakota v. Dole,* 483 U.S. 203 (1987), this Court considered the constitutionality of 23 U.S.C. § 158, which requires the Secretary of Transportation to withhold a percentage of federal highway funds from states that allow the purchase of alcoholic beverages by persons under the age of 21. The Court seemed to acknowledge that Congress could not simply require the state to raise its drinking age, because the Twenty-First Amendment reserved to the states the right to regulate alcoholic beverages. But Secretary Dole argued that 23 U.S.C. § 158 did not prohibit the

states from having a lower drinking age; it just threatened loss of federal funds if they did.

South Dakota argued, based on *Butler,* that the power to give or withhold federal highway funds had the effect of coercing the states to enact the federally-recommended drinking age. However, Chief Justice Rehnquist, writing for the majority, distinguished *Dole* from *Butler*. He wrote,

> When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.

Id. at 211.

Amicus agrees with the dissenting opinions of Justices Brennan and O'Connor.[3] However, Chief Justice Rehnquist tailored his opinion to the facts of the case—a threatened withholding of only five percent of the federal highway funds. He clearly recognized that under some circumstances withholding of funds could be coercive:

> Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point

[3] Possibly Justice O'Connor's prior experience as an Arizona state legislator helped her to appreciate the coercive effect of even a partial denial of federal funds.

> at which "pressure turns into compulsion." Steward Machine Co. v. Davis, supra, at 59.

Id.

The case at hand does not involve a loss of a mere five percent of federal highway funds, nor even a loss of five percent of federal Medicaid funds. Under the ACA, states that do not completely surrender to the new federal requirements will lose **all** federal Medicaid funds. This amounts to more than 40% of all federal funds granted to the states, 7% of all federal spending, more than $276 billion in 2011.[4]

On May 25, 2011, the Alabama State Legislature passed a budget of $1.77 billion, of which approximately $640.5 million is for Medicaid. This $640.5 million constitutes Alabama's share of Medicaid funding, which is 32 percent of total Medicaid funding.[5] The federal government pays the other 68% of Medicaid funding, or $2.08 billion.

The threatened loss of $2.08 billion in federal Medicaid funds—$410 million more than the total Alabama State budget—clearly crosses the line from inducement to coercion. Even following the rationale

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[4] Henry J. Kaiser Foundation, *Federal and State Share of Medicaid Spending, FY2009* (2010); The President's Budget for Fiscal Year 2012, Historical Tables, Table 8.5.

[5] Alabama Medicaid Agency, "Legislators Cut an Additional $9.7 Million from Medicaid Budget," May 31, 2011; http://medicaid.alabama.gov/news_detail.aspx?ID=5151.

of the majority in *South Dakota v. Dole,* this is an unconstitutional infringement on the powers reserved to the states.

IV. THE AFFORDABLE CARE ACT MAY FORCE STATES TO VIOLATE THEIR OWN STATE CONSTITUTIONS.

In contrast to the federal government which has only delegated enumerated powers, it is often assumed that the state governments have plenary power that is limited only by prohibitions in the U.S. Constitution and in their respective state constitutions.

But this view is far from unanimous. Washington Supreme Court Justice Richard B. Sanders, writing with Attorney Barbara Mahoney for the New York University Annual Survey of the Law in 2003, argues that "the people have retained all powers of government except those expressly relinquished by the ratification of their respective state and federal constitutions."[6] They continue,

> [S]tate constitutions prescribe the nature and limits of the people's consent to be governed. They are contracts between the people and their state government, delegated limited authority to exercise certain powers not otherwise retained by the people. To the extent a state government exercises its power to undertake activities beyond those

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[6] Richard B. Sanders and Barbara Mahoney, "Restoration of Limited State Constitutional Government: A Dissenter's View," *New York University Annual Survey of American Law 2003,* 59 N.Y.U. Ann. Surv. Am. L. 269.

> necessary to protect and maintain individual rights, courts must look for specific manifestations of the people's consent that evidence constitutional grants of that authority. But, where a legislature acts without express or necessarily implied authorization of the constitution, it exceeds its authority – even if there is no constitutional provision barring such actions.[7]

The Framers of the American system of government had wrestled with the tyranny and oppression that resulted from unlimited government power in Great Britain. Justice Sanders and Atty. Mahoney ask,

> Why would the people who were so protective of their liberty confer upon their own state governments the virtually unlimited power of the British Parliament? Given the preoccupation with the corruptive influence of power in the eighteenth and nineteenth centuries, when most of our state constitutions were drafted, is it not more likely the powers conferred upon the state were few and surrendered reluctantly?[8]

Justice Sanders and Atty. Mahoney note James Madison's statement in *Federalist No. 45*, "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." However, they contend, this does not mean state governments have unlimited power, for

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[7] *Id.* 270.

[8] *Id.* 272.

> the Federalist papers address the relationship of the states to the federal government, not the relationship of the people to their respective state. Federalist Number 45 merely describes the powers the people may confer upon their state legislatures; it does not delineate powers inherent to state governments."[9]

Amicus notes that the Tenth Amendment reserves power "to the States, or to the people." *Federalist No. 45* addresses what powers the people *may delegate* to their respective state governments; it does not address what powers the people *have actually delegated* to their state governments.

Justice Sanders and Atty. Mahoney say the "oft-repeated proposition" that state legislatures have plenary power "is seldom if ever justified by reasoned analysis."[10] In contrast to the theory that state governments have plenary power, Justice Sanders and Atty. Mahoney note that "virtually every state in the Union has a constitutional provision memorializing the fact that 'all just authority in the institutions of political society is derived from the people, and established with their consent.'"[11]

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[9] *Id.* 272-73.

[10] *Id.* 271. In fn. 11 they note that numerous cases "recite the presumption without articulating a basis for it."

[11] *Id.* 269. In fn. 3 they cite the following state constitutional provisions that recognize state government is by the consent of the governed: Del. Const. pmbl; see also Ala. Const. § 2; Alaska Const. art. I, § 2; Ariz. Const. art. II,

Even in states in which the courts have held that the legislature has plenary power, those powers are subject to limitations by the federal and state constitutions. For example, Art. I § 2 of the Constitution of Alabama of 1901 states:

> That all political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient.

And Art. I § 35 states:

> That the sole object and only legitimate end of government is to protect the citizens in the

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§ 2; Ark. Const. art. II, § 1; Cal. Const. art. II, § 1; Conn. Const. art. I, § 2; Fla. Const. art. 1, § 1; Ga. Const. art. I, § 2, P ii; Haw. Const. art. I, § 1; Idaho Const. art. I, § 2; Ill. Const. art. 1, § 1; Ind. Const. art. I, § 1; Iowa Const. art. I, § 2; Kan. Const. Bill of Rights § 2; Ky. Const. § 4; La. Const. art. I, § 1; Me. Const. art. I, § 2; Md. Const. Decl. of Rights art. 1; Mass. Const. art. 5; Mich. Const. art. I, § 1; Minn. Const. art. 1, § 1; Miss. Const. art. III, § 5; Mo. Const. art. I, § 1; Mont. Const. art. II, § 1; Neb. Const. art. I, § 1; Nev. Const. art. I, § 2; N.H. Const. art. I; N.J. Const. art. I, P 2; N.M. Const. art. II, § 2; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; Or. Const. art. I, § 1; Pa. Const. art. I, § 2; R.I. Const. art. I, § 1; S.C. Const. art. I, § 1; S.D. Const. art. 6, § 1; Tenn. Const. art. I, § 1; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Vt. Const. ch. I, art. 6; Va. Const. art. I, § 2; Wash Const. art. I, § 1; W. Va. Const. art. II, § 2; Wis. Const. art. I, § 1; Wyo. Const. art. I, § 1.

> enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

If some or all of the A.C.A. mandates require a state to perform expanded Medicaid functions that go beyond those authorized by that state's constitution, the effect would be that the A.C.A..forces states to violate their own constitutions. Although one could argue that the Supremacy Clause, U.S. Constitution, Art. VI § 2, makes federal statutes superior to state constitutions, the Framers who drafted the Constitution clearly intended that the state governments be sovereign and undisturbed in the conduct of their own domestic affairs. Even Alexander Hamilton, the Federalist who favored a strong central government more than most of the Framers, stated in *Federalist No. 81,* "[T]he plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States."

Amicus recognizes that this may seem a novel argument, but the concept that state governments have *delegated* rather than plenary powers is consistent with the views and designs of the Framers of our constitutional republic and of those who designed the various state constitutions. *Amicus* therefore respectfully asks the Court to consider this argument but notes that the validity of arguments I, II, and III do not depend upon the validity of argument IV.

CONCLUSION

The mandates of the A.C.A. not only violate the U.S. Constitution and the constitutions of the various states; they so expand the national government and intrude upon the legitimate domains of the states as to fundamentally alter the nature and scope of the American system of government. This is a fundamental sea-change that should be accomplished, if at all, only by a constitutional amendment. *Amicus* therefore urges this Court to hold that these mandates are unconstitutional.

Respectfully submitted,

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