No. 11-398

In The
Supreme Court of the United States

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 MONTANA SHOOTING SPORTS ASS'N AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Minimum Coverage)

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QUESTIONS PRESENTED

1. This Court's Interstate Commerce Clause has jurisprudence misconstrued the Ninth and Tenth Amendments, which by being ratified and enacted after the previous texts in the Constitution, overturned, superseded and displaced portions of the pre-Bill-of-Rights Constitution which are in conflict with the Ninth and Tenth Amendments.

2. The mandates of the Affordable Care Act impermissibly intrude upon the rights of individuals within the several states to retain autonomy over their health care.

3. The individual insurance mandate of the Affordable Care Act is an impermissible modification of Montana's 1889 contract for statehood.

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INTEREST OF AMICUS CURIAE[1]

The Montana Shooting Sports Association, Inc. ("MSSA") is a non-profit corporation organized under the laws of the State of Montana. The purpose of MSSA is to "support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, own and/or manage one or more shooting facilities for the use of its members and/or others, and to conduct such other activities as serves the needs of its members." The aims of the MSSA have been continuously challenged by federal laws and their application, and the MSSA seeks for Montana to reassert a more constitutionally appropriate relationship with the federal government. This brief furthers MSSA's interest in asserting Montanans' opposition to the federal government's now-massive burden of laws and regulations based on Interstate Commerce Clause power, which have been imposed on Montana through political processes in distant Washington which give disproportionate political power to states and regions which do not share Montana's high regard for individual liberty.

The MSSA is the lead Plaintiff in *MSSA v.*

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[1] No counsel for any party authored this brief in whole or in part, nor did any party, person or entity other than amicus make a monetary contribution to the preparation/submission of this brief. The parties have given blanket consent to the filing of *amicus* briefs.

Holder, Case No. 10-36094 (9th Cir.), wherein the MSSA seeks a declaration that Montana's Firearm Freedom Act, MONT. CODE ANN. §§ 30-20-101 through 106 properly exempts firearms made and retained in Montana from all federal authority. As a result, MSSA has developed unique expertise and perspective concerning proper application of the Interstate Commerce Clause. MSSA believes that MSSA's perspective on state/federal relations applies as well to Florida v. HHS; and that this perspective offers constructive insights to aid this Court's consideration of this case.

SUMMARY OF ARGUMENT

It is an axiom of statutory and constitutional interpretation that any law passed after an earlier law supersedes the previous law to the extent that the two are inconsistent. Indeed, it can be said that this principle is the basis for all law, without which no enacted law could be amended. The Ninth and Tenth Amendments, placed in the Constitution on December 15, 1791 after an extended multi-state debate regarding federal and state power, superseded any conflicting provisions of the Constitution, such as the Interstate Commerce Clause of Article 1, Section 8, the Necessary and Proper Clause, Article I, Section 8 and the Supremacy Clause, Article VI, Section 2 which were ratified and enacted on September 17, 1789. The Supreme Court's history of interpreting and construing the Interstate Commerce Clause, at least in the last 75 years, has largely ignored this basic principle of constitutional interpretation.

The general thesis of Respondents in this cases is that the mandates of the Affordable Care Act go impermissibly beyond what is allowed under the current state of Interstate Commerce Clause jurisprudence. The amici go much further and assert that the current state of Interstate Commerce Clause jurisprudence vastly understates the proper role of the Ninth and Tenth Amendments in our constitutional order. Accordingly, the amici assert that the mandates under the Affordable Care Act are impermissible because they purport to wield powers within the several states which Congress does not have and may not wield.

ARGUMENT

I. The Ninth and Tenth Amendments, as later enacted, amended the underlying Constitution, including the Commerce, Supremacy, and Necessary and Proper Clauses.

In District of Columbia v. Heller, 554 U.S. 570 (2008), Justice Scalia closed with a proclamation that "what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." A similar sentiment should be expressed regarding the Ninth and Tenth Amendments. Like the Second Amendment, the Ninth and Tenth Amendments have been mostly ignored over the course of American history. Yet these Amendments are central to a proper understanding of the Constitution.

It is axiomatic that when a law is enacted after an earlier law, the earlier law is considered as repealed to the extent that the two enactments conflict. This maxim of constitutional and statutory construction is the bedrock beneath the rule of law: "Leges posteriores priores contrarias abrogant." Herbert Broom, Maxims of Law (1854). See also, United States v. Tynen, 78 U.S. 88, 92, 11 Wall. 88, 92 (1870) ("When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not

in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act"). Without this principle applied to the Constitution, it would have been impossible for the Eighteenth Amendment (Prohibition) to change the Constitution, and impossible for the Twenty-First amendment to repeal the Eighteenth Amendment.

Thus, the Ninth and Tenth Amendments actually amended and changed the meaning of the underlying Constitution, including the Commerce, Supremacy, and Necessary and Proper clauses. The Interstate Commerce Clause, U.S. Const. Article I, Section 8, Clause 3 was written in very broad terms: "[The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supremacy Clause, Article VI, Clause 2, boldly claims that federal law is supreme and that judges in every state shall be bound thereby." The Necessary and Proper Clause, Article I, Section 8, Clause 18 proclaims that "[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."

For generations, this Court has construed provisions of the Constitution which grant powers to government expansively, while construing provisions which limit government power restrictively. Yet the history of the ratification debates illustrates that the

enactment of the Ninth and Tenth Amendments was intended to prevent such construction.

The original Constitution was hammered out at the Constitutional Convention in Philadelphia between May and September 1787. Its drafters met on the second floor of the Philadelphia Statehouse (now known as Independence Hall) with windows shut, sentries posted below, and delegates sworn to strict silence. The States had chosen seventy-four delegates, nineteen of whom refused to attend, leaving only fifty-five. Most were cosmopolitan and personally anxious for a stronger national government; the American countryside was grossly underrepresented. Before the end of the Convention, fourteen delegates left, leaving forty-one, three of whom refused to sign. Thus, nearly half refused to attend, left, or did not sign. See Roger Roots, The Approaching Death of the Collective Right Theory of the Second Amendment, 39 Duq. L. Rev. 71, 97 (2000).

The document that was circulated for ratification in the winter of 1787-1788 came largely with the onus that it was perceived as a Federalist statement (i.e., that it was being promoted by the advocates of a more centralized government). Opponents of this constitution cited a number of objectionable aspects. In particular, the document provided no express limitations on the powers of the national government. *See* id.

Those suspicious of centralized authority were relentless in their criticism. A sizeable percentage of

delegates to state ratification conventions indicated they would support ratification only if a declaration or bill of rights were amended into it. It soon became evident that the Constitution would not be ratified unless assurances were given that a bill of rights with agreeable terms would soon be attached upon the document's successful return to Philadelphia. The combined number of votes from all of the conventions indicates that 34 percent of state convention delegates approved of the Constitution just as it was and an additional 30 percent favored ratification with proposed amendments. See The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792 (David E. Young ed., 2d ed. 1995), Appendix C. Only by combining were these two groups (totaling 64 percent) able to gain ratification. Id. The largest voting bloc (36 percent) was that of delegates who were against the Constitution unless it was amended prior to ratification. Id. According to these figures, a significant majority (66 percent) required amendments. See id. (providing statistics from the twelve state conventions which met in 1787 and 1788.

When the House Select Committee to draft the Bill of Rights met during the First Congress, it met with the intention of seriously carving back on the extravagant grants of power that had been enunciated in the original Constitution. Roger Sherman, who served with James Madison on the Committee, introduced an amendment beginning as follows: "The People have certain natural rights

which are retained by them when they enter into Society . . . ." Roger Sherman's Draft of the Bill of Rights, in The Rights Retained by the People: The History and Meaning of the Ninth Amendment 351, app. A (Randy E. Barnett ed., 1998). By "certain natural rights," Sherman was pronouncing a recognition that rights such as "Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances" were supreme over the limited powers of government. Id.

As Professor Randy Barnett articulates in Restoring the Lost Constitution (2003), the Ninth Amendments protects from government interference such trivial rights as the choice by a person to wear a hat, or not wear a hat. One significant purpose for the federalism secured by under Tenth Amendment, and voiced by Justice Kennedy in Bond v. United States, 564 U.S. __ (2011), is to enable a state to protect the individual rights of its citizens. "Federalism secures the freedom of the individual. 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."

Thus, the Ninth Amendment preserves the right of individuals to choose to buy or not buy health insurance, and the Tenth Amendment preserves the power of the states to interdict a congressional mandate that would strip state citizens of their rights under the Ninth Amendment.

II. The Constitution does not authorize Congress, by means of the Affordable Care Act, to require individuals within the several states to engage in commerce regarding health care.

As Chief Justice Roberts declared in Citizens United v. Federal Election Commission, 558 U.S. 08-205 (2010), this Court must revise precedent "when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." It is difficult to imagine a line of precedent more jury-rigged, held together with duct tape and baling wire, than the line of cases that have led Congress to believe it may compel citizens to purchase a federally selected consumer product. Not only should the individual mandate of the Affordable Care Act be rejected as impermissibly beyond congressional power, but the Court should seize this opportunity to correct the obvious and misleading "jury-rigging" that has occurred to expand the scope of the Interstate Interstate Commerce Clause in and since Wickard v. Filburn, 317 U.S. 111 (1942).

The Affordable Care Act purports to compel citizens to purchase products and services under the

auspices of the Interstate Commerce Clause, U.S.Const., Art. I, § 8. This assumption of power extends radically beyond our Founders' intent behind the Interstate Commerce Clause as well as the Ninth and Tenth Amendments. For those who believe Congress may assert any power under the Interstate Commerce Clause, this Court ought to clarify that contemporary views of Interstate Commerce Clause power have become "jury-rigged" beyond all reasonableness.

As noted repeatedly by Respondents and various amici, the Affordable Care Act amounts to a vast departure from historical lawmaking by Congress. For the first time ever, Congress presumes power to require individual citizens to shell out hard-earned money to purchase a type of private product selected by Congress. In essence, Congress attempts with the Affordable Care Act to avoid the politically embarrassing prospect of raising taxes to provide universal health care by requiring instead that all individuals must purchase his or her own health care insurance, at threat of penalty for any citizen who fails to comply.

Congress might as well demand that every homeless person buy a house in order to solve the twin problems of homelessness and the crisis of excessive homes sitting vacant and underutilized by owning lenders.

None of the powers granted to Congress in the Constitution authorize Congress to embark upon the new and radical course of requiring that individuals purchase private products, whether houses or health insurance. Moreover, because the Ninth and Tenth Amendments were enacted after the Interstate

Commerce Clause, they must be given deference in any conflict with the Interstate Commerce Clause and other empowering clauses of the underlying Constitution.

Most observers who admit that the Ninth Amendment actually exists and means anything understand that our Founders intent with the Ninth was to protect from government interference an endless array of choices that individuals might care to make, choices far too numerous to catalog in a Bill of Rights, or even to protect with carefully-drawn enumerated powers. One of those obvious choices is whether to purchase or not purchase private health insurance. Surely, this must be beyond need for any thorough explanation.

The conflict between the commerce-based individual mandate and the Tenth Amendment takes at least two forms. First, as Justice Kennedy explained in U.S. v. Bond, the first purpose of maintaining the sovereignty of states is so that the states are adequately empowered to protect the individual liberties of a state's people, liberties taken if the federal government may command people to buy private products. The Tenth Amendment preserves the ability of states to protect the individual liberties of its citizens.

Second, and perhaps for an overlapping reason, the states are admitted to have retained police powers in order to protect and serve their citizens. Imposition of the individual mandate upon citizens usurps and displaces police powers very deliberately left to the states, powers that are protected from such interference by the prohibition of the Tenth Amendment. As a result, Congress has no power to require individuals to engage in

interstate commerce, whether or not it believes requiring them to do so makes good policy sense.

III. The Affordable Care Act violates the federal government's compact with the State of Montana.

The Affordable Care Act extends into the realm of state jurisdiction and violates the liberties of individuals within the jurisdictions of the states. The original thirteen colonies of America were each separately established by charters from the English Crown. Outside of the common bond of each being a dependency and colony of the mother country, England, the colonies were not otherwise united. Each had its own governor, legislative assembly and courts, and each was governed separately and independently by the English Parliament.

Between October, 1775, and the August 1776, each of the colonies separately severed ties and relations with England, and several adopted their own constitutions. The legal effect of the Declaration of Independence was to make each new State a separate and independent sovereign over which there was no other government of superior power or jurisdiction. This was clearly shown in M'Ilvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 212 (1808), where it was held:

> This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that

> they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted.

The representatives who assembled in Philadelphia in May, 1787, to attend the Constitutional Convention, met for the primary purpose of improving the commercial relations among the States, although the product of the Convention produced more than this. But, no intention was demonstrated for the States to surrender in any degree the jurisdiction so possessed by the States at that time, and indeed the Constitution as finally drafted continued the same territorial jurisdiction of the States as existed under the Articles of Confederation. The essence of this retention of state jurisdiction was embodied in Art. I, Sec. 8, Cl. 17 of the U.S. Constitution, which read as follows:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by

> the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

The reason for the inclusion of this clause in the Constitution was and is obvious. Under the Articles of Confederation, the States retained full and complete jurisdiction over lands and persons within their borders. The Congress under the Articles was merely a body which represented and acted as agents of the separate States for external affairs, and had no jurisdiction within the States. This defect in the Articles made the Confederation Congress totally dependent upon any given State for protection, and this dependency did in fact cause embarrassment for that Congress.

By the adoption of the Constitution in 1789, the States jointly surrendered some 17 specific and well defined powers to the federal Congress, which related strictly to external affairs of the States. Any single power, or even several powers combined, do not operate in a fashion as to invade or divest a State of its jurisdiction. As against a single State, the remainder of the States under the Constitution have no right to jurisdiction within the single State absent its consent.

Each state that has entered the union after 1789, like the original 13 colonies, surrendered only the very slender area of jurisdictional powers, while receiving guarantees from the Union that its own

sovereignty and police powers were retained within the powers of the state. Montana officially entered into statehood via the mechanism of a contract, known as The Compact with the United States (Montana Constitution, Article I). There is nothing in that contract which authorizes Congress to compel the citizens of Montana to purchase health insurance, or any other private product. Thus, the congressional mandate for individuals to purchase health insurance under the Affordable Care Act is a unilateral, and therefore impermissible, amendment to or modification of a significant contract.

This principle is preserved and asserted by the Montana Legislature in relation to the Montana Firearms Freedom Act at MONT. CODE ANN. § 30-20-102.

> Legislative declarations of authority. The legislature declares that the authority for this part is the following:
>
> (1) The 10th amendment to the United States constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Montana certain powers as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those powers is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the

> United States was agreed upon and adopted by Montana and the United States in 1889.
>
> (2) The ninth amendment to the United States constitution guarantees to the people rights not granted in the constitution and reserves to the people of Montana certain rights as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those rights is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

Montana entered into statehood in 1889. The contract for statehood to which Montana agreed was between the citizens of Montana, with the Montana Territorial Legislature acting on behalf of the citizens, and the several states already in the Union, with Congress and the President acting as the agent for those several states. This contract was affirmed and detailed by Ordinance 1 of the Montana Territorial Legislature, by the Enabling Act of Congress of 1889, the Organic Act of Congress of 1889, and the Proclamation of Montana Statehood by President Benjamin Harrison.

Montana's contract for statehood is memorialized as Article I of the Montana

Constitution, known as The Compact with the United States ("Compact"). Montana's Compact is a bilateral, written contract or agreement that binds the parties thereto as defined by: Bouvier's, 1839; Bouvier's, 1856; Webster's, 1884; and Black's, 1910. "The terms 'compact' and 'contract' are synonymous." Green v. Biddle, 8 Wheat. 1, 92, 5 L, ed. 547. The only difference between a compact and a contract in any reasonable usage of the terms as they apply here is that a compact is more generally an agreement between or among states. Montana's Compact shares many points in common with usual, bilateral contracts. It includes competent parties, subject matter, legal considerations, mutuality of agreement, and mutuality of obligation.

It is a bedrock principle of contract interpretation that contracts must be interpreted so as to give credence to the intent of the contracting parties. This principle is so well established as to need no elaboration here.

Further, before Montana was allowed statehood, and as a part of the contract, the Montana territorial legislature, on behalf of the people of Montana, was required to approve Ordinance 1. In its fifth paragraph, Ordinance 1 declared, "Fifth. That on behalf of the people of Montana, we in convention assembled, do adopt the constitution of the United States." This adoption was on February 22nd, 1889. Certainly, the Interstate Commerce Clause, in the exact same verbiage as it occurs today, was a part of the "constitution of the United States" that was adopted and accepted by Montana

in 1889 via Ordinance 1.

Thus, any interpretation of congressional power asserted under the Interstate Commerce Clause must be consistent with the general view at that time, which view must inform any observer of the intent of the parties then entering into the contract.

Certainly, there is nothing in the Compact, in the Enabling Act, in the Organic Act or in Ordinance 1 which offers power to Congress to require Montana citizens to purchase health insurance, or any other private product. There was no public or legal view at the time that congressional power under the Interstate Commerce Clause could be expanded to authorize any such federal requirement. Therefore, the Affordable Care Act effectively amends this bilateral contract, but unilaterally. And, the Compact declares on its face that it may only be amended with the consent of the parties, that it shall: "... continue in full force and effect until revoked by the consent of the United States and the people of Montana."

It is also significant that any modification of a contract must pass a more rigorous test than initiation of the underlying contract, so as to not defeat the intent of the contracting parties. In his amicus brief in this case, Professor James Blumstein provides a competent explanation of this principle when he informs:

The law of contract draws a critical

> distinction between contract formation and contract modification. Parties are subject to more restraints when they modify than when they form a contract. See Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521 (1981); WILLISTON ON CONTRACTS (4th ed. 2008)(Richard A. Lord ed.), vol. 3 at 695-719. For example, there is a duty of fair and equitable treatment at contract modification that has no counterpart at contract formation. And the notion of "fair and equitable" goes beyond absence of coercion. Rest.2d Contracts, §89, comment b.

There is no cognizable or documented intention that Montana's contract for statehood, at the time it was entered into, could authorize Congress to require Montana citizens to purchase health insurance under its power to regulate interstate commerce; or could preempt Montana's reserved Tenth Amendment prerogative to protect its citizens from such exercise; or could modify how the reservations of choice were preserved to Montana citizens under the Ninth Amendment. Absent any such intention, the opposite is apparent. Therefore, the individual insurance mandate of the Affordable Care Act should be struck down as an impermissible unilateral amendment to the federal government's binding, bilateral statehood contract with Montana.

CONCLUSION

Accordingly, the decision by the Court of Appeals regarding Affordable Care Act's expanded Medicaid mandate should be affirmed.

Respectfully submitted,

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