Case No. 13-15324

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICK COONS, et al.,
Plaintiffs-Appellants,

vs.

JACOB J. LEW (in his official capacity as Secretary of the United States Department of the Treasury), et al.,
Defendants-Appellees.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the State of Arizona
Case No. 2:10-CV-1714-GMS, Hon. Murray Snow, presiding

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I. Coons has a constitutional right to medical autonomy and has stated a claim that PPACA unduly burdens that right.

The district court erred in refusing to recognize Nick Coons' due process right to medical autonomy. This Court should reverse the dismissal and allow Coons to show that the Patient Protection and Affordable Care Act (PPACA) burdens this right by forcing him to buy government-sanctioned health insurance that he does not want or pay the penalty for refusing to do so, thereby displacing and reducing the health care treatments and patient-doctor relationships he can afford. ER53-54 ¶ 16; ER69 ¶¶ 83-85.

The government does not appear to endorse the district court's grounds for dismissing Coons' medical autonomy claim; namely, the court's refusal to recognize "a substantive due process right to choose medical providers and treatment." ER6. Nor could it, since Coons has shown that such a right is firmly rooted in this Court's precedents. *See* Appellants' Opening Brief ("Opening Brief") pp. 16-17. Instead, the government contends that it may avoid constitutional concerns so long as it affords Coons the option to pay a penalty in exchange for exercising this constitutional right. *See* Appellees' Response ("Response") pp. 9-10. Yet this begs the question. The Constitution does not allow the government "needlessly [to] encourage[] the waiver of constitutional rights," *United States v. Chavez*, 627 F.2d 953, 956 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1376 (1981), or

to impose significant financial penalties on the exercise of constitutional rights. *See id.* at 955-57; *United States v. Frierson*, 945 F.2d 650, 658-59 (3d Cir. 1991).

The government maintains that Coons' medical autonomy concerns are unworthy of protection because "[t]he Supreme Court long ago abandoned the protection of economic rights through substantive due process." Response p. 10 (*quoting U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 601 (6th Cir. 2013)).[1] But Coons does not assert an "economic right." Although the tax penalty is financial, the injury is to his personal liberty right to medical autonomy and to his choice of medical care.[2] The tax "seeks to shape [individual] decisions about whether to buy health insurance," *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2596 (2012), and it forces Coons to choose between yielding his decision-making regarding such intensely personal matters as preferred health care procedures and doctor-patient relationships to a private insurance company, or paying a significant financial penalty. ER53-54 ¶ 16; ER68-69 ¶¶ 80-86. Thus Coons' injury is to his fundamental liberty and triggers strict scrutiny. *Kramer v.*

[1] *U.S. Citizens Ass'n* is not binding on this Court, nor is it helpful in deciding this issue because the Sixth Circuit has not followed this Court's tradition of protecting medical privacy rights. *See U.S. Citizens Ass'n*, 705 F.3d at 601 (rejecting a "right to refuse unwanted medical care").

[2] The government's argument would support placing financial penalties on exercising the right to abortion. That would entail no mere loss of an "economic right," even though it is of a financial nature. Likewise here, Coons asserts a loss of a fundamental liberty.

Union Free School Dist., 395 U.S. 621, 627 (1969) (government must show law is narrowly tailored to achieve a compelling state interest). The government has not met this burden.

Because Coons has identified a protected liberty interest, ER70-71 ¶¶ 87-92, the district court erred in depriving him of the opportunity to introduce evidence substantiating his allegation that PPACA unduly burdens his right to medical autonomy.

II. Coons has a constitutional right to informational privacy and has stated a ripe claim that PPACA unduly burdens that right.

The government relies on *U.S. Citizens Ass'n* for the proposition that Coons can "avoid any privacy concern altogether by simply . . . complying with the individual mandate" and paying the tax. Response p. 11 (*quoting U.S. Citizens Ass'n*, 705 F.3d at 602).[3] But in any case presenting an "unconstitutional conditions" challenge, the government can claim that a plaintiff could avoid the concern by simply acquiescing in the burden imposed on his choice to exercise his

[3] Just as with the medical autonomy claim, *U.S. Citizens Ass'n* is inapposite because the Sixth Circuit does not protect privacy as comprehensively as this Court, nor does it recognize a general right to informational privacy. *Compare J.P. v. DeSanti*, 653 F.2d 1080, 1090-91 (6th Cir. 1981) ("not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual privacy") *with Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (recognizing a "constitutionally protected interest in avoiding 'disclosure of personal matters,' including medical information," and applying a multi-factor balancing test). Thus, the Sixth Circuit's failure to even apply the balancing test to similar claims is inconsistent with this Court's jurisprudence.

rights. It is the being forced to confront that choice that is the gravamen of any unconstitutional conditions claim. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (Constitution protects "rights by preventing the government from coercing people into giving them up"). What the government regards as merely a choice is in fact coercion, because the tax imposes an impermissible burden on the exercise of Coons' privacy right. Whether PPACA's requirement that Coons choose between handing over his private health information to third parties or paying a penalty constitutes an undue burden is a fact-driven inquiry. In dismissing the claim, the district court neither underwent the proper analysis nor made the necessary findings.

The government claims that the law contains safeguards sufficient to eliminate any injury, Response pp. 11-12, but these supposed protections neither mitigate Coons' concerns nor the Act's constitutional deficiencies. Assuming these alleged protections function properly, they would only prevent insurance companies from further disseminating Coons' information. *See* Response p. 12 ("Federal law places strict limits on the manner in which insurance companies may use or disclose individuals' medical information"). But Coons objects to being coerced into disclosing sensitive personal information *to any entity*, including the insurance companies that are clearly encompassed within the law's requirements. ER70-71 ¶¶ 88-92. But for PPACA, he would not be forced to choose between

yielding private information that he would otherwise keep confidential or paying a penalty. ER53-54 ¶¶ 14-16; ER55-56 ¶¶ 20-26.[4]

Moreover, once Coons discloses this information to an insurance company, it is subject to government appropriation. ER70-71 ¶¶ 88-92; *see* Opening Brief pp. 23-24 (citing cases and statutes). The Department of Health and Human Services (HHS) has announced that it plans to allow local, state, and federal governments to share the personal health information of those who seek insurance on the Act's health insurance exchanges. *Patient Protection and Affordable Care Act; Program Integrity: Exchange, SHOP, Premium Stabilization Programs, and Market Standards*, 78 Fed. Reg. 37,032 (Dep't of Health and Human Servs. June 19, 2013) (proposed rule), at 72-73 *available at* https://s3.amazonaws.com/public-inspection.federalregister.gov/2013-14540.pdf. And Michael Astrue, former HHS general counsel and Commissioner of the Social Security Administration, has revealed that the government's present system for collecting personal information in exchanges would "leave members of the public open to identity theft," would

[4] The government also understates the information insurers will solicit, emphasizing that PPACA "will bar most insurance plans from denying coverage or setting premiums on the basis of an individual's medical condition or history." Response p. 11. But this requirement provides an even *greater* incentive for insurance companies to solicit sensitive information from consumers. An insurance company's solvency depends on its ability assess risk and set premiums at an appropriate level, which would be nearly impossible without having any information about a customer's medical history. Coons will establish this through discovery.

result in "exposure of address for victims of domestic abuse and others," and would "inflict on the public the most widespread violation of the Privacy Act in our history." Michael Astrue, *Privacy Be Damned*, The Weekly Standard, August 5, 2013, *available at* http://www.weeklystandard.com/articles/privacy-be-damned_741033.html. HHS recently concluded that it "could not assess . . . efforts to identify security controls and systems risks for the [Health Insurance Exchange's Electronic] Hub and implement safeguards and controls to mitigate identified risks" and that it "could not assess . . . whether vulnerabilities identified by the testing would be mitigated." HHS Office of Inspector General, *Observations Noted During the OIG Review of CMS's Implementation of the Health Insurance Exchange – Data Services Hub*, August 2013, at 4-5 *available at* http://oig.hhs.gov/oas/reports/region1/181330070.pdf. Thus, by forcing Coons to decide between paying a penalty and relinquishing sensitive private information to third parties, the government is asking him to waive his Fourth Amendment expectation of privacy and subject himself to potential security threats.[5]

In any event, the alleged safeguards are among the factors that must be weighed against the privacy right at stake, which requires careful weighing of

[5] Under the voluntary relinquishment to private third parties doctrine, any information Coons discloses to an insurer can then be seized by the government without a warrant, ER70-71 ¶¶ 88-92, because the Supreme Court has held that individuals lack a reasonable expectation of privacy in information they "voluntarily" share by contracting with private companies. *United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. Jacobson*, 466 U.S. 109, 117 (1984).

evidence. *See Tucson Woman's Clinic*, 379 F.3d at 551 (listing factors). The government itself admits this, but advocates rejecting Coons' claim on 12(b)(6) grounds by citing to cases that turn on unique facts. Response pp. 12-14. *See, e.g.*, *Roe v. Sherry*, 91 F.3d 1270 (9th Cir. 1996) (considering privacy rights in the context of a search pursuant to a particular criminal investigation). Whether any factor "outweighs the individual's privacy interest . . . will necessarily vary from case to case." *Seaton v. Mayberg*, 610 F.3d 530, 538 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1534 (2011) (quotations and citations omitted). Moreover, several of the cases the government cites involved weighing privacy interests against a state's broad police powers, an entirely different assessment from that involved here. *See Whalen v. Roe*, 429 U.S. 589, 597-98 (1977) (emphasis added) (weighing privacy interests against "New York's *broad police power*" to "experiment[] with possible solutions to problems of *vital local concern*"); *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783 (9th Cir. 2002) (emphasis added) (weighing privacy interests against *state's* interests).[6] Of course, Coons' claim is against the *federal* government, which "possesses only limited powers; the States and the people retain the remainder." *NFIB*, 132 S. Ct. at 2576. This difference alters the

[6] Another case involved weighing privacy interests against the federal government's interests as a *proprietor*, where the government "has a much freer hand." *NASA v. Nelson*, 131 S. Ct. 746, 757-59 (2011) (involving background checks for government employment conducted in the government's proprietary, not regulatory, capacity).

balancing test. To the extent that the government's cases are relevant, they illustrate the need to remand Coons' claim to the district court so that it can apply the balancing test to the unique circumstances of this case.

It is beyond question that PPACA forces Coons to either to disclose personal information to a third party insurance company – to which the government also has access – or pay an exaction for refusing to do so. That requirement conflicts with the right to informational privacy recognized by this Court. Thus the district court erred in dismissing Coons' well-pleaded privacy claim. The district court afforded Coons no opportunity to prove that the tax unduly burdens his rights, nor did it address any of the relevant factors discussed above. *See* ER6-9. The dismissal should be reversed.

III. Dr. Novack has stated a ripe claim that IPAB violates the separation-of-powers doctrine.

A. The district court did not fully and properly consider Novack's separation-of-powers claim

The government asks this Court to ignore the delegation portion of Novack's separation-of-powers claim because courts have upheld "seemingly vague principles." Response pp. 17-18 (*quoting In re National Sec. Agency Telecommunications Records Litigation*, 671 F.3d 881, 896 (9th Cir 2011), *cert. denied sub nom. Hepting v. AT&T Corp.*, 133 S. Ct. 421 (2012)). But the government's reliance on *In re National Sec. Agency* is misplaced because the law

in question in that case arose "within the realm of national security – a concern traditionally designated to the Executive as part of his Commander-in-Chief power," not to Congress as part of its legislative power. *Id.* at 897. In such cases, "the intelligible principle standard need not be overly rigid," *id.*, unlike in this case. That case did not involve a law that creates a permanent new regulatory body like PPACA does; that case addressed the circumstances under which the Attorney General can exercise his discretion to enforce a law. *Id.* at 896. And unlike IPAB, this exercise of discretion was subject to judicial review. *Id.* at 898. Here, the judiciary is statutorily excluded from reviewing whether IPAB is abiding by its vague directives or any other provision of the law.

The government insists that intelligible principles constrain IPAB, reciting numerous provisions supposedly guiding the Board. Response pp. 18-19. But the Act does not compensate in precision for what it lacks in brevity. These provisions are hopelessly vague and undefined, especially in light of IPAB's broad scope: the power to act "on matters related to the Medicare program." 42 U.S.C. § 1395kkk(c)(2)(A)(vi). For example, although the Act bars IPAB from "ration[ing] health care," §1395kkk(c)(2)(A)(ii), PPACA contains no definition of rationing care. Given that IPAB has power to take whatever action "related to the Medicare program," it is easily foreseeable that IPAB could take action that would qualify as "rationing." Yet because IPAB is immune from judicial review, any such action

would escape legal checks or balances. *See* Timothy Stoltzfus Jost, *The Real Constitutional Problem with the Affordable Care Act*, 36 J. Health Pol. Pol'y & L. 501, 504 (2011) ("IPAB could . . . dramatically reduc[e] payments for [medical services, which] might arguably violate the clause that enjoins the IPAB from establishing systems that ration care or restrict benefits, but these vague limitations certainly do not expressly prohibit such a proposal." This "decision would be immune from judicial review"). IPAB is the sole judge of whether it is obeying the law. *See* § 1395kkk(e)(5) (insulating IPAB from judicial and administrative review). *Cf. Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (emphasis added) (finding an intelligible principle because "compatibility with the legislative design may be ascertained not only by Congress *but by the courts and the public*").

The government cannot avoid a delegation problem simply by increasing a statute's word count. Instead, the proper assessment of whether Congress has unlawfully delegated the lawmaking power weighs the purported constraints on the delegate against the scope of power delegated. *See, e.g.*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (degree of oversight necessary "varies according to the scope of the power congressionally conferred"); *Synar v. United States*, 626 F. Supp. 1374, 1386 (D.C. Cir. 1986) (emphasis in original), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) (constitutionality of delegation must

be judged "on the basis of its scope *plus* the specificity of the standards governing its exercise"). Neither defendants nor the district court employed such a balancing test.

In dismissing Plaintiffs' claim without engaging in *any* balancing or factual determinations, the district court failed to take into account the multiple factors that courts should consider when judging separation-of-powers claims. The government in its response commits the same error, considering and rejecting each factor in isolation. *See, e.g.*, Response p. 20 (courts "have upheld statutes against non-delegation challenges where judicial review was not available"); Response p. 23 ("there is no such constitutional requirement" that a board be bipartisan). But Novack does not contend that any one factor *on its own* is dispositive of whether PPACA violates the separation-of-powers doctrine. Instead, courts must "weigh[] a number of factors," *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986), and consider "the *aggregate effect* of the factors." *Synar*, 626 F. Supp. at 1390 (emphasis added). *See* Opening Brief pp. 36-38 (setting forth the relevant factors and corresponding tests courts apply in a separation-of-powers inquiry).[7]

[7] The government bizarrely contends that not all of the factors in Novack's separation-of-powers argument are properly before the Court. First, it claims that Novack cannot discuss the anti-repeal provisions, because he withdrew Count VI. Response pp. 20-21. But as Appellants acknowledged in their opening brief, they voluntarily dismissed the claim that IPAB's anti-repeal provisions *burden legislators' voting rights*, ER71-77 ¶¶ 93-114, due to the Supreme Court's governing decision in *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343

Finally, the government contends that deciding Novack's separation-of-powers claim is unnecessary because the House and Senate can simply change their rules or Congress can repeal the entire Act, thus eliminating constitutional concerns. Response pp. 20-22. This approach provides no solace for Novack and ignores the purpose of separation of powers.[8] *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 756 (1996) (citations omitted) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny"); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("The structural principles secured by the separation of powers protect the individual"). Permitting an otherwise unconstitutional law to stand simply because it was purportedly promulgated pursuant to Congress's rulemaking authority would effectively eradicate the Constitution's protections. Congress may not use its rulemaking authority to surmount constitutional restraints. *United States v. Smith*, 286 U.S. 6, 33 (1932).

PPACA's comprehensive consolidation of power in IPAB cries out for

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(2011). Opening Brief p. 8 n.4. The anti-repeal provision is independently relevant to Novack's separation-of-powers claim, which remains viable. ER79 ¶ 123 ("The Act . . . purports to entrench the delegation of such powers against review by future Congresses"). Second, the government contends that other separation-of-powers arguments were not alleged in the complaint. Response p. 22. But these arguments are not independent claims at all; they are factors relevant to deciding the separation-of-powers claim.

[8]The government's contention that IPAB can police itself by volunteering to engage in notice-and-comment rulemaking even though the Act does not require it to do so, Response p. 23, is likewise unconvincing.

meaningful judicial scrutiny. Because the district court did not conduct a proper separation-of-powers analysis, its dismissal of Novack's claim should be reversed and remanded.

B. Novack has standing to challenge IPAB

Although the district court did not dismiss Novack's claim on standing grounds, ER12-13, the government claims that Novack lacks standing because his injuries are "speculative," Response p. 17, and "hypothetical." Response p. 15 (quoting *Hartman v. Summers*, 120 F.3d 157, 160 (9th Cir. 1997)). In *Hartman*, however, the plaintiff's injury was too speculative because he "failed to allege that he is subject to the release procedure that he complains of." 120 F.3d at 160. By contrast, Novack has alleged that he receives Medicare reimbursements and thus falls under IPAB's jurisdiction, ER51 ¶ 7, will suffer financial harm as a result of IPAB's actions, ER80 ¶ 128, and is injured by market displacements IPAB's existence has already set in motion. ER72-74 ¶¶ 99-102. Courts have found that plaintiffs subject to a governmental entity's authority have standing to challenge the creation of that entity. *See Nat'l Fed'n of Fed. Employees v. United States*, 727 F. Supp. 17, 21 (D.D.C. 1989), *aff'd*, 905 F.2d 400 (D.C. Cir. 1990) (plaintiff labor union organization had standing to challenge the Base Closure and Realignment Act under the separation of powers doctrine due to "the significant degree of

authority and control that the Department of Defense has over these civilian employees").

Novack also has standing because a plaintiff has standing to challenge the constitutionality of an agency whose primary directive is antithetical to the plaintiff's goals. In *Metropolitan Washington Airport Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), a citizens' group concerned with the abatement of aircraft noise challenged the creation of a Board of Review empowered to veto the Airport Authority's decision to reduce air traffic at Washington National Airport. The Supreme Court held that the plaintiffs had standing to bring a separation-of-powers claim because:

> [T]he harm respondents have alleged is not confined to the consequences of a possible increase in the level of activity at National. The harm also includes the creation of an impediment to a reduction in that activity. . . . The Board of Review and the master plan, which even petitioners acknowledge is at a minimum "noise neutral," therefore injure [Plaintiffs] by making it more difficult for [Plaintiffs] to reduce noise and activity at National.

Id. at 265 (citations omitted). Just as the Board of Review "was created by Congress as a mechanism to preserve operations at National at their present level, or at a higher level if possible," *id.*, PPACA empowers IPAB to reduce – but not to increase – Medicare reimbursements in order to achieve a net reduction in total Medicare spending. ER80 ¶ 128. Just as the creation of the Board of Review "ma[de] it more difficult for [Plaintiffs] to reduce noise and activity" at the airport,

Metropolitan Washington Airport Auth., 501 U.S. at 265, IPAB's virtually unconstrained powers, combined with its directive to "reduce the per capita rate of growth in Medicare spending," 42 U.S.C. § 1395kkk(c), alters the procedure by which Novack is reimbursed for treating Medicare patients. ER51 ¶ 7; ER80 ¶ 128. *See also Synar*, 626 F. Supp. at 1381 (employee association had standing to bring a separation-of-powers challenge against a statute that automatically cut the national budget when the budget deficit exceeded a certain threshold because invalidating the law would preclude cancellation of financial benefits to group).

The Supreme Court's decision in *Bond v. United States* further bolsters Novack's standing to challenge IPAB. There the Court held that a plaintiff has "standing to object to [a law's] violation of a constitutional principle that allocates power within government." 131 S. Ct. at 2365. Individuals "are protected by the operations of separation of powers and checks and balances" so they may "rely[] on those principles in otherwise justiciable cases and controversies." *Id.* at 2365. Because IPAB lacks constitutionally required checks and balances, and subjects Novack to an unlawful procedure that threatens him with financial harm, ER51 ¶ 7; ER80 ¶ 128, Novack has standing to challenge its constitutionality.

This Court has held that a plaintiff "who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies [the injury] part of the standing test." *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901

(9th Cir. 2011) (citations omitted). *See also Clinton v. New York*, 524 U.S. 417, 432 (1998) (farmers' cooperative had standing to challenge Line Item Veto Act even though vetoed provision would not have directly benefitted the cooperative because the cancellation resulted in an unfavorable change in market conditions). In addition to the aforementioned allegations, Novack alleges that the mere anticipation of IPAB's operation is altering market conditions as doctors and patients prepare for the coming regulations. ER72-74 ¶¶ 99-102. Because this "Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy" the injury requirement, *Barnum Timber Co.*, 633 F.3d at 901, these allegations are sufficient to survive a motion to dismiss. *See Bates v. Mortgage Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012).

The government argues that Novack's claim is not ripe because the President has not yet nominated any members to the Board. Response p. 16. But PPACA enables – indeed, *requires* – IPAB to operate even in the absence of voting members. In that case, it empowers the HHS Secretary to create and implement IPAB proposals. *See* 42 U.S.C. § 1395kkk(c)(5). The Secretary currently wields the Board's power, making Novack's claims ripe for review. The Court "will be in no better position later than [it is] now to confront the validity of" IPAB. *See Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102, 145 (1974).

IV. The government and the decision below disregarded the Supreme Court's preemption jurisprudence.

Finally, the district court should not have dismissed Coons' claim that PPACA does not preempt Arizona's Health Care Freedom Act (HCFA). Ariz. Const. art. XXVII, § 2. In a few terse sentences, the government purports to answer Coons' thorough preemption analysis, declaring that if "Arizona law directly conflicts with Section 5000A . . . the state law is preempted by operation of the Supremacy Clause." Response p. 9.[9] But this conclusory assertion is squarely at odds with the Supreme Court's presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

In *United States v. Windsor*, the Supreme Court recently reaffirmed the role of federalism in protecting rights in areas traditionally regulated by the states. *See* 133 S. Ct. 2675, 2690 (2013) (federal Defense of Marriage Act (DOMA) violates equal protection guaranteed by Fifth Amendment by interfering with definition and regulation of marriage that has historically been within the authority of the states). In striking down DOMA, the Court emphasized the Act had a "far greater reach" than the "discrete" and "limited federal laws that regulate the meaning of marriage

[9] Coons' claim is not that Arizona's HCFA preempts *federal* law, as the government insinuates, Response p. 9, but that HCFA is not preempted because federal law "does not clearly, directly and unequivocally override state laws or constitutional provisions, such as . . . the Health Care Freedom Act." ER81 ¶ 133.

in order to further federal policy." *Id.* Like PPACA, DOMA "enacts a directive applicable to [thousands of] federal statutes and . . . regulations. And its operation is directed to a class of persons that the laws of [several] States, have sought to protect." *Id.*

As Coons has previously noted, "preemption analysis does not justify a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives," but instead dictates that a "high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act" when the federal law regulates an area traditionally governed by states. *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1985 (2011). This is especially true when "Congress has legislated . . . in a field which the States have traditionally occupied," *Wyeth*, 555 U.S. at 565, such regulating the field of health care. *Id.* at 1195 n.3; *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Rush Prudential HMO, Inc.*, 536 U.S. 355, 387 (2002); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

The government's response disregards this well-established preemption framework. Response p, 9. Because the district court likewise failed to perform this analysis, and because PPACA cannot meet the "high threshold" necessary to displace state law, the district court erred in dismissing Plaintiffs' non-preemption claim (Count VIII). ER3-5.

CONCLUSION

Because Appellants' claims of medical autonomy, privacy, separation-of-powers, and federalism are ripe and worthy of judicial deliberation, Coons and Novack should be afforded the opportunity to prove their claims. Accordingly, they respectfully request that this Court reverse the decision below and remand for adjudication on the merits.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is 4,541 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 and Times New Roman 14 point font.

/s/ Christina Sandefur

CERTIFICATE OF SERVICE

The attached filing has been electronically filed and served by ECF upon the persons identified in the below Service List.

/s/ Christina Sandefur

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