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# Seven-Sky v. Holder - Amicus Brief of Catholicvote.org

Catholicvote.org

**CASE NO. 11-5047**

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE DISTRCIT OF COLUMBIA CIRCUIT**

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SUSAN SEVEN-SKY, et al.,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR. et al.,

Defendants-Appellees.

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On Appeal from the U.S. District Court for the District of Columbia

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# BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG

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## DISCLOSURE STATEMENT

Neither CatholicVote.org nor Fidelis Center are public corporations and no one holds stock therein. Counsel is a private attorney who has no affiliation with the parties to the case or any financial interest other than that common to all taxpayers.

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[1] There are no authorities upon which the amicus principally relies.

## Interest of The Amicus Curiae

Fidelis Center For Law & Policy ("Fidelis") is a not-for-profit public interest organization that submits this brief on behalf of those who support CatholicVote.org, a nonpartisan voter education program devoted to building a Culture-of-Life. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good as seen in light of the Roman Catholic religious tradition. Committed in principle to the primacy of individual liberty and the importance of private charity as well as the importance of federalism and the doctrine of subsidiarity, CatholicVote.org believes that the Patient Protection and Affordable Care Act is a pernicious expansion of federal power which undermines those fundamental values.

Pursuant to Rule 29, counsel affirms that no party has authored any part of this brief, although both parties kindly consented to its filing, and no person other than those excluded by Rule 29(c)(5)(C) contributed to its preparation. Counsel conferred with other *amicus curiae* who agreed that the themes of this brief were analytically distinct and should be treated separately in service of orderly presentation of argument to this Court.

## SUMMARY OF THE ARGUMENT

The eleven challenges to the Patient Protection and Affordable Care Act ("PPACA), now progressing through the federal courts leave little doubt that the PPACA is the most recent illustration of the prescient observation that while "[t]his [federal] government is acknowledged by all to be one of enumerated powers….the question respecting the extent of powers actually granted, is perpetually arising, and will continue to arise, so long as our system exits." *McCullough v. Maryland*, 17 U.S. 316, 320 (1819). The amicus seeks to assist this Court's effort to properly delineate the scope of federal power in the federal system by placing the claims made for the constitutionality of the PPACA in the context created by three distinct lines of precedent.

We respectfully suggest that the decision below is wrong because it rests upon arguments that simply cannot be squared with precedent from disparate areas that shed light on the proper resolution of this case. More specifically, we submit that the arguments made for PPACA are at odds with three areas of precedent not raised by the parties or other *amici curiae*. The court below held that Congress could regulate mental activity under the commerce power, but it is fundamental that the First Amendment prohibits the federal government from regulating beliefs. The court below upheld PPACA based on its assumption that uninsured persons would need medical care at some point but be unable to pay for it, yet it is

fundamental that the government cannot allocate benefits or burdens based upon arbitrary and irrebuttable presumptions of this kind. The court below upheld PPACA on the theory that inactivity amounted to commercial activity, neglecting precedent indicating that Due Process protects liberty by preventing the exercise of jurisdiction without an element of "purposeful availment." We respectfully suggest that precedent in these three areas provides a telling indication that Congress exceeded its authority when it enacted the PPACA.

## I. The Arguments Made For The PPACA's Individual Mandate Defy Well Recognized Liberty Interests Protected By The Constitution.

The court below held the PPACA constitutional based on four related findings. It found the following: (1) Congress can regulate an individual's mental activity, more specifically the decision to purchase health insurance (or not) because the mental activity substantially affects interstate commerce; (2) all individuals will use health care at some point in their lives and Congress can regulate the health care industry; (3) some uninsured individuals will receive health care services that they will be unable to pay for, resulting in costs that will be shifted to others; and (4) the legal requirement that individuals purchase insurance is necessary to ensure that the PPACA does not have negative consequences. JA 140-57. The difficulty of squaring the claims made for the PPACA with precedent from varied areas of the law compels the conclusion that the claims made for constitutionality of the PPACA must be rejected.

### A. The Beliefs Of Its Citizens Provide No Basis For Governmental Regulation.

The court below held that the mental activity involved in whether to purchase health care is mental activity that can be regulated by Congress. JA 140-41. The decision below is inconsistent with longstanding precedent from this court under the First Amendment. As long ago as *Cantwell v. Connecticut*, the Supreme Court held that the First Amendment "embraces two concepts – freedom to believe and freedom to act. The first is absolute …." 310 U.S. 296 (1940). The court has recognized that because the First Amendment recognizes a "freedom to believe," laws that infringe upon that freedom are *per se* unconstitutional. *Torcaso v. Watkins*, 367 U.S. 488, 492-493 (1961). The freedom of belief is extremely broad, 'no official … can prescribe what shall be orthodox in politics, nationalism, religion, or other matters or opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, the Court has gone so far as to say that in order to regulate belief, it must be shown that the act of "remaining passive … created a clear and present danger….". *Barnette*, 319 U.S. at 633.

The First Amendment provides the same protection where, as in this case, a decision is informed by religious belief. The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs.

*Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Cantwell v. Connecticut*, 310 U.S. at 642; *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). A burden upon religion exists where a state puts substantial pressure on an adherent to modify his behavior and violate his beliefs. *Bowen v. Roy*, 476 U.S. 693, 727 (1986), *citing Thomas v. Review Bd. of Indiana Employment Security Div*., 450 U.S. 707, 717-718 (1981).

The decision below flies in the face of this precedent. The plaintiffs-appellants are individuals who believe the purchase of insurance is unnecessary for reasons that are their own, whether rooted in religious convictions or personal views as to the necessity and desirability of purchasing insurance. It speaks volumes that the Court below had to go so far as to find that Congress can regulate mental activity in order to find PPACA represented a constitutional exercise of the power to regulate commerce among the several states. That such a farfetched conclusion defies the longstanding notion that Congress cannot regulate belief provides one of several indications that the court below reached too far.

### B. Due Process Prevents Government From Regulating Based On Arbitrary And Irrebuttable Presumptions.

In order to find the PPACA constitutional the court below had to hold that (1) all individuals will use health care at some point in their lives and Congress can regulate the health care industry; and (2) some uninsured individuals will receive health care services that they will be unable to pay for, resulting in costs that will be shifted to others. JA 140-57.

The Supreme Court has consistently rejected the very sort of arbitrary and irrebuttable presumption relied upon to justify the individual mandate. Significantly, the Court has rejected such arbitrary and irrebuttable presumptions when used in connection with the taxing power. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989)(Assessment practice which effectively limited meaningful valuation adjustments to transfer of property thereby creating arbitrary disparities in tax burdens violated equal protection); *Williams v. Vermont*, 472 U.S. 14 (1985)(Regulation that allowed Vermont residents registering vehicle to reduce use tax by a credit in amount of use or sales tax paid to another state if person was Vermont resident at time of vehicle was purchased but denying credit to Vermont residents if they were not Vermont residents at time vehicle was purchased created an arbitrary classification that violated due process); *Hooper v. Bernalillo County*, 472 U.S. 612 (1985)(Statute granting tax exemption to Vietnam veterans who resided in the state before May 8, 1976 violated equal protection because it was plainly designed to favor residents before that date over newcomers); *Heiner v. Donnan*, 285 U.S. 312, 329 (1932)(statute creating conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death was so arbitrary and unreasonable as to deprive the taxpayer of his property without due process of law.).

These case rejecting presumptions when used in connection with the taxing power are part of a larger body of case law that shares the same thrust. The Court has consistently struck down arbitrary and capricious classifications that burden a group of citizens based on gross generalizations or conclusive presumptions of the kind at issue here. *See e.g. Cleveland Board of Ed v. LaFluer*, 414 U.S. 632 (1974)(Regulations requiring teachers to take leave four to five months before due date of child violated due process because arbitrary periods did not consistently serve to ensure stated goal of preserving continuity in instruction and swept too broadly by creating a conclusive presumption that teacher would not be fit to teach; requirement of three month delay before return to work after birth violated due process because it created an irrebuttable presumption that mother was not fit to return to work); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)(zoning ordinance which barred grandchild from living with the grandmother while allowing other relatives to live together was an arbitrary interference with family life); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)(City ordinance requiring special use permit for proposed group home for mentally retarded but not other similarly situated uses violated equal protection given lack of rational basis for stated belief that group home posed special threat to legitimate interests); *Romer v. Evans*, 517 U.S. 620 (1996)(Amendment which placed in a solitary class of citizens defined with reference to sexual practices or orientation at

a disadvantage with respect to transactions and relations in both the private and governmental sphere violated equal protection because it imposed a broad and undifferentiated disability on a single named group amounting to a special disability upon those groups alone). And the Court also has struck down arbitrary and capricious classifications creating preferences relating to government benefits. *See e.g. Zobel v. Williams*, 457 U.S. 55 (1982)(Program distributing revenue dividends to residents based on duration of residency violated equal protection because goal of classification was to provide greater benefit to those who had resided longer in the State.).

Taken together these cases recognize that classifications based on arbitrary and conclusive presumptions resting upon gross generalizations violate Due Process because they fail to exhibit sufficient respect for individual liberty. Significantly, in each of these cases the Supreme Court invalidated the arbitrary and capricious presumptions without resort to any heightened level of scrutiny precisely because the classifications were plainly based upon arbitrary preferences or created conclusive presumptions based on gross generalizations.

The court below reached too far when it upheld the constitutionality of the individual mandate based upon the set of assumptions noted above. As one district court has pointed out, the chain of assertions offered in support of the individual mandate employed can be accurately summarized as follows:

> The uninsured can only be said to have a substantial effect on interstate commerce in the manner as described by defendants: (i) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment arrangements directly with the health care provider, or with assistance of family, friends, and charitable; and the costs are thereafter shifted to others.

*Florida v. U.S. Dep't Health & Human Servs.*, 2011 U.S.Dist. LEXIS 8822, at *92-95 (N.D. Fla. 2011). To unpack the chain of assumptions that undergirds this farfetched justification for the individual mandate is to demonstrate that it is nothing more than an arbitrary and irrebuttable presumption which results in a penalty. The Supreme Court has struck down similarly arbitrary and gross presumptions as inconsistent with Due Process. Accordingly, the individual mandate is unconstitutional and the court below erred when it held to the contrary.

### C. Due Process Protects The Liberty Of Citizens To Avoid Jurisdiction By Choosing Not To Engage In Commercial Activity.

The court below combined its notion that the federal government could regulate mental activity with its embrace of an arbitrary and irrebuttable statutory presumption in order to reach an ultimate conclusion that brought uninsured

Americans within the scope of federal jurisdiction exercised under pursuant to the Commerce Clause. The conclusion reached by the court below is just as farfetched as its premises. For in other areas the Supreme Court has indicated that the guarantee of fundamental fairness at the heart of the Due Process Clause entails some ability to avoid jurisdiction by refraining from activity that brings one within the scope of a jurisdictional provision such as the commerce power.

For example, at the outset of the modern jurisprudence governing personal jurisdiction, the Supreme Court rejected a rule based on nothing more than physical presence when it held, in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), that exercising jurisdiction over a defendant was permissible only if the defendant had "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id*. at 316. At the very outset it emphasized that vitally important function of the "purposeful availment" requirement is to "allow [] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

The decision below is wholly inconsistent with the idea that Due Process entails some liberty to avoid jurisdiction. Instead it extends the reach of congressional power under the Commerce Clause to a truly unprecedented extent,

reasoning that Congress may regulate mental activity so as to justify a finding that Congress can regulate noncommercial inactivity. The Supreme Court has never suggested that such inactivity falls within the scope of the commerce power, and as the plaintiffs-appellants demonstrate, it has held to the contrary. The idea that the commerce clause does not allow Congress to regulate noncommercial inactivity is in keeping with the Supreme Court's jurisprudence in the area of personal jurisdiction, which has indicated that one fundamental element of liberty is the ability of citizens to structure their voluntary activity in a way that avoids jurisdiction and penalty, the very results compelled by the PPACA for those who chose not to participate in the marketplace for healthcare insurance. For just this reason, the Supreme Court's Due Process precedent suggests that Congress cannot draw citizens within the regulatory net created by the PPACA.

## CONCLUSION

We respectfully submit that the arguments made for PPACA are at odds with three areas of precedent not raised by the parties or other *amici curiae*. The court below held that Congress could regulate mental activity under the commerce power, but it is fundamental that the First Amendment prohibits the federal government from regulating beliefs. The court below upheld PPACA based on its assumption that uninsured persons would need medical care at some point and be unable to pay for it, but it is fundamental that the government cannot allocate benefits or burdens based upon arbitrary and irrebuttable presumptions of this kind. The court below upheld PPACA on the theory that inactivity amounted to commercial activity, neglecting precedent indicating that Due Process protects liberty by preventing the exercise of jurisdiction without an element of "purposeful availment." We respectfully suggest that precedent in these three areas provides a telling indication that Congress exceeded its authority when it enacted the PPACA. For these reasons, we respectfully suggest that the decision below is wrong and must be reversed.

Respectfully submitted this 25th day of May 2011.

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## CERTIFICATE OF SERVICE

I certify that on this 25th day of May 2011, I filed this document by means of the Court's ECF system and thereby served it upon parties of record pursuant to, and as required by, this courts rules:

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains 2,467 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)B)(iii).

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