

1 STUART F. DELERY
Acting Assistant Attorney General

2 IAN HEATH GERSHENGORN
3 Deputy Assistant Attorney General

4 JOHN S. LEONARDO
United States Attorney, District of Arizona

5 JENNIFER RICKETTS
6 Director

7 SHEILA LIEBER
Deputy Director

8 JOEL McELVAIN
9 TAMRA T. MOORE
ETHAN P. DAVIS
Attorneys
10 United States Department of Justice
Civil Division, Federal Programs Branch
11 20 Massachusetts Ave. NW
Washington, D.C. 20001
12 (202) 514-9242
Ethan.P.Davis@usdoj.gov

13 *Attorneys for Defendants*

14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 Nick Coons; et al.,

17 Plaintiffs,

18 vs.

19 Timothy Geithner; et al.,

20 Defendants

) Case No.: CV-10-1714-PHX-GMS

) **DEFENDANTS' SUPPLEMENTAL**
) **BRIEF**

21
22
23
24
25
26

1 **INTRODUCTION**

2 Plaintiffs’ substantive due process and “alternative non-preemption” claims should
3 be dismissed. The supposed right not to purchase health insurance is not deeply rooted in
4 this Nation’s history and tradition. Nor does the minimum coverage provision violate
5 Coons’ right to medical privacy; other federal laws strictly limit the situations in which
6 insurance companies may disclose confidential medical information, and in any event the
7 due process clause does not prohibit reasonable disclosures of personal medical
8 information to insurance companies. Plaintiffs’ “alternative non-preemption” count is
9 also meritless, as the Supreme Court in *National Federation of Independent Business v.*
10 *Sebelius*, 132 S. Ct. 2566 (2012), conclusively established the constitutionality of the
11 minimum coverage provision. Although plaintiffs contend otherwise, it is well
12 established that, in our federal system, a constitutional federal law trumps a conflicting
13 state law, not vice versa.
14
15

16 **ARGUMENT**

17 **I. The Minimum Coverage Provision Does Not Violate Due Process**

18 The government has explained that Coons does not have a fundamental right under
19 the Due Process Clause not to purchase health insurance. *See* Defs.’ Mot. Dismiss at 41-
20 43, ECF No. 42.¹ To qualify for due process protection, the asserted right must be
21 “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the
22 concept of ordered liberty, such that neither liberty nor justice would exist if they were
23
24

25 ¹ The government has already explained in its briefing that plaintiffs lack standing to
26 assert their claims and that those claims are not ripe for review. Rather than repeat those
arguments here, the government incorporates them by reference.

1 sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citation and
2 internal quotation marks omitted). These include the “rights to marry,” “to have
3 children,” “to direct the education and upbringing of one’s children,” “to marital
4 privacy,” “to use contraception,” “to bodily integrity,” “to abortion,” and possibly “to
5 refuse unwanted lifesaving medical treatment.” *Id.* at 720 (citations omitted). The Court
6 has cautioned against recognizing new fundamental rights, “lest the liberty protected by
7 the Due Process Clause be subtly transformed into the policy preferences of the Members
8 of this Court.” *Id.* (citation omitted).

10 The right to forgo health insurance that one can afford and, as a result, to shift
11 one’s health care costs to third parties, is not “deeply rooted in this Nation’s history and
12 tradition.” *Id.* at 720-1. Avoiding insurance that one can afford is not a prerequisite to
13 liberty. *Glucksberg*, 521 U.S. at 720. Because the right to forgo health insurance does
14 not belong to the same category as the rights to marry, to have children, and the like, the
15 minimum coverage provision is subject only to rational basis review. The minimum
16 coverage provision plainly satisfies this “highly deferential” standard of review. *Flores*
17 *by Galvez-Maldaoanado v. Meese*, 913 F.2d 1315, 1330 (9th Cir. 1990). As the
18 government has explained, Congress rationally found that the minimum coverage
19 provision is essential to creating effective health insurance markets “in which improved
20 health insurance products that are guaranteed issue and do not exclude coverage of pre-
21 existing conditions can be sold,” Pub. L. No. 111-148, §§ 1501(a)(2)(G), 10106(a), while
22 also helping to reduce administrative costs and lower premiums, *id.* §§ 1501(a)(2)(G),
23 (H), 10106(a).
24
25
26

1 Plaintiffs do not respond to these points. Instead, they argue that buying health
2 insurance or paying the assessment “reduces the health care treatments and doctor-patient
3 relationships [Coons] can afford to choose, thereby unduly burdening his right to medical
4 autonomy.” Pls.’ Supp. Br. at 6, ECF No. 85, (relying on *Planned Parenthood v. Casey*,
5 505 U.S. 833, 884 (1992) (plurality op.)). Coons retains the right to see any doctor that
6 he chooses, and he is not required to submit insurance claims if he chooses not to do so.
7 Nor does the minimum coverage provision bar him from creating any patient-doctor
8 relationships that he wants or implicate in any way the right to refuse medical treatment.
9 *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990). As this Court has
10 observed (Order at 4, ECF No. 84), the provision does not even require Coons to
11 purchase health insurance directly; by paying the assessment Coons will have “fully
12 complied with the law.”² *NFIB*, 132 S. Ct. at 2597.

15 Nor does the minimum coverage provision violate any due process right to
16 informational privacy. In plaintiffs’ view, the minimum coverage provision violates due
17 process by forcing Coons to disclose confidential medical information to an insurance
18 company. As an initial matter, this claim is unripe. Plaintiffs’ claim depends on their
19 implausible speculation that *all* insurers will require them to disclose that information
20 after the minimum coverage provision goes into effect. Indeed, the one court to have
21

22
23 ²To the extent plaintiffs claim that the minimum coverage provision burdens Coons’ right
24 to medical autonomy by diverting his income away from the “health care treatments and
25 doctor-patient relationships” he would like to choose, the case plaintiffs rely upon
26 recognizes that “a law [which] has the incidental effect of making it more difficult or
more expensive” to exercise a right “cannot be enough to invalidate it.” *Casey*, 505 U.S.
at 874 (plurality op.).

1 considered the issue has found that this type of claim was not ripe because “[t]o
2 competently conduct either analysis, the Court must at least consider the particular
3 demands of the challenged law, the nature of the information to be disclosed, the purpose
4 for which the government seeks it, the protections afforded to the disclosed information,
5 and any other circumstances particular to the dispute.” *Walters v. Holder*, Civil Action
6 No. 2:10-cv-76-KS-MTP, 2012 WL 3644816, at *5 (S.D. Miss. Aug. 23, 2012).

8 Even if this Court were to reach the merits, the minimum coverage provision in no
9 way *requires* individuals to submit claims to their health plan. Indeed, as the Supreme
10 Court explained, citizens are not required to obtain health coverage at all; rather, they
11 “may lawfully choose to pay [the assessment] in lieu of buying health insurance.” *NFIB*,
12 132 S. Ct. at 2597. Indeed, any plaintiff could choose to pay the monetary assessment
13 rather than purchase health insurance. *See id.* at 2595-96. Plaintiffs’ due process claims
14 thus necessarily fail, given the “especially broad latitude” that Congress has in “creating
15 classifications and distinctions in tax statutes.” *Armour v. City of Indianapolis*, 132 S. Ct.
16 2073, 2080 (2012) (collecting cases); *see also R.J. Reynolds Tobacco Co. v. Shewry*, 423
17 F.3d 906, 921 (9th Cir. 2004) (“The Supreme Court has repeatedly emphasized that
18 deference not warranted in other regulatory areas is warranted when it comes to the tax
19 system.”)

22 Even if the minimum coverage provision did require the purchase of health
23 insurance directly, plaintiffs’ medical privacy claim would be meritless. The ACA
24 *prohibits* the health insurance Exchanges from requiring any applicant to provide any
25 information other than what is “strictly necessary to authenticate identity, determine
26

1 eligibility, and determine the amount of the [premium tax] credit or [cost-sharing]
2 reduction” for which the applicant is eligible. *See* 42 U.S.C. § 18081(g)(1). In addition,
3 given that insurers are prohibited from taking into account an individual’s health status or
4 medical condition when determining eligibility or enrollment, there is no reason to
5 believe the Exchanges would be collecting such information. Moreover, another federal
6 law, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), strictly
7 limits the manner in which insurance companies may use or disclose individuals’ medical
8 information. *Id.* at §§ 1320d, *et seq.*; 45 C.F.R. § 164.502. Because plaintiffs’ medical
9 information is “shielded by statute from unwarranted disclosure,” *NASA v. Nelson*, 131 S.
10 Ct. 746, 762 (2011) (internal quotation and alteration omitted), plaintiffs have no due
11 process claim.
12
13

14 Finally, putting aside the point that the minimum coverage provision does not
15 compel any disclosures of information at all, the constitutional right to informational
16 privacy does not bar “reasonable” disclosures of medical information to insurance
17 companies if they are asked to pay claims. *Id.*, at 759. “[D]isclosures of private medical
18 information to doctors, to hospital personnel, *to insurance companies*, and to public
19 health agencies are often an essential part of modern medical practice even when the
20 disclosure may reflect unfavorably on the character of the patient.” *Whalen v. Roe*, 429
21 U.S. 589, 602 (1977) (emphasis added). *See also Seaton v. Mayberg*, 610 F.3d 530, 537
22 (9th Cir. 2010) (no privacy interest in medical information in “disclosures to . . .
23 *insurance companies*”) (emphasis added).
24
25
26

1 **II. Arizona’s Laws Do Not Preempt Federal Law**

2 There is no conflict between Arizona’s law and the Affordable Care Act if Article
3 XVIII of the Arizona Constitution is interpreted to apply only to *state* laws and to *state*
4 laws mandating health coverage. The Arizona Constitution purports to “preserve the
5 freedom of Arizonans to provide for their health care.” Ariz. Const. art. XXVII, § 2. It
6 provides that “[a] law or rule shall not compel, directly or indirectly, any person,
7 employer or health care provider to participate in any health care system.” *Id.* Nothing
8 in section 2 prohibits *federal* laws passed by *federal* officials, and it is natural to assume
9 that the State passed the Health Care Freedom Act against the background of the federal
10 Constitution’s Supremacy Clause. *See* U.S. Const. art. VI, cl.2. Thus the Arizona
11 Constitution might prohibit a state law minimum coverage provision, but it cannot
12 “prevent the application” of the provision that Congress passed. *See* 42 U.S.C. §
13 18041(d).

14 Moreover, as the Supreme Court concluded, a person subject to the minimum
15 coverage provision “may lawfully choose to pay [the monetary assessment] in lieu of
16 buying health insurance.” *NFIB*, 2012 WL 2427810, at *26. In light of this
17 interpretation, the minimum coverage provision does not conflict with the Arizona
18 Constitution’s prohibition of laws or rules that “compel, directly or indirectly, any
19 person, employer or health care provider to participate in any health care system.” Ariz.
20 Const. art. XXVII, § 2. Plaintiffs attempt to avoid this conclusion by referring to section
21 2’s prohibition of “penalties or fines” (Pls.’ Supp. Br. at 2); that prohibition, however,
22 applies to “penalties or fines *for accepting direct payment from a person or employer for*
23
24
25
26

1 *lawful health care services.*” Ariz. Const. art. XXVII, § 2 (emphasis added). Nothing in
2 the minimum coverage provision or the Affordable Care Act more generally imposes any
3 penalties or fines for accepting direct payment for lawful health care services.

4 In any event, plaintiffs’ admissions that the “PPACA conflicts with the Arizona
5 Constitution art. XXVII, § 2” (Pls.’ Supp. Br. at 2) and that the ACA “unequivocally
6 violates the Arizona Constitution” (*id.*) independently resolve plaintiffs’ non-preemption
7 claim. Contrary to plaintiffs’ view, a state law cannot preempt a constitutional federal
8 law. *See* Pls’ Mot. for Summ. J. 2, ECF No. 49 (arguing that the minimum coverage
9 provision and the assessment, “even if constitutional, are preempted by the Arizona
10 Constitution and the state’s Health Care Freedom Act.”). Rather, in our federal system
11 “state laws are preempted when they conflict with *federal* law,” not vice versa. *Arizona*
12 *v. United States*, 132 S. Ct. 2492, 2501 (2012) (emphasis added). Because the Supreme
13 Court has determined that the minimum coverage provision is a valid exercise of
14 Congress’s tax power, it follows that any state law that “conflicts” (Pls.’ Supp. Br. at 2)
15 with federal law is preempted. For this reason, plaintiffs’ lengthy discussion about how
16 the “Founders envisioned a system of federalism in which states, with their powers
17 protected by the Tenth Amendment and other constitutional provisions, would
18 counterbalance the federal government so as to protect individual freedoms against
19 concentrated power,” is beside the point. *See id.* at 3-6.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CONCLUSION

For the foregoing reasons, this Court should enter a final judgment dismissing this case in its entirety.

DATED: September 27, 2012

Respectfully submitted,
STUART F. DELERY
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Assistant Attorney General
JOHN S. LEONARDO
United States Attorney, District of
Arizona
JENNIFER RICKETTS
Director
SHEILA LIEBER
Deputy Director
s/ Tamra T. Moore _____
JOEL McELVAIN
TAMRA T. MOORE
ETHAN P. DAVIS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, D.C. 20001
Phone: (202) 514-8095
Fax: (202) 616-8470
E-mail: Tamra.Moore@usdoj.gov
Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Clint D. Bolick, Goldwater Institute, cbolick@goldwaterinstitute.org

Diane S. Cohen, Goldwater Institute, dcohen@goldwaterinstitute.org

Nicholas C. Dranias, Goldwater Institute, ndranias@goldwaterinstitute.org

s/ Tamra T. Moore
TAMRA T. MOORE