No. _____

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II, in his
Official Capacity as Attorney General of Virginia,

Petitioner,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of Health and
Human Services, in her Official Capacity,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Circuit Court of Appeals for the Fourth Circuit erred when, contrary to well developed sovereign standing law in this Court and in other circuits, it became the first circuit to deny that a State of the Union has standing to defend its own code of laws.

2. Whether the Fourth Circuit erred, and opened a circuit split, when it construed the Virginia Health Care Freedom Act contrary to the construction placed upon it by the chief law officer of the Commonwealth of Virginia by holding it to be merely symbolic and therefore not a real law capable of giving rise to a sovereign injury, basing this holding in part upon a misreading of the Virginia Constitution and Acts of the Assembly.

3. Whether the Fourth Circuit erred when, contrary to definitive pronouncements of this Court and opinions of other circuits, it read the political question doctrine prong of *Massachusetts v. Mellon* as having continued vitality so as to prevent a State from challenging an enactment of the United States on enumerated powers grounds.

4. Whether the power claimed by Congress in the Patient Protection and Affordable Care Act (PPACA) to mandate that a citizen purchase a good or service from another citizen is unconstitutional because the claimed power exceeds the outer limits of the Commerce Clause even as executed by the Necessary and Proper Clause.

QUESTIONS PRESENTED – Continued

5. Whether the PPACA mandate and penalty can be sustained as an exercise of the taxing power.

6. Whether the PPACA mandate and penalty are severable from all of the remaining provisions of the enactment.

CORPORATE DISCLOSURE STATEMENT

There are no disclosable entities, persons or interests.

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PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Virginia *ex rel*. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the district court denying the Secretary's Motion to Dismiss is reported as *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). The opinion granting summary judgment to Virginia on the unconstitutionality of PPACA, and severing the mandate and penalty, appears as *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010). The Fourth Circuit opinion in *Virginia ex rel. Cuccinelli v. Sebelius*, ___ F.3d ___ (4th Cir. 2011) is informally reported at 2011 U.S. App. LEXIS 18632. The opinion of the Fourth Circuit is reprinted in the Appendix ("App.") at App. 1-44. The first and second district court opinions are reprinted at App. 98-133 and App. 45-95, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 2011. This petition was timely filed within ninety days after judgment, and

this Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Because the constitutional and statutory provisions involved in this case are lengthy, they are cited here as U.S. Const. art. I, § 8 and 124 Stat. 119 (2010), as amended by 124 Stat. 1029 (2010). Pertinent provisions are reproduced in the Appendix. (*See* App. at 136, 137-53).

STATEMENT OF THE CASE

On March 10, 2010, during its 2010 Regular Session, the Virginia General Assembly enacted the Virginia Health Care Freedom Act, Va. Code Ann. § 38.2-3430.1:1 (Supp. 2011). (App. at 30). That act provides in pertinent part:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the Federal Government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a Court or the Department of Social Services where an

> individual is named a party in a judicial or administrative proceeding.

This legislation was enacted in several identical versions on a bi-partisan basis, with margins as high as 90 to 3 in the House of Delegates and 25 to 15 in the Senate. At the time of enactment, the Virginia House of Delegates was composed of 59 Republicans, 39 Democrats and 2 Independents, while the Virginia Senate contained 22 Democrats and 18 Republicans. (App. at 191).

The Attorney General of Virginia has the duty to defend the legislative enactments of the Commonwealth. Va. Code Ann. §§ 2.2-507; 2.2-513 (2008). When the President signed the Patient Protection and Affordable Care Act ("PPACA") on March 23, 2010, the validity of both the Federal and the already enacted state law was drawn into question. If PPACA is supported by an enumerated power, then it prevails under the Supremacy Clause. If not, the Virginia Health Care Freedom Act is a valid exercise of the police powers reserved to the States. In order to resolve this conflict, Virginia filed a Complaint in the United States District Court for the Eastern District of Virginia for Declaratory and Injunctive Relief. (App. at 193).

On May 24, 2010, the Secretary filed a motion to dismiss premised upon lack of standing, the Anti-Injunction Act, ripeness, and failure to state a claim. The motion was fully briefed and extensively argued with considerable participation of amici. (App.

at 198-212). The district court denied the motion to dismiss on August 2, 2010. *Virginia*, 702 F. Supp. 2d at 598. (App. at 134).

On August 16, 2010, the Secretary filed her Answer. (App. at 214). On September 3, 2010, the parties filed cross-motions for summary judgment. (App. at 214-15). Once again there was substantial amici participation. (App. at 215-29).

On December 13, 2010, the district court granted Virginia's motion for summary judgment and declared the individual mandate of PPACA unconstitutional. (App. at 90, 97). The Secretary filed her notice of appeal on January 18, 2011. (App. at 232). Because the district court had ruled that the mandate and penalty were severable from the remainder of PPACA, Virginia filed a notice of appeal the same day to challenge that ruling. (App. at 232). The cases were consolidated by Order dated January 20, 2011. (App. at 233).

On January 26, 2011, the Secretary and Virginia filed a Joint Motion to Expedite Briefing and to Schedule Oral Argument for May 2011. (App. at 247). The motion was granted the same day. (App. at 247). Virginia sought review before judgment pursuant to Rule 11 of this Court. That petition was denied on April 26, 2011. (App. at 306). On May 10, 2011 *Virginia* was argued *seriatim* with argument in *Liberty University, Inc. v. Geithner*, No. 10-2347. (App. at 306).

Following oral argument, this Court unanimously held in *Bond v. United States*, 131 S. Ct. 2355 (2011), that a criminal defendant has standing to challenge a federal statute on enumerated powers grounds. Although it was recognized that in some cases a State may be the "only entity capable of demonstrating the requisite injury," *Id.* at 2366, Bond was allowed to assert both enumerated powers arguments and related state sovereignty issues. *Id.* at 2363-66. Hence, even though there was no direct statutory conflict between state and federal law, Bond was permitted to argue that Pennsylvania had a different policy toward the offense in question, including punishing it more leniently. *Id*. at 2366. Virginia brought *Bond* to the attention of the Fourth Circuit as supplemental authority pursuant to Rule 28(j). (App. at 309).

On June 29, 2011, the Sixth Circuit decided *Thomas More Law Center v. Obama*, No. 10-2388, 2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011). The panel fractured with one judge finding PPACA constitutional, another finding it facially unconstitutional, and the third finding it facially constitutional while reserving the possibility that it may be unconstitutional in some applications. The Thomas More Law Center filed a petition for writ of certiorari with this Court on July 26, 2011.

On August 12, 2011, a divided panel of the Eleventh Circuit declared the mandate and penalty unconstitutional, severing them from the rest of PPACA. *Florida v. United States Dep't of Health &*

Human Services, Nos. 11-11021 & 11-11067, 2011 U.S. App. LEXIS 16806 (11th Cir. Aug. 12, 2011). Both plaintiffs below and the United States filed petitions for writs of certiorari with this Court on September 28, 2011.

The Liberty University appeal and the challenge to Virginia's judgment were both decided September 8, 2011. Characterizing the Liberty University case as "a pre-enforcement action seeking to restrain the assessment of a tax," *Liberty University, Inc. v. Geithner*, No. 10-2347, 2011 U.S. App. LEXIS 18618 at *6 (4th Cir. Sept. 8, 2011), the court found that "the Anti-Injunction Act strips us of jurisdiction." *Id.*[1] The Virginia case was remanded with instructions to dismiss based upon a holding "that Virginia, the sole plaintiff here, lacks standing to bring this action." (App. at 29).

With its holding, the court opened up a circuit split on state sovereign standing and erred in several fundamental and publicly important ways. First, the decision deprived the federal courts in the Fourth Circuit of one of their foundational and most important roles—that of arbiter of competing claims of federal and state power. Second, in an effort to distinguish the well-developed law of sovereign

[1] Judge Davis dissented and voted to uphold PPACA under the Commerce Clause. *Liberty University*, No. 10-2347, 2011 U.S. LEXIS 18618 at *79 (Davis, J., dissenting). Judge Wynn concurred, but stated that if the merits had been reached he would uphold PPACA under the taxing power. *Id.* at *57 (Wynn, J., concurring).

standing, the court opened a split with the District of Columbia Circuit by not deferring to the construction of state law by the chief legal officer of a State, but instead construing it to fall short of being a real law, as though such a thing were possible for a duly enacted and codified statute. Finally, the court exhumed the political question doctrine prong of *Massachusetts v. Mellon*, a prong lacking vitality at least since *Baker v. Carr*, *South Carolina v. Katzenbach*, and *Oregon v. Mitchell*, reinterpreting the political question doctrine as a prudential bar to sovereign standing.

Because the Virginia case was ordered to be dismissed on standing, the court did not reach the constitutionality of PPACA on the merits. But that pure issue of law was exhaustively developed both in the district court and on appeal. In fact, the first sixteen pages of the Fourth Circuit's thirty-three page slip opinion are devoted to listing the parties, amici and counsel who participated in that development. Furthermore, we know that PPACA would have been upheld had the merits been reached because of the statements contained in the dissent and concurrence in *Liberty University.*

The dismissal of the individuals for want of jurisdiction in *Liberty University* suggests that this Court could best ensure reaching the merits of PPACA if it selected the Virginia case as the vehicle, or as a vehicle, for review. The United States adopted a policy of not contesting individual standing and jurisdiction in the circuit courts of appeals while challenging state sovereign standing. The issue of

state sovereign standing was not reached in the Eleventh Circuit because there was at least one individual found to have standing. *Florida*, Nos. 11-11021 & 11-11067, 2011 U.S. App. LEXIS 16806 at 425. Perhaps because few of the twenty-six states suing in Florida had statutes comparable to Virginia's, the state sovereign standing issue was preserved but left largely undeveloped. *Id.* at 426-27. Although the United States conceded individual standing and jurisdiction for Liberty University, *See*, Brief for Appellees at 1, *Liberty University*, No. 10-2347, 2011 LEXIS 18618 (ECF Doc. 34 at 14), the Fourth Circuit requested supplemental briefing on the AIA in both the Virginia and Liberty University cases. (*See* App. at 307). Despite the fact that all parties responded that the AIA was not a bar, *See, e.g.,* Supplemental Brief for Appellees at 2, *Liberty University*, No. 10-2347, the Fourth Circuit dismissed all individual claims under the AIA.[2] *Liberty University*, No. 10-2347, 2011 LEXIS 18618 at *20-21. Notwithstanding this ruling in *Liberty University*, the court stated: "Virginia may well be exempt from the AIA bar. *See South Carolina v. Regan*, 465 U.S. 367, 378 (1984)." (App. at 31 n.1).

Now that a circuit split has opened on the AIA question, it is just as likely that the path to merits review of PPACA passes through a record in which

[2] The challenge of Liberty University to the employer mandate implicated additional issues upon which the court based its dismissal of the university. *Id.* at *21-22 n.3.

state sovereign standing has been well developed as it is that it passes through a case in which only individual standing has been found. In these circumstances, the Virginia case is worthy of Supreme Court review because the ruling on the state sovereign standing issues in the Fourth Circuit has opened a circuit split with respect to an issue of great national importance—whether and how competing claims of state and federal power will be resolved. Merits review should also be granted based upon prudential considerations of what cases provide the best vehicles for review of PPACA on the merits. In the end, Virginia will suggest a grant of multiple petitions. Multiple grants to ensure fullness of presentation finds support in *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003).

REASONS FOR GRANTING THE PETITION

A. The Standing Decision Of The Fourth Circuit Is Independently Worthy Of Supreme Court Review Because It Has Opened A Circuit Split Concerning An Important Question Of Federal Law.

1. The ruling below misapprehends the foundational and continuing role of the federal courts as arbiters of competing claims of state and federal power.

According to the majority, "If we were to adopt Virginia's standing theory, each state could become a

roving constitutional watchdog of sorts" (App. at 41-42). In some respects that is a surprising statement because it is indisputable that the States were intended to be part of the constitutional system of checks and balances. Madison said so in *The Federalist* No. 51 ("The different governments will control each other, at the same time that each will be controlled by itself."). This Court said so last term in a case not addressed by the Fourth Circuit. *Bond*, 131 S. Ct. at 2364 (the sovereignty of the States "is not just an end in itself" because structural federalism "secures to citizens the liberties that derive from the diffusion of sovereign power" (internal quotation marks and citation omitted) and "secures the freedom of the individual.").

The question remains how and where the check of the States was to be felt. There is, of course, what could be styled the nuclear option: two-thirds of the States—five more than are now suing the United States over PPACA[3]—can call a constitutional convention under Article V. This has never been found necessary, in part, because the Constitution provides an ordinary channel for resolving conflicting claims of state and federal power—the federal courts. This was a clear assumption of the Founders. As

[3] Twenty-six States have sued in Florida. *Florida v. U.S. Dep't of Health & Human Services*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822 at 6 (N.D. Fla. Jan. 31, 2011). In addition to Virginia, Oklahoma has sued individually. *See Pruitt v. Sebelius*, No. 6:11-cv-0030 (E.D. Okla. Jan. 21, 2011).

Madison wrote in *The Federalist* No. 39, "the tribunal which is ultimately to decide, is tobe established under the general government." He continued, "Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and it ought to be established under the general rather than under the local governments, or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated." Alexander Hamilton agreed, as recognized by this Court in *New York v. United States*, 505 U.S. 144 (1992):

> In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "the constitution created a Federal Government of limited powers," . . . the task of ascertaining the constitutional line between Federal and State power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.)

> 304, 324 (1816), the Court has resolved questions "of great importance and delicacy in determining whether particular sovereign powers have been granted by the constitution to the Federal Government or have been retained by the States."

Id. at 155 (some internal citations omitted).

In another early and celebrated case, *M'Cullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the boundary-drawing function operated as Madison and Hamilton had envisioned. Indeed, the act taxing the notes of the Bank of the United States at issue in *M'Cullough* was passed with the probable intent to create a test case for the constitutionality of the Bank. *M'Cullough*, 17 U.S. (4 Wheat.) at 320 (suit joined on stipulated facts expressly binding in the United States Supreme Court), 393 ("There is, in point of fact, a branch of no other bank within that state, and there can legally be no others.") (argument of William Pinkney). Chief Justice Marshall famously had no doubts concerning jurisdiction.

> In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and its members, as marked in that constitution, are to be

> discussed, and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a more serious nature; and if it is to be decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution devolved this important duty.

Id. at 400-401.

The proposition that the federal courts have a duty to decide such cases was emphatically reaffirmed three years later in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). There Chief Justice Marshall said:

> It is most true that this Court will not take jurisdiction if it should not but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. . . . In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States.

> We find no exception to this grant, and we cannot insert one.

Id. at 404.

Not only were disputes over conflicting claims of state and federal power deemed Article III cases or controversies at the founding and in the early seminal cases of this Court, but that remains true today. *See, e.g.*, *Bond*, 131 S. Ct. at 2355; *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. at 155; *Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("a State clearly has a legitimate interest in the continued enforceability of its own statutes"); *Diamond v. Charles*, 476 U.S. 54, 62, 65 (1986) ("a State has standing to defend the constitutionality of its statute"); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) ("The power to create and enforce a legal code, both civil and criminal" is a core state function); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

The doctrine of state sovereign standing also is well developed in the courts of appeals. *See, e.g.*, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (State has standing to defend the efficacy of its expungement statute from threatened federal pre-emption); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (States have a sovereign interest in the power to create and enforce a legal code); *Alaska v. U.S. Dep't of Transportation*, 868 F.2d 441, 443-45

(D.C. Cir. 1989) (preemptive effect [of federal regulations] on state statutes is sufficient to confer standing); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transportation*, 766 F.2d 228, 232-33 (6th Cir. 1985) (same).

The Fourth Circuit tentatively agreed that "[a] federal statute that hinders a state's exercise of this sovereign power to 'create and enforce a legal code' at least arguably inflicts an injury sufficient to provide a state standing to challenge the federal statute." (App. at 34) (citing *Wyoming*, 539 F.3d at 1242). But the court continued, "The Secretary contends that Virginia's claim is not of the sort recognized in *Wyoming*." (*Id*.)

This assertion of the Secretary does not withstand scrutiny. In *Wyoming*, the state legislature passed a state expungement law intended to take advantage of an expungement exception in a federal firearms statute. The ATF took the position that there was a federal definition of expungement that the state law did not satisfy. Wyoming issued conceal-carry permits to those whose convictions had been expunged according to state law. The ATF threatened to cease accepting Wyoming conceal-carry permits in lieu of background checks. Wyoming then filed suit for injunctive and declaratory relief and was found to have standing to lose on the merits. *Wyoming*, 539 F.3d at 1244, 1249.

With respect to Article III standing, the Tenth Circuit found that when the exercise of sovereign

authority over persons and entities within the state is threatened with pre-emption, there is sufficient injury in fact to create Article III standing. *Id*. at 1242.[4] The state interest involved was identical to Virginia's interest in this case. The State wanted to regulate persons and entities in accordance with state law, and the United States wished to regulate them under federal law.

The same sovereign interest was found to give rise to Article III standing in *Alaska*, 868 F.2d at 443-45. In addition, the District of Columbia Circuit in that case refused the invitation of the United States "to reject, in the guise of standing analysis, the states' respective constructions of their own laws." *Id.* at 443.

Ohio, 766 F.2d at 232-33, likewise involved competing claims of state and federal power to regulate the same persons or entities. *See also Texas Office of Public Utility Counsel*, 183 F.3d at 449 (recognizing state sovereign standing).

Hence, it is clear that the Fourth Circuit has opened up a deep circuit split on state sovereign standing. The fact that Virginia has demonstrated Article III standing does not end the standing discussion, because it is necessary to address the various subsidiary holdings of the Fourth Circuit,

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[4] The only prudential standing analysis employed was that pertaining to any appeal of agency action. *Wyoming*, 539 F.3d at 1242-44.

beginning with the court's acceptance of the Secretary's argument "that Virginia actually seeks to litigate as *parens patriae* by asserting the rights of its citizens." (App. at 34).

2. The Fourth Circuit has placed limits on sovereign standing unknown to this Court or to the other circuits which have considered sovereign standing.

(a) This is not a *parens patriae* case.

The Secretary's claim that this case is a *parens patriae* case depends upon post-modernist word torture. As relevant here, *Black's* defines the term as follows:

> A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit[.]

Black's Law Dictionary 1137 (7th ed. 1999). The interest being asserted in this case is that of the General Assembly and the Governor in enacting the VHCFA. No citizen has the right or power to assert such a claim. *Diamond*, 476 U.S. at 64.

The Fourth Circuit has confused the incidental benefits conferred on individuals by Virginia's enactment of the VHCFA with *parens patriae* jurisdiction. It is true that the VHCFA, if valid, in addition to being an exercise of sovereign power that may be defended by Virginia, confers individual

rights and benefits. But that was equally true in *Wyoming*—a case which both the Secretary and the Fourth Circuit regard as good law. Indeed, it would be true of almost any state enactment. But Virginia is not asserting an injury tied to the rights and benefits of individuals. Rather, as it has maintained throughout this case, Virginia seeks to defend its sovereign power to regulate the persons and entities within its boundaries with respect to the power to mandate the purchase of health insurance—a power that Virginia alleges that it possesses and the United States lacks. Not only should Virginia be treated as the master of its own theory of the case, *see EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002), but under Virginia law, the Attorney General lacks the authority to file *parens patriae* suits. Such suits must be brought by the Governor in the name of the Commonwealth. Va. Code Ann. § 2.2-111(B).

(b) The Fourth Circuit has opened a split with the District of Columbia Circuit by accepting the invitation of the United States to reject, in the guise of standing analysis, the State's construction of its own law.

The linchpin of the Fourth Circuit's analysis is obviously mistaken. According to the majority opinion,

> By contrast [with other cited state sovereign standing cases], the VHCFA regulates nothing and provides for the administration of no

> state program. Instead, it simply purports to immunize Virginia citizens from federal law.

(App. at 36). This notion is premised on the incorrect factual assertion that the VHCFA was enacted after PPACA. In fact, the VHCFA (now appearing as three identical chapters in the 2010 Acts of Assembly), was enacted on March 10, 2010. 2010 Va. Acts, chs. 106, 107, 108.[5]

Thus, at the time of passage of the Virginia statute, it was possible—and for a time seemed likely—that PPACA would fail of enactment, while the VHCFA would remain the law of Virginia. Irrespective of PPACA, VHCFA prohibits every non-exempted person and entity within the boundaries of Virginia from requiring insurance as a condition of employment or conditioning any other benefit on an insured status. That prohibition would have been then—as it is now—enforceable by private suit or by the Attorney General of Virginia by way of injunction. That is the interpretation that

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[5] The Fourth Circuit recites that the President signed PPACA into law on March 23, 2010 and states that "[t]he Governor of Virginia did not sign the VHFCA into law until the next day." (App. at 30). This appears to be based on a misapprehension of the Virginia Constitution. Pursuant to Article V, § 6(b)(iii) of the Constitution of Virginia, a bill becomes law when the General Assembly agrees to amendments proposed by the Governor. That is how chapters 106, 107 and 108 became law on March 10, 2010. An identical chapter was enacted and signed on March 24, 2010, but it was redundant. 2010 Va. Acts, ch. 818.

the Attorney General of Virginia has placed on the VHCFA throughout this litigation. (*See* Appellee's Opening and Response Brief, *Virginia*, Nos. 11-1057, 11-1058, 2011 U.S. App. LEXIS 18632 (ECF Doc. 102 at 25-26). The refusal of the Fourth Circuit to accept that construction is both an error of statutory construction and opens a separate circuit split. *Alaska*, 868 F.2d at 443-45 (District of Columbia Circuit refused the invitation of the United States "to reject, in the guise of standing analysis, the states' respective constructions of their own laws.").

(c) The understanding of sovereign injury expressed by the Fourth Circuit is erroneous and in conflict with decisions of this Court and those of various circuit courts of appeals.

The Fourth Circuit has concluded: "the individual mandate does not affect Virginia's ability to enforce the VHCFA. Rather the Constitution itself withholds from Virginia the power to enforce the VHCFA against the federal government," (App. at 37) (citing *Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (finding conflict pre-emption of a state margarine law as applied to federal soldiers' home where Congress had explicitly appropriated money to the home to purchase margarine)). This statement is wrong for three reasons. First, it depends on and continues the mistake that the VHCFA only applies to the United States. Second, it ignores the well established rule

that standing and the merits are separate inquiries.[6] *See, e.g.*, *Wyoming*, 539 F.3d at 1244. Third, the argument is circular because it assumes a conclusion on the merits that PPACA is valid. That is so because the Supremacy Clause only operates in favor of "the Laws of the United States which shall be made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. *See New York v. United States*, 505 U.S. at 156.

After repeating the mistaken assertion that the VHCFA is merely a non-binding declaration of policy, (App. at 37), the Fourth Circuit went on to conclude that even if the VHCFA does regulate private employers and localities, that regulation does not conflict with the mandate because the mandate only applies to individuals, not to private employers and localities. (App. at 38). This formulation conflicts with the understanding of sovereign injury as expressed by the decisions of this Court and of other circuits.

Virginia seeks to regulate the entire field of mandated health insurance within its borders with respect to all persons and entities. The desire of the United States to regulate within the claimed reserved police powers of Virginia is what gives rise to

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[6] In footnote 3 of its opinion, the Fourth Circuit suggests Virginia is incorrect in asserting that it would have standing where it is readily apparent that it would lose on the merits. (App. at 41). However, it is the Fourth Circuit that is in error because standing analysis does not turn on the merits and a party may have standing to lose. *See, e.g.*, Transcript of Oral Argument at 25, ln.17-21, *Bond*, 131 S.Ct. at 2355.

sovereign injury as that term heretofore has been understood. The discussion of private employers and localities has arisen in the course of refuting the argument that the VHCFA is merely declaratory. But even within the confines of those examples, if the mandate is valid, a citizen would not be able to win a suit against an employer under the VHCFA for requiring federally approved insurance because that citizen would have suffered no injury. This would frustrate Virginia's sovereign enactment and that frustration illustrates why there is an unavoidable collision of sovereign claims in this case. Despite what the Fourth Circuit argues in footnote 2, the fact that no such suit has yet occurred does not make the sovereign injury speculative or remote. (App. at 38). Virginia and the United States have made mutual antagonistic claims of sovereign right in the present.

3. The Fourth Circuit erred in purporting to exhume the political question doctrine rationale of *Massachusetts v. Mellon*, 262 U.S. 447 (1923), and review should be granted to make clear that the political question prong of *Mellon* has long since been abandoned.

The analytical portions of the Fourth Circuit opinion conclude with a discussion of the proposition that Virginia's law, "because it is not even hypothetically enforceable against the federal government, raises only 'abstract questions of political power, of sovereignty, of government,'"

(App. at 40) (citing *Mellon*, 262 U.S. at 485). The first thing to note is that the state consumer protection laws involved in *Alaska*, 868 F.2d at 441, were "not even hypothetically enforceable against the federal government."[7] The second is that the Fourth Circuit is relying on the long-abandoned political question doctrine rationale of *Mellon*.

Mellon was brought as a test case to answer the questions later answered in *United States v. Butler*, 297 U.S. 1 (1936), and *Helvering v. Davis*, 301 U.S. 619 (1937); to wit, whether the taxing and spending powers are limited by the enumerated powers of Article I, Section 8 of the Constitution. *See* Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 Harv. L. Rev. 548, 548 (1923) (reporting "that there is to be a concerted effort on the part of certain states to challenge the constitutionality of the Sheppard-Townes Act"). *Massachusetts v. Mellon* was argued together with *Frothingham v. Mellon* and was reported in a single opinion. There were four holdings. Two of them were separate and distinct: first, there is no taxpayer standing. *Frothingham*, 262 U.S. at 447, 487 (1923). *But see Flast v. Cohen*, 342 U.S. 88, 106 (1968).

[7] The expungement statute in *Wyoming* was not intended to operate coercively on the United States, but to operate in tandem with federal law. The pre-notification statute in *Ohio*, 766 F.2d at 830, relating to the shipment of nuclear waste, had exemptions for the United States. Thus, direct enforceability against the United States heretofore has not been regarded as an element of sovereign standing.

Second, the States lack *parens patriae* standing against the United States because citizens of a State are also citizens of the United States. *Id.* at 485.

With respect to why Massachusetts could not sue in its own right there was a double holding. The first depends upon modern standing principles. The Maternity Act being challenged by Massachusetts was a spending bill that offered funds to the States in return for voluntary participation in the federal program. Not only was Massachusetts free to participate or not, but no statute of that State was impaired or curtailed and no contemplated action was thwarted. These circumstances led Justice Sutherland to observe, "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject." *Id*. at 480. The Court could have stopped there, although if the State had had a contrary statute to defend, as South Dakota had in *South Dakota v. Dole*, 483 U.S. 203 (1987), there would have been standing as modernly understood. But the Court did not stop there, instead it brought in the political question doctrine.

In doing so, the Court relied upon well recognized political question doctrine cases, *id.* at 480-82, leading commentators to immediately characterize *Mellon* as a political question doctrine case. Maurice Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 359-61 (1923); Melville Fuller Weston, *Political Questions*, 38 Harv. L. Rev. 296, 297 (1925).

Thereafter, for a time, this Court frequently, but not always, cited *Mellon* as a political question case. *See, e.g.*, *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 229 (1974) (Douglas, J., dissenting) (stating that *Mellon* "had an admixture of the 'political question'" doctrine); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 619 (1950) (stating that "[t]he right of a state to press" a claim against the United States "raises familiar difficulties," citing *Mellon*); *Georgia v. Pennsylvania Rail Co*., 324 U.S. 439, 445 (1945) (distinguishing *Mellon* as a political question case); *Ex parte Keough*, 286 U.S. 529 (1932) (citing *Mellon* with guarantee of a republican form of government cases). *But see also Steward Machine Co. v. Davis,* 301 U.S. 548, 592 (1937) (citing *Mellon* as a merits decision); *Nashville, Chattanooga & St. Louis Ry. v. Wallace,* 288 U.S. 249, 261-62 (1933), (distinguishing *Mellon* and *New Jersey v. Sargent*, 269 U.S. 328 (1926), from true political question doctrine cases, on the ground that there was no injury in *Mellon* and *Sargent*).

Then, in 1962, in *Baker v. Carr*, 369 U.S. 186 (1962), this Court repudiated the political question rationale of *Mellon* in two ways. First, *Mellon* was omitted from *Baker*'s list of political question cases. *Baker,* 369 U.S. at 208-37. Second, this Court redefined the political question doctrine to exclude state-federal relations: "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the

'political question.'" *Id.* at 210. Four years later the Supreme Court completed the process of excising the political question doctrine prong of *Mellon* in *South Carolina v. Katzenbach*. In that case, South Carolina was permitted to proceed with its challenge to the Voting Rights Act of 1965 because it was defending its own political rights rather than acting as *parens patriae*. 383 U.S. at 324 (citing *Mellon*). Ever since, until the Fourth Circuit decided this case, state sovereign standing has been uncontroversial in this Court and in the federal circuits.

Nevertheless, as is apparent from the Fourth Circuit's decision here, *Mellon* is capable of misleading the lower courts. According to the Fourth Circuit, it would be intolerable if a State passed an act within the undoubted powers of Congress and thereby achieved standing to sue. (App. at 40-42). The answer, of course, is that standing and the merits are separate inquiries and litigants frequently have standing to lose, as in *Wyoming*. Although the panel opinion meets this argument with incredulity, (App. at 41 n.3), that unexceptionable point was made by Justice Kagan at oral argument in *Bond*. p. 25, ln.17-21. Because of the circuit split and the ability of *Mellon* to confuse lower courts on this point, certiorari should be granted both to establish uniformity among the circuits and to reaffirm that the political question component of *Mellon* does not preclude claims of state sovereign standing.

B. Certiorari should be granted because the federal courts are fractured on the constitutionality of PPACA, a matter of great public importance.

District courts in the Eastern District of Virginia, the Northern District of Florida and the Middle District of Pennsylvania have declared PPACA unconstitutional. *Virginia*, 728 F. Supp. 2d at 798; *Florida v. United States Dep't of Health & Human Services*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8892 (N.D. Fla. Jan. 31, 2011); *Goudy-Bachman v. United States Dep't of Health & Human Services,* No. 1:10-cv-763, 2011 U.S. Dist. LEXIS 102897 (M.D. Pa. Sept. 2011). District courts in the Eastern District of Michigan, the District of Columbia, and the Western District of Virginia have upheld PPACA on the merits. *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010); *Mead v. Holder*, 2011 U.S. Dist. LEXIS 18592 (D.D.C. Feb. 22, 2011); *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010). The Eleventh Circuit has declared PPACA unconstitutional on a two-to-one vote. *Florida*, Nos. 11-11021 & 11-11067, 2011 U.S. App. LEXIS 16808. The Sixth Circuit upheld PPACA, at least against a facial challenge, on a two-to-one vote. *Thomas More Law Center*, No. 10-2388, 2011 U.S. App. LEXIS 13265. Unusually for a case decided on jurisdictional grounds, the merits disposition that the Fourth Circuit would make if there were a remand on jurisdictional grounds is known because Judge Davis and Judge Wynn wrote in *Liberty*

University that they believe PPACA to be constitutional, with Judge Davis relying on the Commerce Clause and Judge Wynn accepting the taxing power argument. Thus, of the fourteen federal judges who have spoken to the constitutionality of PPACA, six have found it unconstitutional under the Commerce Clause, seven have found it constitutional under the Commerce Clause and one has expressed a belief that the penalty is a valid exercise of the taxing power. With the lower courts divided, the constitutionality of PPACA can only be finally resolved in this Court. The United States has recognized this fact by filing with this Court a petition for certiorari to the Eleventh Circuit. The remaining question is which petition or petitions present the best vehicle or vehicles to effectuate that review.

1. This Court should grant certiorari in this case on the merits as well as on the jurisdictional issues in order to ensure reaching the merits.

PPACA continues to roil America and there is widespread belief that the sooner its constitutionality is resolved in this Court the better the country will be for it. As of this filing, the three cases most advanced on this Court's docket are *Thomas More Law Center*, *Florida* and this case.

Thomas More Law Center and *Florida* rest upon individual standing while this case presents the most

developed claim of state sovereign standing. Now that the Fourth Circuit has created a circuit split on personal standing, a grant in *Thomas More Law Center*, *Florida* and this case would cover all jurisdictional possibilities and maximize the likelihood of reaching the merits. *See Gratz*, 539 U.S. at 259-60 (using this Court's Rule 11 to gather a number of cases to permit a constitutional assessment in a wider range of circumstances).

2. The Court should grant certiorari in this case on the merits as well as on the jurisdictional issues because arguments concerning the merits and the appropriate remedy are well developed.

This Court may grant certiorari at any time without regard to the disposition in the courts of appeals. *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897) (certiorari review "may be exercised before or after any decision by" the circuit court of appeals "and irrespective of any ruling or determination therein.").

Doctrinally, this court should grant review to reaffirm that the Commerce Clause has judicially enforceable outer limits. The PPACA mandate and penalty exceed the affirmative outer limits permitted in *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942). *See also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (since *Wickard*, the Supreme Court has gone no further than to hold that Congress can regulate (1) "use of the channels of

interstate commerce," (2) "the instrumentalities of interstate commerce, or persons and things in interstate commerce," and (3) "activities that substantially affect interstate commerce."). The PPACA mandate and penalty also violate the negative outer limits of the Commerce Clause limits which refuse to recognize claims of congressional power tantamount to a national police power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) ("We **always** have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.") (emphasis added).

The mandate and penalty are also not supported by the text of the Commerce Clause, which presupposes an activity to regulate. U.S. Const. art. I, § 8. The historical context in which the Commerce Clause was drafted make it highly unlikely that it included a power to command a citizen to purchase goods or services from another. Certainly there is no tradition or history of the Commerce Clause being used in this way. That is why, prior to passage of PPACA, when the Senate Finance Committee asked the Congressional Research Service whether a mandate supported by a penalty would be constitutional, it received this response: "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service."

Jennifer Stahan & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance, A Conditional Analysis*, July 24, 2009 at 3, 6. *See also* Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.").

The PPACA mandate and penalty cannot be sustained under the Necessary and Proper Clause. The affirmative outer limit of the Commerce Clause relevant to this case—activities substantially affecting commerce—itself depends upon the Necessary and Proper Clause. *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). It would be a mistake to assume that such power is part of the Commerce Clause itself, which can then be infinitely extended by the Necessary and Proper Clause. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause").

The distinction between regulation of activity and inactivity is substantive and vital to the preservation of liberty. Moreover, the mode of regulation must fit the enumerated power by executing it—not by altering its character. If a

claimed power is tantamount to a national police power it would impermissibly alter the character of the Commerce Clause. *Morrison*, 529 U.S. at 618-19.

The use of the Necessary and Proper Clause is also limited by other provisions of the Constitution, including those giving rise to structural federalism.

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of State sovereignty reflected in the various constitutional provisions . . . , it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

Printz v. United States, 521 U.S. at 923-24 (emphasis in original) (citations omitted). *Accord, Alden v. Maine*, 527 U.S. 706, 732-33 (1999). The "various constitutional provisions" referred to by the Court are those that underlie structural federalism, including the limitation of federal power to enumerated, delegated powers. Hence, any application of the Necessary and Proper Clause that renders the concept of enumerated powers superfluous and tantamount to the creation of a national police power fails under the proper prong of the Necessary and Proper Clause.

No court has accepted the argument that the PPACA mandate and penalty can be upheld under the power to tax, and that argument should continue to

be rejected. For nearly a hundred years, this Court has recognized that "taxes" and "penalties" are separate and distinct, stating that "'[a] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.'" *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (quoting *United States v. LaFranca*, 282 U.S. 568, 572 (1931), and holding that a payment specifically denominated as a tax in the tax code was actually a penalty.).

Although elsewhere in PPACA Congress levied taxes denominated as such, *see, e.g.*, PPACA §§ 9001; 9004; 9015; 9017; 10907, Congress itself called the penalty a "penalty." PPACA § 1501. In the taxing arena, this Court has refused to allow litigants to denominate as a tax that which Congress has denominated an exercise of its powers under the Commerce Clause. *Bd. of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 57-58 (1933). In PPACA, Congress made specific Commerce Clause findings in support of the mandate and penalty. PPACA § 1501. The mandate and penalty are structured to operate as a penalty rather than a tax. If they worked together perfectly, conduct would be universally changed and no revenue would be produced. This Court has recognized that civil penalties are separate and distinct from taxes, holding that "tax statutes serve a purpose quite different from civil penalties. . . ." *Dep't of Revenue of*

Montana v. Kurth Ranch, 511 U.S. 767, 784 (1994). To prevail, the Secretary's taxing power argument requires a court first to ignore Congress's express decision to denominate the mandate penalty a "penalty," and then to alter the essential nature of the penalty by ignoring its function so that it can be called a tax. Not only is the Secretary's theory unconvincing, it is ultimately circular. Because the penalty is not in aid of a tax, it is not a "tax penalty" and therefore requires some enumerated power other than the taxing power to support it. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940); *United States v. Butler*, 297 U.S. 1, 61 (1936); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). Because the only possible enumerated power it could rest on is the Commerce Clause, the tax argument collapses back into the Commerce Clause argument.

The record in this case contains an important concession of Secretary Sebelius on the issue of severance. Both the Eastern District of Virginia and the Eleventh Circuit severed the mandate and penalty from all other provisions of PPACA. The controlling case on the propriety and scope of severance is *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). *Alaska Airlines* contains two possible rules of decision. Under a legislative bargain analysis, all provisions of an enactment must be stricken, even provisions that are unquestionably legitimate exercises of congressional power, if the "statute created in the absence is legislation that Congress would not have enacted." *Id.* at 684-85.

With PPACA, Congress itself, in its findings, identified the mandate and penalty as necessary to the architecture of the Act. PPACA § 1501. In the district court the Secretary characterized the mandate and penalty as "a linchpin" of PPACA. Memorandum in Support of Motion to Dismiss at 3, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d at 768 (No. 3:10-cv-00188-HEH, ECF Doc. 22 at 14). The legislative history reveals an awareness that no change could be made to PPACA in the House because the margin necessary to invoke cloture in the Senate had been lost due to an intervening special election. Hence, it is as well known, as such a thing can ever be known, that any change, let alone a major change like the elimination of the mandate and penalty, would have caused PPACA to fail. Should this court find PPACA unconstitutional, Virginia submits under the legislative bargain test that no severance is appropriate.

Alaska Airlines contains an alternative rule of decision. Citing a long line of cases, the *Alaska Airlines* Court wrote:

> "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.'"

Alaska Airlines, 480 U.S. at 684 (citations omitted). The fully operative as law test permits severance at the joint. Virginia argued below that the joint is

defined by all private and public insurance financial regulation. Importantly, the Secretary conceded in the district court that if the mandate and penalty are unconstitutional, "some provisions of the Act plainly cannot survive." Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 31, (*Virginia*, 728 F. Supp. 2d at 768 (No. 3:10-cv-00188-HCH, ECF Doc. 96 at 41). In particular, the Secretary admitted that "insurance industry reforms in Section 1201 such as guaranteed—issue and community—rating will stand or fall with the minimum coverage provision." (*Id.* at 42). These concessions should define the floor for any discussion in this Court of the proper scope of severance under the fully operative as law test.

The constitutionality of PPACA under the Commerce Clause, Necessary and Proper Clause and the taxing power are pure issues of law reviewed *de novo* in this Court. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The same is true for severance if this Court reaches that issue. All of these issues were extensively developed and ruled upon in the district court. The failure of the Fourth Circuit to reach them does not make this case *per se* an improper vehicle for their review.

The jurisdiction to review by writ of certiorari in this Court is plenary at any stage of the proceedings following an appeal without regard to what the circuit court of appeals may have done or not done. 28 U.S.C. § 1254(1); *Brown v. Fletcher*, 237 U.S. 583, 586 (1915). The exercise of that plenary power is

properly based upon the public importance of the question presented for review. *See Dick v. New York Life Insurance Co.*, 359 U.S. 437, 457-63 (1959) (Frankfurter, J., dissenting).

In *Gratz*, 539 U.S. at 259-60, this Court dispensed with a circuit court ruling when it used Supreme Court Rule 11 to bring in a greater number of cases so as to permit a constitutional assessment over a broader range of circumstances. Now that the Fourth Circuit has brought individual standing into question, it would be expedient to grant certiorari in more than one case, including within the grant this particularly well-developed state standing case, to create the highest likelihood of reaching the merits.

CONCLUSION

The ruling of the Fourth Circuit on state sovereign standing conflicts with opinions of this Court and with those of other circuit courts of appeals concerning an important matter of federal constitutional law. As long as that holding stands un-reviewed, important sovereign prerogatives of the States of the Fourth Circuit will be impaired in a manner that defies prior understandings. The Court should grant certiorari on the questions presented on that issue either singly or in company with the merits issues.

This case is a proper vehicle for reviewing the constitutionality of PPACA, and, if reached, reviewing the appropriate remedy, because those issues are pure questions of federal law that were fully developed in the district court. Now that the Fourth Circuit has brought individual standing into question under the AIA, it would be expedient to follow a *Gratz*-like procedure of making multiple grants, including a grant in this case where state sovereign standing has been best developed and in which the United States has made a significant concession on severance.

Respectfully submitted,

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September 30, 2011

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1057

COMMONWEALTH OF VIRGINIA ex rel. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,

Plaintiff-Appellee,

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity,

Defendant-Appellant.

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AMERICA'S HEALTH INSURANCE PLANS; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amici Curiae,

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; THE ARC OF THE UNITED STATES; BREAST CANCER ACTION; FAMILIES USA; FRIENDS OF CANCER RESEARCH; MARCH OF DIMES FOUNDATION; MENTAL HEALTH AMERICA; NATIONAL BREAST CANCER COALITION; NATIONAL ORGANIZATION FOR RARE DISORDERS; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL

SENIOR CITIZENS LAW CENTER; NATIONAL WOMEN'S HEALTH NETWORK; THE OVARIAN CANCER NATIONAL ALLIANCE; AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED; AMERICAN MEDICAL STUDENT ASSOCIATION; CENTER FOR AMERICAN PROGRESS, d/b/a Doctors for America; NATIONAL HISPANIC MEDICAL ASSOCIATION; NATIONAL PHYSICIANS ALLIANCE; CONSTITUTIONAL LAW PROFESSORS; YOUNG INVINCIBLES; KEVIN C. WALSH; AMERICAN CANCER SOCIETY; AMERICAN CANCER SOCIETY CANCER ACTION NETWORK; AMERICAN DIABETES ASSOCIATION; AMERICAN HEART ASSOCIATION; DR. DAVID CUTLER, Deputy, Otto Eckstein Professor of Applied Economics, Harvard University; DR. HENRY AARON, Senior Fellow, Economic Studies, Bruce and Virginia MacLaury Chair, The Brookings Institution; DR. GEORGE AKERLOF, Koshland Professor of Economics, University of California•Berkeley; DR. STUART ALTMAN, Sol C. Chaikin Professor of National Health Policy, Brandeis University; DR. KENNETH ARROW, Joan Kenney Professor of Economics and Professor of Operations Research, Stanford University; DR. SUSAN ATHEY, Professor of Economics, Harvard University; DR. LINDA J. BLUMBERG, Senior Fellow, Urban Institute, Health Policy Center; DR. LEONARD E. BURMAN, Daniel Patrick Moynihan Professor of Public Affairs, The Maxwell School, Syracuse University; DR. AMITABH CHANDRA, Professor of Public Policy, Kennedy School of Government, Harvard University; DR. MICHAEL CHERNEW, Professor, Department of

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LEGAL FUND; THE FEMINIST MAJORITY FOUNDATION; IBIS REPRODUCTIVE HEALTH; INSTITUTE OF SCIENCE AND HUMAN VALUES; MARYLAND WOMEN'S COALITION FOR HEALTH CARE REFORM; MENTAL HEALTH AMERICA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL COALITION FOR LGBT HEALTH; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; THE NATIONAL RESEARCH CENTER FOR WOMEN & FAMILIES; OLDER WOMEN'S LEAGUE; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; RAISING WOMEN'S VOICES; SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW; SOUTHWEST WOMEN'S LAW CENTER; WIDER OPPORTUNITIES FOR WOMEN; THE WOMENS LAW CENTER OF MARYLAND, INCORPORATED; WOMENS LAW PROJECT; VIRGINIA ORGANIZING; AMERICAN HOSPITAL ASSOCIATION; ASSOCIATION OF AMERICAN MEDICAL COLLEGES; CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES; FEDERATION OF AMERICAN HOSPITALS; NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS; NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS; CONSTITUTIONAL ACCOUNTABILITY CENTER; MATTHEW H. ADLER, Leon Meltzer Professor of Law, University of Pennsylvania Law School; REBECCA L. BROWN, Newton Professor of Constitutional Law, University of Southern California Gould School of Law; JESSE HERBERT CHOPER,

Earl Warren Professor of Public Law, University of California, Berkeley, School of Law; MICHAEL C. DORF, Robert S. Stevens Professor of Law, Cornell University Law School; DANIEL FARBER, Sho Sato Professor of Law, University of California, Berkeley, School of Law; BARRY FRIEDMAN, Jacob D. Fuchsberg Professor of Law, New York University School of Law; WILLIAM P. MARSHALL, Kenan Professor of Law, University of North Carolina School of Law; GENE NICHOL, Professor of Law, Director, Center on Poverty, Work & Opportunity, University of North Carolina School of Law; WILLIAM J. NOVAK, Professor of Law, The University of Michigan Law School; RICHARD H. PILDES, Sudler Family Professor of Constitutional Law, Co-Director, Center on Law and Security, New York University School of Law; RICHARD A. PRIMUS, Professor of Law, The University of Michigan Law School; JUDITH RESNIK, Arthur Liman Professor of Law, Yale Law School; THEODORE W. RUGAR, Professor of Law, University of Pennsylvania Law School; ROBERT A. SCHAPIRO, Professor of Law, Emory University School of Law; DAVID L. SHAPIRO, William Nelson Cromwell Professor, Emeritus, Harvard Law School; SUZANNA SHERRY, Herman O. Loewenstein Professor of Law, Vanderbilt University Law School; NEIL S. SIEGEL, Professor of Law and Political Science, Duke University School of Law; PETER J. SMITH, Professor of Law, George Washington University Law School; ADAM WINKLER, Professor of Law, UCLA School of Law; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF IOWA; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT;

CHRISTINE GREGOIRE, Governor of Washington; SERVICE EMPLOYEES INTERNATIONAL UNION; CHANGE TO WIN,

Amici Supporting Appellant,

THE AMERICAN CENTER FOR LAW AND JUSTICE; PAUL BROUN, United States Representative; ROBERT ADERHOLT, United States Representative; TODD AKIN, United States Representative; MICHELE BACHMANN, United States Representative; SPENCER BACHUS, United States Representative; ROSCOE BARTLETT, United States Representative; ROB BISHOP, United States Representative; JOHN BOEHNER, United States Representative; LARRY BUCSHON, United States Representative; DAN BURTON, United States Representative; FRANCISCO "QUICO" CANSECO, United States Representative; ERIC CANTOR, United States Representative; STEVE CHABOT, United States Representative; MIKE CONAWAY, United States Representative; BLAKE FARENTHOLD, United States Representative; JOHN FLEMING, United States Representative; BILL FLORES, United States Representative; RANDY FORBES, United States Representative; VIRGINIA FOXX, United States Representative; TRENT FRANKS, United States Representative; SCOTT GARRETT, United States Representative; LOUIE GOHMERT, United States Representative; RALPH HALL, United States Representative; TIM HUELSKAMP, United States Representative; BILL JOHNSON, United States Representative; WALTER JONES, United States Representative; MIKE KELLY, United States Representative; STEVE KING, United States Representative; JACK KINGSTON,

United States Representative; JOHN KLINE, United States Representative; DOUG LAMBORN, United States Representative; JEFF LANDRY, United States Representative; JAMES LANKFORD, United States Representative; ROBERT LATTA, United States Representative; DONALD MANZULLO, United States Representative; THADDEUS MCCOTTER, United States Representative; CATHY MCMORRIS RODGERS, United States Representative; GARY MILLER, United States Representative; JEFF MILLER, United States Representative; RANDY NEUGEBAUER, United States Representative; STEVE PEARCE, United States Representative; MIKE PENCE, United States Representative; JOE PITTS, United States Representative; MIKE POMPEO, United States Representative; SCOTT RIGELL, United States Representative; PHIL ROE, United States Representative; ED ROYCE, United States Representative; LAMAR SMITH, United States Representative; TIM WALBERG, United States Representative; THE CONSTITUTIONAL COMMITTEE TO CHALLENGE THE PRESIDENT & CONGRESS ON HEALTH CARE; MATTHEW SISSEL; PACIFIC LEGAL FOUNDATION; AMERICANS FOR FREE CHOICE IN MEDICINE; AMERICAN PHYSICIANS AND SURGEONS, INCORPORATED; JANIS CHESTER, MD; MARK J. HAUSER, MD; GUENTER L. SPANKNEBEL, MD; GRAHAM L. SPRUIELL, MD; WASHINGTON LEGAL FOUNDATION; CONSTITUTIONAL LAW SCHOLARS; CATO INSTITUTE; COMPETITIVE ENTERPRISE INSTITUTE; RANDY E. BARNETT, Professor; JUSTICE AND FREEDOM FUND; KURT ALLEN ROHLFS; MOUNTAIN STATES LEGAL FOUNDATION; LANDMARK LEGAL

FOUNDATION; BOB MARSHALL, Virginia Delegate; GUN OWNERS OF AMERICA, INCORPORATED; GUN OWNERS FOUNDATION; AMERICAN LIFE LEAGUE, INCORPORATED; INSTITUTE ON THE CONSTITUTION; THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION; PUBLIC ADVOCATE OF THE UNITED STATES; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; THE LIBERTY COMMITTEE; DOWNSIZE DC FOUNDATION; DOWNSIZEDC.ORG; POLICY ANALYSIS CENTER; FAMILY RESEARCH COUNCIL; WILLIAM BARR, Former United States Attorney General; EDWIN MEESE, III, Former United States Attorney General; DICK THORNBURGH, Former United States Attorney General; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; AMERICAN CIVIL RIGHTS UNION; PHYSICIAN HOSPITALS OF AMERICA; TOUSSAINT TYSON,

Amici Supporting Appellee.

No. 11-1058

COMMONWEALTH OF VIRGINIA ex rel. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,

Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity,

Defendant-Appellee.

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AMERICA'S HEALTH INSURANCE PLANS; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amici Curiae,

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; THE ARC OF THE UNITED STATES; BREAST CANCER ACTION; FAMILIES USA; FRIENDS OF CANCER RESEARCH; MARCH OF DIMES FOUNDATION; MENTAL HEALTH AMERICA; NATIONAL BREAST CANCER COALITION; NATIONAL ORGANIZATION FOR RARE DISORDERS; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL SENIOR CITIZENS LAW CENTER; NATIONAL WOMEN'S HEALTH NETWORK; THE OVARIAN CANCER NATIONAL ALLIANCE; AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED; AMERICAN MEDICAL STUDENT ASSOCIATION; CENTER FOR AMERICAN PROGRESS, d/b/a Doctors for America; NATIONAL HISPANIC MEDICAL ASSOCIATION; NATIONAL PHYSICIANS ALLIANCE; CONSTITUTIONAL LAW PROFESSORS; YOUNG INVINCIBLES; KEVIN C. WALSH; AMERICAN CANCER SOCIETY; AMERICAN CANCER SOCIETY CANCER ACTION NETWORK; AMERICAN DIABETES ASSOCIATION; AMERICAN HEART

ASSOCIATION; DR. DAVID CUTLER, Deputy, Otto Eckstein Professor of Applied Economics, Harvard University; DR. HENRY AARON, Senior Fellow, Economic Studies, Bruce and Virginia MacLaury Chair, The Brookings Institution; DR. GEORGE AKERLOF, Koshland Professor of Economics, University of California-Berkeley; DR. STUART ALTMAN, Sol C. Chaikin Professor of National Health Policy, Brandeis University; DR. KENNETH ARROW, Joan Kenney Professor of Economics and Professor of Operations Research, Stanford University; DR. SUSAN ATHEY, Professor of Economics, Harvard University; DR. LINDA J. BLUMBERG, Senior Fellow, Urban Institute, Health Policy Center; DR. LEONARD E. BURMAN, Daniel Patrick Moynihan Professor of Public Affairs, The Maxwell School, Syracuse University; DR. AMITABH CHANDRA, Professor of Public Policy, Kennedy School of Government, Harvard University; DR. MICHAEL CHERNEW, Professor, Department of Health Care Policy, Harvard Medical School; DR. PHILIP COOK, Dr. Philip Cook, ITT/Sanford Professor of Public Policy, Professor of Economics, Duke University; DR. MICHAEL T. FRENCH, Professor of Health Economics, University of Miami; DR. CLAUDIA GOLDIN, Henry Lee Professor of Economics, Harvard University; DR. TAL GROSS, Department of Health Policy and Management, Mailman School of Public Health, Columbia University; DR. JONATHAN GRUBER, Professor of Economics, MIT; DR. JACK HADLEY, Associate Dean for Finance and Planning, Professor and Senior Health Services Researcher, College of Health and Human Services, George Mason University; DR. VIVIAN HO, Baker Institute Chair in Health

Economics and Professor of Economics, Rice University; DR. JOHN F. HOLAHAN, Ph. D., Director, Health Policy Research Center, The Urban Institute; DR. JILL HORWITZ, Professor of Law and Co Director of the Program in Law & Economics, University of Michigan School of Law; DR. LAWRENCE KATZ, Elisabeth Allen Professor of Economics, Harvard University; DR. GENEVIEVE KENNEY, Senior Fellow, The Urban Institute; DR. FRANK LEVY, Rose Professor of Urban Economics, Department of Urban Studies and Planning, MIT; DR. PETER LINDERT, Distinguished Research Professor of Economics, University of California, Davis; DR. ERIC MASKIN, Albert O. Hirschman Professor of Social Science at the Institute for Advanced Study, Princeton University; DR. ALAN C. MONHEIT, Professor of Health Economics, School of Public Health, University of Medicine & Dentistry of New Jersey; DR. MARILYN MOON, Vice President and Director Health Program, American Institutes for Research; DR. RICHARD J. MURNANE, Thompson Professor of Education and Society, Harvard University; DR. JOSEPH P. NEWHOUSE, John D. MacArthur Professor of Health Policy and Management, Harvard University; DR. LEN M. NICHOLS, George Mason University; DR. HAROLD POLLACK, Helen Ross Professor of Social Service Administration, University of Chicago; DR. MATTHEW RABIN, Edward G. and Nancy S. Jordan Professor of Economics, University of California-Berkeley; DR. JAMES B. REBITZER, Professor of Economics, Management, and Public Policy, Boston University School of Management; DR. MICHAEL REICH, Professor of Economics, University of California at Berkeley; DR. THOMAS RICE,

Professor, UCLA School of Public Health; DR. MEREDITH ROSENTHAL, Department of Health Policy and Management, Harvard School of Public Health; DR. CHRISTOPHER RUHM, Professor of Public Policy and Economics, University of Virginia; DR. JONATHAN SKINNER, Professor of Economics, Dartmouth College, and Professor of Community and Family Medicine, Dartmouth Medical School; DR. KATHERINE SWARTZ, Professor, Department of Health Policy and Management, Harvard School of Public Health; DR. KENNETH WARNER, Dean of the School of Public Health and Avedis Donabedian Distinguished University Professor of Public Health, University of Michigan; DR. PAUL N. VAN DE WATER, Senior Fellow, Center on Budget and Policy Priorities; DR. STEPHEN ZUCKERMAN, Senior Fellow, The Urban Institute; JANET COOPER ALEXANDER, Frederick I. Richman Professor of Law, Stanford Law School; ERWIN CHEMERINSKY, Founding Dean, University of California•Irvine School of Law; AMANDA FROST, Professor of Law, American University Washington College of Law; ANDY HESSICK, Associate Professor of Law, Arizona State University Sandra Day O'Connor College of Law; A.E. DICK HOWARD, White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law; JOHN CALVIN JEFFRIES, JR., David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law; JOHANNA KALB, Assistant Professor, Loyola University New Orleans College of Law; LUMEN N. MULLIGAN, Professor of Law, University of Kansas School of Law; EDWARD A. PURCELL, JR., Joseph Solomon Distinguished Professor of Law, New York Law School; CAPRICE L. ROBERTS, Professor,

Visiting Professor, Catholic University Columbus School of Law; Professor of Law, University of West Virginia School of Law; STEPHEN I. VLADECK, Professor of Law, American University Washington College of Law; HOWARD M. WASSERMAN, Associate Professor, FIU College of Law; AARP; COMMONWEALTH OF MASSACHUSETTS; THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN COLLEGE OF NURSE-MIDWIVES; AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES; AMERICAN MEDICAL WOMEN'S ASSOCIATION; THE ASIAN AMERICAN JUSTICE CENTER; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; THE ASIAN PACIFIC AMERICAN LEGAL CENTER; THE BLACK WOMENS HEALTH IMPERATIVE; THE COALITION OF LABOR UNION WOMEN; CHILDBIRTH CONNECTION; THE CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; THE FEMINIST MAJORITY FOUNDATION; IBIS REPRODUCTIVE HEALTH; INSTITUTE OF SCIENCE AND HUMAN VALUES; MARYLAND WOMEN'S COALITION FOR HEALTH CARE REFORM; MENTAL HEALTH AMERICA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL COALITION FOR LGBT HEALTH; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; THE NATIONAL RESEARCH CENTER FOR WOMEN & FAMILIES; OLDER WOMEN'S LEAGUE; PHYSICIANS FOR

REPRODUCTIVE CHOICE AND HEALTH; RAISING WOMEN'S VOICES; SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW; SOUTHWEST WOMEN'S LAW CENTER; WIDER OPPORTUNITIES FOR WOMEN; THE WOMENS LAW CENTER OF MARYLAND, INCORPORATED; WOMENS LAW PROJECT; VIRGINIA ORGANIZING; AMERICAN HOSPITAL ASSOCIATION; ASSOCIATION OF AMERICAN MEDICAL COLLEGES; CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES; FEDERATION OF AMERICAN HOSPITALS; NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS; NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS; CONSTITUTIONAL ACCOUNTABILITY CENTER; MATTHEW H. ADLER, Leon Meltzer Professor of Law, University of Pennsylvania Law School; REBECCA L. BROWN, Newton Professor of Constitutional Law, University of Southern California Gould School of Law; JESSE HERBERT CHOPER, Earl Warren Professor of Public Law, University of California, Berkeley, School of Law; MICHAEL C. DORF, Robert S. Stevens Professor of Law, Cornell University Law School; DANIEL FARBER, Sho Sato Professor of Law, University of California, Berkeley, School of Law; BARRY FRIEDMAN, Jacob D. Fuchsberg Professor of Law, New York University School of Law; WILLIAM P. MARSHALL, Kenan Professor of Law, University of North Carolina School of Law; GENE NICHOL, Professor of Law, Director, Center on Poverty, Work & Opportunity, University of North Carolina School of Law; WILLIAM J. NOVAK, Professor of Law, The University of Michigan Law School; RICHARD H. PILDES, Sudler Family

Professor of Constitutional Law, Co-Director, Center on Law and Security, New York University School of Law; RICHARD A. PRIMUS, Professor of Law, The University of Michigan Law School; JUDITH RESNIK, Arthur Liman Professor of Law, Yale Law School; THEODORE W. RUGAR, Professor of Law, University of Pennsylvania Law School; ROBERT A. SCHAPIRO, Professor of Law, Emory University School of Law; DAVID L. SHAPIRO, William Nelson Cromwell Professor, Emeritus, Harvard Law School; SUZANNA SHERRY, Herman O. Loewenstein Professor of Law, Vanderbilt University Law School; NEIL S. SIEGEL, Professor of Law and Political Science, Duke University School of Law; PETER J. SMITH, Professor of Law, George Washington University Law School; ADAM WINKLER, Professor of Law, UCLA School of Law; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF IOWA; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; CHRISTINE GREGOIRE, Governor of Washington; SERVICE EMPLOYEES INTERNATIONAL UNION; CHANGE TO WIN,

Amici Supporting Appellee,

THE AMERICAN CENTER FOR LAW AND JUSTICE; PAUL BROUN, United States Representative; ROBERT ADERHOLT, United States Representative; TODD AKIN, United States Representative; MICHELE BACHMANN, United States Representative; SPENCER BACHUS, United States Representative; ROSCOE BARTLETT, United States Representative; ROB BISHOP, United States Representative; JOHN BOEHNER, United States

Representative; LARRY BUCSHON, United States Representative; DAN BURTON, United States Representative; FRANCISCO "QUICO" CANSECO, United States Representative; ERIC CANTOR, United States Representative; STEVE CHABOT, United States Representative; MIKE CONAWAY, United States Representative; BLAKE FARENTHOLD, United States Representative; JOHN FLEMING, United States Representative; BILL FLORES, United States Representative; RANDY FORBES, United States Representative; VIRGINIA FOXX, United States Representative; TRENT FRANKS, United States Representative; SCOTT GARRETT, United States Representative; LOUIE GOHMERT, United States Representative; RALPH HALL, United States Representative; TIM HUELSKAMP, United States Representative; BILL JOHNSON, United States Representative; WALTER JONES, United States Representative; MIKE KELLY, United States Representative; STEVE KING, United States Representative; JACK KINGSTON, United States Representative; JOHN KLINE, United States Representative; DOUG LAMBORN, United States Representative; JEFF LANDRY, United States Representative; JAMES LANKFORD, United States Representative; ROBERT LATTA, United States Representative; DONALD MANZULLO, United States Representative; THADDEUS MCCOTTER, United States Representative; CATHY MCMORRIS RODGERS, United States Representative; GARY MILLER, United States Representative; JEFF MILLER, United States Representative; RANDY NEUGEBAUER, United States Representative; STEVE PEARCE, United States Representative; MIKE PENCE, United States Representative; JOE

PITTS, United States Representative; MIKE POMPEO, United States Representative; SCOTT RIGELL, United States Representative; PHIL ROE, United States Representative; ED ROYCE, United States Representative; LAMAR SMITH, United States Representative; TIM WALBERG, United States Representative; THE CONSTITUTIONAL COMMITTEE TO CHALLENGE THE PRESIDENT & CONGRESS ON HEALTH CARE; MATTHEW SISSEL; PACIFIC LEGAL FOUNDATION; AMERICANS FOR FREE CHOICE IN MEDICINE; AMERICAN PHYSICIANS AND SURGEONS, INCORPORATED; JANIS CHESTER, MD; MARK J. HAUSER, MD; GUENTER L. SPANKNEBEL, MD; GRAHAM L. SPRUIELL, MD; WASHINGTON LEGAL FOUNDATION; CONSTITUTIONAL LAW SCHOLARS; CATO INSTITUTE; COMPETITIVE ENTERPRISE INSTITUTE; RANDY E. BARNETT, Professor; JUSTICE AND FREEDOM FUND; KURT ALLEN ROHLFS; MOUNTAIN STATES LEGAL FOUNDATION; LANDMARK LEGAL FOUNDATION; BOB MARSHALL, Virginia Delegate; GUN OWNERS OF AMERICA, INCORPORATED; GUN OWNERS FOUNDATION; AMERICAN LIFE LEAGUE, INCORPORATED; INSTITUTE ON THE CONSTITUTION; THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION; PUBLIC ADVOCATE OF THE UNITED STATES; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; THE LIBERTY COMMITTEE; DOWNSIZE DC FOUNDATION; DOWNSIZEDC.ORG; POLICY ANALYSIS CENTER; FAMILY RESEARCH COUNCIL; WILLIAM BARR, Former United States Attorney General; EDWIN MEESE, III, Former

United States Attorney General; DICK THORNBURGH, Former United States Attorney General; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; AMERICAN CIVIL RIGHTS UNION; PHYSICIAN HOSPITALS OF AMERICA; TOUSSAINT TYSON,

Amici Supporting Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, District Judge. (3:10-cv-00188-HEH)

Argued: May 10, 2011 Decided: September 8, 2011

Before MOTZ, DAVIS, and WYNN, Circuit Judges.

Vacated and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Davis and Judge Wynn joined.

ARGUED: Neal Kumar Katyal, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant/Cross-Appellee. Earle Duncan Getchell, Jr., OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee/Cross-Appellant. **ON BRIEF:** Tony West, Assistant Attorney General, Beth S. Brinkmann, Deputy Assistant Attorney General, Mark B. Stern,

Alisa B. Klein, Anisha S. Dasgupta, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Neil H. MacBride, United States Attorney, Alexandria, Virginia, for Appellant/Cross-Appellee. Kenneth T. Cuccinelli, II, Attorney General of Virginia, Stephen R. McCullough, Senior Appellate Counsel, Charles E. James, Jr., Chief Deputy Attorney General, Wesley G. Russell, Jr., Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee/Cross-Appellant. Joseph Miller, Julie Simon Miller, AMERICA'S HEALTH INSURANCE PLANS, Washington, D.C.; Seth P. Waxman, Randolph D. Moss, Catherine M. A. Carroll, Madhu Chugh, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for American's Health Insurance Plans, Amicus Curiae. Robin S. Conrad, Shane B. Kawka, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C.; K. Lee Blalack, II, Brian Boyle, Joshua Deahl, O'MELVENY & MYERS LLP, Washington, D.C., for Chamber of Commerce of the United States of America, Amicus Curiae. Rochelle Bobroff, Simon Lazarus, NATIONAL SENIOR CITIZENS LAW CENTER, Washington, D.C., for American Association of People with Disabilities, The ARC of the United States, Breast Cancer Action, Families USA, Friends of Cancer Research, March of Dimes Foundation, Mental Health America, National Breast Cancer Coalition, National Organization for Rare Disorders, National Partnership for Women and Families, National Senior Citizens Law Center,

National Women's Health Network, and The Ovarian Cancer National Alliance, Amici Supporting Appellant/Cross-Appellee. Ian Millhiser, CENTER FOR AMERICAN PROGRESS, Washington, D.C., for American Nurses Association, American Academy of Pediatrics, Incorporated, American Medical Student Association, Center for American Progress, d/b/a Doctors for America, National Hispanic Medical Association, and National Physicians Alliance, Amici Supporting Appellant/Cross-Appellee. Gillian E. Metzger, Trevor W. Morrison, New York, New York; Andrew J. Pincus, Charles A. Rothfeld, Paul W. Hughes, Michael B. Kimberly, MAYER BROWN LLP, Washington, D.C., for Constitutional Law Professors, Amici Supporting Appellant/Cross-Appellee. Brett A. Walter, BAACH ROBINSON & LEWIS PLLC, Washington, D.C., for Young Invincibles, Amicus Supporting Appellant/Cross-Appellee. Kevin C. Walsh, UNIVERSITY OF RICHMOND SCHOOL OF LAW, Richmond, Virginia, for Kevin C. Walsh, Amicus Supporting Appellant/Cross-Appellee. Mary P. Rouvelas, Senior Counsel, AMERICAN CANCER SOCIETY, Washington, D.C.; John Longstreth, Molly Suda, K&L GATES LLP, Washington, D.C., for American Cancer Society, American Cancer Society Cancer Action Network, American Diabetes Association, and American Heart Association, Amici Supporting Appellant/Cross-Appellee. Richard L. Rosen, ARNOLD & PORTER LLP, Washington, D.C., for Economic Scholars, Amici Supporting Appellant/Cross-Appellee. Stephen I. Vladeck, Washington, D.C.; F. Paul Bland, Jr., CHAVEZ & GERTLER, Washington,

D.C., for Professors of Federal Jurisdiction, Amici Supporting Appellant/Cross-Appellee. Stuart R. Cohen, Stacy Canan, AARP FOUNDATION LITIGATION; Michael Schuster, AARP, Washington, D.C., for AARP, Amicus Supporting Appellant/Cross-Appellee. Martha Coakley, Attorney General of Massachusetts, Frederick D. Augenstern, Assistant Attorney General, Thomas M. O'Brien, Assistant Attorney General, Daniel J. Hammond, Assistant Attorney General, Boston, Massachusetts, for Commonwealth of Massachusetts, Amicus Supporting Appellant/ Cross-Appellee. Marcia D. Greenberger, Emily J. Martin, Judith G. Waxman, Lisa Codispoti, NATIONAL WOMEN'S LAW CENTER; Melissa Hart, UNIVERSITY OF COLORADO LAW SCHOOL, Boulder, Colorado, for National Women's Law Center, American Association of University Women, American College of Nurse-Midwives, Amerian Federation of State, County and Municipal Employees, American Medical Women's Association, The Asian American Justice Center, Asian & Pacific Islander American Health Forum; The Asian Pacific American Legal Center, Black Women's Health Imperative, The Coalition of Labor Union Women, Childbirth Connection, The Connecticut Women's Education and Legal Fund, The Feminist Majority Foundation, Ibis Reproductive Health, Institute of Science and Human Values, Maryland Women's Coalition for Health Care Reform, Mental Health America, National Asian Pacific American Women's Forum, National Association of Social Workers, National Coalition for LGBT Health, National Council of Jewish Women,

National Council of Women's Organizations, National Latina Institute for Reproductive Health, The National Research Center for Women & Families, Older Women's League, Physicians for Reproductive Choice and Health, Raising Women's Voices, Sargent Shriver National Center on Poverty Law, Southwest Women's Law Center, Wider Opportunities for Women, The Women's Law Center of Maryland, Incorporated, and Women's Law Project, Amici Supporting Appellant/Cross-Appellee. Thomas D. Domonoske, Harrisonburg, Virginia, for Virginia Organizing, Amicus Supporting Appellant/Cross-Appellee. Sheree R. Kanner, Catherine E. Stetson, Dominic F. Perella, Michael D. Kass, Sara A. Kraner, HOGAN LOVELLS US LLP, Washington, D.C.; Melinda Reid Hatton, Maureen D. Mudron, AMERICAN HOSPITAL ASSOCIATION, Washington, D.C.; Ivy Baer, Karen Fisher, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, Washington, D.C.; Jeffrey G. Micklos, FEDERATION OF AMERICAN HOSPITALS, Washington, D.C.; Larry S. Gage, President, NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS, Washington, D.C.; Lisa Gilden, Vice President, General Counsel/Compliance Officer, THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, Washington, D.C.; Lawrence A. McAndrews, President and Chief Executive Officer, NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS, Alexandria, Virginia, for American Hospital Association, Association of American Medical Colleges, Catholic Health Association of the United States, Federation of

American Hospitals, National Association of Children's Hospitals, and National Association Of Public Hospitals And Health Systems, Amici Supporting Appellant/Cross-Appellee. Elizabeth B. Wydra, Douglas T. Kendall, CONSTITUTIONAL ACCOUNTABILITY CENTER, Washington, D.C., for Constitutional Accountability Center, Amicus Supporting Appellant/Cross-Appellee. Barry Friedman, New York, New York; Jeffrey A. Lamken, Robert K. Kry, Martin V. Totaro, Lucas M. Walker, Washington, D.C., for Law Professors, Amici Supporting Appellant/Cross-Appellee. Kamala D. Harris, Attorney General of California, Manuel M. Medeiros, State Solicitor General, Travis LeBlanc, Special Assistant Attorney General, Daniel J. Powell, Deputy Attorney General, San Francisco, California; Douglas F. Gansler, Attorney General of Maryland, William F. Brockman, Deputy Solicitor General, Joshua N. Auerbach, Assistant Attorney General, Baltimore, Maryland; George C. Jespen, Attorney General of Connecticut, Hartford, Connecticut; Joseph R. Biden, III, Attorney General of Delaware, Wilmington, Delaware; David M. Louie, Attorney General of Hawaii, Honolulu, Hawaii; Tom Miller, Attorney General of Iowa, Des Moines, Iowa; Eric T. Schneiderman, Attorney General of New York, New York, New York; John R. Kroger, Attorney General of Oregon, Salem, Oregon; William H. Sorrell, Attorney General of Vermont, Montpelier, Vermont, for States of California, Connecticut, Delaware, Hawaii, Iowa, Maryland, New York, Oregon, and Vermont, Amici Supporting Appellant/Cross-Appellee. Adam Berger,

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Tyson, Gainesville, Florida, Amicus Supporting Appellee/Cross-Appellant.

DIANA GRIBBON MOTZ, Circuit Judge:

The Commonwealth of Virginia ("Virginia") brings this action against Kathleen Sebelius, the Secretary of the Department of Health and Human Services ("the Secretary"). Virginia challenges one provision of the Patient Protection and Affordable Care Act as an unconstitutional exercise of congressional power. Virginia maintains that the conflict between this provision and a newly-enacted Virginia statute provides it with standing to pursue this action. After finding that this asserted conflict did give Virginia standing to sue, the district court declared the challenged provision unconstitutional. For the reasons that follow, we hold that Virginia, the sole plaintiff here, lacks standing to bring this action. Accordingly, we vacate the judgment of the district court and remand with instructions to dismiss the case for lack of subject-matter jurisdiction.

I.

In March 2010 Congress enacted the Patient Protection and Affordable Care Act ("the Affordable Care Act" or "the Act"), which seeks to institute comprehensive changes in the health insurance industry. Pub. L. No. 111-148. The provision of the Act challenged here requires, with limited exceptions,

that individual taxpayers who fail to "maintain" adequate health insurance coverage pay a "penalty." 26 U.S.C. § 5000A(a)-(b). We describe the Affordable Care Act and this "individual mandate" provision in *Liberty Univ. v. Geithner*, ___ F.3d ___ (4th Cir. 2011). We need not repeat that discussion here. Like the plaintiffs in *Liberty*, Virginia contends that Congress lacked constitutional authority to enact the individual mandate.

This case, however, differs from *Liberty* and every one of the many other cases challenging the Act in a critical respect: the sole provision challenged here – the individual mandate –- imposes no obligations on the sole plaintiff, Virginia. Notwithstanding this fact, Virginia maintains that it has standing to bring this action because the individual mandate allegedly conflicts with a newly-enacted state statute, the Virginia Health Care Freedom Act (VHCFA).

Virginia filed this action on March 23, 2010, the same day that the President signed the Affordable Care Act into law. The Governor of Virginia did not sign the VHFCA into law until the next day. The VHCFA declares, with exceptions not relevant here, that "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage." Va. Code Ann. § 38.2-3430.1:1. It contains no enforcement mechanism.

Because the individual mandate applies only to individual persons, not states, the Secretary moved to dismiss the suit for lack of subject-matter

jurisdiction. The Secretary contended that Virginia had not and could not allege any cognizable injury and so was without standing to bring this action. Virginia insisted that it acquired standing from the asserted "collision" between its new statute, the VHCFA, and the individual mandate. Although the district court recognized that the VHCFA was only "declaratory [in] nature," it held that the VHCFA provided Virginia standing. The court then declared the individual mandate unconstitutional, awarding summary judgment to Virginia.

The Secretary appeals, maintaining that Virginia lacks standing to challenge the individual mandate and that, in any event, the mandate withstands constitutional attack. We review *de novo* the district court's ruling as to standing. *See Benham v. City of Charlotte*, 635 F.3d 129, 134 (4th Cir. 2011). Because we hold that Virginia lacks standing,[1] we cannot reach the question of whether the Constitution authorizes Congress to enact the individual mandate.

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[1] In *Liberty*, we held that the Anti-Injunction Act (AIA) barred two taxpayers from bringing a pre-enforcement action challenging the individual mandate. ___ F.3d at ___. Virginia may well be exempt from the AIA bar. *See South Carolina v. Regan*, 465 U.S. 367, 378 (1984). We do not reach this question, however, because we must dismiss this case for lack of standing. *See Sinochem Intern.* Co. *v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 431 (2007) (noting that "a federal court has leeway to choose among threshold" jurisdictional grounds for dismissing a case (internal quotation omitted)).

See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1998).

II.

Article III of the Constitution confers on federal courts the power to resolve only "cases" and "controversies." A federal court may not pronounce on "questions of law arising outside" of such "cases and controversies." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. ___ (2011) (slip op. at 5). To do so "would be inimical to the Constitution's democratic character" and would weaken "the public's confidence in an unelected but restrained Federal Judiciary." *Id.*

The standing doctrine prevents federal courts from transgressing this constitutional limit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Thus, to ensure that there exists the requisite "case" or "controversy," a plaintiff must satisfy the three requirements that combine to form the "irreducible constitutional minimum of standing." *Id.* at 560.

Specifically, a plaintiff must demonstrate that: (1) it has "suffered an injury in fact"; (2) there exists a "causal connection between the injury and the conduct complained of"; and (3) a favorable judicial ruling will "likely" redress that injury. *Id.* (internal quotations omitted). The burden rests with the party invoking federal jurisdiction, here Virginia, to "establish[ ] these elements." *Id.* at 561. Only if Virginia meets the burden of establishing standing

does the Constitution permit a federal court to address the merits of the arguments presented. *See Steel*, 523 U.S. at 101-02.

Standing here turns on whether Virginia has suffered the necessary "injury in fact." To satisfy that requirement, Virginia must demonstrate that the individual mandate in the Affordable Care Act "inva[des]" its "legally protected interest," in a manner that is both "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560 (internal quotations omitted).

We note at the outset that the individual mandate imposes none of the obligations on Virginia that, in other cases, have provided a state standing to challenge a federal statute. Thus, the individual mandate does not directly burden Virginia, *cf. Bowen v. Public Agencies*, 477 U.S. 41, 50 n.17 (1986), does not commandeer Virginia's enforcement officials, *cf. New York v. United States*, 505 U.S. 144 (1992), and does not threaten Virginia's sovereign territory, *cf. Massachusetts v. EPA*, 549 U.S. 497, 519 (2007). Virginia makes no claim to standing on these bases.

What Virginia maintains is that it has standing to challenge the individual mandate solely because of the asserted conflict between that federal statute and the VHCFA. A state possesses an interest in its "exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458

U.S. 592, 601 (1982)). A federal statute that hinders a state's exercise of this sovereign power to "create and enforce a legal code" at least arguably inflicts an injury sufficient to provide a state standing to challenge the federal statute. *See Wyoming v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008); *see also Diamond v. Charles*, 476 U.S. 54, 62 (1986) (noting in *dicta* that "a State has standing to *defend* the constitutionality of its statute" (emphasis added)). Virginia argues that the individual mandate, in assertedly conflicting with the VHCFA, has caused Virginia this sort of sovereign injury.

The Secretary contends that Virginia's claim is not of the sort recognized in *Wyoming*. Rather, according to the Secretary, Virginia actually seeks to litigate as parens patriae by asserting the rights of its citizens. As the Secretary points out, such a claim would run afoul of the prohibition against states suing the United States on behalf of their citizens. *See Snapp*, 458 U.S. at 610 n.16; *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). This prohibition rests on the recognition that a state possesses no legitimate interest in protecting its citizens from the government of the United States. *See Mellon*, 262 U.S. at 485-86. With respect to the federal government's relationship to individual citizens, "it is the United States, and not the state, which represents [citizens] as parens patriae." *Id.* at 486. When a state brings a suit seeking to protect individuals from a federal statute, it usurps this sovereign prerogative of the federal government and

threatens the "general supremacy of federal law." *Pennsylvania v. Kleppe*, 533 F.2d 668, 677 (D.C. Cir. 1976). A state has no interest in the rights of its individual citizens sufficient to justify such an invasion of federal sovereignty. *See id.* at 677-78 (noting that the "federalism interest" in "avoidance of state inference with the exercise of federal powers" will "predominate and bar" any parens patriae lawsuit against the United States).

Accordingly, the question presented here is whether the purported conflict between the individual mandate and the VHCFA actually inflicts a sovereign injury on Virginia. If it does, then Virginia may well possess standing to challenge the individual mandate. But if the VHCFA serves merely as a smokescreen for Virginia's attempted vindication of its *citizens'* interests, then settled precedent bars this action.

III.

Faithful application of the above principles mandates a single answer to this question: the VHFCA does not confer on Virginia a sovereign interest in challenging the individual mandate. Virginia lacks standing to challenge the individual mandate because the mandate threatens no interest in the "enforceability" of the VHCFA. *Maine v. Taylor*, 477 U.S. 131, 137 (1986).

Contrary to Virginia's arguments, the mere existence of a state law like the VHCFA does not

license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts. Rather, only when a federal law interferes with a state's exercise of its sovereign "power to create *and enforce* a legal code" does it inflict on the state the requisite injury-in-fact. *Snapp*, 458 U.S. at 601 (emphasis added); *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983) (holding that "federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law").

Thus, in each case relied on by Virginia, in which a state was found to possess sovereign standing, the state statute at issue regulated behavior or provided for the administration of a state program. *See Taylor*, 477 U.S. at 132-33 (regulating importation of baitfish); *Diamond*, 476 U.S. at 59-60 (regulating abortion); *Wyoming*, 539 F.3d at 1239-40 (establishing "procedure to expunge convictions of domestic violence misdemeanors" for purposes of "restoring any firearm rights"); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 409 (5th Cir. 1999) (establishing telecommunications aid programs for schools and libraries); *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 442-43 (D.C. Cir. 1989) (regulating airline price advertising); *Ohio v.* U.S. *Dep't of Transp.*, 766 F.2d 228, 230 (6th Cir. 1985) (regulating shipment of hazardous nuclear materials). The state statutes in each of these cases reflect the "exercise of [a state's] sovereign power over individuals and

entities within the relevant jurisdiction." *Snapp*, 458 U.S. at 601.

By contrast, the VHCFA regulates nothing and provides for the administration of no state program. Instead, it simply purports to immunize Virginia citizens from federal law. In doing so, the VHCFA reflects no exercise of "sovereign power," for Virginia lacks the sovereign authority to nullify federal law. *See Mayo v. United States*, 319 U.S. 441, 445 (1943) (stating the "corollary" of the Supremacy Clause that "the activities of the Federal Government are free from regulation by any state"); *Johnson v. Maryland*, 254 U.S. 51, 55-56 (1920) (noting the "entire absence of power on the part of the States to touch . . . the instrumentalities of the United States").

Moreover, the individual mandate does not affect Virginia's ability to enforce the VHCFA. Rather, the Constitution itself withholds from Virginia the power to enforce the VHCFA against the federal government. *See Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (stating that "federal officers who are discharging their duties in a state . . . are not subject to the jurisdiction of the state").Given this fact, the VHCFA merely declares, without legal effect, that the federal government cannot apply insurance mandates to Virginia's citizens. This non-binding declaration does not create any genuine conflict with the individual mandate, and thus creates no sovereign interest capable of producing injury-in-fact.

Nor do we find at all persuasive Virginia's contention that the use of the passive voice in the VHCFA – i.e., a declaration that no Virginia resident "shall be required" to maintain insurance – provides a regulation of private employers and localities that conflicts with the individual mandate. This is so because the *individual* mandate regulates only *individuals*; it does not in any way regulate private employers or localities. *See* 26 U.S.C. § 5000A(a). Thus, Virginia has suffered no injury to its sovereign interest in regulating employers and localities.[2]

In sum, Virginia does not possess a concrete interest in the "continued enforceability" of the VHCFA, *Taylor*, 477 U.S. at 137, because it has not identified any plausible, much less imminent, enforcement of the VHCFA that might conflict with the individual mandate. Rather, the only apparent function of the VHCFA is to declare Virginia's opposition to a federal insurance mandate. And, in fact, the timing of the VHCFA, along with the

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[2] Moreover, even if the individual mandate did some day in the future interfere with the asserted application of the VHCFA to localities and private employers, it would not *now* provide Virginia standing. Only injury that is "actual or imminent, not conjectural or hypothetical" can support Article III standing. *Lujan*, 504 U.S. at 560 (internal quotation omitted). Any future conflict between the individual mandate and the purported regulation of localities or private employers contained in the VHCFA is at best conjectural. Virginia has identified no actual non-federal insurance requirement that runs afoul of the VHCFA, nor has it offered evidence that any private employer or locality is contemplating the imposition of such a requirement.

statements accompanying its passage, make clear that Virginia officials enacted the statute for precisely this declaratory purpose. *See* Va. Governor's Message (Mar. 24, 2010) (Governor stating at VHCFA signing ceremony that "access to quality health care . . . should not be accomplished through an unprecedented federal mandate"); *id.* (Lieutenant Governor also remarking that the VHCFA "sent a strong message that we want no part of this national fiasco"). While this declaration surely announces the genuine opposition of a majority of Virginia's leadership to the individual mandate, it fails to create any sovereign interest in the judicial invalidation of that mandate. *See Diamond*, 476 U.S. at 62 ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.").

Given that the VHCFA does nothing more than announce an unenforceable policy goal of protecting Virginia's residents from federal insurance requirements, Virginia's "real interest" is not in the VHCFA itself, but rather in achieving this underlying goal. *Snapp*, 458 U.S. at 600; *see id*. at 602 (noting that "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement"). But a state may not litigate in federal court to protect its residents "from the operation of [a] federal statute[ ]," *Georgia v. Pa. R. Co.*, 324 U.S. 439, 447 (1945), nor can it escape this bar merely by codifying its objection to the federal

statute in question. *See New Jersey v. Sargent*, 269 U.S. 328, 334 (1926) (dismissing an action whose "real purpose" was "to obtain a judicial declaration that . . . Congress exceeded its own authority").

The presence of the VHCFA neither lessens the threat to federalism posed by this sort of lawsuit nor provides Virginia any countervailing interest in asserting the rights of its citizens. *Cf. Kleppe*, 533 F.2d at 677. After all, the action of a state legislature cannot render an improper state parens patriae lawsuit less invasive of federal sovereignty. *See Mellon*, 262 U.S. at 485-86 (emphasizing that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government"). Nor does a state acquire some special stake in the relationship between its citizens and the federal government merely by memorializing its litigation position in a statute. *See Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997). To the contrary, the VHCFA, because it is not even hypothetically enforceable against the federal government, raises only "abstract questions of political power, of sovereignty, of government." *Mellon*, 262 U.S. at 485. The Constitution does not permit a federal court to answer such questions. *See id*. (noting that courts are "without authority to pass abstract opinions upon the constitutionality of acts of Congress").

To permit a state to litigate whenever it enacts a statute declaring its opposition to federal law, as Virginia has in the VHCFA, would convert the federal

judiciary into a "forum" for the vindication of a state's "generalized grievances about the conduct of government." *Flast v. Cohen*, 392 U.S. 88, 106 (1968). Under Virginia's standing theory, a state could acquire standing to challenge *any* federal law merely by enacting a statute – even an utterly unenforceable one – purporting to prohibit the application of the federal law. For example, Virginia could enact a statute declaring that "no Virginia resident shall be required to pay Social Security taxes" and proceed to file a lawsuit challenging the Social Security Act.[3] Or Virginia could enact a statute codifying its constitutional objection to the CIA's financial reporting practices and proceed to litigate the sort of "generalized grievance[ ]" about federal administration that the Supreme Court has long held to be "committed to the . . . political process." *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (internal quotation omitted).

Thus, if we were to adopt Virginia's standing theory, each state could become a roving

[3] At oral argument, Virginia appeared unconcerned about the prospect of such lawsuits, merely repeating the truism set forth in its brief that "litigants frequently have standing to lose on the merits." Appellee's Br. at 17. This argument fails. The Supreme Court has clearly disavowed such "hypothetical jurisdiction," emphasizing that jurisdictional requirements are mandatory in *all* cases. *Steel*, 523 U.S. at 101. The Court has explained that in cases involving baseless substantive claims, it is all the more important that we respect the "constitutional limits set upon courts in our system of separated powers." *Id.* at 110.

constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court. *See, e.g., id.; Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 227 (1974). We cannot accept a theory of standing that so contravenes settled jurisdictional constraints.

IV.

In concluding that Virginia lacks standing to challenge the individual mandate, we recognize that the question of that provision's constitutionality involves issues of unusual legal, economic, and political significance. The Constitution, however, requires that courts resolve disputes "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Virginia can provide no such "concrete factual context" here, because it challenges a statutory provision that applies not to states, but exclusively to individuals.

Given this fact, Virginia lacks the "personal stake" in this case essential to "assure that concrete adverseness which sharpens the presentation of issues." *Massachusetts v. EPA*, 549 U.S. at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Thus, Virginia's litigation approach might well

diverge from that of an individual to whom the challenged mandate actually does apply. *See United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam) (explaining that the "actual antagonistic assertion of rights" serves as a "safeguard essential to the integrity of the judicial process" (internal quotation omitted)); *Hinson*, 122 F.3d at 373 (noting that rules of standing aim to prevent state "bureaucrats" and "publicity seekers" from "wresting control of litigation from the people directly affected").

Moreover, the lack of factual context here impedes analysis of the underlying constitutional disputes. *See Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't of Labor*, 995 F.2d 510, 513 (4th Cir. 1993) (explaining that the "concrete adverseness" required by standing rules "helps reduce the risk of an erroneous or poorly thought-out decision" (internal quotation omitted)). For example, both parties premise their Commerce Clause arguments on their competing characterizations of what the individual mandate regulates. *Compare* Appellee's Br. at 23 (arguing that § 5000A regulates the "passive status of being uninsured") *with* Appellant's Br. at 45-48 (arguing that § 5000A regulates the financing of consumers' inevitable participation in the health care market). A number of factors might affect the validity of these characterizations, including a taxpayer's current possession of health insurance, current or planned future consumption of health care, or other related voluntary action. *See Thomas More Law Center v.*

Obama, ___ F.3d ___ (6th Cir. 2011) (No. 10-2388, slip op. at 52-53) (opinion of Sutton, J.). The case at hand lacks the concrete factual context critical to a proper analysis of these issues.

In sum, the significance of the questions at issue here only heightens the importance of waiting for an appropriate case to reach the merits. This is not such a case.

V.

For the foregoing reasons, we vacate the judgment of the district court and remand to that court, with instructions to dismiss the case for lack of subject-matter jurisdiction.

VACATED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

MEMORANDUM OPINION
(Cross Motions for Summary Judgment)

(Filed Dec. 13, 2010)

In this case, the Commonwealth of Virginia (the "Commonwealth"), through its Attorney General, challenges the constitutionality of the pivotal enforcement mechanism of the health care scheme adopted by Congress in the Patient Protection and Affordable Care Act ("ACA" or "the Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010). At issue is Section 1501 of the Act, commonly known as the Minimum Essential Coverage Provision ("the Provision"). The Minimum Essential Coverage Provision requires that

every United States citizen, other than those falling within specified exceptions, maintain a minimum level of health insurance coverage for each month beginning in 2014. Failure to comply will result in a penalty included with the taxpayer's annual return. As enacted, Section 1501 is administered and enforced as a part of the Internal Revenue Code.

In its Complaint, the Commonwealth seeks both declaratory and injunctive relief. Specifically, the Commonwealth urges the Court to find that the enactment of Section 1501 exceeds the power of Congress under the Commerce Clause and General Welfare Clause of the United States Constitution. Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision is in direct conflict with Virginia Code Section 38.2-3430.1:1 (2010), commonly referred to as the Virginia Health Care Freedom Act, thus implicating the Tenth Amendment.

As part of the relief sought, the Commonwealth also requests prohibitory injunctive relief barring the United States government from enforcing the Minimum Essential Coverage Provision within its territorial boundaries.

The case is presently before the Court on Motions for Summary Judgment filed by both parties pursuant to Federal Rule of Civil Procedure 56. Both sides have again filed well-researched memoranda supplying the Court with a thorough analysis of the controlling issues and pertinent jurisprudence. The

Court heard oral argument on October 18, 2010. As this Court previously cautioned, this case does not turn on the wisdom of Congress or the public policy implications of the ACA. The Court's attention is focused solely on the constitutionality of the enactment.

A review of the supporting memoranda filed by each party yields no material facts genuinely in issue and neither party suggests to the contrary. The dispute at hand is driven entirely by issues of law.[1]

The present procedural posture of this case is best summarized by the penultimate paragraph of this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss:

> While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate – and tax – a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate court has extended the Commerce Clause or

[1] The Secretary takes issue with the Commonwealth's characterization of aspects of the ACA, its economic impact, and the legislative intent underlying Va. Code Section 38.2-3430.1:1. These disputed facts are neither substantive nor essential to issue resolution, and consequently do not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986).

> Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce.

(Mem. Op. 2, Aug. 2, 2010, ECF No. 84.)

I.

The Secretary, in her Memorandum in Support of Defendant's Motion for Summary Judgment, aptly sets the framework of the debate: "[t]his case concerns a pure question of law, whether Congress acted within its Article I powers in enacting the ACA." (Def.'s Mem. Supp. Mot. Summ. J. 17, ECF No. 91.) At this final stage of the proceedings, with some refinement, the issues remain the same.

Succinctly stated, the Commonwealth's constitutional challenge has three distinct facets. First, the Commonwealth contends that the Minimum Essential Coverage Provision, and affiliated penalty, are beyond the outer limits of the Commerce Clause and associated Necessary and Proper Clause as measured by U.S. Supreme Court precedent. More specifically, the Commonwealth argues that requiring an otherwise unwilling individual to purchase a good or service from a private vendor is beyond the boundaries of congressional Commerce Clause power. The Commonwealth maintains that the failure, or refusal, of its citizens to elect to purchase health

insurance is not economic activity historically subject to federal regulation under the Commerce Clause.

Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision cannot be sustained as a legitimate exercise of the congressional power of taxation under the General Welfare Clause. It argues that the Provision is mischaracterized as a tax and is, in actuality, a penalty untethered to an enumerated power. Congress may not, in the Commonwealth's view, exercise such power to impose a penalty for what amounts to passive inactivity.

Lastly, the Commonwealth asserts that Section 1501 is in direct conflict with the Virginia Health Care Freedom Act. Its Attorney General argues that the enactment of the Minimum Essential Coverage Provision is an unlawful exercise of police power, encroaches on the sovereignty of the Commonwealth, and offends the Tenth Amendment to the U.S. Constitution.

The Secretary prefaces her response with an acknowledgement that the debate over the constitutionality of the ACA has evolved into a polemic mix of political controversy and legal analysis. When viewed from a purely legal perspective, the Secretary maintains that the requirement that most Americans obtain a minimum level of health insurance coverage or pay a tax penalty "is well within the traditional bounds of Congress's Article I powers." (Def.'s Mem. Supp. 1.)

Her argument begins with an explanation of the reformative impact of the health care regime created by the Act. "[T]he Act is an important, but incremental, advance that builds on prior reforms of the interstate health insurance market over the last 35 years." (Def.'s Mem. Supp. 1.) The Secretary points to congressional findings that the insurance industry has failed to take corrective action to eliminate barriers which prevent millions of Americans from obtaining affordable insurance. To correct this systemic failure in the interstate health insurance market, Congress adopted a carefully crafted scheme which bars insurers from denying coverage to those with preexisting conditions, and from charging discriminatory premiums on the basis of medical history.

In order to guarantee the success of these reforms, the Secretary maintains that Congress properly exercised its powers under the Commerce Clause, or alternatively the Necessary and Proper Clause, to adopt a regulatory mechanism to effectuate these health care market reform measures, namely the Minimum Essential Coverage Provision. "[B]ecause the Act regulates health care financing [it] is quintessential economic activity." (Def.'s Reply Mem. 3, ECF No. 132.)

Moreover, the Secretary rejects the Commonwealth's contention that the implementation of the Minimum Essential Coverage Provision through the Necessary and Proper Clause violates state sovereignty. Since the penalty mechanism does

not compel state officials to carry out a federal regulatory scheme, she maintains that it does not implicate the Tenth Amendment.

The Secretary also disputes the logic behind the Commonwealth's contention that the Provision compels health care market participation by individuals who do not wish to purchase insurance. She dismisses the notion that uninsured people can sit passively on the market sidelines. Her reasoning flows from the observation that

> the large majority of the uninsured regularly migrate in and out of insurance coverage. That is, the uninsured, as a class, often make, revisit, and revise economic decisions as to how to finance their health care needs. Congress may regulate these economic actions when they substantially affect interstate commerce. . . . Insurance-purchase requirements have long been fixtures in the United States Code.

(Def.'s Mem. Supp. 2.)

Both the Secretary's argument in defense of the Provision and the apparent underlying rationale of Congress are premised on the facially logical assumption that every individual at some point in life will need some form of health care. "No person can guarantee that he will divorce himself entirely from the market for heath care services." (Def.'s Mem. Opp. Mot. Summ. J. 1, ECF No. 96.) "[N]o person can guarantee that he will never incur a sudden, unanticipated need for expensive care; and very few

persons, absent insurance, can guarantee that they will not shift the cost of that care to the rest of society." (Def.'s Reply Mem. 2.) In the Secretary's view, failure to appreciate this logic is the fatal flaw in the Commonwealth's position.[2]

On a third front, the Secretary defends the Minimum Essential Coverage Provision as a valid exercise of Congress's independent authority to lay taxes and make expenditures for the general welfare. Contrary to earlier representations by the Legislative and Executive branches, the Secretary now states unequivocally that the Provision is a tax, published in the Internal Revenue Code, and enforced by the Internal Revenue Service. The Secretary notes that "[i]ts penalty operates as an addition to an individual's income tax liability on his annual tax return, which is calculated by reference to income." (Def.'s Mem. Supp. 2.) The Secretary also cites projections that it will raise $4 billion annually in general revenue. She takes issue with the Commonwealth's position that there is a legal

[2] In *Florida ex rel. McCollum v. US. Dep't of Health & Human Servs.,* Judge Vinson aptly captures the theoretic underpinning of the Secretary's argument. "Their argument on this point can be broken down to the following syllogism: (1) because the majority of people will at some point in their lives need and consume healthcare services, and (2) because some of the people are unwilling or unable to pay for those services, (3) Congress may regulate everyone and require that everyone have specific, federally-approved insurance." 716 F. Supp. 2d 1120, 1162 (N.D. Fla. 2010).

distinction between penalties that serve regulatory purposes and other forms of revenue raising taxation. In her opinion, any such legal distinction has long been abandoned by the Supreme Court.[3]

Finally, the Secretary highlights several precepts of legal analysis which she suggests should guide the Court in reviewing the issues raised. First, she cautions the Court to remember that the standard for facial challenges establishes a high hurdle. It requires the Commonwealth to demonstrate that there are no possible circumstances in which the Provision could be constitutionally applied. *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). In other words, they "must show that the [statute] cannot operate constitutionally under any circumstance." *West Virginia v. U.S. Dep't of Health & Human Servs.,* 289 F.3d 281, 292 (4th Cir. 2002). Proof of a single constitutional application is all that is necessary in her view. In summary, she explains

> for Virginia's facial challenge to succeed under its theory, this Court would have to conclude that no uninsured individual would ever use or be charged for medical services, and that no uninsured individual would ever

[3] Because the Minimum Essential Coverage Provision is incorporated into the Internal Revenue Code, and technically under the purview of the Secretary of the Treasury, Secretary Sebelius, at this late stage, maintains that the Secretary of the Treasury is a necessary party, whose absence as such warrants dismissal. This aspect of her motion was rejected by a separate Memorandum Order (Dk. No. 152) dated October 13, 2010.

> make an active decision whether to purchase insurance. Because such a showing cannot be made, Virginia's facial challenge must fail.

(Def.'s Mem. Opp. 19.)

On this issue, the Secretary holds the weaker hand. The cases she relies upon, *Salerno* and *West Virginia,* which are styled as facial challenges, focus on the impact or effect of the enactment at issue. The immediate lawsuit questions the authority of Congress – at the bill's inception – to enact the legislation. The distinction is somewhat analogous to subject matter jurisdiction, the power to act ab initio. By their very nature, almost all constitutional challenges to specific exercises of enumerated powers, particularly the Commerce Clause, are facial. "When . . . a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face*." *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 743, 123 S. Ct. 1972, 1986 (2003) (Scalia, J., dissenting); *see also City of Boerne v. Flores,* 521 U.S. 507, 516, 117 S. Ct. 2157, 2162 (1997). A careful examination of the Court's analysis in *Lopez* and *Morrison* does not suggest the standard articulated in *Salerno.* In both *Lopez* and *Morrison,* the Court declared the statute under review to be legally stillborn without consideration of its effect downstream.

In fact, the viability of the *Salerno* dictum cited by the Secretary has been questioned by the Court in

City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849 (1999). "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." *Id.* at 55 n.22, 119 S. Ct. at 1858 n.22. *See also Fargo Women's Health Org. v. Schafer,* 507 U.S. 1013, 1013, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring in denial of stay and injunction); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1458 (8th Cir. 1995).

Even if the Commonwealth is held to the higher standard of proof, unconstitutionality in all applications, it could be met if the enforcement mechanism is itself unconstitutional. Importantly, it is not the effect on individuals that is presently at issue – it is the authority of Congress to compel *anyone* to purchase health insurance. An enactment that exceeds the power of Congress to adopt adversely affects everyone in every application. Indeed, the Minimum Essential Coverage Provision touches every American citizen required to file an annual IRS Form 1040 or 1040A.[4]

Second, the Secretary correctly asks the Court to be mindful that it must presume the constitutionality

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[4] The Commonwealth also contends that the only application at issue is the conflict with the Virginia Health Care Freedom Act. The Court, however, need not specifically reach this issue.

of federal legislation. *Gibbs v. Babbitt,* 214 F.3d 483, 490 (4th Cir. 2000). Third, she reminds the Court that the task at hand is not to independently review the facts underlying the decision of Congress to exercise its Article I authority to enact legislation. Reviewing courts are confined to a determination of whether a rational basis exists for such congressional action. *See Gonzales v. Raich,* 545 U.S. 1, 22, 125 S. Ct. 2195, 2208 (2005).

II.

In this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss, the Court recognized that the Secretary's application of the Commerce Clause and General Welfare Clause appeared to extend beyond existing constitutional precedent. It was also noted that each side had advanced some authority arguably supporting the theory underlying their position. Accordingly, the Court was unable to conclude at that stage that the Complaint failed to state a cause of action. At this point, the analysis proceeds to the next level. To prevail, the Commonwealth, as Plaintiff, must make "a plain showing that Congress has exceeded its constitutional bounds." *Gibbs,* 214 F.3d at 490 (internal citation omitted). To win summary judgment, the Secretary must convince the Court to the contrary.

Under Federal Rule of Civil Procedure 56(c)(2), summary judgment should be granted "if the

pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.,* 597 F.3d 570, 576 (4th Cir. 2010) (quoting Fed. R. Civ. P. 56(c)(2)). "The moving party is 'entitled to judgment as a matter of law' when the nonmoving party fails to make an adequate showing on an essential element for which it has the burden of proof at trial." *News & Observer Publ'g Co.,* 597 F.3d at 576; *see Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 805-06, 119 S. Ct. 1597, 1603 (1999). Aside from sparring over representations of marginal consequence, there do not appear to be any material facts genuinely at issue. This case turns solely on issues of law. Both parties acknowledge that resolution by summary judgment is appropriate.

III.

Turning to the merits, this Court previously noted that the Minimum Essential Coverage Provision appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark. The Court also acknowledged the finite well of jurisprudential guidance in surveying the boundaries of such power. The historically-accepted contours of Article I Commerce Clause power were restated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 150, 91 S. Ct. 1357, 1359 (1971). The *Perez* Court divided traditional Commerce Clause

powers into three distinct strands. First, Congress can regulate the channels of interstate commerce. *Id.* Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* It appears from the tenor of the debate in this case that only the third category of Commerce Clause power is presently at issue.

Critical to the Secretary's argument is the notion that an individual's decision not to purchase health insurance is in effect "economic activity." (Def.'s Mem. Supp. 35.) The Secretary rejects the Commonwealth's implied premise that a person can simply elect to avoid participation in the health care market. It is inevitable, in her view, that every individual – today or in the future – healthy or otherwise – will require medical care. She adds that a large segment of the population is uninsured and "consume[s] tens of billions of dollars in uncompensated care each year." (Def.'s Mem. Opp. 14.) The Secretary maintains that the irrefutable facts demonstrate that "[t]he conduct of the uninsured – their economic decision as to how to finance their health care needs, their actual use of the health care system, their migration in and out of coverage, and their shifting of costs on to the rest of the system when they cannot pay – plainly is economic activity." (Def.'s Mem. Opp. 16-17.)

The Secretary relies on what is commonly referred to as an aggregation theory, which is

conceptually based on the hypothesis that the sum of individual decisions to participate or not in the health insurance market has a critical collective effect on interstate commerce. Congress may regulate even intrastate activities if they are within a class of activities that, in the aggregate, substantially affect interstate commerce. In support of this argument, the Secretary relies on the teachings of the Supreme Court in *Gonzales,* wherein the Court noted that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Gonzales,* 545 U.S. at 17, 125 S. Ct. at 2205-06 (citing *Perez,* 402 U.S. at 154, 91 S. Ct. at 1361). In other words, her argument is premised on the theoretical effect of an aggregation or critical mass of indecision on interstate commerce.

The core of the Secretary's primary argument under the Commerce Clause is that the Minimum Essential Coverage Provision is a necessary measure to ensure the success of its larger reforms of the interstate health insurance market.[5] The Secretary emphasizes that the ACA is a vital step in transforming a currently dysfunctional interstate health insurance market. In the Secretary's view, the key elements of health care reform are coverage of those with preexisting conditions and prevention of discriminatory premiums on the basis of medical

[5] The Secretary seems to sidestep the independent freestanding constitutional basis for the Provision.

history. These features, the Secretary maintains, will have a material effect on the health insurance underwriting process, and inevitably, the cost of insurance coverage. Therefore, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to "implode." Unless everyone is required by law to purchase health insurance, or pay a penalty, the revenue base will be insufficient to underwrite the costs of insuring individuals presently considered as high risk or uninsurable. Therefore, under the Secretary's reasoning, since Congress has the power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, the power to make the regulation effective by enacting the Minimum Essential Coverage Provision. *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 118-19, 62 S. Ct. 523, 525-26 (1942).

The Secretary seeks legal support for her aggregation theory in the Supreme Court's holding in *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82 (1942) and *Gonzales.* She maintains that the central question is whether there is a rational basis for concluding that the class of activities at issue, when "taken in the aggregate," substantially affects interstate commerce. *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2208; *Wickard,* 317 U.S. at 127-28. In other words, "[w]here the class of activities is regulated and that class is within reach of federal power, the courts

have no power 'to excise, as trivial, individual instances' of the class." *Gonzales,* 545 U.S. at 23, 125 S. Ct. at 2209 (quoting *Perez,* 402 U.S. at 154, 91 S. Ct. at 1361); *United States v. Malloy,* 568 F.3d 166, 180 (4th Cir. 2009), *cert. denied,* 130 S. Ct. 1736 (2010).

In *Wickard,* the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm. The Court reasoned that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. *Wickard* is generally acknowledged to be the most expansive application of the Commerce Clause by the Supreme Court, followed by *Gonzales.*

At issue in *Gonzales* was whether the aggregate effect of personal growth and consumption of marijuana for medicinal purposes under California law had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause. The Supreme Court concluded that "Mike the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales,* 545 U.S. at 18-19, 125 S. Ct. at 2206-07.

The Secretary emphasizes that the Commonwealth's challenge fails to appreciate the significance of the overall regulatory scheme and program at issue. Quoting from *Gonzales,* the Secretary notes that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." (Def.'s Mem. Supp. 19 (quoting *Gonzales,* 545 U.S. at 17, 125 S. Ct. at 2206).) Furthermore, the Secretary adds that "[f]or the provisions of '[a] complex regulatory program' to fall within [Congress's] commerce power, '[i]t is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.'" (Def.'s Mem. Opp. 9 (quoting *Gibbs,* 214 F.3d at 497).)

When reviewing congressional exercise of the Commerce Clause powers, the Secretary cautions that a court "need not itself measure the impact on interstate commerce of the activities Congress sought to regulate, nor need the court calculate how integral a particular provision is to a larger regulatory program. The court's task instead is limited to determining 'whether a rational basis exists' for Congress's conclusions."[6] (Def.'s Mem. Supp. 19

[6] In response to footnote 1 in the Court's Memorandum Opinion denying Defendant's Motion to Dismiss, the Secretary addresses the effect of the McCarran-Ferguson Act on the power of Congress to regulate the business of insurance under the

(Continued on following page)

(quoting *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2208).)

Because the Minimum Essential Coverage Provision is the linchpin which provides financial viability to the other critical elements of the overall regulatory scheme, the Secretary concludes that its adoption is within congressional Commerce Clause powers. She emphasizes that Congress "rationally found that a failure to regulate the decision to delay or forego insurance – i.e., the decision to shift one's costs on to the larger health care system – would undermine the 'comprehensive regulatory regime.'" (Def.'s Mem. Supp. 27 (quoting *Gonzales,* 545 U.S. at

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Commerce Clause. The Act expressly declared that the regulation and taxation of the business of insurance, and all who engage in it, should be subject to the laws of the several states unless Congress specifically states the contrary. 15 U.S.C. § 1012. *Life Partners, Inc. v. Morrison,* 484 F.3d 284, 292 (4th Cir. 2007) *cert. denied,* 552 U.S. 1062 (2007).

The Secretary points out that where Congress exercises that power, its enactment controls over any contrary state law. *Humana, Inc. v. Forsyth,* 525 U.S. 299, 306, 119 S. Ct. 710, 716 (1999). Specifically, the Secretary maintains that the ACA reforms the insurance industry by preventing insurers from denying or revoking coverage for those with preexisting conditions and by protecting individuals with such conditions from being charged discriminatory rates. These provisions, which are effectuated by the Minimum Essential Coverage Provision, in the Secretary's view, regulate the business of insurance.

The Commonwealth counters, however, that an individual's decision not to purchase insurance is not within the logical ambit of the business of insurance.

27, 125 S. Ct. at 2211).) Therefore, the Secretary posits that because the guaranteed coverage and rate discrimination issues are unquestionably within the Commerce Clause powers, the mechanism chosen by Congress to effectuate those reforms, the Minimum Essential Coverage Provision, is also a proper exercise of that power – either under the Commerce Clause or the associated Necessary and Proper Clause.

IV.

The Secretary characterizes the Minimum Essential Coverage Provision as the vital kinetic link that animates Congress's overall regulatory reform of interstate health care and insurance markets. "[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States v. Comstock,* 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819). The Secretary maintains that because Congress has rationally concluded "that the minimum coverage provision is necessary to make the other regulations in the Act effective," it is an appropriate exercise of the Necessary and Proper Clause. (Def.'s Mem. Supp. 29.) Again, the Secretary contends that the determination of whether the means adopted to attain its legislative goals are rationally related is reserved for Congress alone.

Burroughs v. United States, 290 U.S. 534, 547-48, 54 S. Ct. 287, 291 (1934).

Although the Necessary and Proper Clause vests Congress with broad authority to exercise means, which are not themselves an enumerated power, to implement legislation, it is not without limitation. As the Secretary concedes, the means adopted must not only be rationally related to the implementation of a constitutionally-enumerated power, but it must not violate an independent constitutional prohibition. *Comstock,* 130 S. Ct. at 1956-57. Whether the Minimum Essential Coverage Provision, which requires an individual to purchase health insurance or pay a penalty, is borne of a constitutionally-enumerated power, is the core issue in this case. As the Supreme Court noted in *Buckley v. Valeo*, "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, . . . so long as the exercise of that authority does not offend some other constitutional restriction." 424 U.S. 1, 132, 96 S. Ct. 612, 688 (1976) (internal citation omitted). The Commonwealth argues that the Provision offends a fundamental restriction on Commerce Clause powers.

In their opposition, the Commonwealth focuses on what it perceives to be the central element of Commerce Clause jurisdiction – economic activity. The Commonwealth distinguishes what was deemed to be "economic activity" in *Wickard* and *Gonzales,* namely a voluntary decision to grow wheat or cultivate marijuana, from the involuntary act of

purchasing health insurance as required by the Provision. In *Wickard* and *Gonzales,* individuals made a conscious decision to grow wheat or cultivate marijuana, and consequently, voluntarily placed themselves within the stream of interstate commerce. Conversely, the Commonwealth maintains that the Minimum Essential Coverage Provision compels an unwilling person to perform an involuntary act and, as a result, submit to Commerce Clause regulation.

Drawing on the logic articulated in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995) and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740 (2000), which limited the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that actually affect interstate commerce, the Commonwealth contends that a decision not to purchase a product, such as health insurance, is not an economic *activity.* In *Morrison,* the Court noted that "[e]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 608, 120 S. Ct. at 1748-49. The Court in *Morrison* also pointed out that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id* at 614, 120 S. Ct. at 1752. Finally, in *Morrison,* the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate

commerce." *Id.* at 617, 120 S. Ct. at 1754. The Commonwealth urges a similar analysis in this case.

The Commonwealth does not appear to challenge the aggregate effect of the many moving parts of the ACA on interstate commerce. Its lens is narrowly focused on the enforcement mechanism to which it is hinged, the Minimum Essential Coverage Provision.

The Commonwealth argues that the Necessary and Proper Clause cannot be employed as a vehicle to enforce an unconstitutional exercise of Commerce Clause power, no matter how well intended. Although the Necessary and Proper Clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers, its authority is not unbridled. As Chief Justice John Marshall observed in *McCulloch,* "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch,* 17 U.S. (4 Wheat.) at 421.

More recently, in restating the limitations on the scope of the Necessary and Proper Clause, the Supreme Court defined the relevant inquiry, "we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock,* 130 S. Ct. at 1956. If a person's decision not to purchase health insurance at a particular point in time does

not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

The Secretary, in rebuttal, faults the Commonwealth's reasoning as overly simplistic. She argues that the Commonwealth's theory is dependent on which method a person chooses to finance their inevitable health care expenditures. If the costs are underwritten by an insurance carrier, it is activity; if the general public pays by default, it is passivity. She maintains that under the Commonwealth's reasoning, the former is subject to Commerce Clause powers, while the latter is not. The Secretary also points out that under the Commonwealth's approach, "it [is] unclear whether an individual became 'passive,' and therefore supposedly beyond the reach of the commerce power, if he dropped his policy yesterday, a week ago, or a year ago." (Def.'s Mem. Opp. 18.) She characterizes the Commonwealth's logic as untenable.

The Secretary also rejects the notion that the imposition of a monetary penalty for failing to perform an act is outside the spirit of the Constitution. She offers two examples to highlight the point. In the context of Superfund regulation, a property owner cannot avoid liability for allowing contamination on his property by claiming that he was only "passive." Mere ownership of contaminated property under the Superfund Act triggers an obligation to undertake remedial measures. *Nurad,*

Inc. v. Wm. E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992). Moreover, a property owner cannot defeat an action to take a parcel of his land under the power of eminent domain, simply by passively taking no action. *Berman v. Parker,* 348 U.S. 26, 33, 75 S. Ct. 98, 103 (1954).

In addition, the Secretary points out that sanctions have historically been imposed for failure to timely file tax returns or truthfully report or pay taxes due, as well as failure to register for the selective service or report for military duty. The Commonwealth, however, counters that most of the examples presented are directly related to a specific constitutional provision – empowering Congress to assess taxes and to provide and maintain an Army and Navy, U.S. Const. art. I, § 8, or requiring compensation for exercising the power of eminent domain. U.S. Const. amend. V. In the case of the landowner sanctioned for contamination of his property, liability largely stemmed from an active transaction of purchase. In contrast, no specifically articulated constitutional authority exists to mandate the purchase of health insurance.

V.

Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within constitutional bounds. Salutatory goals and creative drafting have never been sufficient to offset

an absence of enumerated powers. As the Supreme Court noted in *Morrison*, "[e]ven [our] modern-era of precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 608, 120 S. Ct. at 1748-49 (quoting *Lopez,* 514 U.S. at 556-57, 115 S. Ct. at 1628). Congressional findings, no matter how extensive, are insufficient to enlarge the Commerce Clause powers of Congress. *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752.

In *Wickard* and *Gonzales,* the Supreme Court staked out the outer boundaries of Commerce Clause power. In both cases, the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initialed change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.

In *Morrison* and *Lopez,* however, the Supreme Court tightened the reins and insisted that the perimeters of legislation enacted under Commerce Clause powers square with the historically-accepted contours of Article I authority delineated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 91 S. Ct. 1357 (1971). Pertinent to the immediate case, the Court in *Perez* stated that Congress has the power to regulate *activities* that substantially affect interstate commerce. *Id.* at 150, 91 S. Ct. at 1359. In *Perez,* the Court upheld a federal prohibition on extortionate credit transactions, even though the

specific transaction in question had not occurred in interstate commerce.

The Court in *Lopez* and *Morrison* constrained the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that had a demonstrable effect on interstate commerce. In *Lopez,* the Court found that the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm in a school zone, exceeded Congress's Commerce Clause authority. First, the Court held that the statute by its terms had nothing to do with commerce or any sort of economic enterprise. Second, it concluded that the act could not be sustained "under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez,* 514 U.S. at 561, 115 S. Ct. at 1631.

Later in *Morrison,* the Court concluded that the Commerce Clause did not provide Congress with the authority to impose civil remedies under the Violence Against Women Act. Despite extensive factual findings regarding the serious impact that gender-motivated violence has on victims and their families, the Court concluded that it was insufficient by itself to sustain the constitutionality of Commerce Clause legislation. *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752. The Court in *Morrison* ultimately rejected the argument that Congress may regulate noneconomic, violent criminal conduct based solely on

that conduct's aggregated effect on interstate commerce. *Id.* at 617, 120 S. Ct. at 1754.

In surveying the legal landscape, several operative elements are commonly encountered in Commerce Clause decisions. First, to survive a constitutional challenge the subject matter must be economic in nature and affect interstate commerce, and second, it must involve activity. Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity. The constitutional viability of the Minimum Essential Coverage Provision in this case turns on whether or not a person's decision to refuse to purchase health care insurance is such an activity.

In her argument, the Secretary urges an expansive interpretation of the concept of activity. She posits that every individual in the United States will require health care at some point in their lifetime, if not today, perhaps next week or even next year. Her theory further postulates that because near universal participation is critical to the underwriting process, the collective effect of refusal to purchase health insurance affects the national market. Therefore, she argues, requiring advance purchase of insurance based upon a future contingency is an activity that will inevitably affect interstate commerce. Of course, the same reasoning could apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject

to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence.

The power of Congress to regulate a class of activities that in the aggregate has a substantial and direct effect on interstate commerce is well settled. *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2209. This even extends to noneconomic activity closely connected to the intended market. *Hoffman v. Hunt,* 126 F.3d 575, 587-88 (4th Cir. 1997). But these regulatory powers are triggered by some type of self-initiated action. Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.[7] In doing so, enactment of the Minimum Essential Coverage Provision exceeds the Commerce Clause powers vested in Congress under Article I.

Because an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally

[7] The collective effect of an aggregate of such inactivity still falls short of the constitutional mark.

deployed when tethered to a lawful exercise of an enumerated power. *See Comstock,* 130 S. Ct. at 1956-57. As Chief Justice Marshall noted in *McCulloch,* it must be within "the letter and spirit of the constitution." 17 U.S. (4 Wheat.) at 421. The Minimum Essential Coverage Provision is neither within the letter nor the spirit of the Constitution. Therefore, the Necessary and Proper Clause may not be employed to implement this affirmative duty to engage in private commerce.

VI.

On an alternative front, the Secretary contends that the Minimum Essential Coverage Provision is a valid exercise of Congress's independent taxation power under the General Welfare Clause in Article 1.[8] Despite pre-enactment representations to the contrary by the Executive and Legislative branches, the Secretary now argues that the Minimum Essential Coverage Provision is, in essence, a "tax penalty." The Secretary notes that the Provision is codified in the Internal Revenue Code and the penalty, if applicable, is reported and paid as a part of an individual's annual tax return.

Because the Provision is purportedly a product of congressional power of taxation, judicial review is

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[8] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare." U.S. Const. art. I, § 8, cl. 1.

generally narrow and limited. *United States v. Ptasynski,* 462 U.S. 74, 84, 103 S. Ct. 2239, 2245 (1983). Relying on *United States v. Aiken,* 974 F.2d 446 (4th Cir. 1992), the Secretary asserts that the power of Congress to lay and collect taxes, duties, and excises under Article I, Section 8 of the U.S. Constitution, requires only that it be a revenue raising measure and that the associated regulatory provisions bear a "reasonable relation" to the statute's taxing power. *Id.* at 448; *see also Sonzinsky v. United States,* 300 U.S. 506, 513, 57 S. Ct. 554, 555-56 (1937) (involving whether a levy on the sale of firearms described as a tax and passed by Congress's taxing power was in fact a tax). According to the Secretary, the power of Congress to tax for the general welfare is checked only by the electorate. "Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *United States v. Kahrigher,* 345 U.S. 22, 31, 73 S. Ct. 510, 515 (1953), *overruled on other grounds, Marchetti v. United States,* 390 U.S. 39, 88 S. Ct. 697 (1968).

The Secretary also reiterates that Congress may use its power under the tax clause even for purposes that would exceed its power under other provisions of Article I. *United States v. Sanchez,* 340 U.S. 42, 44, 71 S. Ct. 108, 110 (1950). As an example, the Secretary highlights the assessment of estate taxes. Congress has the authority to impose inheritance taxes but lacks power under the Commerce Clause to regulate the administration of estates.

The Secretary takes issue with the Commonwealth's contention that the Minimum Essential Coverage Provision is a penalty, rather than a tax, and that there is a legal distinction between the two. "In passing on the constitutionality of a tax law [the court is] 'concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.'" *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 363, 61 S. Ct. 586, 588 (1941) (internal citation omitted).

Initially she points out that the Provision has all the historic attributes of a tax. First and foremost, the Provision generates revenue forecast to be approximately $4 billion annually to be paid into the general treasury. She argues that this falls squarely within the classic definition of a tax, namely, "a . . . burden, laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. 213, 224, 116 S. Ct. 2016, 2113 (1996) (quoting *New Jersey v. Anderson,* 203 U.S. 483, 492, 27 S. Ct. 137, 140 (1906)).[9] The income threshold for the penalty to apply under the Minimum Essential Coverage Provision is based on the statutory level requiring individuals to file income tax returns and is calculated by reference to the individual's household

[9] A penalty, on the other hand, imports the notion of a punishment for an unlawful act or omission. *Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. at 224, 116 S. Ct. at 2113.

income for the given year. If the penalty applies, the taxpayer reports it on his return for that year. The penalty becomes an additional income tax liability. 26 U.S.C. § 5000A(b)(2). The Secretary therefore maintains that Congress treated the Minimum Essential Coverage Provision as an exercise of its taxing power in addition to its commerce power.

The Secretary also dismisses the Commonwealth's contention that the Provision is a penalty as opposed to a tax. She concedes that the Provision has a regulatory purpose, but adds that "[e]very tax is in some measure regulatory" to the extent "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky,* 300 U.S. at 513, 57 S. Ct. at 555. She also emphasizes that courts have abandoned the antiquated distinction between revenue raising taxes and regulatory penalties. *Bob Jones Univ. v. Simon,* 416 U.S. 725, 741 n.12, 94 S. Ct. 2038, 2048 (1974). Although Section 1501 variously employs the terms "tax" and "penalties," "the labels used do not determine the extent of the taxing power." *Simmons v. United States,* 308 F.2d 160, 166 n.21 (4th Cir. 1962).

Furthermore, despite the Commonwealth's insistence to the contrary, the Secretary argues that courts have upheld the exercise of congressional taxing power even when its regulatory intent or purpose extends beyond its Commerce Clause authority. "From the beginning of our government the courts have sustained taxes although imposed

with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *Sanchez,* 340 U.S. at 45, 71 S. Ct. at 110. The Commonwealth's analysis is further flawed, in her view, because their foundational bedrock of supporting authority consists of long discarded criminal as opposed to regulatory cases. The Minimum Essential Coverage Provision does not impose a criminal punishment.

Therefore, the Secretary maintains that because the Minimum Essential Coverage Provision in fact generates revenue and its regulatory features are rationally related to the goal of requiring every individual to pay for the medical services they receive, which is within the ambit of Commerce Clause powers, the Provision must be upheld.

The Commonwealth urges the Court to reject the Secretary's simplistic analysis that casts aside a wealth of historical tax clause jurisprudence. The Commonwealth does not dispute that the principles it relies upon as controlling have been rarely deployed in recent years, but the scope of congressional power under review is without modern counterpart. The Commonwealth also disagrees that the penalty provision in question meets the classic characteristics of a tax – or was intended by Congress to be a tax. The text of Section 1501 unequivocally states that it is a product of the Commerce Clause, not the General Welfare Clause. Moreover, any revenue generated is

merely incidental to a violation of a regulatory provision.

Irrespective of labels, the Commonwealth contends that the federal government is seeking to smuggle an unconstitutional exercise of the Commerce Clause past judicial review in the guise of a tax. In the Commonwealth's view, this legislative tactic offends the letter and spirit of the Constitution. "[T]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate." (Tr. 81:18-21, July 1, 2010 (*citing Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20, 37, 42 S. Ct. 449, 450 (1922))); *see United States v. Butler,* 297 U.S. 1, 68, 56 S. Ct. 312, 320 (1936); *Linder v. United States,* 268 U.S. 5, 17, 45 S. Ct. 446, 448-49 (1925). "[A] 'purported tax' that is actually a penalty to force compliance with a regulatory scheme must be tied to an enumerated power other than the taxing power." (Pl.'s Reply Mem. 11, ECF No. 117.)

The Attorney General of Virginia specifically asks the Court to closely examine the viability of the Secretary's core premise that the terms "tax" and "penalty" are legally synonymous and interchangeable. The Commonwealth maintains that the mainstay of the Secretary's taxation argument founders on the shoals of this faulty assumption. This notion of interchangeable is apparently derived from a footnote in *Bob Jones University*

> It is true that the Court [in earlier cases] drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. Even if such distinctions have merit, it would not assist petitioner [in this case], since its challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which are clearly intended to raise revenue.

Bob Jones Univ., 416 U.S. at 741 n.12, 94 S. Ct. at 2048 n.12 (internal citations omitted).

The Secretary argues that this cursory footnote disarms the precedential impact of an entire body of constitutional law governing regulatory penalties. In the Commonwealth's view, the Secretary has misconstrued the import and precedential effect of this footnote, which should be accorded no more dignity than dicta. To support this contention, the Commonwealth directs the Court's attention to a contrary position articulated by the Supreme Court in *United States v. La Franca.* "The two words [tax versus penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca,* 282 U.S. 568, 572, 51 S. Ct. 278, 280 (1931); *see also Reorganized CF&I*

Fabricators of Utah, Inc., 518 U.S. at 224, 116 S. Ct. at 2112.[10]

The Attorney General of Virginia maintains that the distinction between a tax and a penalty may be subtle, but is nonetheless significant. He adds that the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause because it must be in aid of an enumerated power. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940); *United States v. Butler,* 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936).

Despite the Secretary's characterization of such cases as superannuated, the Commonwealth hastens to reply that they have never been overruled by the U.S. Supreme Court. In fact, the Commonwealth points out that the holding in the *Child Labor Tax Case* was restated with approval by the Supreme Court in 1994 in *Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 114 S. Ct. 1937 (1994). "Yet we have also recognized that 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" *Id.* at 779, 114 S. Ct. at

[10] In rejoinder, the Secretary notes that the term "penalty" defined and discussed in *Reorganized CF&I Fabricators of Utah, Inc.* referred to a payment as a penalty for an unlawful act, not a noncompliance sanction, as here.

1946 (*citing Child Labor Tax Case,* 259 U.S. at 38). The Commonwealth argues that this is such a case.

The Commonwealth also discounts the significance of Congress's use of the term "tax" in the ACA and the placement of the Minimum Essential Coverage Provision in the Internal Revenue Code. "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision of this title. . . ." 26 U.S.C. § 7806(b).

The Commonwealth emphasizes that the best evidence of congressional intent is the language chosen by that legislative body. In the Minimum Essential Coverage Provision (26 U.S.C. § 5000A(b)(1)) Congress specifically denominated this payment for failure to comply with the mandate as a "penalty." "Because the PPACA penalty is an exaction for an omission – one that if it operated perfectly would produce no revenue – it is a penalty as a matter of law. . . ." (Pl.'s Mem. Opp. Mot. Summ. J. 28, ECF No. 95.)

During oral argument on the Secretary's Motion to Dismiss, the Deputy Assistant Attorney General of the United States informed the Court that because the Provision in fact generated revenue, and its regulatory features were rationally related to the goal of requiring every individual to pay for the medical services they receive, "that's the end of the ballgame." (Tr. 44:11, July 1, 2010.) The Commonwealth

maintains that the question of whether a provision is a penalty or tax is a question of law for the Court to resolve, relying on *Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. at 224-26, 116 S. Ct. 2113-14 and *La Franca,* 282 U.S. at 572, 51 S. Ct. at 280.

Because the noncompliance penalty provision in Section 1501 lacks a bona fide intention to raise revenue for the general welfare, the Commonwealth argues that it does not meet the historical criteria for a tax. Furthermore, the resulting regulatory tax, untethered to an enumerated power, is an unconstitutional encroachment on the state's power of regulation under the Tenth Amendment. *See Butler,* 297 U.S. at 68, 56 S. Ct. at 320; *Child Labor Tax Case,* 259 U.S. at 37-38, 42 S. Ct. at 451. While the Provision may have the incidental effect of raising revenue, the Commonwealth maintains that its clear intended purpose is to exercise prohibited police power to compel individuals to enter into private commercial transactions.

VII.

The Minimum Essential Coverage Provision reads in pertinent part: "[i]f a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) [mandatory insurance coverage] . . . there is hereby imposed on the taxpayer a penalty. . . ." 26 U.S.C. § 5000A(b)(1). Although purportedly grounded in the General Welfare Clause, the notion that the generation of revenue was a

significant legislative objective is a transparent afterthought. The legislative purpose underlying this provision was purely regulation of what Congress misperceived to be economic activity. The only revenue generated under the Provision is incidental to a citizen's failure to obey the law by requiring the minimum level of insurance coverage. The resulting revenue is "extraneous to any tax need." *See Kahriger,* 345 U.S. at 31, 73 S. Ct. at 515.[11] The use of the term "tax" appears to be a tactic to achieve enlarged regulatory license.

Compelling evidence of the intent of Congress can be found in the Act itself. In the preface to Section 1501, Congress specifically recites the constitutional basis for its actions and includes requisite findings of fact. "The individual . . . [mandate] is commercial and economic in nature, and substantially affects interstate commerce. . . ." 42 U.S.C. § 18091(a)(1). The Secretary is correct that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary." *Sanchez,* 340

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[11] In *Florida ex rel. McCollum,* 716 F. Supp. 2d at 1137-38, Judge Vinson perceptively notes that the Provision fails to mention any revenue generating purposes, characteristic of most tax clause enactments. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 841, 115 S. Ct. 2510, 2522 (1995).

U.S. at 44, 71 S. Ct. at 110 (internal citations omitted). The sources cited by the Secretary to support this proposition, however, are readily distinguishable from the immediate case. Unlike the mandate at hand, in *Sanchez* and *Sonzinsky,* the enactment in question purported on its face to be an exercise of the taxing power.

In concluding that Congress did not intend to exercise its powers of taxation under the General Welfare Clause, this Court's analysis begins with the unequivocal denials by the Executive and Legislative branches that the ACA was a tax. In drafting this provision, Congress specifically referred to the exaction as a penalty. "[T]here is hereby imposed on the taxpayer a penalty . . . " 26 U.S.C. § 5000A(b)(1). Earlier versions of the bill in both the House of Representatives and the Senate used the more politically toxic term "tax" when referring to the assessment for noncompliance with the insurance mandate. *See* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009); Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009); and America's Healthy Future Act, S. 1796, 111th Cong. (2009). Each of these earlier versions specifically employed the word "tax" as opposed to "penalty" as the sanction for noncompliance.

In the final version of the ACA enacted by the Senate on December 24, 2009, the term "penalty" was substituted for "tax" in Section 1501(b)(1). A logical inference can be drawn that the substitution of this critical language was a conscious and deliberate act

on the part of Congress. *See Russello v. United States,* 464 U.S. 16, 23-24, 104 S. Ct. 296, 300-301 (1983); *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). This shift in terminology during the final hours preceding an extremely close floor vote undermines the contention that the terms "penalty" and "tax" are synonymous.[12]

It is also significant to note that unlike the term "penalty" used in Section 1501(b)(1), other sections of the ACA specifically employ the word "tax." Section 9009 imposes a tax on the sale of any taxable medical device by the manufacturer, producer, or importer. Section 9001 imposes a tax on high-cost, employer-sponsored health care coverage. Section 9015 imposes a tax on certain high-income taxpayers. Finally, Section 10907 imposes a tax on any indoor tanning service. The legislature's apparent careful choice of words supports the conclusion that the term "tax" was not used indiscriminately. As the Supreme Court observed in *Duncan v. Walker*, "it is well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' 533 U.S. 167, 173, 121 S. Ct. 2120, 2125 (2001) (internal citations omitted).

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[12] The Secretary's use of the newly-coined expression "tax penalty" adds little to the debate.

This Court is also not persuaded that the placement of the Minimum Essential Coverage Provision in the Internal Revenue Code under "miscellaneous excise taxes" has the significance claimed by the Secretary. The Internal Revenue Code itself clearly states that such placement does not give rise to any inference or presumption that the exaction was intended to be a tax. *See* 26 U.S.C. § 7806(b). Given the anomalous nature of this Provision, it is equally plausible that Congress simply docked the Provision in a convenient harbor.

This Court is therefore unpersuaded that Section 1501(b)(1) is a bona fide revenue raising measure enacted under the taxing power of Congress. As the Supreme Court pointed out in *La Franca*, "[t]he two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty, it cannot be converted into a tax by the simple expedient of calling it such." *La Franca,* 282 U.S. at 572, 515 S. Ct. at 280. The penalizing feature of this so-called tax has clearly "los[t] its character as such" and has become "a mere penalty with the characteristics of regulation and punishment." *Kurth Ranch,* 511 U.S. at 799, 114 S. Ct. at 1946 (citing *Child Labor Tax Case,* 259 U.S. at 28, 42 S. Ct. at 451). No plausible argument can be made that it has "the purpose of supporting the Government." *Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. at 224, 116 S. Ct. at 2113 (quoting *New Jersey v. Anderson,* 203 U.S. 483, 492, 27 S. Ct. 137, 140 (1906)).

Having concluded that Section 1501(b)(1) is, in form and substance, a penalty as opposed to a tax,[13] it must be linked to an enumerated power other than the General Welfare Clause. *See Sunshine Anthracite Coal Co.,* 310 U.S. at 393, 60 S. Ct. at 912; *Butler,* 297 U.S. at 61, 56 S. Ct. at 317; *Child Labor Tax Case,* 259 U.S. at 38, 42 S. Ct. at 451. Notwithstanding criticism by the pen of some constitutional scholars, the constraining principles articulated in this line of cases, while perhaps dormant, remains viable and applicable to the immediate dispute. Although they have not been frequently employed in recent years, this absence appears to be more a product of the unprecedented nature of the legislation under review than an abandonment of established principles.

It is clear from the text of Section 1501 that the underlying regulatory scheme was conceived as an exercise of Commerce Clause powers. This is supported by specific factual findings purporting to demonstrate the effect of the health care scheme on interstate commerce. In order for the noncompliance penalty component to survive constitutional challenge, it must serve to effectuate a valid exercise of an enumerated power – here

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[13] If allowed to stand as a tax, the Minimum Essential Coverage Provision would be the only tax in U.S. history to be levied directly on individuals for their failure to affirmatively engage in activity mandated by the government not specifically delineated in the Constitution.

the Commerce Clause. *Sunshine Anthracite Coal Co.,* 310 U.S. at 393, 60 S. Ct. at 912.

Earlier in this opinion, the Court concluded that Congress lacked power under the Commerce Clause, or associated Necessary and Proper Clause, to compel an individual to involuntarily engage in a private commercial transaction, as contemplated by the Minimum Essential Coverage Provision. The absence of a constitutionally viable exercise of this enumerated power is fatal to the accompanying sanction for noncompliance. The Deputy Assistant Attorney General of the United States intimated as much during oral argument on the Defendant's Motion to Dismiss, "if it is unconstitutional, then the penalty would fail as well." (Tr. 21:10-11, July 1, 2010.)

A thorough survey of pertinent constitutional case law has yielded no reported decisions from any federal appellate courts extending the Commerce Clause or General Welfare Clause to encompass regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce or role in a global regulatory scheme. The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police powers. At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose to participate.

Article I, Section 8 of the Constitution confers upon Congress only discrete enumerated governmental powers. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people. *See* U.S. Const. amend. X; *Printz v. United States,* 521 U.S. 898, 919, 117 S. Ct. 2365, 2376-77 (1997).

On careful review, this Court must conclude that Section 1501 of the Patient Protection and Affordable Care Act – specifically the Minimum Essential Coverage Provision – exceeds the constitutional boundaries of congressional power.

VIII.

Having found a portion of the Act to be invalid, the Section 1501 requirement to maintain minimum essential health care coverage, the Court's next task is to determine whether this Section is severable from the balance of the enactment. Predictably, the Secretary counsels severability, and the Commonwealth urges wholesale invalidation. The Commonwealth's position flows in part from the Secretary's frequent contention that Section 1501 is the linchpin of the entire health care regimen underlying the ACA. However, the bill embraces far more than health care reform. It is laden with provisions and riders patently extraneous to health care – over 400 in all.

The most recent guidance on the permissible scope of severance is found in *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 130 S. Ct. 3138 (2010). "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any 'problematic portions while leaving the remainder intact.'" *Id.* at 3161 (quoting *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 328-29, 126 S. Ct. 961, 967 (2006)). Because "[t]he unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co. v. Corp. Comm'n of Okla.,* 286 U.S. 210, 234, 52 S. Ct. 559, 565 (1932), "the 'normal rule' is 'that partial, rather than facial, invalidation is the required course.'" *Free Enter. Fund,* 130 S. Ct. at 3161 (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S. Ct. 2794, 2802 (1985)).

The teachings of *Free Enterprise* are a direct descendent of the rule restated in *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 107 S. Ct. 1476 (1987). "The standard for determining the severability of an unconstitutional provision is well established: '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Id.* at 684, 107 S. Ct. at 1480 (quoting *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S. Ct. 612, 677 (1976)).

In applying this standard, the Court must also consider whether the balance of the statute will function in a manner consistent with the intent of Congress in the wake of severance of the unconstitutional provision. *Alaska Airlines,* 480 U.S. at 685, 107 S. Ct. at 1480. Finally, in evaluating severability, the Court must determine whether in the absence of the severed unconstitutional provision, Congress would have enacted the statute. *Id.* at 685, 107 S. Ct. at 1480. Given the vagaries of the legislative process, "this inquiry can sometimes be 'elusive.'" *Free Enter. Fund,* 130 S. Ct. at 3161 (quoting *I.N.S. v. Chadha,* 462 U.S. 919, 932, 103 S. Ct. 2764, 2774 (1983)).

The final element of the analysis is difficult to apply in this case given the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote. It would be virtually impossible within the present record to determine whether Congress would have passed this bill, encompassing a wide variety of topics related and unrelated to heath care, without Section 1501. Even then, the Court's conclusions would be speculative at best. Moreover, without the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.

Therefore, this Court will hew closely to the time-honored rule to sever with circumspection, severing any "problematic portions while leaving the

remainder intact." *Ayotte,* 546 U.S. at 329, 126 S. Ct. at 967. Accordingly, the Court will sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501.[14]

IX.

The final issue for resolution is the Commonwealth's request for injunctive relief enjoining implementation of Section 1501 – at least until a higher court acts. In reviewing this request, the Commonwealth urges this Court to employ the traditional requirements for injunctive relief articulated in *Monsanto Co. v. Geerston Seed Farms,* 130 S. Ct. 2743, 2756 (2010). This case, however, turns on atypical and uncharted applications of constitutional law interwoven with subtle political undercurrents. The outcome of this case has significant public policy implications. And the final word will undoubtedly reside with a higher court.

Aside from scant guiding precedent on the central issues, there are no compelling exigencies in this case. The key provisions of Section 1501 – the only aspect of the ACA squarely before this Court – do not take effect until 2013 at the earliest. Therefore,

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[14] A court's ability to rewrite legislation is severely constrained and best left to the legislature. "[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options [to amend legislation] going forward." *Free Enter. Fund,* 130 S. Ct. at 3162.

the likelihood of any irreparable harm pending certain appellate review is somewhat minimal. Although the timely implementation of Section 1501 might require each side to take some initial preparatory steps in the ensuing months, none are irreversible.

Historically, federal district courts have been reluctant to invoke the extraordinary remedy of injunctive relief against federal officers where a declaratory judgment is adequate. "[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." *Comm. on the Judiciary of the United States House of Representatives v. Miers,* 542 F.3d 909, 911 (D.C. Cir. 2008); *see also Smith v. Reagan,* 844 F.2d 195, 200 (4th Cir. 1988); *Sanchez-Espinoza v. Regan,* 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). The Commonwealth appears to concede that if the Secretary is duty-bound to honor this Court's declaratory judgment, there is no need for injunctive relief. (Pl.'s Reply Mem. 19.) In this Court's view, the award of declaratory judgment is sufficient to stay the hand of the Executive branch pending appellate review.

X.

In the final analysis, the Court will grant Plaintiffs Motion for Summary Judgment and deny Defendant's similar motion. The Court will sever

Section 1501 from the balance of the ACA and deny Plaintiffs request for injunctive relief.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Dec. 13, 2010
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

ORDER
(Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment)

(Filed Dec. 13, 2010)

THIS MATTER is before the Court on Motions for Summary Judgment filed by both parties (Dk. Nos. 88, 90) on September 3, 2010, pursuant to Federal Rule of Civil Procedure 56. For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's Motion is GRANTED as to its request for declaratory relief and DENIED as to its request for injunctive relief, and Defendant's Motion is DENIED.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Dec. 13, 2010
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

MEMORANDUM OPINION
(Defendant's Motion to Dismiss)

(Filed Aug. 2, 2010)

This is a narrowly-tailored facial challenge to the constitutionality of Section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). This provision, in essence, requires individuals to either obtain a minimum level of health insurance coverage or pay a penalty for failing to do so. According to the Complaint, which seeks declaratory and injunctive relief, the enactment of Section 1501 not only exceeds the power of Congress under the Commerce Clause

and General Welfare Clause of the United States Constitution, but is also directly at tension with Virginia Code Section 38.2-3430.1:1 (2010), commonly referred to as the Virginia Health Care Freedom Act.

The case is presently before the Court on Defendant's Motion to Dismiss, filed pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). Both sides have filed extensive and thoroughly researched memoranda supporting their respective positions. The Court heard oral argument on July 1, 2010. Although this case is laden with public policy implications and has a distinctive political undercurrent, at this stage the sole issues before the Court are subject matter jurisdiction and the legal sufficiency of the Complaint.

I.

In the Complaint, the Commonwealth of Virginia (the "Commonwealth") assails Section 1501 (or "Minimum Essential Coverage Provision") on a number of fronts. First, the Commonwealth contends that requiring an otherwise unwilling individual to purchase a good or service from a private vendor is beyond the outer limits of the Commerce Clause. In the Commonwealth's view, the failure – or refusal – of its citizens to elect to purchase health insurance is not "economic activity" and therefore not subject to federal regulation under the Commerce Clause. Succinctly put, the Commonwealth defies the Secretary to point to any Commerce Clause

jurisprudence extending its tentacles to an individual's decision not to engage in economic activity. Furthermore, they argue that since Section 1501 exceeds this enumerated power, Congress cannot invoke either the Necessary and Proper Clause or its taxation powers to regulate such passive economic inactivity.

Alternatively, the Commonwealth maintains that Section 1501 is in direct conflict with the Virginia Health Care Freedom Act. The Commonwealth argues that the enactment of Section 1501 therefore encroaches on the sovereignty of the Commonwealth and offends the Tenth Amendment to the Constitution.

The Defendant in this case is Kathleen Sebelius, in her official capacity as Secretary of the Department of Health and Human Services (the "Secretary"). The Secretary's Motion to Dismiss, filed under both Fed. R. Civ. P. 12(b)(1) and (b)(6), has several distinct strands. The Secretary argues initially that the Attorney General of Virginia, in his official capacity, lacks standing to challenge Section 1501, thereby depriving this Court of subject matter jurisdiction. Because the mandatory insurance provision is not effective until 2014, the Secretary also maintains that the issues are not ripe for immediate resolution.

With respect to the merits, the Secretary contends that the Complaint lacks legal vitality and therefore fails to state a cause of action. She asserts

that the Minimum Essential Coverage Provision is amply supported by time-honored applications of Congress's Commerce Clause powers and associated regulatory authority under the Necessary and Proper Clause. The theoretical foundation for the Secretary's position is predicated on factual findings by Congress that Section 1501 is the central ingredient of a complex health care regulatory scheme. Its core underpinning is the notion that every individual will need medical services at some point. Everyone, voluntarily or otherwise, is therefore either a current or future participant in the health care market.

To underwrite this health care scheme and guarantee affordable coverage to every individual, the cost of providing these services must be defrayed from some source, particularly as to the individuals who are uninsured. To address the annual deficit caused by uncompensated medical services, which according to the Secretary is approximately $43 billion, Congress included the penalty provision in Section 1501 to coax all individuals to purchase insurance. Because Section 1501, like the Act as a whole, regulates decisions about how to pay for services in the health care market and the insurance industry, the Secretary reasons that it necessarily affects interstate commerce.

Lastly, the Secretary contends that Section 1501 is a valid exercise of Congress's independent authority to use its taxing and spending power under the General Welfare Clause. Therefore, she argues that this action is barred by the Anti-Injunction Act.

II.

Turning first to the standing issue, relying on *Massachusetts v. Mellon,* 262 U.S. 447, 43 S. Ct. 597 (1923), the Secretary argues that the Attorney General's prosecution of this case, on behalf of the citizens of the Commonwealth of Virginia, is barred by the long-standing doctrine of "*parens patriae*." *Id.* at 485, 43 S. Ct. at 600. In *Mellon,* the U.S. Supreme Court noted that because citizens of an individual state are also citizens of the United States, "[i]t cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Id.* The Court further stated in *Mellon* that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.* at 485-86, 43 S. Ct. at 600. Therefore, the Secretary contends that a state does not have standing as *parens patriae* to bring an action against the federal government. *Id.*; *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 610 n.16, 102 S. Ct. 3260, 3270 (1982).

The Secretary further maintains that the congressional enactment at issue, Section 1501, imposes no obligation on the Commonwealth as a sovereign. The Secretary marginalizes the conflict between Section 1501 and the Virginia Health Care Freedom Act as a political policy dispute manufactured for the sole purpose of creating standing. The resulting abstract policy dispute causes

no imminent injury to the sovereign and is thus insufficient to support standing to challenge a federal enactment. *Mellon,* 262 U.S. at 484-85, 43 S. Ct. at 600.

On the other hand, the Commonwealth views the task at hand differently. In prosecuting the immediate action, the Commonwealth, through its Attorney General, is not simply representing individual citizens, it is defending the constitutionality and enforceability of its duly enacted laws. The Commonwealth maintains that its standing to defend its legislative enactments is a fossilized principle uniformly recognized by the U.S. Supreme Court, citing *Diamond v. Charles,* 476 U.S. 54 (1986).

> "[T]he power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 601, 102 S. Ct. 3260, 3265-66, 73 L. Ed. 2d 995 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club v. Morton,* 405 U.S. [727,] 740, 92 S. Ct. [1361,] 1369 [(1972)], in defending the standards embodied in that code.

Diamond, 476 U.S. at 65, 106 S. Ct. at 1705.

The Commonwealth draws a clear distinction between this case and those relied upon by the Secretary. The Commonwealth argues that it is not prosecuting this case in a *parens patriae,* or

quasi-sovereign capacity. In the immediate case, the Commonwealth is exercising a core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause. Unlike *Mellon,* irrespective of its underlying legislative intent, the Virginia statute is directly in conflict with Section 1501 of the Patient Protection and Affordable Care Act.[1]

A subsidiary element of the Secretary's argument that this Court lacks subject matter jurisdiction is the alleged absence of any imminent injury to sovereign interest. The Commonwealth counters that the conflict between federal and state law is "immediate and complete with respect to the legal principles at issue." (Pl.'s Mem. Opp'n Mot. Dismiss 4.) By way of

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[1] In 1945, Congress passed the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.,* in reaction to the U.S. Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S. Ct. 1162 (1944). The Act expressly declared that the continued regulation and taxation of the business of insurance, and all who engage in it, should be subject to the laws of the several states unless Congress specifically states the contrary. *Life Partners, Inc. v. Morrison,* 484 F.3d 284, 292 (4th Cir. 2007), *cert. denied,* 2007 U.S. Lexis 12349 (Dec. 3, 2007); *see also Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 430, 66 S. Ct. 1142, 1155 (1946). The Secretary argues that the language of Section 1501 is sufficient to imply an intent on the part of Congress to in effect preempt any state regulation to the contrary. The Commonwealth appears to disagree. (Tr. 48-49, July 1, 2010.) The demarcation between state and federal responsibility in this area will require further development in future proceedings in order to adequately address the Commonwealth's Tenth Amendment argument.

further elucidation, the Commonwealth contends that it has already begun taking steps to prepare for the implementation of the Patient Protection and Affordable Care Act. It asserts that "officials are presently having to deviate from their ordinary duties to begin the administrative response to the changes in federal law as they cascade through the Medicaid and insurance regulatory systems." (Pl.'s Mem. Opp'n Mot. Dismiss 4.)

The next facet of the Secretary's challenge to the Court's subject matter jurisdiction in this case invokes the Anti-Injunction Act, 26 U.S.C. § 7421(a).[2] The Anti-Injunction Act provides, in pertinent part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Secretary argues that the restraining effect of this Act is broad enough to include payments which are labeled a

[2] By implication, this argument would also include parallel provisions in the Declaratory Judgment Act, 28 U.S.C. § 2201(a). "Though the Anti-Injunction Act concerns federal courts' subject matter jurisdiction and the tax-exclusion provision of the Declaratory Judgment Act concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive." *In re Leckie Smokeless Coal Co.,* 99 F.3d 573, 583 (4th Cir. 1996). "In light of the two provisions' coextensive nature, a finding that one of the two statutes does not bar the debtors in the instant cases from seeking and obtaining free and clear orders will necessitate a finding that the other statute does not pose an obstacle either." *Id.* at 584.

"penalty rather than a tax," as the Secretary styles the assessment in this case for failure to purchase the requisite insurance coverage. (Def.'s Mem. Supp. Mot. Dismiss 16.) Because the Secretary maintains that the immediate action constitutes an abatement of a tax liability or penalty, she claims the District Court lacks jurisdiction. The Secretary's position is that the only appropriate relief vehicle for a citizen seeking to challenge the penalty provisions of Section 1501 would be to pay the required penalty and sue for a refund. *See Bob Jones Univ. v. Simon,* 416 U.S. 725, 736, 94 S. Ct. 2038, 2046 (1974).

The Commonwealth urges a more narrow interpretation of the Anti-Injunction Act. The Commonwealth contends that the word "person" used in the operative portion of the Anti-Injunction Act does not include a state. The U.S. Supreme Court, as well as the Fourth Circuit, has almost uniformly held that the word "person" appearing in a federal statute should not be interpreted as including a state. There is a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 780, 120 S. Ct. 1858, 1866 (2000); *see also Va. Office for Prot. & Advocacy v. Reinhard,* 405 F.3d 185, 189 (4th Cir. 2005). "The presumption is, of course, not a hard and fast rule of exclusion, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Vt. Agency of Natural Res.,* 529 U.S. at 781, 120 S. Ct. at 1867 (internal citations omitted). The Commonwealth

argues that the Secretary has failed to overcome the requisite presumption because she cannot point to any persuasive authority that the Anti-Injunction Act applies to states. Therefore, the Commonwealth argues that the Anti-Injunction Act does not apply to its prosecution of this case.

Alternatively, the Commonwealth contends that the claims advanced in this case fall squarely within an exception to the Anti-Injunction Act recognized in *South Carolina v. Regan,* 465 U.S. 367, 104 S. Ct. 1107 (1984). In *Regan,* the Supreme Court observed that the Anti-Injunction Act was not intended to bar "actions brought by aggrieved parties for whom [Congress] has not provided an alternative remedy." *Id.* at 378, 104 S. Ct. at 1114. Because the Commonwealth contends that only the sovereign has standing to seek judicial vindication of its own statutes, it claims the effect of the Anti-Injunction Act would be to deny the Commonwealth a remedy to address the effect of the federal enactment at issue.

Although the Commonwealth's contention that the term "person" in the Anti-Injunction Act does not apply to states may be well-founded, this Court believes it is clear that the *Regan* exception applies in this case.[3] As the Supreme Court held in *Regan,* the

[3] This Court can also not ignore the fact that the Commonwealth's Complaint does not challenge the penalty provision of the Patient Protection and Affordable Care Act, though the two undeniably act in tandem. Instead, the

(Continued on following page)

Anti-Injunction Act "was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." *Id.* at 381, 104 S. Ct. at 1115; *see also In re Leckie Smokeless Coal Co.,* 99 F.3d at 584. Additionally, the *Regan* Court emphasized that, "the indicia of congressional intent – the [Anti-Injunction] Act's purposes and the circumstances of its enactment – demonstrate that Congress did not intend the Act to apply where an aggrieved party would be required to depend on the mere possibility of persuading a third party to assert his claims." *Regan,* 465 U.S. at 381, 104 S. Ct. at 1115. However, "[b]ecause of the strong policy animating the Anti-Injunction Act, and the sympathetic, almost unique, facts in *Regan,* courts have construed the *Regan* exception very narrowly. . . ." *Judicial Watch, Inc. v. Rossotti,* 317 F.3d 401, 408 n.3 (4th Cir. 2003).

Despite this narrow interpretation, this Court finds the justification for allowing an exception to the Anti-Injunction Act in *Regan* applies with equal strength to the circumstances in this case. First, the Supreme Court found that "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Regan,* 465 U.S. at 380, 104 S. Ct. at 1115 (citing *Singleton v. Wulff,* 428 U.S. 106, 114, 96 S. Ct. 2868, 2874 (1976)).

Complaint exclusively attacks the constitutionality of the mandate to purchase health care insurance.

Thus, in this case, without standing to defend the constitutionality of a state's right to create and enforce its own legal code, an individual taxpayer would be unable to assert the constitutional rights of the Commonwealth. Second, "to make use of this remedy the State 'must first be able to find [an individual] willing to subject himself to the rigors of litigation against the Service, and then must rely on [him] to present the relevant arguments on [its] behalf.'" *Id.* (citing *Bob Jones,* 416 U.S. at 747 n.21, 94 S. Ct. at 2051). Due to the magnitude, cost, and *sui generis* interest of Virginia in this case, even if standing was not an issue, it appears the Commonwealth would be hard-pressed to find a suitable party to argue the case on its behalf.

Third, and perhaps most importantly, "[b]ecause it is by no means certain that the State would be able to convince a taxpayer to raise its claims, reliance on the remedy suggested by the Secretary would create the risk that the Anti-Injunction Act would entirely deprive the State of any opportunity to obtain review of its claims." *Id.* at 380-81, 104 S. Ct. at 1115. Applying this logic to the Commonwealth, as a sovereign entity not required to purchase insurance under Section 1501, Virginia will never be assessed the fine imposed under the Patient Protection and Affordable Care Act, and consequently, never afforded an opportunity to pay the penalty and request a refund. Therefore, this Court concludes that "[b]ecause Congress did not prescribe an alternative

remedy for the plaintiff in this case, the Act does not bar this suit." *Id.* at 381, 104 S. Ct. at 1115-16.

Although this lawsuit has the collateral effect of protecting the individual interests of the citizens of the Commonwealth of Virginia, its primary articulated objective is to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law. Despite its declaratory nature, it is a lawfully-enacted part of the laws of Virginia. The purported transparent legislative intent underlying its enactment is irrelevant. The mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.[4] As the U.S. Supreme Court noted in *Alfred L. Snapp & Son, Inc.,* it is common ground that states have an interest as sovereigns in exercising "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc.,* 458 U.S. at 601, 102 S. Ct. at 3265. With few exceptions, courts have uniformly held that individuals do not have standing to bring a Tenth Amendment claim. *Kennedy v. Allera,* ___ F.3d ___, 2010 WL 2780188, at *8 (4th Cir. July 15, 2010) (citing *Brooklyn Legal*

[4] Federal courts have long recognized the duty of state Attorneys General to defend the laws of their states. *See* Fed. R. Civ. P. 5.1(a)(2) (requiring that any party challenging the constitutionality of a state statute serve notice on the state Attorney General).

Servs. Corp. B v. Legal Servs. Corp., 462 F.3d 219, 234-36 (2d Cir. 2006)).

The power of the Attorney General to prosecute claims on behalf of the state he or she represents remains unsettled despite centuries of legal debate.[5] This is particularly true in cases involving suits against the federal government. *See Alaska v. U.S. Dep't of Transp.,* 868 F.2d 441, 443 n.1 (D.C. Cir. 1989). Reviewing courts, in their standing analysis, have distinguished cases where the individual interests of citizens are purely at stake from those in which the interest of the state, as a separate body politic, is implicated. The former is distinguished by legal commentators from the latter as quasi-sovereignty as opposed to sovereignty. While standing jurisprudence in the area of quasi-sovereign or *parens patriae* standing defies simple formulation, courts have uniformly held that "where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed, wholly apart from the alleged general harm." *Ctr. for Biological Diversity v. U.S. Dep't of Interior,* 563 F.3d 466, 476-77

[5] Given the stake states have in protecting their sovereign interests, they are often accorded "special solicitude" in standing analysis. *Massachusetts v. EPA,* 549 U.S. 497, 520, 127 S. Ct. 1438, 1455 (2007).

(D.C. Cir. 2009) (citing *Massachusetts v. EPA,* 549 U.S. 497, 127 S. Ct. 1438 (2007)).[6]

Closely analogous to the immediate case is *Wyoming ex rel. Crank v. United States,* 539 F.3d 1236 (10th Cir. 2008). There the State of Wyoming sought declaratory and injunctive relief against a decision of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, which determined that a Wyoming statute purportedly establishing a procedure to expunge domestic violence misdemeanor convictions, in order to restore lost firearms rights, would not have the intended effect under federal law. As in the immediate case, the United States challenged the Article III standing of the State of Wyoming to seek judicial relief from the conflicting federal regulation. The Tenth Circuit held that Wyoming's stake in the controversy was sufficiently adverse to warrant Article III standing.

Relying on the teachings of *Alfred L. Snapp & Son, Inc.,* the Tenth Circuit observed that the states have a legally protected sovereign interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which]

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[6] Of course, Article III standing has other elements. A plaintiff must demonstrate: (i) an injury-in-fact that is both concrete and particularized, as well as actual or imminent; (ii) an injury that is traceable to the conduct complained of; and (iii) an injury that is redressable by a decision of the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

involves the power to create and enforce a legal code." *Wyoming,* 539 F.3d at 1242 (quoting *Alfred L. Snapp & Son, Inc.,* 458 U.S. at 601, 102 S. Ct. at 3265). "Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong. Accordingly, we conclude that Wyoming has sufficiently alleged an injury-in-fact. . . ." *Id.* at 1242 (internal citations omitted).

This Court finds the Tenth Circuit's standing analysis in *Wyoming* to be sound and adopts its principled and logical reasoning in this case. The Commonwealth, through its Attorney General, satisfies Article III's standing requirements under the facts of this case.

III.

Resolution of the standing issue resolves only a single strand of the case or controversy requirements of Article III subject matter jurisdiction. The matter must also be ripe for adjudication. In other words, the claim must be sufficiently mature and issues sufficiently defined and concrete to create an actual justiciable controversy. *See Blanchette v. Conn. Gen. Ins. Corps. (Reg'l Rail Reorganization Act Cases),* 419 U.S. 102, 138-39, 95 S. Ct. 335, 356 (1974). "[R]ipeness is peculiarly a question of timing. . . ." *Id.* at 140, 95 S. Ct. at 357. It implicates both constitutional limitations and prudential consideration. *Reno v. Catholic Soc. Servs. Inc.,* 509 U.S. 43, 57 n.18, 1135 S. Ct. 2485, 2496 (1993). In

determining whether a claim is ripe for judicial review, courts evaluate "'the fitness of the issues for judicial decision' and 'the hardship of withholding court consideration.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758, 1767 n.2 (2010) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 805, 808, 123 S. Ct. 2026, 2031 (2003)). "The burden of proving ripeness falls on the party bringing suit." *Miller v. Brown,* 462 F.3d 312, 319 (4th Cir. 2006).

This element of the Secretary's argument is closely intertwined with her contention that Virginia has not demonstrated that it will suffer a hardship from the provision it challenges because the Minimum Essential Coverage Provision does not go into effect until 2014. This lack of immediate impact, in her view, renders the Commonwealth's challenge premature. To support this contention, the Secretary relies principally on *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S. Ct. 803 (1966). *Katzenbach* involved a suit to enjoin enforcement of certain provisions of the Voting Rights Act of 1965, particularly those sections providing civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act. The *Katzenbach* Court found those sections of the statute imposing criminal penalties to be premature for constitutional review, but held that the regulatory portions were ripe for judicial consideration.

It is important to note that the Supreme Court has historically drawn a distinction between the

ripeness analysis employed for criminal statutes as opposed to other regulatory enactments. *Reg'l Rail Reorganization Act Cases,* 419 U.S. at 143 n.29, 95 S. Ct. at 358. Unlike a regulatory statute, the decision to initiate criminal prosecutions resides within the discretion of prosecutors – and allows for citizens to voluntarily bring their conduct within the bounds of the law. *Id.* The Minimum Essential Coverage Provision presently before the Court lacks criminal remedies. In fact, it specifically waives criminal prosecution or sanctions for failure to pay a penalty levied by the Act. 26 U.S.C. § 5000A(g)(2)(A). Therefore, neither prosecutorial discretion nor self-regulated citizen conduct considerations are present here. With certain delineated exceptions, 26 U.S.C. § 5000A(a) mandates that a citizen purchase, or otherwise obtain insurance, or face a monetary assessment. The central issue in this case is the Commonwealth's sovereign interest in upholding the Virginia Health Care Freedom Act. The issues presented are purely legal and further development of the factual record would not clarify the issues for judicial resolution. *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 581, 105 S. Ct. 3325, 3333 (1985).

While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. This provision will compel scores of people who are not currently enrolled to evaluate and

contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements.

More importantly, the Commonwealth must revamp its health care program to ensure compliance with the enactment's provisions, particularly with respect to Medicaid. This process will entail more than simple fine tuning. Unquestionably, this regulation radically changes the landscape of health insurance coverage in America.

The Supreme Court, and the preponderance of reviewing courts of appeals, have not been reticent to consider the constitutionality of legislative enactments prior to their date of effectiveness when the resulting alleged injury is impending and more than a "mere possibility." *See Pierce v. Soc'y of Sisters,* 268 U.S. 510, 45 S. Ct. 571 (1925) (ruling a year prior to the challenged law's date of effectiveness was permissible); *see also Virginia v. Am. Booksellers Ass'n.,* 484 U.S. 383, 392-93, 108 S. Ct. 636, 642-43 (1988) (upholding a pre-enforcement challenge to a state law on First Amendment grounds). Again, the alleged injury in this case is the collision between state and federal law. Neither the White House nor Congress has given any indication that the Minimum Essential Coverage Provision at issue will not be

enforced, and the Court sees no reason to assume otherwise. *Am. Booksellers Ass'n.,* 484 U.S. at 393, 108 S. Ct. at 643. Nor do the facts before the Court here present a "hypothetical" case, *United States v. Raines,* 362 U.S. 17, 22, 80 S. Ct. 519, 523 (1960), or a "remote and abstract . . . inquiry." *Int'l Longshoremen's Union, Local 37 v. Boyd,* 347 U.S. 222, 224, 74 S. Ct. 447, 448 (1954).

The issues in this case are fully framed, the underlying facts are well settled, and the case is accordingly ripe for review. The Commonwealth has therefore satisfied all requirements of Article III standing.

IV.

Turning to the merits of the Complaint, it is important to keep in mind that the Court's mission at this stage is narrow. To survive a Rule 12(b)(6) challenge, a complaint need only state a legally viable cause of action. "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992), *cert. denied,* 510 U.S. 828, 114 S. Ct. 93 (1993). In reviewing a 12(b)(6) motion, the complaint must be construed in the light most favorable to the plaintiff, assuming its factual allegations to be true. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984).

This time-honored standard is a bit more difficult to apply in the context of this case. The congressional enactment under review – the Minimum Essential Coverage Provision – literally forges new ground and extends Commerce Clause powers beyond its current high watermark. Counsel for both sides have thoroughly mined relevant case law and offered well reasoned analyses. The result, however, has been insightful and illuminating, but short of definitive. While this Court's decision may set the initial judicial course of this case, it will certainly not be the final word.

The historically-accepted contours of Article I Commerce Clause power were restated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 150, 91 S. Ct. 1357, 1359 (1971). First, Congress can regulate the channels of interstate commerce. *Id.* Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* It appears from the argument and memoranda of counsel that only the third category is implicated in the case at hand.

In arguing that an individual's decision not to purchase health insurance is in effect "economic activity," the Secretary relies on an aggregation theory. In other words, the sum of individual decisions to participate or not in the health insurance market has a critical effect on interstate commerce.

The Secretary's argument is drawn in large measure from the teachings of the Supreme Court in *Gonzales v. Raich,* 545 U.S. 1, 125 S. Ct. 2195 (2005), wherein the Court noted:

> [O]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. . . . In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."

Gonzales, 545 U.S. at 17, 125 S. Ct. at 2205-06 (quoting *United States v. Lopez,* 514 U.S. 549, 558, 115 S. Ct. 1624, 1629 (1995)).

In the Secretary's view, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the health care regime to "implode." At oral argument, the Deputy Assistant Attorney General of the United States, on behalf of the Secretary, described the collective effect of the Minimum Essential Coverage Provision as the critical element of the national health care scheme, "[a]nd what the [congressional] testimony was, was if you do the preexisting condition exclusion and no differential health care

status, without a minimum coverage type provision, it will inexorably drive that market into extinction. And what somebody said more succinctly was, the market will implode." (Tr. 33:7-13, July 1, 2010.)

To support this argument, the Secretary compared the market impact of the universal insurance requirement to regulation of wheat harvested for personal consumption or marijuana grown for personal use. In *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82 (1942), acknowledged by most constitutional scholars as the most expansive application of the Commerce Clause, the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm. The Court reasoned that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. The Court concluded:

> [The fact that] appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. . . . But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.

Wickard, 317 U.S. at 127-28, 63 S. Ct. at 90-91.

Similarly, in *Gonzales v. Raich,* the Supreme Court concluded that the aggregate effect of personal growth and consumption of marijuana for medicinal purposes, pursuant to California law, had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause. "Like the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales,* 545 U.S. at 18-19, 125 S. Ct. at 2206-07.

In response, the Commonwealth highlights what it perceives to be the critical distinction between the line of cases relied upon by the Secretary and the Commerce Clause application presently before the Court. What the Supreme Court deemed to be "economic activity" in *Wickard* and *Raich* necessarily involved a voluntary decision to perform an act, such as growing wheat or cultivating marijuana. The Commonwealth argues that this critical element is absent in the regulatory mechanism established in the Minimum Essential Coverage Provision. This provision, the Commonwealth maintains, requires a person to perform an involuntary act and as a result, submit to Commerce Clause regulation. The Commonwealth continues that neither the U.S. Supreme Court nor any circuit court of appeals has

upheld the extension of Commerce Clause power to encompass economic inactivity.

Drawing on the logic articulated in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995), and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740 (2000), which limited the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that actually affect interstate commerce, the Commonwealth contends that a decision not to purchase a product, such as health insurance, is not an economic activity. It is a virtual state of repose – or idleness – the converse of activity. At best, Section 1501 regulates future activity in anticipation of need.

In *United States v. Morrison,* the Court acknowledged that its "interpretation of the Commerce Clause has changed as our Nation has developed. . . . [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 607-08, 120 S. Ct. at 1748-49 (quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S. Ct. 615 (1937)). The Court in *Morrison* also noted that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752. Finally, in *Morrison,* the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that

conduct's aggregate effect on interstate commerce." *Id.* at 617, 120 S. Ct. at 1754.

The Commonwealth further maintains that the Secretary's position finds no sustenance in the Necessary and Proper Clause. U.S. Const. art. I, § 8. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. The Commonwealth draws the Court's attention to several observations of the Supreme Court in the recent case of *United States v. Comstock,* 130 S. Ct. 1949 (2010). The Court in *Comstock* began its analysis by quoting Chief Justice Marshall in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Comstock,* 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

In commenting on Chief Justice Marshall's remarks, the Court in *Comstock* noted that:

> [W]e have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. . . . [T]he relevant inquiry is simply whether the

> means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement.

Id. at 1956-57 (internal citations omitted).

The Commonwealth maintains that even if a congressional enactment is noble and legitimate, the means adapted to enforce it under the Necessary and Proper Clause must be within the letter and spirit of the Constitution. In other words, it must have a firm constitutional foundation rooted in Article I. The goals of those portions of the Patient Protection and Affordable Care Act directly pertinent to health care, i.e., universal health insurance coverage, no exclusion of persons with preexisting conditions, a requirement that all people receiving health care pay for such services in a timely fashion, etc., are laudable. The Commonwealth argues, however, that the Necessary and Proper Clause cannot be employed as a vehicle to enforce an unconstitutional exercise of Commerce Clause power, no matter how well intended. If a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically, an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

In rebuttal, the Secretary reiterates her position that a person cannot simply elect to avoid participation in the health care market. It is

inevitable, in her view, that every person – today or in the future – healthy or otherwise – will require medical care. The Minimum Essential Coverage Provision simply provides a vehicle for prompt and dependable payment for such services if and when rendered. The Secretary also rejects the notion that the imposition of a monetary penalty for failing to perform a lawful act is alien to the spirit of the Constitution. The Secretary points out that sanctions have historically been imposed for failure to timely file tax returns or truthfully report or pay taxes due, as well as failure to register with the Selective Service or report for military duty. These examples, as the Commonwealth aptly notes, are directly tethered to a specific constitutional provision empowering Congress to assess taxes and provide and maintain an Army and Navy. U.S. Const. art. I, § 8. No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so.

As previously mentioned, the Commerce Clause aspect of this debate raises issues of national significance. The position of the parties are widely divergent and at times novel. The guiding precedent is informative, but inconclusive. Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far. At this juncture, the Court is not persuaded that the Secretary has demonstrated that the Complaint fails to state a cause of action with respect to the

Commerce Clause element. This portion of the Complaint advances a plausible claim with an arguable legal basis.

V.

The final aspect of the Secretary's Rule 12(b)(6) challenge raises an even closer and equally unsettled issue under congressional taxing powers. Contrary to pre-enactment representations by the Executive and Legislative branches, the Secretary now argues alternatively that the Minimum Essential Coverage Provision is a product of the government's power to tax for the general welfare. (Tr. 19:16-17, July 1, 2010.) This is of course supported by the placement of the penalty provisions within the Internal Revenue Code. Because the Secretary contends that the Minimum Essential Coverage Provision is an exercise of the less bridled power of Congress to tax, this element of the argument presents a much closer question than the preceding Commerce Clause debate.

The Secretary suggests that the constitutional analysis under the Tax Clause involves only two factors. Relying on *United States v. Aiken,* 974 F.2d 446 (4th Cir. 1992), she asserts that the power of Congress to lay and collect taxes, duties, and excises, under Article I, Section 8 of the U.S. Constitution, requires only that it be a revenue-raising measure and that the associated regulatory provisions bear a reasonable relation to the statute's taxing purpose.

Id. at 448; *see also Sonzinsky v. United States,* 300 U.S. 506, 513, 57 S. Ct. 554, 555-56 (1937); *United States v. Doremus,* 249 U.S. 86, 39 S. Ct. 214 (1919). According to the Secretary, the power of Congress to tax for the general welfare is checked only by the electorate. "Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *United States v. Kahriger,* 345 U.S. 22, 31, 73 S. Ct. 510, 515 (1953), *overruled on other grounds, Marchetti v. United Sales* [sic]*,* 390 U.S. 39, 88 S. Ct. 697 (1968). The Secretary points out that the power of Congress to use its taxing and spending power under the General Welfare Clause has long been recognized as extensive. *McCray v. United States,* 195 U.S. 27, 56-59, 24 S. Ct. 769, 776-78 (1904). Furthermore, the Secretary notes that Congress may use its power under the Tax Clause even for purposes that would exceed its powers under other provisions of Article I. *United States v. Sanchez,* 340 U.S. 42, 44, 71 S. Ct. 108, 110 (1950).

Therefore, the Secretary argues that because the Minimum Essential Coverage Provision in fact generates revenue and its regulatory features are rationally related to the goal of requiring every individual to pay for the medical services they receive, "that's the end of the ballgame." (Tr. 44:11, July 1, 2010.)

Initially, in response, the Commonwealth contends that the noncompliance penalty provision in Section 1501 does not meet the historical criteria for

a tax.[7] Aside from being referred to in Section 1501 at Section 5000A(b)(1) as a "penalty," the clear purpose of the assessment is to regulate conduct, not generate revenue for the government.[8] In fact, the Commonwealth adds that if there is full compliance – if everyone purchases health insurance as required – this provision will generate no revenue. The Commonwealth's doubt as to its purported purpose is heightened further by the prefatory language of Section 1501 which describes it as a derivative of the Commerce Clause. The Solicitor General of Virginia correctly noted during oral argument that the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause – it must be in aid of an enumerated power. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940); *United States v. Butler,* 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936).

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[7] "[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. 213, 224, 116 S. Ct. 2106, 2112 (1996) (internal citations omitted). On the other hand, a penalty imports the notion of a punishment for an unlawful act or omission. *Id.* "The two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca,* 282 U.S. 568, 572, 51 S. Ct. 278, 280 (1931).

[8] In contrast, the Commonwealth points out that elsewhere in the Act, Congress specifically described levies as taxes, such as Sections 9001, 9004, 9015, and 9017.

Although the Commonwealth concedes that the power of Congress to tax exceeds its ability to regulate under the Commerce Clause, it is not without limitation. "[T]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate." (Tr. 81:18-21, July 1, 2010 (citing *Bailey v. Drexel Furniture Co. (Child Labor Tax Case),* 259 U.S. 20, 37, 42 S. Ct. 449, 450 (1922).) To amplify its point, the Commonwealth focuses the Court's attention on a series of cases in which the Supreme Court struck down certain "regulatory taxes" as an unconstitutional encroachment on the state's power of regulation under the Tenth Amendment. *See Butler,* 297 U.S. at 68, 56 S. Ct. at 320; *Linder v. United States,* 268 U.S. 5, 17-18, 45 S. Ct. 446, 449 (1925); *Child Labor Tax Case,* 259 U.S. at 35, 42 S. Ct. at 451. In commenting on the limitations on the power of Congress to levy taxes to promote the general welfare, the Court in *Butler* noted that, "despite the breadth of the legislative discretion, our duty to hear and to render, judgment remains. If the statute plainly violates the stated principle of the Constitution, we must so declare." *Butler,* 297 U.S. at 67, 56 S. Ct. at 320; *see also Kahriger,* 345 U.S. at 29, 73 S. Ct. at 513.[9]

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[9] Citing commentaries from a number of constitutional scholars, the Secretary maintains that this line of cases has fallen into desuetude. The Commonwealth counters that none of these cases have been overruled by the U.S. Supreme Court.

By analogy, the Commonwealth argues that the Minimum Essential Coverage Provision not only invokes rights reserved to the states, but also seeks to compel activity beyond the reach of Congress. As discussed above, the division of responsibility for regulating insurance between the Commonwealth and the federal government, to the extent relevant, is yet to be adequately staked out in this case.

The centerpiece of the Complaint at issue is its contention that Congress lacks the authority to regulate economic inactivity. Lacking such power to regulate a person's decision not to participate in interstate commerce, logically, the Commonwealth argues, Congress would not have the power to tax or impose a penalty for such inactivity. This, of course, is the core issue in this case.

To bolster its position, the Commonwealth suggests that a careful survey of constitutional history yields no basis for such extension of Tax Clause powers. In its Memorandum in Opposition to Motion to Dismiss, the Commonwealth observes that "historically, direct taxes were taxes on persons or things, while duties, imposts, and excises have never meant a tax on a decision not to purchase or not to do something unrelated to a larger voluntary business or other undertaking." (Pl. Mem. Opp'n Mot. Dismiss 32.)

In her opposition, the Secretary rejoins that the Commonwealth misinterprets the limitations of Congress's power under the Tax Clause. "[A] tax

statute [does not] necessarily fall because it touches on activities which Congress might not otherwise regulate." *Sanchez,* 340 U.S. at 44, 71 S. Ct. at 110. For example, the Secretary argues that Congress can tax inheritances even though the regulation of estates and inheritances is beyond Congress's Commerce Clause powers. *Knowlton v. Moore,* 178 U.S. 41, 59-60, 20 S. Ct. 747, 755 (1900). The Secretary stresses that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *Sanchez,* 340 U.S. at 44, 71 S. Ct. at 110. "[A] tax is not any the less a tax because it has a regulatory effect. . . ." *Sonzinsky,* 300 U.S. at 513, 57 S. Ct. at 556 (internal citations omitted).

Casting aside many aspects of the Commonwealth's argument, the Secretary contends that in the final analysis, the Minimum Essential Coverage Provision falls within Congress's extensive general welfare authority. She also underscores that decisions of how best to provide for the general welfare are for the representative branches, not for the courts. *Helvering v. Davis,* 301 U.S. 619, 640, 57 S. Ct. 904, 908 (1937). "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky,* 300 U.S. at 513-14, 57 S. Ct. at 556.

In enacting Section 1501 of the Patient Protection and Affordable Care Act, Congress made extensive findings on the substantial effect of

decisions to purchase health insurance on the vast interstate health care market. These findings alone, in the Secretary's view, provide more than adequate support for her contention that the penalty (or tax) at issue is rationally related to the objective of maintaining a financially viable health care market by requiring everyone to pay for the services they receive. She adds, through counsel, "[t]hat consuming health care services without paying for them is activity, plain and simple." (Tr. 92:12-14, July 1, 2010.) In this context, a consumer's failure to act is a clear burden on interstate commerce.

The Secretary appeared to concede during oral argument, however, that if the ability to require the Minimum Essential Coverage Provision is not within the letter and spirit of the Constitution, than the penalty necessarily fails. As the Deputy Assistant Attorney General of the United States appeared to note in his response to the Court, "if it is unconstitutional, then the penalty would fail as well." (Tr. 21:10-11, July 1, 2010.)

VI.

While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate – and tax – a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from

any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce. Given the presence of some authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this stage that the Complaint fails to state a cause of action.[10]

The Secretary's Motion to Dismiss will therefore be denied. Resolution of the controlling issues in this case must await a hearing on the merits.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Aug. 2, 2010
Richmond, VA

[10] "It is well-established that defendants bear the burden of proving that plaintiffs' claims fail as a matter of law." *Bennett v. MIS Corp.,* 607 F.3d 1076, 1091 (6th Cir. 2010). "Under Rule 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated." James Wm. Moore, et al., *Moore's Federal Practice* § 12.34(1)(a) (3d ed. 2010).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	Civil Action No. 3:10CV188-HEH

ORDER
(Denying Defendant's Motion to Dismiss)

(Filed Aug. 2, 2010)

THIS MATTER is before the Court on Defendant's Motion to Dismiss (Dk. No. 21), filed on May 24, 2010. For the reasons stated in the accompanying Memorandum Opinion, the Defendant's Motion to Dismiss is DENIED.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Aug. 2, 2010
Richmond, VA

CONSTITUTIONAL PROVISIONS

Article I, § 8, clauses 1 and 3 of the United States Constitution provides in relevant part:

The Congress shall have power to lay and collect taxes . . . to pay the debts and provide for the . . . general welfare of the United States; but all duties imposts and excises shall be uniform throughout the United States;

* * *

To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes;

* * *

STATUTORY PROVISIONS

Excerpts from the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

Sec. 1501. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

(a) Findings. – Congress makes the following findings:

(1) In general. – The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) Effects on the national economy and interstate commerce. – The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $ 2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $ 4,700,000,000,000 in 2019. Private health insurance spending is projected to be $ 854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in

interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. According to the Congressional Budget Office, the requirement will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(F) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a

significant role in regulating health insurance which is in interstate commerce.

(G) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(H) Administrative costs for private health insurance, which were $ 90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) Supreme Court ruling. – In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation. (b) In General. – Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:

"CHAPTER 48 – MAINTENANCE OF MINIMUM ESSENTIAL COVERAGE

"Sec. 5000A. Requirement to maintain minimum essential coverage.

"Sec. 5000A. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

"(a) Requirement To Maintain Minimum Essential Coverage. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

"(b) Shared Responsibility Payment. –

"(1) In general. – If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).

"(2) Inclusion with return. – Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

"(3) Payment of penalty. – If an individual with respect to whom a penalty is imposed by this section for any month –

"(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

"(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

"(c) Amount of Penalty. –

"(1) In general. – The penalty determined under this subsection for any month with respect to any individual is an amount equal to 1/12 of the applicable dollar amount for the calendar year.

"(2) Dollar limitation. – The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to all individuals for whom the taxpayer is liable under subsection (b)(3) shall not exceed an amount equal to 300 percent the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

"(3) Applicable dollar amount. – For purposes of paragraph (1) –

"(A) In general. – Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $ 750.

"(B) Phase in. – The applicable dollar amount is $ 95 for 2014 and $ 350 for 2015.

"(C) Special rule for individuals under age 18. – If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

"(D) Indexing of amount. – In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $ 750, increased by an amount equal to –

"(i) $ 750, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting 'calendar year 2015' for 'calendar year 1992' in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $ 50, such increase shall be rounded to the next lowest multiple of $ 50.

"(4) Terms relating to income and families. – For purposes of this section –

"(A) Family size. – The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

"(B) Household income. – The term 'household income' means, with respect to any taxpayer for any taxable year, an amount equal to the sum of –

"(i) the modified gross income of the taxpayer, plus

"(ii) the aggregate modified gross incomes of all other individuals who –

"(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

"(II) were required to file a return of tax imposed by section 1 for the taxable year.

"(C) Modified gross income. – The term 'modified gross income' means gross income –

"(i) decreased by the amount of any deduction allowable under paragraph (1), (3), (4), or (10) of section 62(a),

"(ii) increased by the amount of interest received or accrued during the taxable year which is exempt from tax imposed by this chapter, and

"(iii) determined without regard to sections 911, 931, and 933.

"(D) Poverty line. –

"(i) In general. – The term 'poverty line' has the meaning given that term in section 2110(c)(5) of the Social Security Act (42 U.S.C. 1397jj(c)(5)).

"(ii) Poverty line used. – In the case of any taxable year ending with or within a calendar year, the poverty line used shall be the most recently published poverty line as of the 1st day of such calendar year.

"(d) Applicable Individual. – For purposes of this section –

"(1) In general. – The term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

"(2) Religious exemptions. –

"(A) Religious conscience exemption. – Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is a member of a recognized religious sect or division thereof described in section 1402(g)(1) and an adherent of established tenets or teachings of such sect or division as described in such section.

"(B) Health care sharing ministry. –

"(i) In general. – Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

"(ii) Health care sharing ministry. – The term 'health care sharing ministry' means an organization –

"(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

"(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

"(III) members of which retain membership even after they develop a medical condition,

"(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

"(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

"(3) Individuals not lawfully present. – Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

"(4) Incarcerated individuals. – Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

"(e) Exemptions. – No penalty shall be imposed under subsection (a) with respect to –

"(1) Individuals who cannot afford coverage. –

"(A) In general. – Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

"(B) Required contribution. – For purposes of this paragraph, the term 'required contribution' means –

"(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored

plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

"(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

"(C) Special rules for individuals related to employees. – For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination shall be made by reference to the affordability of the coverage to the employee.

"(D) Indexing. – In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding

calendar year and 2013 over the rate of income growth for such period.

"(2) Taxpayers with income under 100 percent of poverty line. – Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than 100 percent of the poverty line for the size of the family involved (determined in the same manner as under subsection (b)(4)).

"(3) Members of Indian tribes. – Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

"(4) Months during short coverage gaps. –

"(A) In general. – Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

"(B) Special rules. – For purposes of applying this paragraph –

"(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

"(ii) if a continuous period is greater than the period allowed under subparagraph (A), no

exception shall be provided under this paragraph for any month in the period, and

"(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods. The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

"(5) Hardships. – Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

"(f) Minimum Essential Coverage. – For purposes of this section –

"(1) In general. – The term 'minimum essential coverage' means any of the following:

"(A) Government sponsored programs. – Coverage under –

"(i) the Medicare program under part A of title XVIII of the Social Security Act,

"(ii) the Medicaid program under title XIX of the Social Security Act,

"(iii) the CHIP program under title XXI of the Social Security Act,

"(iv) the TRICARE for Life program,

"(v) the veteran's health care program under chapter 17 of title 38, United States Code, or

"(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers).

"(B) Employer-sponsored plan. – Coverage under an eligible employer-sponsored plan.

"(C) Plans in the individual market. – Coverage under a health plan offered in the individual market within a State.

"(D) Grandfathered health plan. – Coverage under a grandfathered health plan.

"(E) Other coverage. – Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

"(2) Eligible employer-sponsored plan. – The term 'eligible employer-sponsored plan' means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is –

"(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

"(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

"(3) Excepted benefits not treated as minimum essential coverage. – The term 'minimum essential coverage' shall not include health insurance coverage which consists of coverage of excepted benefits –

"(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

"(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

"(4) Individuals residing outside United States or residents of territories. – any applicable individual shall be treated as having minimum essential coverage for any month –

"(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

"(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

"(5) Insurance-related terms. – Any term used in this section which is also used in title I of the

Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

"(g) Administration and Procedure. –

"(1) In general. – The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

"(2) Special rules. – Notwithstanding any other provision of law –

"(A) Waiver of criminal penalties. – In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

"(B) Limitations on liens and levies. – The Secretary shall not –

"(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

"(ii) levy on any such property with respect to such failure."

"(c) Clerical Amendment. – The table of chapters for subtitle D of the Internal Revenue Code of 1986 is amended by inserting after the item relating to chapter 47 the following new item:

"CHAPTER 48 – Maintenance of Minimum Essential Coverage."

"(d) Effective Date. – The amendments made by this section shall apply to taxable years ending after December 31, 2013.

STATE STATUTORY PROVISION

Virginia Code § 38.2-3430.1:1, provides that:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

PUBLIC LAW 111-148 [H.R. 3590]
MAR. 23, 2010
PATIENT PROTECTION
AND AFFORDABLE CARE ACT

111 P.L. 148; 124 Stat. 119;
2010 Enacted H.R. 3590; 111 Enacted H.R. 3590

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title. – This Act may be cited as the "Patient Protection and Affordable Care Act".

(b) Table of Contents. – The table of contents of this Act is as follows:

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,	)	
Plaintiff,	)	**Civil Action No. 3:10cv188**
v.	)	
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 3, 2010)

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September 3, 2010

*Counsel for the
Commonwealth of
Virginia*

* * *

II. COMMONWEALTH'S STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 56(b), the Commonwealth submits the following statement of facts believed to be undisputed.

1. At the 2010 Regular Session of the Virginia General Assembly, Virginia Code § 38.2-3430.1:1, the Health Care Freedom Act, was enacted with the assent of the Governor. (Doc. 1 at 1 ¶ 1; Doc. 87 at 1 ¶ 2).

2. That statute provides:

   > No resident of this Commonwealth, regardless of whether he has or is

> eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

(Doc. 1 ¶ 3; Doc. 87 at 1 ¶ 3).

3. Subsequently, PPACA was enacted into law. 124 Stat. 119, 1029 (2010).

4. Congress expressly stated that the mandate and penalty were essential elements of the act without which the statutory scheme cannot function. (PPACA § 1501; § 10106).

5. The Federal act contains no severability clause. (PPACA *passim*).

6. Kathleen Sebelius in her official capacity is presently responsible for administering PPACA. (PPACA *passim*; Doc. 1 at 3 ¶ 8; Doc. 87 at 2 ¶ 8).

7. Before the act was passed, the Senate Finance Committee asked the Congressional Research Service to opine on the constitutionality of the individual mandate. The Service replied: "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this Clause to require an individual to purchase a good or a service." Cong. Research Serv. *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis 3* (2009). Similar advice was given by the Congressional Budget Office in connection with the Clinton administration health care initiative. *See The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, CBO Memorandum, at 1 (August 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf ("A

mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.").

8. PPACA passed the Senate on a party line vote with considerable minority protest. *See, e.g.*, Cong. Rec. Nov. 2, 2009 S10965 (no bill); *id.*, S10973 (bill being drafted behind closed doors); *id.*, Nov. 17, 2009 S11397 ("The majority leader has had in his office a secret bill that he is working on that we have not seen yet."); *id.*, S11401 (No Child Left Behind got 7 weeks on the floor – "We don't even have a bill yet"); *id.*, Nov. 19, 2009 S11819 (bill is a shell, not the real one); *id.*, Nov. 30, 2009 S11982 (Official debate begins); *id.*, Dec. 3, 2009 S12263 (bill has been on floor for 3 days and never has been in committee); *id.*, Dec. 5, 2009 S12487 (majority will not slow down); *id.*, Dec. 11, 2009 S12981 ("We are going to have three Democratic amendments and one Republican amendment voted on, and the Democrats wrote the bill"); *id.*, S12977 (votes on amendments blocked; "In the meantime, this backroom deal that is being cut, which we

haven't seen – supposedly it has been sent to the CBO to see what it would cost"); *id.*, Dec. 14, 2009 S13144 ("There is somewhere in this building a hidden bill, known as the manager's amendment, which is being drafted by one or two or three people . . . "); *id.*, Dec. 17, 2009 S13344 (bill is not being given the legislative time it deserves because the polls show a majority of Americans are against it and thus it has become a political nightmare for the majority who now simply want to ram it through before Christmas even though "no one outside the majority leader's conference room has seen it yet"); *id.*, Dec. 22, 2009 S13756 (Nebraska deal); *Id.*, Mar. 10, 2010 H1307 (reconciliation being used because bill could not re-pass the Senate).

9. In contrast, the General Assembly of Virginia passed several identical versions of the Virginia Health Care Freedom Act ("HCFA") on a bi-partisan basis, with margins as high as 90 to 3 in the House of Delegates and 25 to 15 in the Senate. *See* SB 417 Individual health insurance coverage; resident of State shall not be required to obtain a policy, *available at* http://leg.state.va.us/cgi-bin/legp504.exe?101+sum+SB417. At the time of passage of the HCFA, the Virginia House of Delegates contained 59 Republicans, 39 Democrats and 2 Independents, while the Virginia Senate contained 22 Democrats and 18 Republicans. See attached Declarations of Bruce Jamerson and Susan Schaar.

10. Although the mandate does not take effect for several years, PPACA imposes immediate and continuing burdens on Virginia. (Aff. Sec'y Hazel) (Doc. 28).

* * *

APPEAL, CLOSED

U.S. District Court
Eastern District of Virginia – (Richmond)
CIVIL DOCKET FOR CASE
#: 3:10-cv-00188-HEH

Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II v. Sebelius
Assigned to:
District Judge Henry E. Hudson
Case in other court: USCA, 11-01057
USCA, 11-01058
Cause: 28:1331 Federal Question

Date Filed: 03/23/2010
Date Terminated: 12/13/2010
Jury Demand: None
Nature of Suit: 950 Constitutional – State Statute
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
03/23/2010	1	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF against Kathleen Sebelius; filing fee paid $ 350, receipt number 34683007662; filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Civil Cover Sheet, # 2 Receipt)(cmcc,) (Entered: 03/23/2010)
03/23/2010	2	Summons Issued as to Kathleen Sebelius, U.S. Attorney and U.S.

		Attorney General. Delivered to counsel. (cmcc,) (Entered: 03/23/2010)
03/23/2010	3	ORDER that the undersigned recuses himself from presiding over this action. It is hereby ORDERED that the Clerk reassign this action to another judge in accord with the standard assignment system. Signed by District Judge Robert E. Payne on 3/23/2010. Copies to counsel.(cmcc,) (Entered: 03/23/2010)
03/23/2010		Case reassigned by standard assignment system to District Judge Henry E. Hudson. District Judge Robert E. Payne no longer assigned to the case. (Reassigned pursuant to Order entered 3/23/2010.) (cmcc,) (Entered: 03/23/2010)
03/25/2010	4	Certificate of Reporting Service by Kathleen Sebelius. Kathleen Sebelius served on 3/23/2010, answer due 5/24/2010. (cmcc,) (Entered: 03/26/2010)
04/30/2010	5	ORDER SETTING PRETRIAL CONFERENCE – Initial Pretrial Conference set for 6/3/2010 at 9:15 AM before District Judge Henry E. Hudson (rpiz) (Entered: 04/30/2010)
04/30/2010	6	SCHEDULING ORDER with Attachment # 1 Pretrial Schedule A (signed by District Judge Henry E. Hudson on 4/30/2010) (rpiz) (Entered: 04/30/2010)

05/05/2010	7	MOTION re 6 Scheduling Order *and Brief in Support Thereof* by Kathleen Sebelius. (Attachments: # 1 Proposed Order)(Hambrick, Jonathan) (Entered: 05/05/2010)
05/05/2010	8	RESPONSE to Motion re 7 MOTION re 6 Scheduling Order *and Brief in Support Thereof* filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Proposed Order)(McCullough, Stephen) (Entered: 05/05/2010)
05/05/2010	9	MOTION for Erika Myers to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	10	MOTION for Joel McElvain to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	11	MOTION for Sheila Lieber to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	12	MOTION for Ian Gershengorn to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010		Notice of Correction: Plaintiff counsel has been advised to include the complete signature block on the certificate of service

		on future documents. (cmcc,) (Entered: 05/06/2010)
05/06/2010	13	ORDER granting 7 Defendant's Motion to Modify the Scheduling Order, which the Court will construe as a Motion to Extend Time; the Defendant shall file her Answer or otherwise respond to the Complaint on or before May 24, 2010; if the Defendant files a motion to dismiss the Complaint, the time for filing an Answer shall be deferred until fourteen days after a ruling on that motion to dismiss. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/06/2010)
05/07/2010	14	ORDER granting 9 Motion for Pro hac vice. Appointed Erika Myers for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	15	ORDER granting 10 Motion for Pro hac vice. Appointed Joel McElvain for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	16	ORDER granting 11 Motion for Pro hac vice. Appointed Sheila M. Lieber for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on

		5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	17	ORDER granting 12 Motion for Pro hac vice. Appointed Ian Gershengorn for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/19/2010	18	MOTION for Leave to File Excess Pages *and Brief in Support Thereof* by Kathleen Sebelius. (Attachments: # 1 Proposed Order)(Hambrick, Jonathan) (Entered: 05/19/2010)
05/19/2010	19	MOTION *to Establish Briefing Schedule* by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/19/2010)
05/19/2010	20	ORDER re: 18 Motion for Leave to Exceed the Page Limitations imposed by Local Civil Rule 7(F); that Defendant is GRANTED leave to file a memorandum in support of her motion to dismiss not to exceed 45 pages; it is FURTHER ORDERED that Plaintiff is GRANTED leave to file a memorandum in opposition to defendant's motion to dismiss not to exceed 45 pages; and it is FURTHER ORDERED that Plaintiff shall file its opposition to Defendant's motion to dismiss on or before 06/07/2010, and defendant shall file her reply brief in support of her motion to

		dismiss on or before 06/22/2010. Signed by District Judge Henry E. Hudson on 05/19/2010. (walk,) (Entered: 05/19/2010)
05/24/2010	21	MOTION to Dismiss by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/24/2010)
05/24/2010	22	Memorandum in Support re 21 MOTION to Dismiss filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/24/2010)
06/03/2010	23	ORDER regarding hearing dates for oral argument: 1) Defendant's Motion to Dismiss – July 1, 2010 at 10:00 a.m.; 2) Motions for Summary Judgment – October 18, 2010 at 9:00 a.m.; parties to set briefing schedule for Motions for Summary Judgment, with briefs due fourteen days before the October 18, 2010 hearing date; all amicus filings are due fourteen days before the hearing date which the specific brief addresses. Signed by District Judge Henry E. Hudson on 6/3/2010. Copies to counsel.(cmcc,) (Entered: 06/03/2010)
06/03/2010	24	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Initial Pretrial Conference held on 6/3/2010. Hearing on deft's Motion to Dismiss scheduled for

		7/1/2010 at 10:00 a.m. Hearing on Motions for Summary Judgment scheduled for 10/18/2010 at 9:00 a.m.; all briefs due 14 days prior to hearing date. (rpiz) (Entered: 06/03/2010)
06/04/2010	25	TRANSCRIPT of Proceedings held on 6/3/2010, before Judge Henry E. Hudson. Court Reporter/Transcriber Krista Liscio, Telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/6/2010. Redacted Transcript Deadline set for 8/4/2010. Release of Transcript Restriction set for 9/2/2010.(liscio, krista) (Entered: 06/04/2010)
06/04/2010	26	MOTION for Leave to File Amicus Curiae Brief by Ray Elbert Parker. (Attachments: # 1 Proposed Amicus Brief – Received, # 2 Cover Letter)(cmcc,) (Entered: 06/04/2010)
06/07/2010	27	Notice of Filing of Official Transcript re: 25 Transcript. (cmcc,) (Entered: 06/07/2010) 06/07/2010 28 RESPONSE in Opposition re 21 MOTION to Dismiss filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1

		Affidavit Exhibit A)(Getchell, Earle) (Entered: 06/07/2010)
06/07/2010	29	NOTICE of Appearance by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/07/2010)
06/07/2010	30	Financial Interest Disclosure Statement (Local Rule 7.1) by American Center for Law & Justice et al.. (May, Colby) (Entered: 06/07/2010)
06/07/2010	31	MOTION for Leave to File *Amici Brief* by American Center for Law & Justice et al.. (Attachments: # 1 Proposed Amici Brief, # 2 Proposed Order)(May, Colby) (Entered: 06/07/2010)
06/08/2010	32	CERTIFICATE of Service re 29 Notice of Appearance by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/08/2010)
06/08/2010	33	CERTIFICATE of Service re 30 Financial Disclosure Statement by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/08/2010)
06/09/2010	34	NOTICE of Attorney Withdrawal of Appearance re: Erika L. Myers by Kathleen Sebelius (Hambrick, Jonathan) Modified on 6/9/2010 to edit.(cmcc,). (Entered: 06/09/2010)

06/10/2010	35	ORDER granting 26 Motion for Leave to File Amicus Curiae Brief submitted by Ray Elbert Parker; this Motion is GRANTED and the Clerk is directed to file the pro se movant's Friend of the Court Amicus Curiae Brief. Signed by District Judge Henry E. Hudson on 6/10/2010. Copies to counsel and movant, Ray Elbert Parker. (cmcc,) (Entered: 06/10/2010)
06/10/2010	36	Amicus Curiae Brief ("Friend of the Court Amicus Curiae Brief") entered by Ray Elbert Parker (filed pursuant to Order entered 6/10/2010). (cmcc,) (Entered: 06/10/2010)
06/10/2010	37	ORDER granting 31 Motion for Leave to File a Brief as Amici Curiae supporting Plaintiff's opposition to the Defendant's motion to dismiss, by amici American Center for Law and Justice, United States Representatives Paul Broun, Todd Akin, Rob Bishop, John Boehner, Michael Burgess, Dan Burton, Eric Cantor, Mike Conaway, Mary Fallin, John Fleming, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Bob Goodlatte, Jeb Hensarling, Walter Jones, Steve King, Doug Lamborn, Robert Latta, Michael McCaul, Cathy McMorris Rodgers, Jerry Moran, Mike Pence, Jean Schmidt, Lamar Smith, Todd Tiahrt, and Zach Wamp,

		and the Constitutional Committee to Challenge the President and Congress on Health Care; IT IS ORDERED that the motion for leave to file a brief as amici curiae is granted and FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered on the docket of the above-captioned matter. Signed by District Judge Henry E. Hudson on 6/10/2010. Copies to counsel and pro se amicus. (cmcc,) (Entered: 06/10/2010)
06/10/2010	38	Response *Amici Brief* filed by Todd Akin, American Center for Law and Justice, Rob Bishop, John Boehner, Paul Broun, Michael Burgess, Dan Burton, Eric Cantor, Mike Conaway, Constitutional Committee to Challenge the President and Congress on Health Care, Mary Fallin, John Fleming, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Bob Goodlatte, Jeb Hensarling, Walter Jones, Steve King, Doug Lamborn, Robert Latta, Michael McCaul, Jerry Moran, Mike Pence, Cathy McMorris Rodgers, Jean Schmidt, Lamar Smith, Todd Tiahrt, Zach Wamp. (May, Colby) (Entered: 06/10/2010)
06/15/2010	39	MOTION for Leave to File *Amicus Curiae Brief* by Physician Hospitals of America. (Attachments: # 1 Memorandum of Law in Support,

		# 2 Proposed Brief)(Fender, Matthew) (Entered: 06/15/2010)
06/16/2010		Notice of Correction: Movant counsel will refile document 39 with the signature on the document matching the filing user's login (required by CM/ECF Policies and Procedures); the memorandum in support will be filed as a separate document. (cmcc,) (Entered: 06/16/2010)
06/16/2010	40	MOTION for Leave to File *Amicus Curiae Brief (refiled)* by Physician Hospitals of America. (Attachments: # 1 Proposed Amicus Brief)(Oostdyk, Scott) (Entered: 06/16/2010)
06/16/2010	41	Memorandum in Support re 40 MOTION for Leave to File *Amicus Curiae Brief (refiled)* filed by Physician Hospitals of America. (Oostdyk, Scott) (Entered: 06/16/2010)
06/16/2010	42	ORDER granting a Motion for Leave to Participate as Amicus Curiae (Dk. No. 39) in Opposition to Defendant's Motion to Dismiss; this Motion is GRANTED and Movant is directed to file its Brief of Amicus Curiae Physician Hospitals of America in Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/16/2010. Copies to counsel. (cmcc,) (Entered: 06/16/2010)

06/16/2010	43	Memorandum *Amicus Curiae Brief* filed by Physician Hospitals of America. (Oostdyk, Scott) (Entered: 06/16/2010)
06/17/2010	44	MOTION for Leave to File *Amicus Curiae Brief* by Small Business Majority Foundation, Inc.. (Attachments: # 1 Proposed Amicus Brief, # 2 Memorandum of Law in Support, # 3 Financial Disclosure, # 4 Proposed Order, # 5 Certificate of Service)(Young, John) (Entered: 06/17/2010)
06/17/2010	45	MOTION and Memorandum in Support for Leave to File *Brief Amici Curiae* by Center for American Progress, Federal Rights Project National Senior Citizens Law Center. (Attachments: # 1 Brief Amici Curiae, # 2 Proposed Order)(France, Angela) Modified on 6/17/2010 to edit event (cmcc,). (Entered: 06/17/2010)
06/17/2010		Notice of Correction: Movant counsel will refile certain attachments to document 44 as separate documents as required by CM/ECF Policies and Procedures. (cmcc,) (Entered: 06/17/2010)
06/17/2010	46	MOTION for Leave to File *Amicus Curiae Brief* by Washington Legal Foundation. (Attachments: # 1 Exhibit Proposed Amicus Brief,

		# 2 Proposed Order)(Samp, Richard) (Entered: 06/17/2010)
06/17/2010	47	NOTICE of Appearance by Richard Abbott Samp on behalf of Washington Legal Foundation (Samp, Richard) (Entered: 06/17/2010)
06/17/2010	48	Memorandum in Support re 44 MOTION for Leave to File *Amicus Curiae Brief* filed by Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	49	Financial Interest Disclosure Statement (Local Rule 7.1) by Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	50	CERTIFICATE OF SERVICE by Small Business Majority Foundation, Inc. re 44 MOTION for Leave to File *Amicus Curiae Brief*. (cmcc,) (Entered: 06/17/2010)
06/17/2010	51	ORDER granting a Motion for Leave to File Brief Amici Curiae (Dk. No. 44) in Support of Defendant's Motion to Dismiss; the Motion is GRANTED and Movants are directed to file the Brief Amici Curiae of Small Business Majority Foundation, Inc. and The Main Street Alliance in Support of Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)

06/17/2010	52	MOTION for Leave to Appear Amicus Curiae by Liberty Group. (Attachments: # 1 Proposed Brief, # 2 Proposed Order)(Forest, John) (Entered: 06/17/2010)
06/17/2010	53	NOTICE of Appearance by Andrew Abbott Nicely on behalf of Constitutional Law Professors (Nicely, Andrew) (Entered: 06/17/2010)
06/17/2010	54	MOTION for Leave to File *Amicus Curiae Brief In Support of the Defendant's Motion to Dismiss* by Constitutional Law Professors. (Attachments: # 1 Amicus Brief of Constitutional Law Professors, # 2 Proposed Order)(Nicely, Andrew) (Entered: 06/17/2010)
06/17/2010	55	Response *Brief Amici Curiae* filed by Main Street Alliance, Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	56	NOTICE of Appearance by George William Norris, Jr on behalf of Cato Institute (Norris, George) (Entered: 06/17/2010)
06/17/2010	57	Financial Interest Disclosure Statement (Local Rule 7.1) by Cato Institute. (Norris, George) (Entered: 06/17/2010)
06/17/2010	58	MOTION for Leave to File *Amici Memorandum* by Cato Institute, Competitive Enterprise Institute, and Prof. Randy E. Barnett. (Norris,

		George) Modified to edit parties (cmcc,). (Entered: 06/17/2010)
06/17/2010	59	Memorandum *of Amici Cato Institute, Competitive Enterprise Institute and Prof. Randy E. Barnett Supporting Plaintiff's Opposition to Defendant's Motion to Dismiss* to 28 Response in Opposition to Motion filed by Cato Institute. (Norris, George) (DOCUMENT RECEIVED, NOT FILED, PENDING LEAVE OF COURT) Modified on 6/17/2010 (cmcc,). (Entered: 06/17/2010)
06/17/2010	60	ORDER granting a Motion for Leave to File Amicus Curiae Brief in Opposition to Defendant's Motion to Dismiss (Dk. No. 46), submitted by the Washington Legal Foundation; the Motion is GRANTED and Movant is DIRECTED to file its Brief of Washington Legal Foundation as Amicus Curiae in Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	61	ORDER granting Motion for Leave to File Brief of Amici Curiae by the March of Dimes Foundation, et al., in Support of Defendant's Motion to Dismiss (Dk. No. 45); the Motion is GRANTED and Movants are DIRECTED to file their Brief of Amici Curiae in Support of Defendant's

		Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	62	ORDER granting Motion for Leave to Participate as Amicus Curiae in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss (Dk. No. 52), submitted by Liberty Guard; this Motion is GRANTED and Movant is DIRECTED to file its Amicus Curiae Brief in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	63	ORDER granting Motion for Leave to File Amicus Curiae Brief in Support of Defendant's Motion to Dismiss (Dk. No. 54), submitted by constitutional law professors Jack M. Balkin, Gillian E. Metzger, and Trevor W. Morrison; the Motion is GRANTED and Movants are DIRECTED to file their Amicus Curiae Brief of Constitutional Law Professors in Support of Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	64	MOTION for Leave to File Supplement for Amicus Curiae Party by Ray Elbert

		Parker. (Attachments: # 1 Proposed Memorandum by Amicus Curiae Party)(cmcc,) (Entered: 06/17/2010)
06/17/2010	65	MOTION for Leave to File *Brief Amicus Curiae* by Landmark Legal Foundation. (Attachments: # 1 Exhibit Brief Amicus Curiae, # 2 Proposed Order)(St. George, Timothy) (Entered: 06/17/2010)
06/18/2010	66	ORDER GRANTING 58 Motion by Movants Cato Institute, et al. for Leave to Participate as Amici Curiae and Movants are DIRECTED to file their Memorandum as Amici Curiae Supporting Plaintiff's Opposition to Defendant's Motion to Dismiss. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. (walk,) (Entered: 06/18/2010)
06/18/2010	67	ORDER GRANTING 64 Motion for Leave to File Supplement Motion for Amicus Curiae Party, submitted by Ray Elbert Parker, Pro Se. The Clerk is DIRECTED to file Petitioner's Brief. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. Copy mailed to Mr. Parker. (walk,) (Entered: 06/18/2010)
06/18/2010	68	Brief Amicus Curiae in Support of Plaintiff's Opposition re: 21 MOTION to Dismiss filed by Liberty Guard. (Forest, John) Modified to edit (cmcc,). (Entered: 06/18/2010)

06/18/2010	69	Brief of Amici Curiae Supporting Plaintiff's Opposition to 21 Defendant's Motion to Dismiss by Cato Institute, Competitive Enterprise Institute and Prof. Randy E. Barnett. (Norris, George) Modified to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	70	Brief Amicus Curiae in Support to 21 MOTION to Dismiss filed by Constitutional Law Professors Jack M. Balkin, Gillian E. Metzger, and Trevor W. Morrison. (Nicely, Andrew) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	71	ORDER GRANTING 65 Motion by Movant Landmark Legal Foundation for Leave to Participate as Amicus Curiae and Movant is DIRECTED to file its Brief Amicus Curiae in Opposition to Defendant's Motion to Dismiss. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. (walk,) (Entered: 06/18/2010)
06/18/2010	72	Brief Amicus Curiae in Opposition re 21 MOTION to Dismiss filed by Washington Legal Foundation. (Samp, Richard) Modified to edit(cmcc,). (Entered: 06/18/2010)
06/18/2010		Notice of Correction re: Document 47; the filing user has been requested to file a separate Certificate of Service

		and to link the filing to Document 47. (walk,) (Entered: 06/18/2010)
06/18/2010	73	CERTIFICATE of Service re 47 Notice of Appearance by Richard Abbott Samp on behalf of Washington Legal Foundation (Samp, Richard) (Entered: 06/18/2010)
06/18/2010	74	Brief Amicus Curiae *in Opposition to Motion to Dismiss* filed by Landmark Legal Foundation. (St. George, Timothy) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	75	Brief Amici Curiae of The March of Dimes Foundation, The American Association of People with Disabilities, The ARC of the United States, Breast Cancer Action, Families USA, the Family Violence Prevention Fund, Friends of Cancer Research, Mental Health America, National Breast Cancer Coalition, The National Organization for Rare Disorders, The National Partnership for Women & Families, National Patient Advocate Foundation, The National Senior Citizens Law Center, The National Women's Law Center, The Ovarian Cancer National Alliance, Raising Women's Voices for the Health Care We Need, and United Cerebral Palsy, in Support of Motion to Dismiss filed by Center for American Progress, Federal Rights

		Project National Senior Citizens Law Center. (France, Angela) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010		Notice of Correction: Amici counsel was contacted re: document 59, Amici Brief, regarding CM/ECF Policies and Procedures for documents needing leave of court. No action is necessary at this time. (cmcc,) (Entered: 06/22/2010)
06/21/2010	76	Supplemental Brief by Amicus Curiae Petitioner filed by Ray Elbert Parker (filed pursuant to Order entered 6/18/2010). (cmcc,) (Entered: 06/21/2010)
06/22/2010	77	Reply to 21 MOTION to Dismiss filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Statutory Materials)(Hambrick, Jonathan) (Entered: 06/22/2010)
06/23/2010	78	RESPONSE to Motion re 64 MOTION for Leave to File filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 06/23/2010)
06/24/2010		Set Deadlines/Hearings as to 21 Motion to Dismiss: Motion Hearing set for 7/1/2010 at 10:00 AM before District Judge Henry E. Hudson (rpiz) (Entered: 06/24/2010)
06/30/2010	79	Amicus Curiae "Reply to Plaintiff's Memorandum of June 23, 2010 in

		Opposition to Dismiss Without Prejudice or Alternatively, for a Change of Venue" filed by Ray Elbert Parker. (cmcc,) (Entered: 06/30/2010)
07/01/2010	80	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Motion Hearing held on 7/1/2010 re 21 Motion to Dismiss filed by Kathleen Sebelius. Argument heard. Motion taken under advisement by Court; Memorandum Opinion to enter. (rpiz) (Entered: 07/02/2010)
07/08/2010	81	TRANSCRIPT of Proceedings held on July 1, 2010, before Judge Henry E. Hudson. Court Reporter/Transcriber Krista Liscio, Telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber. Redaction Request due 8/9/2010. Redacted Transcript Deadline set for 9/7/2010. (liscio, krista) (Entered: 07/08/2010)
07/08/2010	82	Notice of Filing of Official Transcript re 81 Transcript. (cmcc,) (Entered: 07/08/2010)
07/09/2010	83	Amicus Curiae Post Trial Memorandum in Support of Opposition to Defendant's Motion to Dismiss filed by Ray Elbert Parker. (cmcc,) (Entered: 07/12/2010)

08/02/2010	84	MEMORANDUM OPINION. Signed by District Judge Henry E. Hudson on 8/2/2010. Copies to counsel of record.(cmcc,) (Entered: 08/02/2010)
08/02/2010	85	ORDER regarding Defendant's Motion to Dismiss (Dk. No. 21), filed May 24, 2010; for reasons stated in the accompanying Memorandum Opinion, the Defendant's Motion to Dismiss is DENIED. Signed by District Judge Henry E. Hudson on 8/2/2010. Copies to counsel of record. (cmcc,) (Entered: 08/02/2010)
08/10/2010	86	CONSENT ORDER on the briefing schedule for the Motions for Summary Judgment to be filed by the parties; consistent with the Court's June 3, 2010 Order, the parties have conferred and agreed on such a schedule and accordingly it is ORDERED, AJUDGED and DECREED by the Court (see Order for details). Signed by District Judge Henry E. Hudson on 8/10/2010. Copies to counsel.(cmcc,) (Entered: 08/10/2010)
08/16/2010	87	ANSWER to 1 Complaint, by Kathleen Sebelius.(Hambrick, Jonathan) (Entered: 08/16/2010)
09/03/2010	88	MOTION for Summary Judgment by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 09/03/2010)

09/03/2010	89	Memorandum in Support re 88 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Affidavit, # 2 Affidavit)(Getchell, Earle) (Entered: 09/03/2010)
09/03/2010	90	MOTION for Summary Judgment by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 09/03/2010) 09/03/2010 91 Memorandum in Support re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Exhibits)(Hambrick, Jonathan) (Entered: 09/03/2010) Jonathan) (Entered: 09/03/2010)
09/03/2010	91	Memorandum in Support re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Exhibits)(Hambrick, Jonathan) (Entered: 09/03/2010)
09/07/2010		Set Deadlines/Hearings as to 88 Motion for Summary Judgment by Commonwealth of Virginia and 90 Motion for Summary Judgment by Kathleen Sebelius: Motions Hearing set for 10/18/2010 at 9:00 AM before District Judge Henry E. Hudson (rpiz) (Entered: 09/07/2010)
09/17/2010	92	MOTION ("Optional") for Leave to File Amicus Brief by W. Spencer

		Connerat, III. (cmcc,) (Entered: 09/17/2010)
09/21/2010	93	ORDER granting 92 Optional Motion for Leave to File Amicus Brief by W. Spencer Connerat, III; the Clerk is directed to file Movant's Optional Motion for Leave to File Amicus Brief as Movant's Brief as Amicus Curiae Supporting Plaintiff. Signed by District Judge Henry E. Hudson on 9/21/2010. Copies to counsel and Connerat. (cmcc,) (Entered: 09/21/2010)
09/21/2010	94	Amicus Brief in Support of Plaintiff filed by W. Spencer Connerat, III (filed pursuant to Order entered 9/21/2010). (cmcc,) (Entered: 09/21/2010)
09/23/2010	95	Memorandum in Opposition re 90 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 09/23/2010)
09/23/2010	96	Opposition to 88 MOTION for Summary Judgment filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 09/23/2010)
09/30/2010	97	NOTICE of Appearance by Patrick Michael McSweeney on behalf of Randy E. Barnett, Cato Institute, Competitive Enterprise Institute (McSweeney, Patrick) (Entered: 09/30/2010)

09/30/2010	98	NOTICE of Appearance by Patrick Michael McSweeney on behalf of Steven J. Willis (McSweeney, Patrick) (Entered: 09/30/2010)
09/30/2010		Notice of Correction: Local counsel for Pacific Legal Foundation has been advised to file notice of appearance. (cmcc,) (Entered: 10/01/2010)
09/30/2010	99	MOTION for Timothy Sandefur to appear Pro hac vice by Pacific Legal Foundation. (Attachments: # 1 Receipt)(cmcc,) (Entered: 10/01/2010)
09/30/2010	100	MOTION for Luke Anthony Wake to appear Pro hac vice by Pacific Legal Foundation. (Attachments: # 1 Receipt)(cmcc,) (Entered: 10/01/2010)
10/01/2010	101	MOTION for Leave to File *BRIEF IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT* by Young Invincibles. (Attachments: # 1 Proposed Order Proposed Order, # 2 Exhibit Amicus Brief) (Walter, Brett) (Entered: 10/01/2010)
10/01/2010	102	MOTION for Leave to File *Amicus Curiae Memorandum in Support of Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for Summary Judgment* by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute. (Attachments: # 1 Proposed Memorandum

		Supporting Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for Summary Judgment, # 2 Proposed Order)(McSweeney, Patrick) (Entered: 10/01/2010)
10/01/2010	103	ORDER granting a Motion for Leave to File Brief of Amicus Curiae Young Invincibles, supporting Defendant's Motion for Summary Judgment (Dk. No. 101) ; ORDERED that the motion for leave to file a brief as amicus curiae is granted and FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered. Signed by District Judge Henry E. Hudson on 10/1/2010. Copies to counsel. (cmcc,) (Entered: 10/01/2010)
10/01/2010	104	Brief Amicus Curiae in Support of Defendant's Motion for Summary Judgment filed by Young Invincibles. (cmcc,) (Entered: 10/01/2010)
10/01/2010	105	ORDER granting Motion for Leave to File Amicus Curiae Memorandum supporting Plaintiff's Motion for Summary Judgment and opposing Defendant's Motion for Summary Judgment by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute (Dk. No. 102); it is ORDERED that the motion for leave to file a brief as amici curiae is granted. Signed by District Judge Henry E. Hudson on 10/1/2010.

		Copies to counsel. (cmcc,) (Entered: 10/01/2010)
10/01/2010	106	Memorandum as Amici Curiae Supporting Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for summary Judgment filed by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute. (cmcc,) (Entered: 10/01/2010)
10/04/2010	107	NOTICE of Appearance by Robert Luther, III on behalf of Americans for Free Choice in Medicine and Pacific Legal Foundation (Luther, Robert) (Entered: 10/04/2010)
10/04/2010	108	MOTION for Leave to File *Amicus Brief in Support of Plaintiff's Motion for Summary Judgment* by Washington Legal Foundation. (Attachments: # 1 Proposed Order Granting Motion for Leave, # 2 Exhibit Proposed Amicus Brief)(Samp, Richard) (Entered: 10/04/2010)
10/04/2010	109	NOTICE of Appearance by Tara Lynn Renee Zurawski on behalf of William P. Barr, Edwin Meese, III, Richard L. Thornburgh (Zurawski, Tara) (Entered: 10/04/2010)
10/04/2010	110	NOTICE of Appearance by Edwin Louis Fountain on behalf of William P. Barr, Edwin Meese, III, Richard L. Thornburgh (Fountain, Edwin) (Entered: 10/04/2010)

10/04/2010	111	MOTION for Leave to *File Amicus Curiae Brief* by Physician Hospitals of America. (Attachments: # 1 Memorandum Of Law in Support, # 2 Exhibit Proposed Amicus Brief) (Oostdyk, Scott) (Entered: 10/04/2010)
10/04/2010	112	MOTION for Extension *of Time to File a Motion for Leave to Participate as Amici Curiae* by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Fountain, Edwin) (Entered: 10/04/2010)
10/04/2010	113	Memorandum in Support re 112 MOTION for Extension *of Time to File a Motion for Leave to Participate as Amici Curiae* filed by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Attachments: # 1 Proposed Order)(Fountain, Edwin) (Entered: 10/04/2010)
10/04/2010	114	MOTION for Leave to File *Amicus Curiae Brief in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* by American Civil Rights Union. (Attachments: # 1 Proposed Order, # 2 Exhibit Proposed amicus brief)(Gray, Daniel) (Entered: 10/04/2010)
10/04/2010	115	Financial Interest Disclosure Statement (Local Rule 7.1) by American Civil Rights Union. (Gray, Daniel) (Entered: 10/04/2010)

10/04/2010	116	NOTICE of Appearance by Richard B. Rogers on behalf of American Civil Rights Union (Rogers, Richard) (Entered: 10/04/2010)
10/04/2010	117	REPLY to Response to Motion re 88 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 10/04/2010)
10/04/2010	118	Brief in Support *Amicus Curiae Brief of Constitutional Law Professors In Support of the Secretary's Motion For Summary Judgment* filed by Jack M. Balkin, Gillian E. Metzger, Trevor W. Morrison. (Nicely, Andrew) (Entered: 10/04/2010)
10/04/2010	119	ORDER GRANTING Plaintiff's 111 Motion for Leave to Participate as Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment; Movant Physician Hospitals of America is directed to file its Brief of Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment. Signed by District Judge Henry E. Hudson on 10/1/2010. (lhin,) (cmcc,). (Entered: 10/04/2010)
10/04/2010	120	ORDER GRANTING the American Civil Rights Union's 114 Motion for Leave to File Amicus Curiae Brief; upon receipt of this Order, counsel for the American Civil Rights Union shall electronically file the brief

		Signed by District Judge Henry E. Hudson on 10/4/2010. (lhin,) (Entered: 10/04/2010)
10/04/2010	121	ORDER GRANTING 112 Motion by the Former U.S. Attorneys General William Barr, Edwin Meese, III and Dick Thornburg [sic] for an Extension of Time to Seek Leave to File a Brief as amici curiae. It is FURTHER ORDERED that Movants shall file their motion seeking leave to participate as amici curiae by 10/08/2010. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/04/2010)
10/04/2010	122	Memorandum *in Support of Plaintiff's 88 Motion for Summary Judgment and in Opposition to Defendant's 90 Motion for Summary Judgment* filed by Physician Hospitals of America. (Oostdyk, Scott). Modified docket entry on 10/05/2010. (walk,). (Entered: 10/04/2010)
10/04/2010	123	ORDER GRANTING 108 Motion by amici curiae Washington Legal Foundation and several constitutional law scholars for Leave to File an amici curiae Brief in support of Plaintiff's Motion for Summary Judgment. The Clerk shall cause the proposed brief to be filed and entered on the docket. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/04/2010)

10/04/2010	124	NOTICE of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/04/2010)
10/04/2010	125	Brief by Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant to the Court's Order dated 10/04/2010. (walk,) (Entered: 10/04/2010)
10/04/2010	126	MOTION for Leave to File *Amicus Brief and Brief in Support* by Mountain States Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Amicus Brief)(Pendley, William) (Entered: 10/04/2010)
10/04/2010	127	MOTION for Leave to File *Brief Amicus Curiae* by Pacific Legal Foundation. (Luther, Robert) (Entered: 10/04/2010)
10/04/2010	128	NOTICE of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/04/2010)
10/04/2010	129	Brief in Support *of Commonwealth of Virginia* filed by Americans for Free Choice in Medicine and Pacific Legal Foundation. (Luther, Robert). PLEASE NOTE: Received verbal notification from counsel Robert Luther, III that "Pro Hac Vice Pending" listed under his name on page one of the document is a typographical error.

		Mr. Luther is counsel of record and doesn't have a Pro Hac Vice application pending before the Court. (walk,). (Entered: 10/04/2010)
10/04/2010	130	MOTION for Leave to File *Brief Amicus Curie* [sic] *in Support of Plaintiff's Motion for Summary Judgment* by Landmark Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Exhibit Brief Amicus Curiae)(St. George, Timothy) (Entered: 10/04/2010)
10/04/2010	131	Brief in Support to 88 MOTION for Summary Judgment *by Plaintiff and in Opposition to 90 MOTION for Summary Judgment by Defendant* filed by American Civil Rights Union. (Rogers, Richard) (Entered: 10/04/2010)
10/04/2010	132	REPLY to Response to Motion re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 10/04/2010)
10/04/2010	133	MOTION for Leave to File *Amicus Curiae Brief* by Virginia Organizing. (Attachments: # 1 Exhibit Amicus Brief, # 2 Affidavit Amicus Brief Exhibit 1)(Bennett, Leonard) (Entered: 10/04/2010)
10/04/2010	134	Memorandum in Support re 133 MOTION for Leave to File *Amicus Curiae Brief* filed by Virginia Organizing. (Bennett, Leonard) (Entered: 10/04/2010)

10/04/2010	135	Financial Interest Disclosure Statement (Local Rule 7.1) by Virginia Organizing. (Bennett, Leonard) (Entered: 10/04/2010)
10/05/2010	136	ORDER GRANTING 126 Motion by Mountain States Legal Foundation for Leave to File Amicus Curiae Brief in Support of Plaintiff's Motion for Summary Judgment. The Clerk shall cause the proposed brief to be filed and entered on the docket. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	137	Amicus Curiae Brief by Mountain States Legal Foundation in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant to the Court's Order dated 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	138	ORDER GRANTING 127 Motion for Leave to File Amicus Curiae for Americans for Free Choice in Medicine and Pacific Legal Foundation and they are directed to file their Brief of Amicus Curiae in Support of Plaintiff's 88 Motion for Summary Judgment. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 122; the filing user should have

		selected the filing event "Memorandum in Support," instead of "Memorandum." The docket text has been corrected and the document has been linked to 88 and 90 motions. (walk,) (Entered: 10/05/2010)
10/05/2010	139	ORDER GRANTING 133 Motion for Leave to File Brief of Amicus Curiae Virginia Organizing in Support of Defendant's Motion for Summary Judgement and Movant Virginia Organizing is directed to file its Brief of Amicus Curiae in Support of Defendant's Motion for Summary Judgment. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	140	ORDER GRANTING 130 Motion of amicus Landmark Legal Foundation for leave to file a brief as amicus curiae supporting Plaintiff's motion for summary judgment. It is FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered on the docket. Signed by District Judge Henry E. Hudson on 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	141	Amicus Curiae Brief of Landmark Legal Foundation in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant

		to the Court's Order dated 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 124; the filing user has been requested to file a separate Certificate of Service and link it to document 124. (walk,). The filing user has also been requested to file a separate Certificate of Service for Document 128 which appears to be a duplicate of Document 124 . (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 130; the filing user's login does not match the signature on the document. The filing user must refile the document with the filing user's signature block, or the attorney whose signature block appears on the document must refile the document. (walk,) (Entered: 10/05/2010)
10/05/2010	142	CERTIFICATE of Service re 124 Notice of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/05/2010)
10/05/2010	143	CERTIFICATE of Service re 128 Notice of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/05/2010)
10/05/2010	144	MOTION by Eve Ellingwood to Intervene. (Attachments: # 1 Exhibit A, # 2 Exhibit B1, # 3 Exhibit B2, # 4

Exhibit C, # 5 Exhibit D, and # 6 Exhibit E). (walk,) (Entered: 10/05/2010)

10/05/2010 145 Amended MOTION for Leave to File *Breif* [sic] *Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment* by Landmark Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Amicus Brief)(St. George, Timothy) (Entered: 10/05/2010)

10/06/2010 146 ORDER DENYING 144 Motion by Eve Ellington for Intervention. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/06/2010. Copy mailed to Movant. (walk,) (Entered: 10/06/2010)

10/08/2010 147 NOTICE by Kathleen Sebelius re 90 MOTION for Summary Judgment *of Supplemental Authority* (Attachments: # 1 Supplement Supplemental Authority)(Hambrick, Jonathan) (Entered: 10/08/2010)

10/08/2010 148 MOTION for Leave to File *Brief as Amici Curiae* by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Zurawski, Tara) (Entered: 10/08/2010)

10/08/2010 149 Memorandum in Support re 148 MOTION for Leave to File Brief as Amici Curiae filed by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Attachments: # 1 Proposed Amici Curiae Brief, # 2

		Proposed Order) (Zurawski, Tara) (Entered: 10/08/2010)
10/08/2010	150	ORDER granting 148 Motion for Leave to File Brief as Amici Curiae; the Clerk shall cause the proposed brief to be filed. Signed by District Judge Henry E. Hudson on 10/8/10. (jtho,) (Entered: 10/08/2010)
10/12/2010	151	Memorandum of Amici Curiae, Former United States Attorneys General William Barr, Edwin Meese, Dick Thornburgh, in Support *OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Amici Curiae)* . (Zurawski, Tara) Modified on 10/12/2010 to edit(cmcc,). (Entered: 10/12/2010)
10/13/2010	152	ORDER that, in her Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, the Secretary, at this late stage, asserts that the Commonwealth's failure to join the Secretary of the Treasury as an indispensible party entitles her to judgment; the Court is not persuaded that the Secretary of the Treasury is a necessary party. Defendant's request for judgment for failure to join the Secretary of the Treasury is DENIED (see Order for details). Signed by District Judge Henry E. Hudson on 10/13/2010. Copies to counsel of record.(cmcc,) (Entered: 10/13/2010)

10/15/2010	153	NOTICE by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II re 88 MOTION for Summary Judgment *Plaintiff's Notice of Supplemental Authority* (Attachments: # 1 Exhibit)(Getchell, Earle) (Entered: 10/15/2010)
10/15/2010	154	ORDER granting 99 Motion for Pro hac vice. Timothy Sandefur appointed for Amici Americans for Free Choice in Medicine and Pacific Legal Foundation. Signed by District Judge Henry E. Hudson on 10/15/2010. Copies to counsel. (cmcc,) (Entered: 10/15/2010)
10/15/2010	155	ORDER granting 100 Motion for Pro hac vice. Luke Anthony Wake appointed for Americans for Free Choice in Medicine and Pacific Legal Foundation. Signed by District Judge Henry E. Hudson on 10/15/2010. Copies to counsel. (cmcc,) (Entered: 10/15/2010)
10/18/2010	156	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Motion Hearing held on 10/18/2010 re 88 Motion for Summary Judgment filed by Commonwealth of Virginia and 90 Motion for Summary Judgment filed by Kathleen Sebelius. Argument heard. Matter taken under advisement by Court; Memorandum Opinion to enter. (rpiz) (Entered: 10/18/2010)

11/07/2010	157	TRANSCRIPT of proceedings held on October 18, 2010 before Judge Henry E. Hudson. Court Reporter/ Transcriber Krista Liscio, telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 12/7/2010. Redacted Transcript Deadline set for 1/7/2011. Release of Transcript Restriction set for 2/5/2011.(liscio, krista) (Entered: 11/07/2010)
11/08/2010	158	Notice of Filing of Official Transcript re 157 Transcript. (cmcc,) (Entered: 11/08/2010)
11/24/2010	159	ORDER DENYING Motion by amicus curiae W. Spencer Connerat, III for leave to file the Motion for Summary Judgment and Warrant for Arrest, as well as any further filings in this action (please see Order for additional information). The Clerk is directed to lodge the aforementioned document in the Clerk's Office in the event that a notice of appeal if filed regarding this Order. It is so ORDERED. Signed by District Judge Henry E. Hudson on 11/24/2010. Copy mailed to Mr. Connerat. (walk,) (Entered: 11/24/2010)

12/03/2010	160	NOTICE by Kathleen Sebelius re 90 MOTION for Summary Judgment *of Supplemental Authority* (Attachments: # 1 Supplemental Authority) (Hambrick, Jonathan) (Entered: 12/03/2010)
12/13/2010	161	MEMORANDUM OPINION. Signed by District Judge Henry E. Hudson on 12/13/2010. (walk,) (Entered: 12/13/2010)
12/13/2010	162	ORDER that Plaintiff's 88 Motion for Summary Judgment is GRANTED as to its request for declaratory relief and DENIED as to its request for injunctive relief, and Defendant's 90 Motion for Summary Judgment is DENIED. It is so ORDERED. Signed by District Judge Henry E. Hudson on 12/13/2010. (walk,) (Entered: 12/13/2010)
01/18/2011	163	NOTICE OF APPEAL by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 01/18/2011)
01/18/2011	164	NOTICE OF APPEAL by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 01/18/2011)
01/18/2011	165	USCA Appeal Fees received $ 455, receipt number 34683011385, re 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II (lbre,) (Entered: 01/18/2011)

01/19/2011	166	Transmission of Notice of Appeal to US Court of Appeals re 163 Notice of Appeal. (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (lbre,) (Entered: 01/19/2011)
01/19/2011	167	Transmission of Notice of Appeal to US Court of Appeals re 164 Notice of Appeal. (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (lbre,) (Entered: 01/19/2011)
01/20/2011		USCA Case Number 11-1057, Case Manager R.Warren, for 163 Notice of Appeal filed by Kathleen Sebelius. (lbre,) (Entered: 01/20/2011)
01/20/2011		USCA Case Number 11-1058, Case Manager R.Warren, for 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (lbre,) (Entered: 01/20/2011)
01/20/2011	168	ORDER of USCA as to 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II, 163 Notice of Appeal filed by Kathleen Sebelius : The Court consolidates Case No. 11-1057(L) and Case No. 11-1058. (lbre,) (Entered: 01/20/2011)

General Docket
United States Court of Appeals
for the Fourth Circuit

Docketed: 01/20/2011
Termed: 09/08/2011

Court of Appeals Docket #: 11-1057
Nature of Suit: 2950 Constitutionality of State Statutes
Commonwealth of Virginia, Ex R v. Kathleen Sebelius
Appeal From: United States District Court for the Eastern District of Virginia at Richmond
Fee Status: us

Case Type Information:
1) Civil U.S.
2) United States
3) null

Originating Court Information:
District: 0422-3 : 3:10-cv-00188-HEH
Presiding Judge: Henry E. Hudson, U. S. District Court Judge
Date Filed: 03/23/2010

Date Order/ Judgment:	Date Order/ Judgment EOD:	Date NOA Filed:
12/13/2010	12/13/2010	01/18/2011
08/02/2010	08/02/2010	

Prior Cases:
None

Current Cases:

	Lead	Member	Start	End
Cross-Appeal				
	11-1057	11-1058	01/20/2011	
Seriatim				
	10-2347	11-1057	01/26/2011	
	10-2347	11-1058	01/26/2011	

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia

Plaintiff-Appellee

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity

Defendant-Appellant

AMERICA'S HEALTH INSURANCE PLANS; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Amici Curiae

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; THE ARC OF THE UNITED STATES; BREAST CANCER ACTION; FAMILES USA; FRIENDS OF CANCER RESEARCH; MARCH OF DIMES FOUNDATION; MENTAL HEALTH AMERICA; NATIONAL BREAST CANCER COALITION; NATIONAL ORGANIZATION FOR RARE DISORDERS; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL SENIOR CITIZENS LAW CENTER; NATIONAL WOMEN'S HEALTH NETWORK; THE OVARIAN CANCER NATIONAL ALLIANCE; AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED; AMERICAN MEDICAL STUDENT ASSOCIATION; CENTER FOR AMERICAN PROGRESS, d/b/a Doctors for America; NATIONAL HISPANIC MEDICAL ASSOCIATION; NATIONAL PHYSICIANS

ALLIANCE; CONSTITUTIONAL LAW PROFESSORS; YOUNG INVINCIBLES; KEVIN C. WALSH; AMERICAN CANCER SOCIETY; AMERICAN CANCER SOCIETY CANCER ACTION NETWORK; AMERICAN DIABETES ASSOCIATION; AMERICAN HEART ASSOCIATION; DR. DAVID CUTLER, Deputy, Otto Eckstein Professor of Applied Economics, Harvard University; DR. HENRY AARON, Senior Fellow, Economic Studies, Bruce and Virginia MacLaury Chair, The Brookings Institution; DR. GEORGE AKERLOF, Koshland Professor of Economics, University of California-Berkeley; DR. STUART ALTMAN, Sol C. Chaikin Professor of National Health Policy, Brandeis University; DR. KENNETH ARROW, Joan Kenney Professor of Economics and Professor of Operations Research, Stanford University; DR. SUSAN ATHEY, Professor of Economics, Harvard University; DR. LINDA J. BLUMBERG, Senior Fellow, Urban Institute, Health Policy Center; DR. LEONARD E. BURMAN, Daniel Patrick Moynihan Professor of Public Affairs, The Maxwell School, Syracuse University; DR. AMITABH CHANDRA, Professor of Public Policy, Kennedy School of Government, Harvard University; DR. MICHAEL CHERNEW, Professor, Department of Health Care Policy, Harvard Medical School; DR. PHILIP COOK, Dr. Philip Cook, ITT/ Sanford Professor of Public Policy, Professor of Economics, Duke University; DR. MICHAEL T. FRENCH, Professor of Health Economics, University of Miami; DR. CLAUDIA GOLDIN, Henry Lee Professor of Economics, Harvard University; DR. TAL GROSS, Department of Health Policy and Management, Mailman

School of Public Health, Columbia University; DR. JONATHAN GRUBER, Professor of Economics, MIT; DR. JACK HADLEY, Associate Dean for Finance and Planning, Professor and Senior Health Services Researcher, College of Health and Human Services, George Mason University; DR. VIVIAN HO, Baker Institute Chair in Health Economics and Professor of Economics, Rice University; DR. JOHN F. HOLAHAN, Ph. D., Director, Health Policy Research Center, The Urban Institute; DR. JILL HORWITZ, Professor of Law and Co- Director of the Program in Law & Economics, University of Michigan School of Law; DR. LAWRENCE KATZ, Elisabeth Allen Professor of Economics, Harvard University; DR. GENEVIEVE KENNEY, Senior Fellow, The Urban Institute; DR. FRANK LEVY, Rose Professor of Urban Economics, Department of Urban Studies and Planning, MIT; DR. PETER LINDERT, Distinguished Research Professor of Economics, University of California, Davis; DR. ERIC MASKIN, Albert O. Hirschman Professor of Social Science at the Institute for Advanced Study, Princeton University; DR. ALAN C. MONHEIT, Professor of Health Economics, School of Public Health, University of Medicine & Dentistry of New Jersey; DR. MARILYN MOON, Vice President and Director Health Program, American Institutes for Research; DR. RICHARD J. MURNANE, Thompson Professor of Education and Society, Harvard University; DR. JOSEPH P. NEWHOUSE, John D. MacArthur Professor of Health Policy and Management, Harvard University; DR. LEN M. NICHOLS, George Mason University; DR. HAROLD POLLACK, Helen Ross Professor of Social Service Administration, University of Chicago;

DR. MATTHEW RABIN, Edward G. and Nancy S. Jordan Professor of Economics, University of California-Berkeley; DR. JAMES B. REBITZER, Professor of Economics, Management, and Public Policy, Boston University School of Management; DR. MICHAEL REICH, Professor of Economics, University of California at Berkeley; DR. THOMAS RICE, Professor, UCLA School of Public Health; DR. MEREDITH ROSENTHAL, Department of Health Policy and Management, Harvard School of Public Health; DR. CHRISTOPHER RUHM, Professor of Public Policy and Economics, University of Virginia; DR. JONATHAN SKINNER, Professor of Economics, Dartmouth College, and Professor of Community and Family Medicine, Dartmouth Medical School; DR. KATHERINE SWARTZ, Professor, Department of Health Policy and Management, Harvard School of Public Health; DR. KENNETH WARNER, Dean of the School of Public Health and Avedis Donabedian Distinguished University Professor of Public Health, University of Michigan; DR. PAUL N. VAN DE WATER, Senior Fellow, Center on Budget and Policy Priorities; DR. STEPHEN ZUCKERMAN, Senior Fellow, The Urban Institute; JANET COOPER ALEXANDER, Frederick I. Richman Professor of Law, Stanford Law School; ERWIN CHEMERINSKY, Founding Dean, University of California-Irvine School of Law; AMANDA FROST, Professor of Law, American University Washington College of Law; ANDY HESSICK, Associate Professor of Law, Arizona State University Sandra Day OConnor College of Law; A.E. DICK HOWARD, White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law; JOHN CALVIN

JEFFRIES, JR., David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law; JOHANNA KALB, Assistant Professor, Loyola University New Orleans College of Law; LUMEN N. MULLIGAN, Professor of Law, University of Kansas School of Law; EDWARD A. PURCELL, JR., Joseph Solomon Distinguished Professor of Law, New York Law School; CAPRICE L. ROBERTS, Professor, Visiting Professor, Catholic University Columbus School of Law; Professor of Law, University of West Virginia School of Law; STEPHEN I. VLADECK, Professor of Law, American University Washington College of Law; HOWARD M. WASSERMAN, Associate Professor, FIU College of Law; AARP; COMMONWEALTH OF MASSACHUSETTS; THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN COLLEGE OF NURSE-MIDWIVES; AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES; AMERICAN MEDICAL WOMEN'S ASSOCIATION; THE ASIAN AMERICAN JUSTICE CENTER; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; THE ASIAN PACIFIC AMERICAN LEGAL CENTER; THE BLACK WOMENS HEALTH IMPERATIVE; THE COALITION OF LABOR UNION WOMEN; CHILDBIRTH CONNECTION; THE CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; THE FEMINIST MAJORITY FOUNDATION; IBIS REPRODUCTIVE HEALTH; INSTITUTE OF SCIENCE AND HUMAN VALUES; MARYLAND WOMEN'S COALITION FOR HEALTH CARE REFORM; MENTAL HEALTH AMERICA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S

FORUM; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL COALITION FOR LGBT HEALTH; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; THE NATIONAL RESEARCH CENTER FOR WOMEN & FAMILIES; OLDER WOMEN'S LEAGUE; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; RAISING WOMEN'S VOICES; SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW; SOUTHWEST WOMEN'S LAW CENTER; WIDER OPPORTUNITIES FOR WOMEN; THE WOMENS LAW CENTER OF MARYLAND, INCORPORATED; WOMENS LAW PROJECT; VIRGINIA ORGANIZING; AMERICAN HOSPITAL ASSOCIATION; ASSOCIATION OF AMERICAN MEDICAL COLLEGES; CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES; FEDERATION OF AMERICAN HOSPITALS; NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS; NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS; CONSTITUTIONAL ACCOUNTABILITY CENTER; MATTHEW H. ADLER, Leon Meltzer Professor of Law, University of Pennsylvania Law School; REBECCA L. BROWN, Newton Professor of Constitutional Law, University of Southern California Gould School of Law; JESSE HERBERT CHOPER, Earl Warren Professor of Public Law, University of California, Berkeley, School of Law; MICHAEL C. DORF, Robert S. Stevens Professor of Law, Cornell University Law School; DANIEL FARBER, Sho Sato Professor of Law, University of California, Berkeley, School of Law;

BARRY FRIEDMAN, Jacob D. Fuchsberg Professor of Law, New York University School of Law; WILLIAM P. MARSHALL, Kenan Professor of Law, University of North Carolina School of Law; GENE NICHOL, Professor of Law, Director, Center on Poverty, Work & Opportunity, University of North Carolina School of Law; WILLIAM J. NOVAK, Professor of Law, The University of Michigan Law School; RICHARD H. PILDES, Sudler Family Professor of Constitutional Law, Co-Director, Center on Law and Security, New York University School of Law; RICHARD A. PRIMUS, Professor of Law, The University of Michigan Law School; JUDITH RESNIK, Arthur Liman Professor of Law, Yale Law School; THEODORE W. RUGAR, Professor of Law, University of Pennsylvania Law School; ROBERT A. SCHAPIRO, Professor of Law, Emory University School of Law; DAVID L. SHAPIRO, William Nelson Cromwell Professor, Emeritus, Harvard Law School; SUZANNA SHERRY, Herman O. Loewenstein Professor of Law, Vanderbilt University Law School; NEIL S. SIEGEL, Professor of Law and Political Science, Duke University School of Law; PETER J. SMITH, Professor of Law, George Washington University Law School; ADAM WINKLER, Professor of Law, UCLA School of Law; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF IOWA; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; CHRISTINE GREGOIRE, Governor of Washington; SERVICE EMPLOYEES INTERNATIONAL UNION; CHANGE TO WIN

Amici Supporting Appellant

THE AMERICAN CENTER FOR LAW AND JUSTICE; PAUL BROUN, United States Representative; ROBERT ADERHOLT, United States Representative; TODD AKIN, United States Representative; MICHELE BACHMANN, United States Representative; SPENCER BACHUS, United States Representative; ROSCOE BARTLETT, United States Representative; ROB BISHOP, United States Representative; JOHN BOEHNER, United States Representative; LARRY BUCSHON, United States Representative; DAN BURTON, United States Representative; FRANCISCO "QUICO" CANSECO, United States Representative; ERIC CANTOR, United States Representative; STEVE CHABOT, United States Representative; MIKE CONAWAY, United States Representative; BLAKE FARENTHOLD, United States Representative; JOHN FLEMING, United States Representative; BILL FLORES, United States Representative; RANDY FORBES, United States Representative; VIRGINIA FOXX, United States Representative; TRENT FRANKS, United States Representative; SCOTT GARRETT, United States Representative; LOUIE GOHMERT, United States Representative; RALPH HALL, United States Representative; TIM HUELSKAMP, United States Representative; BILL JOHNSON, United States Representative; WALTER JONES, United States Representative; MIKE KELLY, United States Representative; STEVE KING, United States Representative; JACK KINGSTON, United States Representative; JOHN KLINE, United States Representative; DOUG LAMBORN, United States Representative; JEFF LANDRY, United States Representative; JAMES LANKFORD, United States Representative; ROBERT LATTA, United States

Representative; DONALD MANZULLO, United States Representative; THADDEUS MCCOTTER, United States Representative; CATHY MCMORRIS RODGERS, United States Representative; GARY MILLER, United States Representative; JEFF MILLER, United States Representative; RANDY NEUGEBAUER, United States Representative; STEVE PEARCE, United States Representative; MIKE PENCE, United States Representative; JOE PITTS, United States Representative; MIKE POMPEO, United States Representative; SCOTT RIGELL, United States Representative; PHIL ROE, United States Representative; ED ROYCE, United States Representative; LAMAR SMITH, United States Representative; TIM WALBERG, United States Representative; THE CONSTITUTIONAL COMMITTEE TO CHALLENGE THE PRESIDENT & CONGRESS ON HEALTH CARE; MATTHEW SISSEL; PACIFIC LEGAL FOUNDATION; AMERICANS FOR FREE CHOICE IN MEDICINE; AMERICAN PHYSICIANS AND SURGEONS, INCORPORATED; JANIS CHESTER, MD; MARK J. HAUSER, MD; GUENTER L. SPANKNEBEL, MD; GRAHAM L. SPRUIELL, MD; WASHINGTON LEGAL FOUNDATION; CONSTITUTIONAL LAW SCHOLARS; CATO INSTITUTE; COMPETITIVE ENTERPRISE INSTITUTE; RANDY E. BARNETT, Professor; JUSTICE AND FREEDOM FUND; KURT ALLEN ROHLFS; MOUNTAIN STATES LEGAL FOUNDATION; LANDMARK LEGAL FOUNDATION; BOB MARSHALL, Virginia Delegate; GUN OWNERS OF AMERICA, INCORPORATED; GUN OWNERS FOUNDATION; AMERICAN LIFE LEAGUE, INCORPORATED; INSTITUTE ON THE CONSTITUTION; THE

LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION; PUBLIC ADVOCATE OF THE UNITED STATES; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; THE LIBERTY COMMITTEE; DOWNSIZE DC FOUNDATION; DOWNSIZEDC.ORG; POLICY ANALYSIS CENTER; FAMILY RESEARCH COUNCIL; WILLIAM BARR, Former United States Attorney General; EDWIN MEESE, III, Former United States Attorney General; DICK THORNBURGH, Former United States Attorney General; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; AMERICAN CIVIL RIGHTS UNION; TOUSSAINT T. TYSON; PHYSICIAN HOSPITALS OF AMERICA

Amici Supporting Appellee

01/20/2011	1	Case docketed. Originating case number: 3:10-cv-00188-HEH. Case manager: RWarren. Date notice of appeal filed: 01/18/2011 [11-1057] (RW)
01/20/2011	2	DOCKETING NOTICE issued Re: [1],case docketed Initial forms due within 14 days. Originating case number: 3:10-cv-00188-HEH. [11-1057] (RW)
01/20/2011	3	ORDER filed [998506596] consolidating case 11-1058 with 11-1057 Cross-appeal appellant:Kathleen Sebelius.

		Copies to all parties. [11-1057, 11-1058] (RW)
01/20/2011	4	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Alisa B. Klein for Kathleen Sebelius in 11-1057, 11-1058.[998507102] [11-1057, 11-1058] Alisa Klein
01/20/2011	5	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Anisha S. Dasgupta for Kathleen Sebelius in 11-1057, 11-1058.[998507118] [11-1057, 11-1058] Anisha Dasgupta
01/21/2011	6	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by E. Duncan Getchell, Jr. for Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. [998507688] [11-1057, 11-1058] Earle Getchell
01/21/2011	7	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Kenneth T. Cuccinelli, II for Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. [998507708] [11-1057, 11-1058] Earle Getchell
01/21/2011	8	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Charles E. James, Jr. for

		Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. [998507718] [11-1057, 11-1058] Earle Getchell
01/21/2011	9	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Wesley G. Russell, Jr. for Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. [998507749] [11-1057, 11-1058] Wesley Russell
01/21/2011	10	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Stephen R. McCullough for Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. [998507786] [11-1057, 11-1058] Stephen McCullough
01/21/2011	11	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, Appellant Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1058. Was any question on Disclosure Form answered yes? No [998508043] [11-1057, 11-1058] Earle Getchell

01/21/2011	12	BRIEFING ORDER filed. Name of Cross-Appeal Appellant for briefing purposes: Kathleen Seblius. Opening Brief and Appendix due 03/02/2011. Opening/Response Brief Due: 04/04/2011. Response/Reply Brief Due 05/09/2011. [11-1057, 11-1058] (RW)
01/26/2011	13	Joint MOTION filed by Appellant Kathleen Sebelius in 11-1057, Appellee Kathleen Sebelius in 11-1058 to expedite decision. Date and method of service: 01/26/2011 ecf [998511052] [11-1057, 11-1058] Alisa Klein
01/26/2011	14	ORDER filed [998511546] granting Motion to expedite decision [13] Copies to all parties. [11-1057, 11-1058] (RW)
01/26/2011	15	ORDER filed [998511550] updating/ resuming cross-appeal briefing order deadlines Opening brief and appendix due 02/28/2011. Response/ Opening Brief Due: 03/28/2011. Reply/Response Brief Due 04/11/2011 Copies to all parties. [11-1057, 11-1058] (RW)
01/26/2011	16	ORDER filed [998511562] granting Motion to schedule oral argument [998511063-2]

		in 10-2347, argument in seriatim with case number(s): 11-1057(L) Copies to all parties. [10-2347, 11-1057, 11-1058] (DL)
01/28/2011	17	DOCKETING STATEMENT filed by Appellant Kathleen Sebelius. [11-1057] Alisa Klein
02/14/2011	18	SUPREME COURT REMARK – petition for writ of certiorari filed. 02/08/2011. 10-1014. [11-1057] (DHB)
02/18/2011	19	CASE TENTATIVELY CALENDARED for oral argument during the 5/10/11-5/13/11 argument session. Notify Clerk's Office of any scheduling conflict by: 02/28/2011 [11-1057, 11-1058] (JLC)
02/23/2011	20	NOTICE FILED RE: CONFLICT WITH PROPOSED ARGUMENT DATES by Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057. Argument Session: 5/10/11-5/13/11 Days you are available: 5/10/11-5/13/11 Other scheduling information: Anytime is acceptable during this term. Appellee request that No. 10-1997 be argued on a different day during this

		term. [11-1057, 11-1058] Earle Getchell
02/28/2011	21	BRIEF filed by Appellant Kathleen Sebelius in 11-1057, Appellee Kathleen Sebelius in 11-1058 in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 02/28/2011. Is this a redacted brief?No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998534253] [11-1057, 11-1058] Anisha Dasgupta
02/28/2011	22	OPENING BRIEF (PAPER) file-stamped, on behalf of Kathleen Sebelius in 11-1057, 11-1058. Number of pages: [78]. Sufficient: YES. Entered on Docket Date: 03/01/2011. [998535311] [11-1057, 11-1058] (RW)
02/28/2011	23	APPENDIX (PAPER) file-stamped, on behalf of Kathleen Sebelius in 11-1057, 11-1058. Total number of volumes (including any sealed): 2. Total number of pages in all volumes: 1140. Total number of sealed volumes: 0. Entered

		on Docket Date: 03/01/2011. [998535317] [11-1057, 11-1058] (RW)
03/02/2011	24	AMICUS CURIAE/ INTERVENOR BRIEF filed by Rochelle Bobroff, Attorney for Amici Curiae, AAPD, et al. in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 02/03/2011. [998536278] [11-1057, 11-1058] Rochelle Bobroff
03/02/2011	25	ORDER filed [998536357] granting filing of amicus curiae brief (FRAP 29(e)) Party added: American Association of People with Disabilities, The Arc of the United States, Breast Cancer Action, Familes USA, Friends of Cancer Research, March of Dimes Foundation, Mental Health America, National Breast Cancer Coalition, National Organization for Rare Disorders, National Partnership for Women and Families, National Senior Citizens Law Center, National Women's Health Network and The Ovarian Cancer National Alliance in 11-1057 and American Association of People with

		Disabilities, The Arc of the United States, Breast Cancer Action, Familes USA, Friends of Cancer Research, March of Dimes Foundation, Mental Health America, National Breast Cancer Coalition, National Organization for Rare Disorders, National Partnership for Women and Families, National Senior Citizens Law Center, National Women's Health Network and The Ovarian Cancer National Alliance in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/02/2011	26	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Amici Supporting Appellant American Association of People with Disabilities, Breast Cancer Action, Familes USA, Friends of Cancer Research, March of Dimes Foundation, Mental Health America, National Breast Cancer Coalition, National Organization for Rare Disorders, National Partnership for Women and Families, National Senior Citizens Law Center, National Women's Health Network, The Arc of the United States and

		The Ovarian Cancer National Alliance in 11-1057, 11-1058. Was any question on Disclosure Form answered yes? No [998536445] [11-1057, 11-1058] (RW)
03/02/2011	79	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Association of People with Disabilities, Breast Cancer Action, Familes USA, Friends of Cancer Research, March of Dimes Foundation, Mental Health America, National Breast Cancer Coalition, National Organization for Rare Disorders, National Partnership for Women and Families, National Senior Citizens Law Center, National Women's Health Network, The Arc of the United States and The Ovarian Cancer National Alliance in 11-1057, 11-1058. Number of pages: [35]. Entered on Docket Date: 03/09/2011. [998541041] [11-1057, 11-1058] (RW)
03/04/2011	27	AMICUS CURIAE/ INTERVENOR BRIEF filed by AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL STUDENT ASSOCIATION;

		CENTER FOR AMERICAN PROGRESS D/B/A DOCTORS FOR AMERICA; NATIONAL HISPANIC MEDICAL ASSOCIATION; AND NATIONAL PHYSICIANS ALLIANCE IN SUPPORT OF APPELLANTS in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/04/2011. [998537774] [11-1057, 11-1058] Ian Millhiser
03/04/2011	28	– [Edited 03/11/2011 by JHM]. **Reason for Edit: Document Struck.** [11-1057, 11-1058] Paul Hughes
03/04/2011	29	ORDER filed [998537814] granting filing of amicus curiae brief (FRAP 29(e)) Party added: American Nurses Association, American Academy of Pediatrics, Incorporated, American Medical Student Association, Center for American Progress, National Hispanic Medical Association and National Physicians Alliance in 11-1057 and American Nurses Association, American Academy of Pediatrics, American Medical Student Association, Center for American Progress,

		National Hispanic Medical Association and National Physicians Alliance in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/04/2011	30	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Amici Supporting Appellant American Academy of Pediatrics, Incorporated, American Medical Student Association, American Nurses Association, Center for American Progress, National Hispanic Medical Association and National Physicians Alliance in 11-1057. Was any question on Disclosure Form answered yes? No [998537822] [11-1057, 11-1058] (RW)
03/04/2011	31	ORDER filed [998537829] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Constitutional Law Professors in 11-1057 and Constitutional Law Professors in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/04/2011	32	DOCKETING FORMS FOLLOW-UP NOTICE ISSUED to Amicus Supporting Appellant Constitutional Law Professors in 11-1057 re: filing of disclosure form (Loc.R. 26.1) Disclosure

		statement due from Constitutional Law Professors on 03/14/2011 [11-1057, 11-1058] (RW)
03/04/2011	71	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Academy of Pediatrics, Incorporated, American Medical Student Association, American Nurses Association, Center for American Progress, National Hispanic Medical Association and National Physicians Alliance in 11-1057, 11-1058. Number of pages: [35]. Entered on Docket Date: 03/09/2011. [998540797] [11-1057, 11-1058] (RW)
03/04/2011	73	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Constitutional Law Professors in 11-1057, 11-1058. Number of pages: [34]. Entered on Docket Date: 03/09/2011.[998540807] [11-1057, 11-1058] (RW)
03/07/2011	33	AMICUS CURIAE/ INTERVENOR BRIEF filed by YOUNG INVINCIBLES in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998538774] [11-1057, 11-1058] Brett Walter

03/07/2011	34	NOTICE ISSUED to Young Invincibles in 11-1057 requesting motion/amended motion/petition. Motion/amended motion due 03/17/2011 [11-1057, 11-1058] (RW)
03/07/2011	35	AMICUS CURIAE/ INTERVENOR BRIEF filed by Kevin C. Walsh in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998538978] [11-1057, 11-1058] Kevin Walsh
03/07/2011	36	ORDER filed [998538986] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Kevin C. Walsh in 11-1057 and Kevin C. Walsh in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/07/2011	37	AMICUS CURIAE/ INTERVENOR BRIEF filed by American Cancer Society, American Cancer Society Cancer Action Network, American Diabetes Association, and American Heart Association – Amici Supporting Appellant in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed,

		Dispatched, or Delivered to Court: 03/07/2011. [998539062] [11-1057, 11-1058] Molly Suda
03/07/2011	38	ORDER filed [998539083] granting filing of amicus curiae brief (FRAP 29(e)) Party added: American Cancer Society, American Cancer Society Cancer Action Network, American Diabetes and American Heart Association in 11-1057 and American Cancer Society, American Cancer Society Cancer Action Network, American Diabetes and American Heart Association in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/07/2011	39	AMICUS CURIAE/ INTERVENOR BRIEF filed by Dr. David Cutler, Otto Eckstein Professor of Applied Economics, Harvard University; Dr. Henry Aaron, Senior Fellow, Economic Studies, Bruce and Virginia MacLaury Chair, The Brookings Institution; et al. in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539189] [11-1057, 11-1058] Richard Rosen

03/07/2011	40	AMICUS CURIAE/ INTERVENOR BRIEF filed by Professors of Federal jurisdiction in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539200] [11-1057] Frank Bland
03/07/2011	41	[Edited 03/08/2011 by RW]. **Reason for Edit: Incorrect Entry Struck.** [11-1057, 11-1058] Thomas Domonoske
03/07/2011	42	AMICUS CURIAE/ INTERVENOR BRIEF filed by AARP Amicus Curiae in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539231] [11-1057, 11-1058] Stuart Cohen
03/07/2011	43	AMICUS CURIAE/ INTERVENOR BRIEF filed by Commonwealth of Massachusetts in support of Appellant in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or

		Delivered to Court: 03/07/2011. [998539273] [11-1057, 11-1058] Frederick Augenstern
03/07/2011	44	AMICUS CURIAE/ INTERVENOR BRIEF filed by National Women's Law Center et al in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539302] [11-1057, 11-1058] Melissa Hart
03/07/2011	45	AMICUS CURIAE/ INTERVENOR BRIEF filed by VIRGINIA ORGANIZING in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539305] [11-1057, 11-1058] Thomas Domonoske
03/07/2011	46	AMICUS CURIAE/ INTERVENOR BRIEF filed American Hospital Association Et Al. by in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539321]

		[11-1057, 11-1058] Catherine Stetson
03/07/2011	47	AMICUS CURIAE/ INTERVENOR BRIEF filed by Constitutional Accountability Center in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539347] [11-1057, 11-1058] Elizabeth Wydra
03/07/2011	48	AMICUS CURIAE/ INTERVENOR BRIEF filed by Law Professors Barry Friedman, Matthew Adler, et al. in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539367] [11-1057, 11-1058] Jeffrey Lamken
03/07/2011	49	AMICUS CURIAE/ INTERVENOR BRIEF filed by Amicus Curiae Brief of the States of California, Connecticut, Delaware, Hawaii, Iowa, Maryland, New York, Oregon and Vermont in Support of Appellant in electronic and paper format. Type of Brief:

		Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539388] [11-1057, 11-1058] Daniel Powell
03/07/2011	50	AMICUS CURIAE/ INTERVENOR BRIEF filed by Kristin Houser for Governor of Washington, Christine O. Gregoire in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539394] [11-1057, 11-1058] Kristin Houser
03/07/2011	51	AMICUS CURIAE/ INTERVENOR BRIEF filed by Service Employees International Union and Change To Win, Amici Curiae Supporting Appellant-Defendant in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/08/2011. [998539396] [11-1057, 11-1058] Jonathan Weissglass
03/07/2011	52	AMICUS CURIAE/ INTERVENOR BRIEF filed by America's Health Insurance

		Plans in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/07/2011. [998539401] [11-1057, 11-1058] Randolph Moss
03/07/2011	72	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of AARP in 11-1057, 11-1058. Number of pages: [42]. Entered on Docket Date: 03/09/2011.[998540801] [11-1057, 11-1058] (RW)
03/07/2011	74	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Mr. Kevin C. Walsh in 11-1057, 11-1058. Number of pages: [33]. Entered on Docket Date: 03/09/2011. [998540813] [11-1057, 11-1058] (RW)
03/07/2011	75	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Janet Cooper Alexander, Erwin Chemerinsky, Amanda Frost, Andy Hessick, A.E. Dick Howard, Mr. John Calvin Jeffries, Jr., Johanna Kalb, Lumen N. Mulligan, Mr. Edward A. Purcell, Jr., Caprice L. Roberts, Stephen I. Vladeck and Howard M. Wasserman in 11-1057, 11-1058. Number of pages: [45].

		Entered on Docket Date: 03/09/2011.[998540820] [11-1057, 11-1058] (RW)
03/07/2011	76	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Hospital Association, Association of American Medical Colleges, Catholic Health Association of the United States, Federation of American Hospitals, National Association of Children's Hospitals and National Association of Public Hospitals and Health Systems in 11-1057, 11-1058. Number of pages: [35]. Entered on Docket Date: 03/09/2011.[998540940] [11-1057, 11-1058] (RW)
03/07/2011	77	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Matthew H. Adler, Rebecca L. Brown, Jesse Herbert Choper, Michael C. Dorf, Daniel Farber, Barry Friedman, William P. Marshall, Dr. Len M. Nichols, William J. Novak, Richard H. Pildes, Richard A. Primus, Judith Resnik, Theodore W. Rugar, Robert A. Schapiro, David L. Shapiro, Suzanna Sherry, Neil S. Siegel, Peter J. Smith and Adam Winkler in 11-1057, 11-1058. Number of

		pages: [45]. Entered on Docket Date: 03/09/2011.[998541009] [11-1057, 11-1058] (RW)
03/07/2011	78	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of State of California, State of Connecticut, State of Delaware, State of Hawaii, State of Iowa, State of Maryland, State of New York, State of Oregon and State of Vermont in 11-1057, 11-1058. Number of pages: [47]. Entered on Docket Date: 03/09/2011.[998541030] [11-1057, 11-1058] (RW)
03/07/2011	80	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Dr. Henry Aaron, Dr. George Akerlof, Dr. Stuart Altman, Dr. Kenneth Arrow, Dr. Susan Athey, Dr. Linda J. Blumberg, Dr. Leonard E. Burman, Dr. Amitabh Chandra, Dr. Michael Chernew, Dr. Philip Cook, Dr. David Cutler, Dr. Claudia Goldin, Dr. Tal Gross, Dr. Jonathan Gruber, Dr. Jack Hadley, Dr. Vivian Ho, Dr. John F. Holahan, Dr. Jill Horwitz, Dr. Lawrence Katz, Dr. Frank Levy, Dr. Peter Lindert, Dr. Eric Maskin, Dr. Alan C. Monheit, Dr. Marilyn Moon, Dr. Richard

		J. Murnane, Dr. Len M. Nichols, Dr. Harold Pollack, Dr. Matthew Rabin, Dr. James B. Rebitzer, Dr. Michael Reich, Dr. Thomas Rice, Dr. Meredith Rosenthal, Dr. Christopher Ruhm, Dr. Jonathan Skinner, Dr. Katherine Swartz, Dr. Paul N. Van de Water, Dr. Kenneth Warner and Dr. Stephen Zuckerman in 11-1057, 11-1058. Number of pages: [31]. Entered on Docket Date: 03/09/2011.[998541052] [11-1057, 11-1058] (RW)
03/07/2011	81	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Constitutional Accountability Center in 11-1057, 11-1058. Number of pages: [44]. Entered on Docket Date: 03/09/2011.[998541057] [11-1057, 11-1058] (RW)
03/07/2011	82	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of America's Health Insurance Plans in 11-1057, 11-1058. Number of pages: [38]. Entered on Docket Date: 03/09/2011.[998541071] [11-1057, 11-1058] (RW)
03/07/2011	83	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Change to Win and Service Employees International

		Union in 11-1057, 11-1058. Number of pages: [46]. Entered on Docket Date: 03/09/2011. [998541084] [11-1057, 11-1058] (RW)
03/07/2011	84	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Christine Gregoire in 11-1057, 11-1058. Number of pages: [43]. Entered on Docket Date: 03/10/2011.[998541800] [11-1057, 11-1058] (RW)
03/07/2011	85	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Association of University Women, American College of Nurse-Midwives, American Federation of State, County, and Municipal Employees, American Medical Women's Association, Asian & Pacific Islander American Health Forum, Childbirth Connection, Ibis Reproductive Health, Institute of Science and Human Values, Maryland Women's Coalition for Health Care Reform, Mental Health America, National Asian Pacific American Women's Forum, NASW, National Coalition for LGBT Health, National Council of Jewish Women, National Council of Women's

		Organizations, National Latina Institute for Reproductive Health, Older Women's League, Physicians for Reproductive Choice and Health, Raising Women's Voices, Sargent Shriver National Center on Poverty Law, Southwest Women's Law Center, The Asian American Justice Center, The Asian Pacific American Legal Center, The Black Womens Health Imperative, The Coalition of Labor Union Women, The Connecticut Women's Education and Legal Fund, The Feminist Majority Foundation, The National Research Center for Women & Families, The Womens Law Center of Maryland, Incorporated, Wider Opportunities for Women and Womens Law Project in 11-1057, 11-1058. Number of pages: [63]. Entered on Docket Date: 03/10/2011.[998541846] [11-1057, 11-1058] (RW)
03/07/2011	89	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Cancer Society, American Cancer Society Cancer Action Network, American Diabetes and American Heart Association in 11-1057.

		Number of pages: [33]. Entered on Docket Date: 03/11/2011. [998542999] [11-1057, 11-1058] (JHM)
03/07/2011	90	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Commonwealth of Massachusetts in 11-1057. Number of pages: [22]. Entered on Docket Date: 03/11/2011. [998543016] [11-1057, 11-1058] (JHM)
03/07/2011	99	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Young Invincibles in 11-1057, 11-1058. Number of pages: [30]. Entered on Docket Date: 03/17/2011.[998547167] [11-1057, 11-1058] (RW)
03/08/2011	53	ORDER filed [998539574] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Dr. David Cutler, Dr. Henry Aaron, Dr. George Akerlof, Dr. Stuart Altman, Dr. Kenneth Arrow, Dr. Susan Athey, Dr. Linda J. Blumberg, Dr. Leonard E. Burman, Dr. Amitabh Chandra, Dr. Michael Chernew, Dr. Philip Cook, Dr. Michael T. French, Dr. Claudia Goldin, Dr. Tal Gross, Dr. Jonathan Gruber, Dr. Jack Hadley, Dr. Vivian Ho, Dr. John

F. Holahan, Dr. Jill Horwitz, Dr. Lawrence Katz, Dr. Genevieve Kenney, Dr. Frank Levy, Dr. Peter Lindert, Dr. Eric Maskin, Dr. Alan C. Monheit, Dr. Marilyn Moon, Dr. Richard J. Murnane, Dr. Joseph P. Newhouse, Dr. Len M. Nichols, Dr. Harold Pollack, Dr. Matthew Rabin, Dr. James B. Rebitzer, Dr. Michael Reich, Dr. Thomas Rice, Dr. Meredith Rosenthal, Dr. Christopher Ruhm, Dr. Jonathan Skinner, Dr. Katherine Swartz, Dr. Kenneth Warner, Dr. Paul N. Van de Water and Dr. Stephen Zuckerman in 11-1057 and Dr. David Cutler, Dr. Henry Aaron, Dr. George Akerlof, Dr. Stuart Altman, Dr. Kenneth Arrow, Dr. Susan Athey, Dr. Linda J. Blumberg, Dr. Leonard E. Burman, Dr. Amitabh Chandra, Dr. Michael Chernew, Dr. Philip Cook, Dr. Michael T. French, Dr. Claudia Goldin, Dr. Tal Gross, Dr. Jonathan Gruber, Dr. Jack Hadley, Dr. Vivian Ho, Dr. John F. Holahan, Dr. Jill Horwitz, Dr. Lawrence Katz, Dr. Genevieve Kenney, Dr. Frank Levy, Dr. Peter Lindert, Dr. Eric Maskin, Dr. Alan C. Monheit, Dr. Marilyn

		Moon, Dr. Richard J. Murnane, Dr. Joseph P. Newhouse, Dr. Len M. Nichols, Dr. Harold Pollack, Dr. Matthew Rabin, Dr. James B. Rebitzer, Dr. Michael Reich, Dr. Thomas Rice, Dr. Meredith Rosenthal, Dr. Christopher Ruhm, Dr. Jonathan Skinner, Dr. Katherine Swartz, Dr. Kenneth Warner, Dr. Paul N. Van de Water and Dr. Stephen Zuckerman in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	54	ORDER filed [998539728] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Janet Cooper Alexander, Erwin Chemerinsky, Amanda Frost, Andy Hessick, A.E. Dick Howard, John Calvin Jeffries Jr., Johanna Kalb, Lumen N. Mulligan, Edward A. Purcell Jr., Caprice L. Roberts, Stephen I. Vladeck and Howard M. Wasserman in 11-1057 and Janet Cooper Alexander, Erwin Chemerinsky, Amanda Frost, Andy Hessick, A.E. Dick Howard, John Calvin Jeffries Jr., Johanna Kalb, Lumen N. Mulligan, Edward A. Purcell Jr., Caprice L. Roberts, Stephen I. Vladeck and Howard M. Wasserman in 11-1058 Copies

		to all parties. [11-1057, 11-1058] (RW)
03/08/2011	55	ORDER filed [998539747] granting filing of amicus curiae brief (FRAP 29(e)) Party added: AARP in 11-1057 and AARP in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	56	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Amicus Supporting Appellant AARP in 11-1057, 11-1058. Was any question on Disclosure Form answered yes? No [998539750] [11-1057, 11-1058] (RW)
03/08/2011	57	ORDER filed [998539758] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Commonwealth of Massachusetts in 11-1057 and Commonwealth of Massachusetts in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	58	ORDER filed [998539786] granting filing of amicus curiae brief (FRAP 29(e)) Party added: NWLC, American Association of University Women, American College of Nurse-Midwives, American Federation of State, County, and Municipal Employees, American Medical

Women's Association, The Asian American Justice Center, Asian & Pacific Islander American Health Forum, The Asian Pacific American Legal Center, The Black Womens Health Imperative, The Coalition of Labor Union Women, Childbirth Connection, The Connecticut Women's Education and Legal Fund, The Feminist Majority Foundation, Ibis Reproductive Health, Institute of Science and Human Values, Maryland Women's Coalition for Health Care Reform, Mental Health America, National Asian Pacific American Women's Forum, NASW, National Coalition for LGBT Health, National Council of Jewish Women, National Council of Women's Organizations, National Latina Institute for Reproductive Health, The National Research Center for Women & Families, Older Women's League, Physicians for Reproductive Choice and Health, Raising Women's Voices, Sargent Shriver National Center on Poverty Law, Southwest Women's Law Center, Wider Opportunities for Women, The Womens Law Center of Maryland, Incorporated

and Womens Law Project in 11-1057 and NWLC, American Association of University Women, American College of Nurse-Midwives, American Federation of State, County, and Municipal Employees, American Medical Women's Association, The Asian American Justice Center, Asian & Pacific Islander American Health Forum, The Asian Pacific American Legal Center, The Black Womens Health Imperative, The Coalition of Labor Union Women, Childbirth Connection, The Connecticut Women's Education and Legal Fund, The Feminist Majority Foundation, Ibis Reproductive Health, Institute of Science and Human Values, Maryland Women's Coalition for Health Care Reform, Mental Health America, National Asian Pacific American Women's Forum, NASW, National Coalition for LGBT Health, National Council of Jewish Women, National Council of Women's Organizations, National Latina Institute for Reproductive Health, The National Research Center for Women & Families, Older

		Women's League, Physicians for Reproductive Choice and Health, Raising Women's Voices, Sargent Shriver National Center on Poverty Law, Southwest Women's Law Center, Wider Opportunities for Women, The Womens Law Center of Maryland, Incorporated and Womens Law Project in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	59	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Amici Supporting Appellant American Association of University Women, American College of Nurse-Midwives, American Federation of State, County, and Municipal Employees, American Medical Women's Association, Asian & Pacific Islander American Health Forum, Childbirth Connection, Ibis Reproductive Health, Maryland Women's Coalition for Health Care Reform, Mental Health America, Mental Health America, National Asian Pacific American Women's Forum, NASW, National Coalition for LGBT Health, National Council of Jewish Women, National Council of Women's

Organizations, National Latina Institute for Reproductive Health, Older Women's League, Physicians for Reproductive Choice and Health, Raising Women's Voices, Sargent Shriver National Center on Poverty Law, Southwest Women's Law Center, The Asian American Justice Center, The Asian Pacific American Legal Center, The Black Womens Health Imperative, The Coalition of Labor Union Women, The Connecticut Women's Education and Legal Fund, The Feminist Majority Foundation, The National Research Center for Women & Families, NWLC, The Womens Law Center of Maryland, Incorporated, Wider Opportunities for Women and Womens Law Project in 11-1057, Amici Supporting Appellant American Association of University Women, American College of Nurse-Midwives, American Federation of State, County, and Municipal Employees, American Medical Student Association, Asian & Pacific Islander American Health Forum, Childbirth Connection, Ibis Reproductive Health, Maryland Women's Coalition

for Health Care Reform, Mental Health America, Mental Health America, National Asian Pacific American Women's Forum, NASW, National Coalition for LGBT Health, National Council of Jewish Women, National Council of Women's Organizations, National Latina Institute for Reproductive Health, Older Women's League, Physicians for Reproductive Choice and Health, Raising Women's Voices, Sargent Shriver National Center on Poverty Law, Southwest Women's Law Center, The Asian American Justice Center, The Asian Pacific American Legal Center, The Black Womens Health Imperative, The Coalition of Labor Union Women, The Connecticut Women's Education and Legal Fund, The Feminist Majority Foundation, The National Research Center for Women & Families, NWLC, The Womens Law Center of Maryland, Incorporated, Wider Opportunities for Women and Womens Law Project in 11-1058. Was any question on Disclosure Form answered yes? No [998539822] [11-1057, 11-1058] (RW)

03/08/2011	60	DOCKETING FORMS FOLLOW-UP NOTICE ISSUED to Amicus Supporting Appellant Virginia Organizing in 11-1057, 11-1058 re: filing of appearance form (Loc.R. 46(g)). Appearance form due on 03/18/2011 from Thomas Dean Domonoske [11-1057, 11-1058] (RW)
03/08/2011	61	ORDER filed [998539861] granting filing of amicus curiae brief (FRAP 29(e)) Party added: American Hospital Association, Association of American Medical Colleges, Catholic Health Association of the United States, Federation of American Hospitals, National Association of Children's Hospitals and National Association of Public Hospitals and Health Systems in 11-1057 and American Hospital Association, Association of American Medical Colleges, Catholic Health Association of the United States, Federation of American Hospitals, National Association of Children's Hospitals and National Association of Public Hospitals and Health Systems in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)

03/08/2011	62	ORDER filed [998539877] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Constitutional Accountability Center in 11-1057 and Constitutional Accountability Center in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	63	ORDER filed [998539915] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Matthew H. Adler, Rebecca L. Brown, Jesse Herbert Choper, Michael C. Dorf, Daniel Farber, Barry Friedman, William P. Marshall, Gene Nichol, William J. Novak, Richard H. Pildes, Richard A. Primus, Judith Resnik, Theodore W. Rugar, Robert A. Schapiro, David L. Shapiro, Suzanna Sherry, Neil S. Siegel, Peter J. Smith and Adam Winkler in 11-1057 and Matthew H. Adler, Rebecca L. Brown, Jesse Herbert Choper, Michael C. Dorf, Daniel Farber, Barry Friedman, William P. Marshall, Gene Nichol, William J. Novak, Richard H. Pildes, Richard A. Primus, Judith Resnik, Theodore W. Rugar, Robert A. Schapiro, David L. Shapiro, Suzanna Sherry, Neil S. Siegel, Peter J. Smith and Adam Winkler in 11-1058

		Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	64	ORDER filed [998539985] granting filing of amicus curiae brief (FRAP 29(e)) Party added: State of California, State of Connecticut, State of Delaware, State of Hawaii, State of Iowa, State of Maryland, State of New York, State of Oregon and State of Vermont in 11-1057 and State of California, State of Connecticut, State of Delaware, State of Hawaii, State of Iowa, State of Maryland, State of New York, State of Oregon and State of Vermont in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	65	ORDER filed [998539996] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Christine Gregoire in 11-1057 and Christine Gregoire in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	67	ORDER filed [998540014] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Service Employees International Union and Change to Win in 11-1057 and Service Employees International Union and Change

		to Win in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	68	ORDER filed [998540032] granting filing of amicus curiae brief (FRAP 29(e)) Party added: America's Health Insurance Plans in 11-1057 and America's Health Insurance Plans in 11-1058 Copies to all parties. [11-1057, 11-1058] (RW)
03/08/2011	69	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Amicus Curiae America's Health Insurance Plans in 11-1057, 11-1058. Was any question on Disclosure Form answered yes? Yes [998540033] [11-1057, 11-1058] (RW)
03/08/2011	70	NOTICE ISSUED RE: email address confirmation. [11-1057, 11-1058] (JJQ)
03/11/2011	86	Corrected AMICUS CURIAE/ INTERVENOR BRIEF by Amicus Supporting Appellant Constitutional Law Professors in 11-1057 in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/11/2011. [998542628] [11-1057, 11-1058] Paul Hughes

03/11/2011	87	CASE CALENDARED for oral argument. Date: 05/10/2011. Registration Time: 8:45-9:00. Daily Arguments Begin: 9:30. [11-1057, 11-1058] (JLC)
03/11/2011	88	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Neal Kumar Katyal for Kathleen Sebelius in 11-1058.[998542912] [11-1057, 11-1058] Alisa Klein
03/11/2011	91	Docket correction requested from Neal Kumar Katyal for Kathleen Sebelius in 11-1058, 11-1057. Re: [88],appearance of counsel. Counsel needs to become member of bar. Access to appearance of counsel has been restricted to case participants. [11-1058, 11-1057] (DHB)
03/11/2011	92	ORAL ARGUMENT ACKNOWLEDGMENT by Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, Appellant Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1058. Counsel arguing: E. Duncan Getchell, Jr. [998543365] [11-1057, 11-1058] Earle Getchell

03/11/2011	93	CORRECTED AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Constitutional Law Professors in 11-1057, 11-1058. Number of pages: [44]. Entered on Docket Date: 03/14/2011. [998543904] [11-1057, 11-1058] (RW)
03/16/2011	94	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Neal Kumar Katyal for Kathleen Sebelius in 11-1058.[998546125] [11-1057, 11-1058] Alisa Klein
03/16/2011	95	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Neal Kumar Katyal for Kathleen Sebelius in 11-1057.[998546128] [11-1057, 11-1058] Alisa Klein
03/16/2011	96	ORAL ARGUMENT ACKNOWLEDGMENT by Appellant Kathleen Sebelius in 11-1057, Appellee Kathleen Sebelius in 11-1058. Counsel arguing: Neal Kumar Katyal Opening argument time: 15 Rebuttal argument time: 5 [998546131] [11-1057, 11-1058] Alisa Klein
03/16/2011	97	MOTION by Amicus Supporting Appellant Young Invincibles in 11-1057 leave to file Amicus Curiae Brief amicus curiae

		Brief [33]. Date and method of service: 03/16/2011 ecf [998546405] [11-1058, 11-1057] Brett Walter
03/16/2011	98	ORDER filed [998546434] granting Motion for leave to file [97], granting filing of amicus curiae brief (FRAP 29(e)) Copies to all parties. [11-1057, 11-1058] (RW)
03/18/2011	100	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Thomas D. Domonoske for Virginia Organizing in 11-1058. [998548849] [11-1057, 11-1058] Thomas Domonoske
03/18/2011	101	ORDER filed [998548850] granting filing of amicus curiae brief (FRAP 29(e)) Copies to all parties . . . [11-1057, 11-1058] (RW)
03/28/2011	102	BRIEF by Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, Appellant Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1058 in electronic and paper format. Type of Brief: Opening&Response. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or

		Delivered to Court: 03/28/2011. Is this a redacted brief?No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998554443] [11-1057, 11-1058] Earle Getchell
03/28/2011	103	OPENING/RESPONSE BRIEF (PAPER) file-stamped, on behalf of Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. Number of pages: [83]. Entered on Docket Date : 03/28/2011. [998554605] [11-1057, 11-1058] (RW)
03/28/2011	104	AMICUS CURIAE/ INTERVENOR BRIEF by American Center for Law and Justice et al., amici supporting Appellee-Plaintiff in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/29/2011. [998554670] [11-1057, 11-1058] Colby May
03/28/2011	105	ORDER filed [998554802] granting filing of amicus curiae brief (FRAP 29(e)) Party added: The American Center for Law and Justice, Paul Broun, Robert Aderholt, Todd Akin, Michele Bachmann, Spencer Bachus,

Roscoe Bartlett, Rob Bishop, John Boehner, Larry Bucshon, Dan Burton, Francisco Quico Canseco, Eric Cantor, Steve Chabot, Mike Conaway, Blake Farenthold, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Ralph Hall, Tim Huelskamp, Bill Johnson, Walter Jones, Mike Kelly, Steve King, Jack Kingston, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Donald Manzullo, Thaddeus McCotter, Cathy McMorris Rodgers, Gary Miller, Jeff Miller, Randy Neugebauer, Steve Pearce, Mike Pence, Joe Pitts, Mike Pompeo, Scott Rigell, Phil Roe, Ed Royce, Lamar Smith, Tim Walberg and The Constitutional Committee to Challenge the President & Congress on Health Care in 11-1057 and The American Center for Law and Justice, Paul Broun, Robert Aderholt, Todd Akin, Michele Bachmann, Spencer Bachus, Roscoe Bartlett, Rob Bishop, John Boehner, Larry Bucshon, Dan Burton, Francisco Quico Canseco, Eric Cantor, Steve Chabot, Mike Conaway,

		Blake Farenthold, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Ralph Hall, Tim Huelskamp, Bill Johnson, Walter Jones, Mike Kelly, Steve King, Jack Kingston, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Donald Manzullo, Thaddeus McCotter, Cathy McMorris Rodgers, Gary Miller, Jeff Miller, Randy Neugebauer, Steve Pearce, Mike Pence, Joe Pitts, Mike Pompeo, Scott Rigell, Phil Roe, Ed Royce, Lamar Smith, Tim Walberg and The Constitutional Committee to Challenge the President & Congress on Health Care in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
03/28/2011	106	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Robert Aderholt, Todd Akin, Michele Bachmann, Spencer Bachus, Roscoe Bartlett, Rob Bishop, John Boehner, Larry Bucshon, Dan Burton, Francisco Quico Canseco, Eric Cantor, Steve Chabot, Mike Conaway, Blake Farenthold, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks,

		Scott Garrett, Louie Gohmert, Ralph Hall, Tim Huelskamp, Bill Johnson, Walter Jones, Mike Kelly, Steve King, Jack Kingston, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Donald Manzullo, Thaddeus McCotter, Gary Miller, Jeff Miller, Randy Neugebauer, Steve Pearce, Mike Pence, Joe Pitts, Mike Pompeo, Scott Rigell, Cathy McMorris Rodgers, Phil Roe, Ed Royce, Lamar Smith, The American Center for Law and Justice, The Constitutional Committee to Challenge the President & Congress on Health Care and Tim Walberg in 11-1057, 11-1058. Number of pages: [37]. Entered on Docket Date: 03/29/2011.[998555174] [11-1057, 11-1058] (RW)
03/31/2011	107	AMICUS CURIAE/ INTERVENOR BRIEF by Matthew Sissel, Pacific Legal Foundation, and Americans for Free Choice in Medicine – all Amicus Curiae supporting Plaintiff-Appellee/Cross-Appellant in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/31/2011.

		[998557791] [11-1057, 11-1058] Timothy Sandefur
03/31/2011	108	ORDER filed [998557809] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Matthew Sissel, Pacific Legal Foundation and Americans for Free Choice in Medicine in 11-1057 and Matthew Sissel, Pacific Legal Foundation and Americans for Free Choice in Medicine in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
03/31/2011	109	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Americans for Free Choice in Medicine, Pacific Legal Foundation and Matthew Sissel in 11-1057, 11-1058. Number of pages: [42]. Entered on Docket Date: 04/01/2011. [998558476] [11-1057, 11-1058] (RW)
04/04/2011	110	AMICUS CURIAE/ INTERVENOR BRIEF by Association of American Physicians and Surgeons et al. in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011.

		[998559479] [11-1057, 11-1058] Andrew Schlafly
04/04/2011	111	ORDER filed [998559522] granting filing of amicus curiae brief (FRAP 29(e)) Party added: American Physicians and Surgeons, Incorporated, Janis Chester, Mark J. Hauser, Guenter L. Spanknebel and Graham L. Spruiell in 11-1057 and American Physicians and Surgeons, Incorporated, Janis Chester, Mark J. Hauser, Guenter L. Spanknebel and Graham L. Spruiell in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/04/2011	112	AMICUS CURIAE/ INTERVENOR BRIEF by Washington Legal Foundation and Constitutional Law Scholars in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998559592] [11-1057, 11-1058] Cory Andrews
04/04/2011	113	ORDER filed [998559641] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Washington Legal Foundation and Constitutional Law Scholars

		in 11-1057 and Washington Legal Foundation and Constitutional Law Scholars in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/04/2011	114	AMICUS CURIAE/ INTERVENOR BRIEF by Cato Institute, Competitive Enterprise Institute and Prof. Randy E. Barnett in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998559694] [11-1057, 11-1058] Patrick McSweeney
04/04/2011	115	ORDER filed [998559755] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Cato Institute, Competitive Enterprise Institute and Randy E. Barnett in 11-1057 and Cato Institute, Competitive Enterprise Institute and Randy E. Barnett in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/04/2011	116	AMICUS CURIAE/ INTERVENOR BRIEF by Justice and Freedom Fund, Supporting Appellee/ Cross-Appellant and Affirmance in electronic and paper format. Type of Brief: Amicus Curiae.

		Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998559836] [11-1057, 11-1058] Deborah Dewart
04/04/2011	117	MOTION by Kurt A Rohlfs leave to file documents electronically. Date and method of service: 04/04/2011 ecf [998559852] [11-1057, 11-1058] (JJQ)
04/04/2011	118	ORDER filed [998559855] granting Motion for leave to file documents electronically. [117] in 11-1057 Copies to all parties . . . [11-1057, 11-1058] (JJQ)
04/04/2011	119	ORDER filed [998559866] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Justice and Freedom Fund in 11-1057 and Justice and Freedom Fund in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/04/2011	120	AMICUS CURIAE/ INTERVENOR BRIEF by Rohlfs, Kurt A. in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998559898] [11-1057, 11-1058] Kurt Rohlfs

04/04/2011	121	ORDER filed [998559925] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Kurt Allen Rohlfs in 11-1057 and Kurt Allen Rohlfs in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/04/2011	122	MOTION by American Civil Rights Union; Amicus Supporting Plaintiff-Appellee Commonwealth of Virginia to file amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal within time allowed by FRAP 29(e). added to case.. Date and method of service: 04/04/2011 ecf [998560000] [11-1057, 11-1058] David Lehn
04/04/2011	123	AMICUS CURIAE/ INTERVENOR BRIEF by Mountain States Legal Foundation, amicus curiae in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/05/2011. [998560043] [11-1057, 11-1058] Joel Spector
04/04/2011	124	AMICUS CURIAE/ INTERVENOR BRIEF by Landmark Legal Foundation Supporting Appellee

		Commonwealth of Virginia in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998560087] [11-1058, 11-1057] Richard Hutchison
04/04/2011	125	AMICUS CURIAE/ INTERVENOR BRIEF by Delegate Bob Marshall, Gun Owners of America, Inc., Gun Owners Foundation, American Life League, Inc., Institute on the Constitution, the Lincoln Institute for Research and Education, Public Advocate of the United States, et al. in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998560213] [11-1057, 11-1058] William Olson
04/04/2011	126	AMICUS CURIAE/ INTERVENOR BRIEF by Family Research Council in Support of Appellee/ Cross-Appellant and Affirmance in Part and Reversal in Part in electronic and paper format. Type of Brief: Amicus Curiae.

		Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998560218] [11-1057, 11-1058] Kenneth Klukowski
04/04/2011	127	AMICUS CURIAE/ INTERVENOR BRIEF by Former Attorneys General William Barr, Edwin Meese, III, and Dick Thornburgh in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/05/2011. [998560229] [11-1057, 11-1058] Michael Carvin
04/04/2011	128	AMICUS CURIAE/ INTERVENOR BRIEF by Chamber of Commerce of the United States of America as Amicus Curiae in Support of Neither Party in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998560232] [11-1058, 11-1057] Brian Boyle

04/04/2011	129	MOTION by Physician Hospitals of America leave to file Amicus Curiae Brief, to file amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal within time allowed by FRAP 29(e). added to case.. Date and method of service: 04/04/2011 ecf [998560242] [11-1057, 11-1058] Lisa Sharp
04/04/2011	130	AMICUS CURIAE/ INTERVENOR BRIEF by Center for Constitutional Jurisprudence, Amicus Curiae Supporting Appellee in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998560243] [11-1057, 11-1058] John Eastman
04/04/2011	140	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Randy E. Barnett, Cato Institute and Competitive Enterprise Institute in 11-1057, 11-1058. Number of pages: [36]. Entered on Docket Date: 04/05/2011.[998560657] [11-1057, 11-1058] (RW)
04/04/2011	146	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Justice and Freedom

		Fund in 11-1057, 11-1058. Number of pages: [44]. Entered on Docket Date: 04/05/2011. [998560927] [11-1057, 11-1058] (RW)
04/04/2011	147	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of William Barr, Edwin Meese, III and Dick Thornburgh in 11-1057, 11-1058. Number of pages: [40]. Entered on Docket Date: 04/05/2011.[998560954] [11-1057, 11-1058] (RW)
04/04/2011	148	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Chamber of Commerce of the United States of America in 11-1057, 11-1058. Number of pages: [38]. Entered on Docket Date: 04/05/2011.[998561000] [11-1057, 11-1058] (RW)
04/04/2011	149	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Life League, Incorporated, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Incorporated, Institute on the Constitution, Bob Marshall, Policy Analysis Center, Public Advocate of the

		United States, The Liberty Committee and The Lincoln Institute for Research and Education in 11-1057, 11-1058. Number of pages: [43]. Entered on Docket Date: 04/05/2011. [998561016] [11-1057, 11-1058] (RW)
04/04/2011	150	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Physicians and Surgeons, Incorporated, Janis Chester, MD, Mark J. Hauser, MD, Guenter L. Spanknebel, MD and Graham L. Spruiell, MD in 11-1057, 11-1058. Number of pages: [39]. Entered on Docket Date: 04/05/2011.[998561029] [11-1057, 11-1058] (RW)
04/04/2011	151	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Mountain States Legal Foundation in 11-1057, 11-1058. Number of pages: [43]. Entered on Docket Date: 04/06/2011.[998562123] [11-1057, 11-1058] (RW)
04/04/2011	152	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Landmark Legal Foundation in 11-1057, 11-1058. Number of pages: [41]. Entered on Docket Date:

		04/06/2011.[998562155] [11-1057, 11-1058] (RW)
04/04/2011	153	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Family Research Council in 11-1057, 11-1058. Number of pages: [35]. Entered on Docket Date: 04/06/2011. [998562168] [11-1057, 11-1058] (RW)
04/04/2011	158	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Constitutional Law Scholars and Washington Legal Foundation in 11-1057, 11-1058. Number of pages: [41]. Entered on Docket Date: 04/07/2011.[998563332] [11-1057, 11-1058] (RW)
04/04/2011	159	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Center for Constitutional Jurisprudence in 11-1057, 11-1058. Number of pages: [30]. Entered on Docket Date: 04/07/2011. [998563341] [11-1057, 11-1058] (RW)
04/04/2011	160	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Mr. Kurt Allen Rohlfs in 11-1057, 11-1058. Number of pages: [36]. Entered on Docket

		Date: 04/07/2011.[998563362] [11-1057, 11-1058] (RW)
04/05/2011	131	NOTICE ISSUED to Ms. Anisha S. Dasgupta for Kathleen Sebelius, Neal Kumar Katyal for Kathleen Sebelius and Ms. Alisa Beth Klein for Kathleen Sebelius in 11-1057, 11-1058 requesting response to Motion to file amicus curiae brief [122]Response due: 04/07/2011.[998560276].. [11-1057, 11-1058] (RW)
04/05/2011	132	ORDER filed [998560282] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Mountain States Legal Foundation in 11-1057 and Mountain States Legal Foundation in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	133	ORDER filed [998560297] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Landmark Legal Foundation in 11-1057 and Landmark Legal Foundation in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	134	ORDER filed [998560346] granting filing of amicus curiae brief (FRAP 29(e))

		Party added: Bob Marshall, Gun Owners of America, Incorporated, Gun Owners Foundation, American Life League, Incorporated, Institute on the Constitution, The Lincoln Institute for Research and Education, Public Advocate of the United States, Conservative Legal Defense and Education Fund, The Liberty Committee, Downsize DC Foundation, DownsizeDC.org and Policy Analysis Center in 11-1057 and Bob Marshall, Gun Owners of America, Incorporated, Gun Owners Foundation, American Life League, Incorporated, Institute on the Constitution, The Lincoln Institute for Research and Education, Public Advocate of the United States, Conservative Legal Defense and Education Fund, The Liberty Committee, Downsize DC Foundation, DownsizeDC.org and Policy Analysis Center in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	135	ORDER filed [998560391] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Family Research Council in 11-1057 and Family Research

		Council in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	136	ORDER filed [998560432] granting filing of amicus curiae brief (FRAP 29(e)) Party added: William Barr, Edwin Meese III and Dick Thornburgh in 11-1057 and William Barr, Edwin Meese III and Dick Thornburgh in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	137	ORDER filed [998560595] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Chamber of Commerce of the United States of America in 11-1057 and Chamber of Commerce of the United States of America in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	138	NOTICE ISSUED to Ms. Anisha S. Dasgupta for Kathleen Sebelius, Neal Kumar Katyal for Kathleen Sebelius and Ms. Alisa Beth Klein for Kathleen Sebelius in 11-1057, 11-1058 requesting response to Motion to file amicus curiae brief [129]Response due: 04/07/2011.[998560609].. [11-1057, 11-1058] (RW)

04/05/2011	139	ORDER filed [998560627] granting filing of amicus curiae brief (FRAP 29(e)) Party added: Center for Constitutional Jurisprudence in 11-1057 and Center for Constitutional Jurisprudence in 11-1058 Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	141	RESPONSE/ANSWER by Kathleen Sebelius in 11-1058 to notice requesting response [131]. [11-1057, 11-1058] Alisa Klein
04/05/2011	142	RESPONSE/ANSWER by Kathleen Sebelius in 11-1058 to notice requesting response [138]. [11-1057, 11-1058] Alisa Klein
04/05/2011	143	ORDER filed [998560767] granting Motion to file amicus curiae brief [122] Amicus brief due: Amicus brief due 04/06/2011, updating/resuming amicus brief deadlines Copies to all parties . . . [11-1057, 11-1058] (RW)
04/05/2011	144	ORDER filed [998560804] granting Motion to file amicus curiae brief [129] Amicus brief due: Amicus brief due 04/06/2011; updating/resuming amicus brief deadlines Copies to all parties . . . [11-1057, 11-1058] (RW)

04/05/2011	145	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) by Amicus Curiae Chamber of Commerce of the United States of America in 11-1058. Was any question on Disclosure Form answered yes? No [998560867] [11-1058, 11-1057] Brian Boyle
04/06/2011	154	AMICUS CURIAE/ INTERVENOR BRIEF by Amicus Supporting Appellee Physician Hospitals of America in 11-1057 in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/06/2011. [998562251] [11-1057, 11-1058] Lisa Sharp
04/06/2011	155	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Physician Hospitals of America in 11-1057, 11-1058. Number of pages: [18]. Entered on Docket Date: 04/06/2011. [998562259] [11-1057, 11-1058] (RW)
04/07/2011	156	AMICUS CURIAE/ INTERVENOR BRIEF by Amicus Supporting Appellee American Civil Rights Union in 11-1057 in electronic and

		paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/04/2011. [998563298] [11-1057, 11-1058] Peter Ferrara
04/07/2011	157	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Civil Rights Union in 11-1057, 11-1058. Number of pages: [35]. Entered on Docket Date: 04/07/2011. [998563320] [11-1057, 11-1058] (RW)
04/08/2011	161	BRIEF by Appellant Kathleen Sebelius in 11-1057, 11-1058 in electronic and paper format. Type of Brief: Response&Reply. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/08/2011. Is this a redacted brief?No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998564842] [11-1057, 11-1058] Anisha Dasgupta
04/08/2011	162	RESPONSE/REPLY BRIEF (PAPER) file-stamped, on behalf of Kathleen Sebelius in 11-1057, 11-1058. Number of pages: [54]. Sufficient: YES.

		Entered on Docket Date: 04/11/2011. [998565402] [11-1057, 11-1058] (RW)
04/15/2011	163	BRIEF by Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, Appellant Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1058 in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/15/2011. Is this a redacted brief?No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998569150] [11-1057, 11-1058] Earle Getchell
04/15/2011	164	REPLY BRIEF (PAPER) file-stamped, on behalf of Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. Number of pages: [38]. Sufficient: YES. Entered on Docket Date: 04/15/2011. [998569336] [11-1057, 11-1058] (MR)

04/26/2011	165	SUPREME COURT REMARK – petition for writ of certiorari denied. 04/25/2011 [11-1057] (DHB)
05/10/2011	166	ORAL ARGUMENT heard before the Honorable DIANA GRIBBON MOTZ, ANDRE M. DAVIS and JAMES A. WYNN, JR.. Attorneys arguing case: Neal Kumar Katyal for Appellant Kathleen Sebelius and Mr. Earle Duncan Getchell, Jr. for Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, Mr. Earle Duncan Getchell, Jr. for Appellant Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II and Neal Kumar Katyal for Appellee Kathleen Sebelius in 11-1058. Courtroom Deputy: RJ Warren. [998586836] [11-1057, 11-1058] (RW)
05/17/2011	167	MOTION by Potential Amici Curiae Toussaint T. Tyson in 11-1057, Potential Amici Curiae Toussaint T. Tyson in 11-1058 to file amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal outside time allowed by FRAP 29(e). added to case., leave to file. Date and method of service: 05/17/2011 ecf [998591548] [11-1057,

		11-1058] – [Edited 05/17/2011 by RW] Toussaint Tyson
05/23/2011	168	COURT ORDER filed [998595778] requesting supplemental briefing. Supplemental briefs due 05/31/2011 Copies to all parties. [11-1057, 11-1058] (RW)
05/31/2011	169	Supplemental BRIEF by Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, Appellant Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1058 in electronic and paper format. Type of Brief: Supplemental Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 05/31/2011. Is this a redacted brief?No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998601780] [11-1057, 11-1058] Earle Getchell
05/31/2011	170	SUPPLEMENTAL BRIEF (PAPER) file-stamped, on behalf of Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II in 11-1057, 11-1058. Number of pages: [16].

		Entered on Docket Date: 05/31/2011. [998601872] [11-1057, 11-1058] (RW)
05/31/2011	171	MOTION by Amicus Supporting Appellee Pacific Legal Foundation in 11-1057, 11-1058 Steven J. Willis to file amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal within time allowed by FRAP 29(e). added to case.. Date and method of service: 05/31/2011 ecf [998601909] [11-1057, 11-1058] Timothy Sandefur
05/31/2011	162	Supplemental BRIEF by Appellant Kathellen Sebelius in 11-1057, Appellee Kathleen Sebelius in 11-1058 in electronic and paper format. Type of Brief: Supplemental Opening. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 05/31/2011. Is this a redacted brief?No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998601992] [11-1057, 11-1058] Alisa Klein
05/31/2011	173	SUPPLEMENTAL BRIEF (PAPER) file-stamped, on behalf of Kathleen Sebelius in 11-1057,

		11-1058. Number of pages: [18]. Entered on the Docket Date: 06/06/2011. [998605747] [11-1057, 11-1058] (RW)
06/16/2011	174	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellee Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. [998613961]. [11-1057] Stephen McCullough
06/20/2011	175	COURT ORDER filed [998615269] granting Motion to file supplemental amicus curiae letter brief [171], granting Motion to file amicus curiae brief [167] Amicus briefs due 06/30/2011. Copies to all parties . . . [11-1057, 11-1058] (RW)
06/20/2011	176	Supplemental AMICUS CURIAE/INTERVENOR BRIEF by Amicus Supporting Appellee Pacific Legal Foundation in 11-1057, 11-1058 in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 05/31/2011. [998615644] [11-1057, 11-1058] Timothy Sandefur

07/01/2011	177	Brief by Amicus Supporting Appellee Toussaint T. Tyson in 11-1058 [167]. Date and method of service: 05/17/2011 ecf [998623796] [11-1057, 11-1058] – [Edited 07/07/2011 by BW] – [Edited 07/12/2011 by RW]. **Reason for Edit: Document Struck.** [998623796] [11-1057, 11-1058] Toussaint Tyson
07/01/2011	178	Docket correction requested from Toussaint T. Tyson in 11-1057, 11-1058. Re: [177], Motion to file amicus curiae brief. Access to Motion to file amicus curiae brief has been restricted to case participants and the entry will be struck upon receipt of the correct filing. [11-1057, 11-1058] (ALC)
07/06/2011	179	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellee Kathleen Sebelius in 11-1058. [998625918]. [11-1057, 11-1058] Alisa Klein
07/06/2011	180	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellant Kathleen Sebelius in 11-1057. [998625924]. [11-1057, 11-1058] Alisa Klein
07/08/2011	181	AMICUS CURIAE/ INTERVENOR BRIEF by Amicus Supporting Appellee

		Toussaint T. Tyson in 11-1058 in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/06/2011. [998627417] [11-1057, 11-1058] Toussaint Tyson
07/08/2011	182	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of Toussaint T. Tyson in 11-1057, 11-1058. Number of pages: [25]. Entered on Docket Date: 07/12/2011.[998630171] [11-1057, 11-1058] (RW)
08/15/2011	183	CHANGE OF ADDRESS Notice by Pacific Legal Foundation in 11-1057, 11-1058. [11-1057, 11-1058] Timothy Sandefur
09/08/2011	184	PUBLISHED AUTHORED OPINION filed. Originating case number: 3:10-cv-00188-HEH Paper copies to all parties and the district court/agency will be mailed when the printed opinion is received. [998672799]. [11-1057, 11-1058] – [Edited 09/08/2011 by DHB] (DHB)
09/08/2011	185	JUDGMENT ORDER filed. Disposition method: 11-1057 opn.p.arg 11-1058 opn.p.arg.

Decision: Vacated and
remanded. Originating case
number: 3:10-cv-00188-HEH.
Entered on Docket Date:
09/08/2011. [998672807]
Copies to all parties and
the district court/agency..
[11-1057, 11-1058] (DHB)