Nos. 11-1057 & 1058

In the United States Court of Appeals
for the Fourth Circuit

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF VIRGINIA,
Plaintiff-Appellee/Cross-Appellant,
v.
KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

Brief *Amicus Curiae* of Virginia 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, Conservative Legal Defense and Education Fund, The Liberty Committee, Downsize DC Foundation, DownsizeDC.org, and Policy Analysis Center In Support of Plaintiff-Appellee and Affirmance

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-1057-8 Caption: Commonwealth of Virginia v. Kathleen Sebelius

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I certify that on April 4, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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(signature)

April 4, 2011
(date)

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Delegate Bob Marshall (R-13) is a senior member of the Virginia House of Delegates and was the Chief Patron of the Virginia Health Care Freedom Act (2010 Acts of the Assembly Chapter 818) which undergirds the current litigation. **Gun Owners of America, Inc., Public Advocate of the United States, The Liberty Committee, and DownsizeDC.org**, are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Each was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, the construction of state and federal constitutions and statutes, and questions related to human and civil rights secured by law. **Gun Owners Foundation,**[2] **American Life League, Inc., The Lincoln Institute for Research and Education, Conservative Legal Defense and**

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[1] No party's counsel authored this brief, and no party, party's counsel, or person other than the *amici curiae* contributed money to the preparation or submission of this brief. *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

[2] In resolving the standing issue, the District Court below relied on the important case of Wyoming ex rel. Crank v. United States, 539 F.3d 1236 (10th Cir. 2008), involving a usurpation of state authority by the Bureau of Alcohol, Tobacco, Firearms and Explosives. GOF filed *amicus* briefs in both the district court and in the court of appeals.

Education Fund, Downsize DC Foundation, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3), and involved in educating the public on important policy issues. **The Institute on the Constitution** is an educational organization intended to reconnect Americans to the history of the American Republic. These organizations have filed *amicus curiae* briefs in other important cases.

ARGUMENT

I. Virginia Has Standing to Bring this Action.

The United States (hereinafter "the Government") contests the Commonwealth of Virginia's standing to challenge the minimum coverage provision of the "**Patient Protection and Affordable Care Act**" ("PPACA") (Pub. L. 111-148) on the theory that 26 U.S.C. section 5000A(a) concerns only individuals, not states. Brief for Appellant ("Govt. Br.") pp. 24-30. Three of the Government's related arguments are addressed here.

A. The Virginia Health Care Freedom Act Is Not an Act of Nullification.

The Commonwealth supports its standing based on the General Assembly's enactment of the "**Virginia Health Care Freedom Act**" ("VHCFA"), with this case having been filed by the Attorney General in his role to defend such

legislative enactments. *See* Appellee Brief ("Va. Br.") pp. 2-3. The Government misrepresents the VHCFA as "**declaring** [PPACA] a **nullity**." Govt. Br. p. 24 (emphasis added).

Delegate **Bob Marshall** (R-13), *amicus* herein and a senior member of the House of Delegates, was the **Chief Patron** of VHCFA, which he "offered" in the House of Delegates on January 13, 2010 as H.B. 10.[3] His was the first bill prefiled on this subject (on Dec. 7, 2009), and the only bill termed the "Virginia Health Care Freedom Act."[4] This Act (2010 Acts of the Assembly Chapter 818) was codified, and reads in pertinent part, as follows:

> **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. [Sec. 38.2-2430.1:1, Code of Virginia (emphasis added).]

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[3] http://lis.virginia.gov/cgi-bin/legp604.exe?101+sum+HB10

[4] Senate legislation was also enacted under different titles: S. 283, Frederick M. Quayle (R-13) (2010 Acts of the Assembly Ch. 106); S. 311, Stephen H. Martin (R-11) (2010 Acts of the Assembly Ch. 107), and S. 417, Jill Holtzman Vogel (R-27) (2010 Acts of the Assembly Ch. 108).

In enacting H.B. 10, the Virginia General Assembly was fulfilling its constitutional role. The people of the several states ratified the U.S. Constitution on the premise that **state legislatures** will always be:

> not only vigilant but suspicious and jealous **guardians of the rights of the citizens, against encroachments from the Federal government** [who] will constantly have their attention awake to the conduct of the national rules and will be ready enough, if anything improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent. [A. Hamilton, Federalist No. 26, G. Carey & J. McClellan, edts., The Federalist, p. 134 (1990) (capitalization original, bold added). *See also* A. Hamilton, Federalist No. 28, p. 141.]

The role of the federal judiciary, too, was made clear to the people during the ratification debates.

> [I]n the case Congress shall misconstrue ... part of the Constitution, and exercise powers not warranted by its true meaning ... the success of the usurpation will depend on the executive and **judiciary departments**, which are to expound and give effect to the legislative acts...." [J. Madison, Federalist No. 44, *Id.*, p. 233 (emphasis added).]

Now that the Virginia General Assembly has performed its constitutional duty, the question is whether the federal judiciary will fulfil its role, or deny to the people their constitutional heritage of a state government's lawful effort to check a usurpation of power by the federal government.

Contrary to the Government's characterization, VHCFA does not purport to nullify or declare unconstitutional any federal law. Rather, as the instant litigation

demonstrates, the statute is the basis upon which the Commonwealth seeks judicial review to determine whether PPACA is unconstitutional. Any effort to misconstrue this case as one of unilateral "nullification" is prejudicial and wholly unwarranted.

Indeed, in the great tradition of the Virginia General Assembly's resistance to federal tyranny, VHCFA cannot be viewed as anything but measured and moderate, coming nowhere near the Virginia Resolutions of December 1798. Penned by James Madison, the Virginia Resolutions declared outright that the Alien and Sedition Acts were "**unconstitutional**."[5] If the Government wants to disparage nullification, its dispute is with the father of the Constitution, not with VHCFA.

B. The Doctrine of Parens Patriae Does Not Apply.

The Government characterizes the Commonwealth's challenge as one brought "parens patriae,"[6] while the Commonwealth explains its challenge as one

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[5] Virginia Resolutions, Dec. 21, 1798, The Founder's Constitution, Vol. 5, p. 135.

[6] Govt. Br. p. 26.

based upon state sovereignty.[7] Neither brief accurately characterizes the role of a state in our federal structure.

The Government argues that this case is governed, and standing is barred, by Massachusetts v. Mellon, 262 U.S. 447 (1923),[8] but the Government's reliance is misplaced. First of all, the Mellon Court does not absolutely bar Virginia's case: "[w]e need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress" and "the State, under some circumstances may sue in that capacity for the protection of its citizens." 262 U.S. at 485-86.

Second, it is purely speculative for the Government to say that enactment of "Virginia's declaratory statute is immaterial; the Supreme Court would not have reached a different conclusion in Mellon if the state had first incorporated its complaint into a statute...." Govt. Br. p. 26. Without the formal action by a state legislature, no Court could be sure whether an attorney general's action has the full force of the people's representatives behind it.

The Government attempts to take refuge in the ancient English doctrine articulated in Mellon that "in respect to their relations with the Federal

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[7] Va. Br. p. 13.

[8] Govt. Br. pp. 25-26.

Government ... it is the United States, and not the State, which represents them as *parens patriae*...." Govt. Br. pp. 25-26. These *amici* reject the notion that any government — federal or state — can be viewed as the "parent for the nation" as if the American populace were incapable and legally incompetent "children." Neither President Obama, nor Speaker Pelosi, nor Majority Leader Reid may assume the role of "parents" to the citizens of the Commonwealth and the United States. One would have thought that John Locke's First Treatise on Government would have put to rest — even in England — the argument that the king was the parent of the nation and his subjects were his children. Locke's argument draws deeply from the Holy Bible in explaining that no king can consider himself the "heir of Adam" or owning any type of divine right to rule. J. Locke, Two Treatises of Government, ed. Thomas Hollis (London: A. Millar et al., 1764), pp. 18-19. Certainly, there is no place for such a doctrine in the United States of America.

Even the Commonwealth's brief mistakenly bases its standing argument on "joint sovereignty," utilizing Supreme Court precedent, rather than relying upon First Principles. Va. Br. p.16. In the United States, it is **the people who are sovereign**. *See, e.g.*, Declaration of Independence ("governments are instituted among Men, deriving their just powers from the consent of the governed"); and

Preamble, U.S. Constitution. The states are more appropriately viewed, as James Madison instructs in the Virginia Resolutions, *supra*, as "parties" to a constitutional "compact" with the federal government — indeed, the states were the pre-existing entities through which the people acted to create the federal government. *See also* Preamble to and Article VII, U.S. Constitution. Thus, it is within the power of the Commonwealth to seek the protection of a federal court, on its own behalf and on behalf of its sovereign citizens, to protect its laws and areas of jurisdiction from unconstitutional usurpations of power by Congress and the President.

C. The Federal Judicial Power Is Not Subject to Prudential Limitations.

The Government apparently believes that the Commonwealth's suit relating to the minimum coverage provision presents "abstract questions of **political** power, of sovereignty, of government.'" Govt. Br. p. 26 (emphasis added). Yet the Government concedes that identical claims brought by individuals could be resolved by federal courts. Govt. Br. p. 24.

The Government asserts that "disputes [between states and the federal government] are resolved in the **political** arena, not the courts." Govt. Br. pp. 26, 28 (emphasis added). Nowhere does the Government explain from the text of the

Constitution why the federal courts may disregard claims of unconstitutional federal impingements on state prerogatives. To the extent that the Government's arguments can be read as recommending some form of prudential dismissal, it is instructive to remember that the federal judicial power is not subject to prudential considerations — "[t]he judicial Power **shall extend** to all Cases ... arising under this Constitution..." Article III, Section 2, U.S. Constitution (emphasis added). As Chief Justice Marshall so persuasively stated:

> 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. **We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.** The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. [Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added).]

Any principle by which the courts are said to have the latitude to overlook usurpations of power by other branches of the federal government impairs the constitutional role of the federal judiciary. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). To preserve the rule of law, and the consent of the governed, the federal judiciary must not shirk its constitutional duty to adjudicate the plight of states whose police powers and other regulatory prerogatives are being invaded,

or the plight of citizens who are being forced to buy a product they do not want — leaving the other federal branches without check, and the victims without remedy. Rather, all judicial power must be exercised without even the appearance of partiality: "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour." Leviticus 19:15.

II. THE INDIVIDUAL MANDATE CANNOT BE JUSTIFIED AS A CONSTITUTIONAL EXERCISE OF CONGRESS'S POWER TO REGULATE INTERSTATE COMMERCE.

The Government characterizes PPACA as a regulation of the interstate health care market. *See id.*, pp. 13-15. As such, PPACA is argued to be a constitutional exercise of the power delegated by the Constitution to Congress "to regulate Commerce ... among the several States," insisting that PPACA "regulates interstate activity that is **truly national** and **inherently economic**." *See id.*, pp. 17-18, 23 (emphasis added). The Government is sorely mistaken. Health care decisions are **inherently personal and moral**, not collectivist and economic.

PPACA coerces all Americans — except for the poor[9] and those who qualify under one of two narrow statutorily-defined religious exemptions[10] — to financially support a monolithic system that requires every individual to have minimal essential health care insurance coverage, or pay a penalty to the United States government. *See* 26 U.S.C. § 5000A(a)-(c). It is the constitutionality of this provision that is at issue in this case.

A. The Individual Mandate Is Morally-Based, Not Commerce-Based.

The Government would have this Court believe that Congress found that "the means of payment for services in the interstate health care market is economic activity that substantially affects interstate commerce." Govt. Br. p. 30. In fact, PPACA contains no Congressional findings about interstate commerce in support of any of its numerous provisions, but for one: Section 1501's individual minimum essential coverage. *See* Sec. 1501(a)(1) and (2). Even there the Government has mischaracterized the mandate as one imposed upon individual "participants in the health care market [to] have insurance to **pay for the services they consume.**" Govt. Br. p. 30 (emphasis added). In fact, however, the individual minimum essential coverage mandate requires the prepayment of a

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[9] *See* 26 U.S.C. § 5000A(e)(1).

[10] *See* 26 U.S.C. § 5000A(d)(2).

government-approved, so-called "insurance" policy[11] **whether or not** the insured would incur any obligation to pay for any service provided by the Government or its healthcare or health insurance agents.

To establish that the "individual responsibility requirement [is] **commercial and economic in nature,**"[12] Congress posited that the only decision a person makes is "economic and financial," that is, "**how** and **when** health care is paid for and **when** health insurance is purchased."[13] Indeed, in its brief the Government allows for only one health care choice: to participate in the government-operated health care market by purchasing health insurance, or pay a penalty. Govt. Br. p. 43. But that choice is not based upon economic considerations. Rather, it is based upon a "moral imperative" that each individual must participate by the purchase of health insurance in order for the government-operated system to meet the purported "greater good." *See* Govt. Br. p. 43.

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[11] In reality, PPACA is a coerced prepayment plan financed by fines and threats of fines without regard to risk or characteristics of the insured upon which true health insurance is based. *See, e.g.*, E. Haislmaier, "Obamacare and Insurance Rating Rules," Web Memo (The Heritage Foundation, Jan. 20, 2011).

[12] Section 1501(a)(1).

[13] Section 1501(a)(2)(A).

In fact,[14] there will be many Americans who resist establishment medicine, using alternative health care treatments outside of the government-defined and controlled health care market. In providing for religious and other exceptions to the individual essential coverage mandate,[15] PPACA concedes its subject matter is not quintessentially economic and financial, but moral and religious. Indeed, the individual mandate is designed for the altruistic purpose of compelling each person to pay for the healthcare of others, as Congress has specifically found:

> [t]he [individual mandate] 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.** [Section 1501(a)(2)(C).]

As a "moral imperative," the individual minimum coverage mandate cannot be constitutionally justified under the Commerce Clause. As Chief Justice John Marshall ruled in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), that clause defines "the subject to be regulated [to be] commerce." *Id.*, 22 U.S. at 189. And, as the United States Supreme Court has since consistently ruled, Congress may not reach a purely local activity, such as a decision not to purchase a service or commodity, unless it "'exerts a substantial **economic** effect on interstate

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[14] *See* Part III, *infra*.

[15] *See* 26 U.S.C. § 5000A(d)(2) and (3).

commerce.'" *See* Gonzales v. Raich, 545 U.S. 1, 17 (2005). While the individual minimum coverage mandate may "affect price and market conditions," unlike the regulation of home manufacture and consumption of marijuana in Raich, Congress's decision to impose that mandate has nothing to do with the "supply and demand in the national market" of health insurance. *See* Govt. Br. p. 45. Rather, the individual minimum coverage mandate serves the "societal judgment" of Congress that no person should be denied health care because of his inability to pay for it or for his failure to have purchased insurance to cover the costs. *See* Govt. Br. p. 43.

As revealed by Congressional findings, the individual mandate was designed to achieve a purported social good that serves society by:

> (1) "increas[ing] the number and share of Americans who are insured" (Section 1501(2)(C));
>
> (2) protecting people from "bankruptcy," and thereby, "improv[ing] financial security for families" (Section 1501(2)(E)); and
>
> (3) adding "healthy individuals" to the insurance risk pool so as to extend health insurance to the otherwise uninsurable (Section 1501(2)(G)).

Plainly, even Congress essentially found that the individual mandate is not an economic measure, but a humanitarian duty of all to relieve the American people

from the uniquely "unpredictable" and "universal" human condition of illness and mortality. *See* Govt. Br. pp. 41-44.

The Government has attempted to liken PPACA to Title II of the 1964 Civil Rights act, arguing that as "racial discrimination" was within the constitutional reach of the Commerce power, so also "universal coverage" is within Congress's authority to regulate interstate commerce. *See* Govt. Br. pp. 52, 54. But the Government overlooks the fact that the United States Supreme Court upheld Title II because of the "disruptive effect that racial discrimination has had on commercial intercourse," not because racial segregation in public accommodations is morally repugnant. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964). To be sure, the civil rights anti-discrimination legislation was concerned with a "moral and social wrong," but, in recognition of limitations on federal power to deal with such matters, Congress exempted restaurants from coverage, if such establishments did not "serve[] or offer[] to serve interstate travelers or if a substantial portion of the food which it serves ... has moved in commerce." *See* Katzenbach v. McClung, 379 U.S. 294, 297 (1964). Thus, the Supreme Court observed, it was racial discrimination's "burden [on commercial intercourse] which empowered Congress to enact appropriate legislation." Ht. of Atlanta, 379 U.S. at 257.

PPACA, however, has identified its subject as a national health and well-being problem and, unlike the Civil Rights Act, has provided no exemption from its mandate of "universal coverage" for purely intrastate activity. Rather, the exceptions to and exemptions from the individual minimum coverage mandate in PPACA are limited to religious and moral considerations. On its face, PPACA generally, and the individual minimum coverage mandate specifically, is a moral and humanitarian measure, not a commercial one, which Congress is not empowered by the Commerce Clause to enact.

B. PPACA Is Not a Constitutional Exercise of Congress's Power to *Regulate* Interstate Commerce.

Even if this Court should rule that the **subject matter** of PPACA and its individual mandate are commerce within the meaning of that term in Article I, Section 8, Clause 3, **PPACA and its individual mandate** are nonetheless unconstitutional because they are not within the power of Congress to "**regulate** Commerce ... among the several States," or to make such **"laws** which are necessary and proper for carrying into execution the [Commerce] power." (Emphasis added.) Rather, PPACA is an unconstitutional governmental proprietary take-over of one-sixth of the national economy[16] based upon the

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[16] *See* K. Terry, "Health Spending Hits 17.3 Percent of GDP in Largest Annual Jump," Bnet.com (Feb. 4, 2010).

unconstitutional assumption that the Commerce and Necessary and Proper Clauses empower Congress to **engage** in commerce when, in fact, the two clauses empower Congress **only to make the rules** by which nongovernmental entities are to carry out commerce.

As Chief Justice Marshall observed in Gibbons v. Ogden, the "constitution being ... one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word." *Id.*, 22 U.S. at 189. After "settling" the meaning of the words, "commerce among the several States," the Chief Justice turned his attention to the power conferred upon Congress with respect to that subject, and found it to be to "regulate; that is, to prescribe the **rule** by which commerce is to be **governed**." *Id.*, 22 U.S. at 196 (emphasis added). The authority conferred upon Congress by the Commerce Clause, then, is governmental in nature, not proprietary. To that end, Article I, Section 1 of the Constitution vests Congress with "all **legislative** powers herein granted." (Emphasis added.) Legislative power, in turn, is the power to make the laws — the rules of conduct — for civil society.[17] With respect to the Commerce Clause, Congress has authority to **make the rules** governing the carrying out of

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[17] *See* I W. Blackstone, Commentaries on the Laws of England, p. 44 (Univ. of Chicago facsimile ed.: 1765).

interstate commerce, such as the licensing of the coastal trade in Gibbons, but not to create a government agency to **engage** in commerce. *See* Ashwander v. TVA, 297 U.S. 288, 339-40 (1936).

The threshold question here is whether PPACA is a "regulation" within the meaning of the Commerce Clause, that is, whether (a) it is a prescribed set of **rules** of conduct by which the a nongovernment health care market is to be governed, or whether (b) PPACA, itself, creates a national **commercial enterprise** designed to manage and control health care workers and facilities and health insurance companies in the marketing, sale, and deliverance of health care and wellness goods and services. A careful examination of PPACA's salient features demonstrates that it does the latter, not the former.

1. PPACA Puts the Government into the Management and Control of the Health Care Insurance Business.

In 1943, the Social Security Board and organized labor "proposed a wholly Federal system of social insurance with the Surgeon General in the role of **gatekeeper** for the provision of medical care." L. Snyder, "Passage and Significance of the 1944 Public Health Service Act," 109 Public Health Reports, pp. 721, 723 (Nov.-Dec. 1994) (emphasis added). In response, Morris Fishbein, the "American Medical Association's chief editorialist ... called the proposed role

of the Surgeon Generall to be that of a '**virtual gauleiter**'[18] of American medicine." *Id.* (emphasis added). As a result of such opposition, the proposal for "national health insurance" was abandoned in favor of the 1944 Public Health Service Act, not predicated upon "the financing of personal health services." *Id.,* p. 724.

Sixty-seven years later, Congress has amended the 1944 Public Health Service Act, enacting PPACA — which not only provides for the "financing of personal health services," but places the federal government in **full control** of the definition, deliverance and management of those services. Even worse than appointing the Surgeon General as "gatekeeper," as the 1943 proposed act would have done, PPACA has appointed the Secretary of Health and Human Service ("HHS Secretary") as the Chief Executive Officer ("CEO") with czar-like powers to do whatever is necessary to make PPACA work. Thus, PPACA contains "more than 2,500 references" to the HHS Secretary, including "700 instances in which the Secretary 'shall' do something, and more than 200 cases in which she 'may' take some form of regulatory action if she chooses," as well as "139 occasions,

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[18] In the 1940's a "gauleiter" was "a political functionary occupying [an] important position in a totalitarian regime or hierarchy." N. Webster, Third New International Dictionary, p. 941 (1964).

[where] the law mentions decisions that the 'Secretary determines.'" P. Klein, "The Empress of Obamacare" The American Spectator (June 2010).

Even when the HHS Secretary is told that she "shall" do something, that apparently does not mean that she is bound by law to do what she has been commanded to do. For example, PPACA "**requires** the Secretary to impose restrictions on the imposition of annual limits on the dollar value of essential health benefits ... for any participant or beneficiary in a new or existing group health plan or policy years beginning on or after September 23, 2010 and prior to January 1, 2014."[19] But the HHA Secretary has already granted over a thousand waivers to labor unions, corporations, and health insurance companies. *See* "Obama Administration Keeps Giving Out Obamacare Waivers, Despite New Republican Spotlight," The Daily Caller.[20] Although there is nothing in PPACA that authorizes such waivers,[21] the entire process appears to be governed by

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[19] *See* Department of Health and Human Services Memorandum on Process for Obtaining Waivers of the Annual Limits Requirements of PHS ACT Section 2711, Sept. 3, 2010 (hereinafter "HHS Waiver Memo").

[20] http://dailycaller.com/2011/03/07/obama-administration-keeps-giving-out-obamacare-waiv.

[21] "The word 'waiver' appears 97 times in the law — but not in relation to annual coverage limits." *See* C. Jaarda, "ObamaCare Doesn't Give Sec. Sebelius Waiver Authority" (March 15, 2011) http://alineofsight.com/blogs/christopher-jaarda/2011/03/15/obamacare-doesnt-give-sec-sebelius-waiver-authori

economic or political considerations calculated to make PPACA stay in business. According to the HHS memorandum on the subject, any entity seeking a waiver must describe "why compliance ... would result in a significant decrease in access to benefits ... or significant increase in premiums paid by those covered by such plans or policies." HHS Waiver Memo, p. 3. Thus, above all else, the waiver process is a proprietary one whereby the HHS Secretary determines whether any particular "mini-med" plan is worth saving in light of the overall economic goals respecting PPACA's health insurance products. *See* M. Cannon, "McDonald's Case Highlights Obamacare's Threat to Low-Income Workers, Political Freedom" (National Review OnLine) (Sept. 30, 2010).

But PPACA goes even further, empowering the HHS Secretary to place caps on the percentage of insurance premiums that could be used for insurers' administrative expenses. With respect to the so-called "medical loss ratio" ("MLR"),"[22] the HHS Secretary is positioned to place a ceiling on private insurers' already low profit margins.[23] The factors relevant to the task of calculating the

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[22] *See* A. Roy, "Year One of the Obamacare Era," National Review OnLine (Mar. 24, 2011).

[23] *See* "Obamacare's January Insurance Time Bomb," The Apothecary (May 7, 2010) http://www.avikroy.org/2010/05/obamacares-january-insurance-

MLR are economic and practical, not legal. *See* A. Roy, "How ObamaCare May Disrupt Your Health Plan," Forbes.com (Sept. 29, 2010). Indeed, the National Association of Insurance Commissioners, tasked by PPACA to draft MLR guidelines for HHS approval, "excluded certain important activities from the MLR calculation, including":

> reviewing insurance claims to prevent unnecessary tests and procedures; fraud prevention activities; and doing due diligence and keeping tabs on hospitals and doctors to ensure they are performing high-quality, high value-medicine. [*Id.*]

As a direct consequence of these managerial restrictions, many insurers are expected to go out of business, thereby "driving premiums up and consumer choices down." *Id.*

2. PPACA's "Public Option" Puts the Government in the Health Care Insurance Business.

Prior to the enactment of PPACA, HHS Secretary Sebelius asserted that it was essential to healthcare reform to ensure a "government alternative to private health insurance" — widely known as the "Public Option." *See* "Sebelius: Public Health Care Option 'Not the Essential Element.'" The Huffington Post (Aug. 16, 2009). Lacking the votes for a public option, President Obama announced that his administration would abandon its effort to "giv[e] Americans the option of

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time-bomb.html.

government-run insurance as a part of a new health care system." *Id.* Secretary Sebelius announced that the administration would be content with a provision in the bill that would provide for "consumer-owned nonprofit cooperatives [to] sell insurance in competition with private industry." *Id.* Section 1322 set up a "program to assist **establishment** and **operation** of nonprofit, membership run health insurance issuers."

Thereafter, by way of the budget reconciliation process, a new section 1334(a) was quietly inserted into PPACA, whereby the **Office of Personnel Management** ("OPM") is "legally required to sponsor at least two national health insurance plans beginning in 2014,"[24] one of which must be a non-profit entity.[25] While the OPM Director is required by PPACA Section 1334(a)(4) to negotiate with the sponsored plans various terms, including "a medical loss ratio," those terms need not meet the mandates set by HHS requirements for private insurers. In essence, an OPM-sponsored health insurance plan "would ... *not* be subject to the same certification or qualification processes that are outlined for private health plans for competition in the health insurance exchanges, established under

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[24] R. Moffit, "Obamacare and the Hidden Public Option: Crowding out Private Coverage," p. 1, WebMemo (The Heritage Foundation: Jan. 18, 2011).

[25] PPACA Section 1334(a)(3).

[PPACA] Section 1331." *Id.* Although PPACA contemplates that the Director of OPM will "consult" with the HHS Secretary,[26] "OPM-sponsored plans would compete nationwide [under] a special set of plans, governed by special rules" applicable only to themselves. *Id.,* p. 3. Scheduled to become operative in 2014, the OPM-sponsored plans would enjoy "national monopoly" status as health insurers operating within their own market free of competition — a robust public option.[27] *Id.,* p. 2. Although administered by OPM, the PPM-endorsed plans would be offered to the general public, not just to federal workers. In short, the "public option" is back, never really having been abandoned by the Obama administration.[28]

3. PPACA Puts Government into the Management and Control of the Health Care and Wellness Business.

Title I of PPACA is aptly called the "**Quality**, Affordable **Health Care** for **All** Americans." (Emphasis added.) Section 1001 of the title amends the "Public

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[26] *See, e.g.,* PPACA Section 1334(b)(4).

[27] *See* Henry J. Kaiser Family Foundation, "Summary of New Health Reform Law," Focus on Health Reform, p. 4 (June 18, 2010).

[28] Truly, then Speaker Nancy Pelosi was right when she said that we would have to pass the health care reform bill to "find out" what was in it. *See* Heritage Lectures, Mar. 14, 2011, R. Moffit, "Why the Health Care Law Has Sparked a National Debate Over First Principles," (The Heritage Foundation).

Health Service Act," Title 42 of the United States Code — not provisions governing "Commerce" in Title 15. PPACA adds sections calculated to transform individual, family, and private business decisions concerning health care and wellness into collectivist decisions made by government agencies and unelected bureaucrats.

First, new Section 2713 provides as follows:

> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the **United States Preventive Services Task Force;**
> (2) immunizations that have in effect a recommendation from the **Advisory Committee on Immunization Practices of the Centers of Disease Control and Prevention** with respect to the individual involved; and
> (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the **Health Resources and Services Administration;**
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> ***
>
> (5) for the purposes of this Act, and for the purposes of any other provision of law, the current recommendations of the **United States Preventive Service Task Force** regarding breast cancer screening, mammography, and prevention shall be considered the most current .... [42 U.S.C. § 2713 (emphasis added).]

Second, new Section 2717(a) provides that within two years the Secretary of Health and Human Services, "in consultation with experts in health care quality and stakeholders, shall develop reporting requirements for use by a group health plan ... that —

> (A) improve health outcomes through implementation of activities such as ... **care coordination, chronic disease management, and medication and care compliance initiatives, including the use of the medical homes model as defined** for purposes of section 3602 of [PPACA];
> (B) **implement activities** that prevent hospital readmissions...;
> (C) implement activities that improve patient safety ...;
> (D) **implement wellness and health promotion activities**.
> [42 U.S.C. § 2717(a) (emphasis added).]

New Section 2717(b) contemplates "**personalized wellness and prevention services**, which are **coordinated, maintained or delivered by a health care provider**, a **wellness and prevention plan manager**, or a health, wellness or prevention services organization [and] which may include the following wellness and prevention efforts:

> (1) Smoking cessation.
> (2) Weight management.
> (3) Stress management.
> (4) Physical fitness.
> (5) Nutrition.
> (6) Heart disease prevention.
> (7) Healthy lifestyle support.
> (8) Diabetes prevention. [42 U.S.C. § 2717(b) (emphasis added).]

In sum, under PPACA every personal health care decision is, or potentially will become, a matter of **public health policy** under the management and control of some arm of the federal government. Indeed, under PPACA, the serving sizes of the meals that we buy at restaurants and of the snacks purchased from vending

machines may soon be "standardized" in the government's headlong plunge into wellness minutiae.[29]

C. As a "Tax," the Individual Mandate Confirms that PPACA Is an Unconstitutional Exercise of Congress's Commerce Power.

The Government calls attention to the fact that "the minimum coverage provision appears in the Internal Revenue Code and **operates** as a tax." Govt. Br. p. 23 (emphasis added). Thus, the Government argues that the "minimum coverage provision is ... authorized by Congress's power to 'lay and collect taxes.'" Govt. Br. p. 58. And, as is true of any tax, the Government argues it may impose a **penalty** for nonpayment of the tax. Govt. Br. p. 59. According to this argument, PPACA Section 5000(A)(a), entitled, "Requirement to Maintain Essential Coverage," is the **tax**, and Section 5000(A)(b) is the **penalty** levied on any individual who "fails to meet the requirement of subsection (a)," that is, who fails to pay the tax. In order to sustain its position, the Government must demonstrate that payment to a private insurance company for the minimum essential health coverage is a "tax."

At the time the nation was founded, a tax was defined as a "rate or sum of money assessed on the person or property of a citizen by government, **for the use**

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[29] *See* G. Turner, "Consumerism in Europe," p. 1 (June 4, 2010). http://www.galen.org/component,8/action,show_content/id,0/blog_id,1423/t...

of the nation or state." II N. Webster, American Dictionary of the English Language, p. 90 (1828). The renowned constitutional scholar, Thomas M. Cooley, defined taxes to be "burden or charges imposed by the legislative power upon persons or property, to raise money for public purposes." T. Cooley, A Treatise on Constitutional Limitations, p. 593 (5th ed., The Lawbook Exchange: 1883). In support of this definition, Professor Cooley dropped this footnote:

> Blackwell on Tax Titles, 1. A tax is a contribution imposed by government on individuals **for the service of the State"** ... In its most enlarged sense the word taxes embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising **public revenue.**" [*Id.*, 593, n.1. (emphasis added).]

In order for a payment of a premium to a **private** insurance company for benefits to be a tax, the insurance company receiving the mandated premium payment must be, in reality, a **government** agency or instrumentality. By characterizing the premium payment mandate as a tax, the Government necessarily takes the position that the private insurance company to which the premium is paid is functioning as an agent or instrumentality of the federal government, and PPACA must be, in effect, a government-run and managed commercial enterprise. The characterization of the individual mandate as a tax supports the proposition that PPACA is an unconstitutional commercial enterprise — totally unauthorized

either by the power vested by the Constitution to "regulate" interstate commerce, or to make "laws necessary and proper for carrying into execution" the commerce power.

III. PPACA Constitutes Federal Take-over of Health and Medicine in Violation of the Power of the States and of the People Secured by the Tenth Amendment.

Stripped bare of the pretense that PPACA is a commercial regulation of the interstate health care market, PPACA is exposed for what it really is — a plenary exercise of power over the General Welfare of the American people. Congress has no such power. *See* United States v. Butler, 297 U.S. 1, 64 (1936). Instead, the general police power resides in the several states and is secured to them by the Tenth Amendment. *See* United States v. Lopez, 514 U.S. 549, 566 (1995).

Furthermore, Congress has been delegated no power to intrude upon the intimate and sensitive individual decisions having to do with their personal health and wellness. Rather, such power is secured to the People by the Tenth Amendment.

A. PPACA Intrudes on State Regulation of the Practice of Medicine.

PPACA has features which appear designed to facilitate the monitoring of medical care, through the requirement of electronic medical records and the selection of "best methods" standards of care which would be forced on all physicians and patients.[30] The relationship between a patient and his physician would be violated, and the availability of therapies not sanctioned by federal bureaucrats would be crushed.

In 1954, the U.S. Supreme Court recognized that in our federalist structure it was the states, not the federal government, that had authority over the practice of medicine:

> It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health ... including medicine, osteopathy, phisiotherapy, dentistry, veterinary medicine, pharmacy, nursing, podiatry and optometry. [Barsky v. Board of Regents of the State of New York, 347 U.S. 442, 449 (1954).]

See also Watson v. Maryland, 218 U.S. 173, 176 (1910).

PPACA undermines one of the great advantages of our federal system — that policies can be tested by state legislatures operating as "a laboratory" trying

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[30] *See* B. McCaughey, "Medical Privacy and ObamaCare," The Wall Street Journal (Apr. 9, 2010).

new approaches to difficult issues of public policy, as envisioned by Justice Louis Brandeis. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). With PPACA, in response to the principal voices of establishment medicine, the practice of medicine and individual healthcare choices are put under the control of unelected federal bureaucrats who cannot be directly removed from office, leading to even further disillusionment by an increasingly outraged citizenry.

B. PPACA Suppresses Individual Healthcare Choice.

The individual mandate requires that each person buy health insurance, but typically the medical care provided by health insurance is limited to conventional, pharmaceutical-centered, allopathic medicine. The types of healthcare which an increasing number of Americans use is excluded from government-limited coverage. For example, medicare.com explains:

> Alternative Therapy, also know as **Alternative Medicine**, is currently **not covered by Medicare**. These therapies include homeopathy, naturopathy, acupuncture, holistic therapies, midwifery and herbal medicine. In addition, Medicare does not cover Complementary Medicine ... newly invented approaches to healing [or] pre-modern medical practices. You pay 100% of Alternative Therapy expenses.[31]

As true of Medicare, these therapies are not expected to be covered by PPACA.

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[31] *See* http://www.medicare.com/services-and-procedures/alternative-therapies.html?ht= (Emphasis added.)

Although the principal proponents of PPACA would probably view themselves as pluralistic, multi-cultural, and open-minded, PPACA is predicated on the supremacy of Western medicine, to the exclusion of any other approach. However, under PPACA, Eastern medical approaches, homeopathy developed in Germany and widely used throughout the Commonwealth of Nations, native American therapies, herbal approaches presented in the Holy Bible, and other therapies are treated as though they were without value.

The insurance which the government requires would have virtually no value to those Americans who opt for alternatives to conventional medicine. Viewed in this way, the decision not to purchase insurance by many individuals is not selfish, or foolish, but a response to the reasonable conclusion that health insurance does not meet their personal needs. The mandatory PPACA premiums and penalty reduce available funds to pursuing wellness and nonconventional treatments. Thus, the individual mandate coerces a kind of altruism, transforming personal duty to help others into a coerced civil duty in violation of the free exercise of religion, as defined in the Virginia Bill of Rights, and in derogation of the power of the people secured by the Tenth Amendment.[32]

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[32] *See* Virginia Bill of Rights, Art. I. section 16 ("it is the mutual duty of all to practice Christian Forbearance, love and charity toward each other.").

CONCLUSION

For the reasons stated herein, the decision of the district court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amici Curiae* Delegate Bob Marshall, *et al*., complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,912 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point Times New Roman.

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Dated: April 4, 2011

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Delegate Bob Marshall, *et al.*, in Support of Plaintiff-Appellee and Affirmance, was made, this 4th day of April 2011, by the Court's Case Management/Electronic Case Files system and by mailing upon the following attorneys for the parties:

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