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 Before Judgment To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. Whether the district court erred in holding that the Commonwealth has standing to challenge the minimum coverage provision (as stated by the Secretary).

2. Whether the district court erred in holding that the minimum coverage provision is not a valid exercise of Congress's Article I powers (as stated by the Secretary).

3. Whether the district court erred when it held that the unconstitutional mandate and penalty of the *Patient Protection and Affordable Care Act of 2010*, P.L. 111-148, 124 Stat. 119 (2010), as amended by the *Health Care and Education Reconciliation Act of 2010*, P.L. 111-152, 124 Stat. 1029 (2010), is severable from all the remaining provisions of the law.

4. Whether the district court erred when it denied injunctive relief.

CORPORATE DISCLOSURE STATEMENT

There are no disclosable entities, persons or interests.

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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 before judgment in a case pending on appeal to the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the district court denying the Secretary's Motion to Dismiss is reported as *Commonwealth of Virginia, ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). That decision and the Memorandum Opinion granting summary judgment to Virginia are reprinted in the Appendix ("App.") at App. 1-53.

JURISDICTION

The judgment of the district court was entered on December 13, 2010. Notices of appeal were timely filed within 60 days of judgment by the Secretary and by the Commonwealth of Virginia on January 18, 2011. The appeals were consolidated and docketed in the court of appeals on January 20, 2011 as *Commonwealth of Virginia v. Kathleen Sebelius*, No. 11-1057. Accordingly, the jurisdiction of this Court is

invoked under 28 U.S.C. §§ 1254(1) and 2101(e), and Rule 11 of this Court.

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 98-147).

STATEMENT OF THE CASE

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), ("PPACA") imposes complex and significant regulatory changes on all 50 States. Businesses also must come to grips with the intricate requirements of the law and dramatically reorder the way health insurance is provided to their employees. PPACA was challenged from the moment it was signed. A steady drumbeat of new lawsuits continues to punctuate the news. Despite the regulatory overhaul PPACA imposes on the States, uncertainty surrounds the law. In carefully reasoned opinions, two district courts have found that Congress overstepped its authority in enacting all or part of PPACA. Other courts have disagreed, leaving the States and businesses unsure

whether PPACA's complex requirements, or parts of them, will survive. Given the importance of the issues at stake to the States and to the economy as a whole, this Court should grant certiorari to resolve a matter of imperative public importance.

The United States Senate passed PPACA, on Christmas Eve 2009, on a straight party line vote without a single vote to spare. Cobbled together in secret, PPACA was passed through without committee hearing or report, employing such florid deal-making as to generate scornful popular terms like "the Louisiana Purchase" and "the Cornhusker Kick-back." (App. at 156-57).

At the heart of PPACA's financing scheme is § 1501,[1] which requires American citizens, with certain exceptions, to purchase a good or service from other citizens; to wit, a policy of insurance complying with federal standards. (App. at 102-115). Although Congress purported to be exercising Commerce Clause powers in enacting PPACA, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), this claim was known to be problematical. When the Senate Finance Committee had asked the Congressional Research Service whether a mandate supported by a penalty would be constitutional, the response was equivocal: "Whether such a requirement would be constitutional under the Commerce Clause

[1] Section 1501 is now codified at 26 U.S.C. § 5000A.

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."[2] Because an intervening election in Massachusetts removed the availability of cloture in the Senate, PPACA was passed by the House of Representatives unaltered, and then subjected to minor amendment in a reconciliation process dealing as much with college loans as with health care.

Meanwhile, at the 2010 Regular Session of the Virginia General Assembly, the Virginia Health Care Freedom Act, *Virginia Code* § 38.2-3430.1:1, had been enacted with the assent of the Governor. (App. at 116). 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

[2] Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional 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.").

> 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 157).

The Attorney General of Virginia has the duty to defend the legislative enactments of the Commonwealth. *Virginia Code* §§ 2.2-507; 2.2-513. When the President signed PPACA on March 23, 2010, the validity of both the Federal and State enactments were drawn into question. If PPACA was supported by an enumerated power, then it would prevail under the Supremacy Clause. If not, the Health Care Freedom Act would be 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 54-55).

The gravamen of the Complaint was that the claimed power to require a citizen to purchase a good or a service from another citizen lacks any principled limit and is tantamount to a national police power.

Virginia demonstrated below that since *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court has reached 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." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Section 1501 of PPACA seeks to regulate **inactivity** affecting interstate commerce, a claimed power well in excess of the affirmative outer limits of the Commerce Clause heretofore recognized, even as executed by the Necessary and Proper Clause. *See Gonzales v. Raich*, 545 U.S. 1 (2005). This claimed power also violates the negative outer limits of the Commerce Clause identified in *Lopez* and in *United States v. Morrison*, 529 U.S. 598 (2000). As was so clearly stated in *Morrison*: "We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618-19 (emphasis in original). *See also Morrison*, 529 U.S. at 663 (recognizing that heightened scrutiny might be justified where Congress acted in haste without taking "a hard look" at federalism issues or if it otherwise followed questionable procedures.) (Breyer, J., dissenting).

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. (App. at 56-57). Ten amici were granted leave to file and did file briefs in support or in opposition. (App. at 194-205).

With respect to standing, Virginia argued that states suffer a sovereign injury and have standing to claim that the national government is acting in excess of its enumerated powers whenever their code of laws is attacked or whenever they are otherwise commanded to give way. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144, 155 (1992); *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 & Sons v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) ("[T]he power to create and enforce a legal code, both civil and criminal" is a core State function); *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 pre-emption threatened by a federal agency's interpretation of federal law); *Tex. Ofc. of Pub. Util. 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.'") (citing *Alfred L. Snapp & Sons*); *Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443-45 (D.C. Cir. 1989) ("pre-emptive effect [of federal regulations] is the injury" sufficient to confer Article III standing); *Ohio v. USDOT*, 766 F.2d

228, 232-33 (6th Cir. 1985) ("since Ohio is litigating the constitutionality of its own statute," it has standing).

With regard to the Anti-Injunction Act, 26 U.S.C. § 7421(a), and its parallel tax provisions in the Declaratory Judgment Act, 28 U.S.C. § 2201(a), Virginia noted that these statutes establish a "pay and sue" rule whereby assessed taxes must be paid before being challenged. Virginia argued that this Court has made it clear that the Anti-Injunction Act does not apply to non-taxpayer States. *South Carolina v. Regan*, 465 U.S. 367 (1984). This proposition necessitates the conclusion that there is similarly no bar under the Declaratory Judgment Act, 28 U.S.C. § 2201. *In re: Leckie Smokeless Coal Co. v. United Mine Workers of America*, 99 F.3d 573, 583-84 (4th Cir. 1996) (on this proposition, the acts are coextensive).

Virginia further argued that considerations of ripeness are no bar because the collision between PPACA and the Virginia enactment are patent. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010), quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

Finally, with respect to the motion to dismiss for failure to state a claim, Virginia maintained that it was clear Congress was claiming a power never before asserted and was operating beyond the affirmative and negative limits of the Commerce Clause as heretofore recognized. Under these circumstances it was plausible that a claim had been stated for violation of the Commerce Clause. Likewise, the Commonwealth made a plausible argument that the Secretary's alternative claims based upon the taxing powers were unsound.

On the tax issue, the threshold problem for the Secretary is that there is a justiciable difference between a tax and a penalty. *United States v. LaFranca*, 282 U.S. 568, 572 (1931). "'A tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" *United States v. Reorganized (F&I) Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (citation omitted). A penalty not supporting a tax is not a tax penalty but a naked penalty requiring an enumerated power other than the taxing power to support it. Furthermore, even if the penalty were a tax "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 a regulation and punishment." *Dep't of Rev. of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994). *See also United States v. Butler*, 297 U.S. 1, 68 (1936); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). Because at this

point the penalty requires a supporting enumerated power independent of the taxing power—and the only possible one would be the Commerce Clause—the tax argument collapses back into the Commerce Clause argument.

Based upon these authorities and considerations the district court denied the motion to dismiss on August 2, 2010. *Commonwealth of Virginia v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). (App. at 89).

On August 16, 2010, the Secretary filed her Answer. (App. at 207). On September 3, 2010 the parties filed cross-motions for summary judgment. (App. at 2). They were supported or opposed in twelve briefs amicus curiae, including briefs filed on behalf of former Attorneys General Barr, Meese, and Thornburgh, and in briefs filed on behalf of eighteen law professors. (App. at 209-22). On the threshold and merits issues, Virginia argued in conformity with its positions at the motion to dismiss stage. With respect to remedy, Virginia argued that under the legislative bargain prong of *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), the mandate and penalty, if unconstitutional, are not severable from the remainder of PPACA. On the second prong of *Alaska Airlines*, which turns on the ability of remaining provisions to function without the stricken parts, the Secretary conceded that changes in insurance regulation, such as guaranteed issue and community rating, were not severable from the mandate and penalty. (App. at 148-49, 151). Indeed, the Secretary asserted that the changes in insurance would collapse

that industry without the mandate and penalty. (App. at 148-49). Virginia argued in the alternative that at least all means of financing the PPACA scheme, including Medicare and Medicaid changes, had been intended to work together and could not be severed from the mandate and penalty. (App. at 46).

On October 7, 2010, the United States District Court for the Eastern District of Michigan in *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), found that the private party plaintiffs that were before it had standing, found that their claims were ripe, found that the penalty was not a tax triggering the Anti-Injunction Act and ruled that PPACA is a constitutional exercise of power under the Commerce Clause. The Secretary filed her Notice of Supplemental Authority on October 8, 2010 bringing that decision to the attention of the district court in the Eastern District of Virginia. (App. at 221).

On October 14, 2010, the United States District Court for the Northern District of Florida in *State of Florida v. United States Department of Health and Human Services*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010), denied the motion to dismiss filed by the United States. In the course of its decision that court held that PPACA could not be sustained under the taxing power. *Id.* at 1139-40. Virginia filed its Notice of Supplemental Authority the same day bringing that decision to the attention of the district court. (App. at 223).

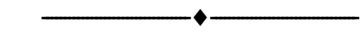
On November 30, 2010, the United State District Court for the Western District of Virginia in *Liberty University v. Geithner*, 2010 WL 4860299, No. 6:10cv15 (W.D. Va. Nov. 30, 2011), found that the claims of Liberty University and two individuals conferred standing upon them and were ripe for adjudication. The mandate and penalty were found not to trigger the Anti-Injunction Act and PPACA was upheld as a constitutional exercise of Congressional Commerce Clause power. The Secretary filed her Notice of Supplemental Authority on December 3, 2010 bringing this decision to the attention of the district court. (App. at 225).

On December 13, 2010, the district court granted Virginia's Motion for Summary Judgment and declared PPACA unconstitutional. (App. at 52-53). The Secretary filed her Notice of Appeal on January 18, 2011. (App. at 225). Because the district court had ruled that the mandate and penalty were severable, Virginia filed a Notice of Appeal the same day. (App. at 225). The cases were consolidated by Order dated January 20, 2011 and the consolidated appeals were docketed in the Fourth Circuit that day. (App. at 92-94, 95). Hence, this petition is ripe under Rule 11.

On January 26, 2011, the Secretary and Virginia filed a Joint Motion to Expedite Briefing and to Schedule Oral Argument for May 2011. (Case 11-1057 Doc. 13). The Motion was Granted the same day, (Case 11-1057 Doc. 15), and oral argument is tentatively scheduled for the May 10-13 session, to be

conducted *seriatim* with argument in the *Liberty University* case. (Case 11-1057 Doc. 24).

On January 28, 2011, the Secretary filed her non-binding Statement of Issues on appeal. (Case 11-1057 Doc. 17 at 3). That statement is repeated *supra* as Questions Presented No. 1 and No. 2.



REASONS FOR GRANTING THE PETITION

A petition for writ of certiorari before judgment in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

A. This Case Is of Imperative National Importance Requiring Immediate Determination in this Court.

PPACA has roiled America. The party that unanimously opposed PPACA in the House of Representatives has just seen its largest electoral gains in over seventy years. With the intervention of six additional states in the Florida suit on January 19, 2011, it became possible for the first time in American history to count a clear majority of states in litigation with the federal government, each claiming that the federal government has exceeded its enumerated powers. That same day the House of Representatives voted to repeal PPACA on a vote of

245 to 189. On January 21, 2011, Oklahoma filed suit in the Eastern District of Oklahoma to vindicate a recently enacted constitutional amendment which conflicts with PPACA.

Despite these developments, the States, citizens and the economy remain mired in uncertainty. Because the changes effected by PPACA are so massive, the States are forced to devote considerable resources now to meet the requirements of a congressional enactment that this Court may find invalid. In Virginia, some of the key agencies involved with PPACA include the Office of the Secretary of Health and Human Resources, the Department of Medical Assistance Services, the Department of Health, the Bureau of Insurance, and the state medical teaching hospitals. Virginia must assess whether to develop a high risk pool or default to the federal government, overhaul its insurance laws, and create a health benefit exchange. *See, e.g.,* 42 U.S.C. §§ 18001 (high risk pools); 18031 (health benefit exchanges). The latter entails the administrative costs associated with creating an entirely new agency, expanding an existing agency, or providing support for an independent entity. The General Assembly of Virginia is presently considering complex bills on a variety of PPACA-related issues.[3] All 50 states

[3] *See* House Bills 1928, 1958, (both overhauling various aspects of Virginia insurance law in light of PPACA); 2434 (creating a Health Benefit Exchange), and Senate Bill 1366 (same). Information about these bills is available at the General Assembly's website, http://leg1.state.va.us/lis.htm

currently are undertaking similar efforts. States are also struggling to determine the costs of expanding the Medicaid program and how to cope with them.

Citizens and businesses are widely believed to be reducing spending and delaying hiring in response to the overhang of uncertainty. Under PPACA, effective December 31, 2013, hardly a distant horizon, certain employers with more than 50 employees who do not offer health insurance as a benefit will have to pay a fee of $2,000 per every full-time employee.[4] Any employer who employs more than 200 employees and offers insurance to those employees must automatically enroll new employees in this insurance, and continue to maintain insurance for existing employees already enrolled in this insurance.[5] Employers will have to offer vouchers allowing qualified employees to obtain coverage through a state-run insurance exchange rather than through the employer.[6] PPACA also establishes minimum standards of coverage that health insurance plans must achieve to be considered a "qualified health plan."[7] What satisfies the definition of a qualified health plan will be determined through the HHS regulations. Hundreds of businesses have sought and

[4] 26 U.S.C. § 4980H(a).

[5] 29 U.S.C. § 218a.

[6] 42 U.S.C. § 18101.

[7] 42 U.S.C. §§ 18021, 18022.

obtained waivers from certain PPACA requirements, but those waivers are temporary.[8]

Given the burdens and uncertainties associated with PPACA, it is not surprising that the Governor, Lieutenant Governor and Speaker of the House of Delegates of the Commonwealth of Virginia have requested the Attorney General to seek expedited appeal. The Secretary herself, in her Joint Motion to Expedite Briefing and to Schedule Oral Argument for May 2011, filed in the Fourth Circuit on January 26, has agreed that "[t]he constitutionality of the Affordable Care Act has public policy implications of the highest magnitude." (Case 11-1057 Doc. 13 at 3).

There is a palpable consensus in this country that the question of PPACA's constitutionality must be and will be decided in this Court. Under these circumstances, the issues presented here should be considered to be at least as important as those presented in many of the cases where immediate review has been permitted under Rule 11 or its predecessors. Such cases include challenges to the legality of the Federal Sentencing Guidelines, *Mistretta v. United States*, 488 U.S. 361 (1989), the reorganization of two railroads, *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970), a coal strike, *United States v. United Mine Workers of America*, 330 U.S.

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[8] http://www.hhs.gov/ociio/regulations/approved_applications_for_waiver.html (noting that 711 waivers that must be renewed annually were issued for FY 2011).

258, 269 (1947), a denial of the power of a federal court to enforce rent control, *Porter v. Dicken*, 328 U.S. 252 (1946), a constitutional challenge to the Bituminous Coal Conservation Act, *Carter v. Carter Coal Co.,* 298 U.S. 238, 285 (1936), a constitutional challenge to the Railroad Retirement Act, *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 340 (1935), and the effect of a railroad dispute on the economy of St. Louis, Missouri. *St. Louis, Kansas City & Col. R.R. Co. v. Wabash R.R. Co.*, 217 U.S. 247, 250-51 (1910).

Rule 11 also has been employed to enable this Court to gather a number of cases so as to permit it to make a constitutional assessment in a wider range of circumstances. *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003). It should be so employed here. In both *Thomas More Law Center* and in the *Liberty University* cases, the Department of Justice failed to independently cross appeal standing. Because that issue is jurisdictional, it is not waivable and may be asserted by a party at anytime or by this Court *sua sponte*. As a consequence, it cannot be known prior to decision whether those cases provide a good vehicle for reaching the constitutional merits. Sovereign standing, on the other hand, is more categorically established than is individual standing, which in any specific case turns on the particular facts of that case. Granting certiorari in this case will ensure a good vehicle for merits review. Granting certiorari in this case and then expanding it to reach all merits decisions pending in the courts of appeal would serve

the aggregation interest recognized in *Gratz*, 539 U.S. at 259-60.

The United States District Court for the Northern District of Florida declared PPACA unconstitutional in its entirety on January 31, 2011. Enlarging a grant of certiorari in this case to include that case once an appeal is docketed would further expand and develop the records on which the issue of severability can be considered.

B. The Imperative Public Importance of the Constitutionality of PPACA and the Proper Scope of Severance Justify Deviation from Normal Appellate Practice.

The paradigm cases for the grant of Rule 11 review are challenges to federal power involving significant national economic impact. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392; *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 584-85 (1952); *United Mine Workers of Am.*, 330 U.S. 258; *Carter Coal Co.*, 298 U.S. 238; *Alton R. Co.*, 295 U.S. 330; *United States v. Bankers Trust Co.*, 294 U.S. 240, 243 (1935). The pending case shares both aspects of those cases: constitutional questions and significant national economic effect. Furthermore, the presence of pure issues of constitutional law on the merits ensures that normal appellate practice will not further focus the controlling issues, which, in any event, are bottomed on decisions of this Court. Indeed, because the constitutionality of PPACA can only be resolved

by determining whether and to what extent this Court will enlarge the existing affirmative and negative outer limits of the Commerce Clause, or overrule the *Child Labor Tax Case*, it is not clear to what extent the courts of appeal are even entitled to engage in independent legal development in the face of binding precedent from this Court. *See Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) (this Court has the exclusive prerogative to reverse its own cases).[9]

C. This Case Is "Cert. Worthy" In its Own Right and Is a Good Vehicle for Resolving Constitutional Issues Which Have Been Variously Decided Around the Country and Which Can Only Be Finally Decided in this Court.

This Court has deemed a split among district courts in different circuits as a factor weighing in favor of granting certiorari under Rule 11. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Such a split

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[9] The district courts in Virginia and Florida expressly recognized this point. *See* App. at 44 (relying on this Court's cases to reject the argument that the "penalty" is a tax, while recognizing that the line of cases has been criticized by some scholars); *Florida v. United States Dep't of Health and Human Servs.*, 2011 WL 285683, No. 3:10cv91, slip op. 43 (N.D. Fla. Jan. 31, 2011) ("existing case law thus extends only to those 'activities' that have a substantial relationship to, or substantially affect, interstate commerce. I am required to interpret this law as the Supreme Court presently defines it. Only the Supreme Court can redefine or expand it further.").

exists here and has merely been deepened by the Florida decision. *See Florida v. United States Dep't of Health and Human Servs.*, 2011 WL 285683.

This case is a particularly good vehicle for resolving the split because all of the issues raised by the Department of Justice—standing, the Anti-Injunction Act, ripeness, and the limits of the Commerce Clause and of the Taxing Power—have been raised here where they have been exhaustively developed. Although it appears from the non-binding Statement of Issues in the Secretary's Docketing Statement that she does not intend to appeal the Anti-Injunction Act or ripeness, she is pursuing standing. Because the Secretary has not appealed standing in the *Thomas More Law Center* and *Liberty University* cases, they are not reliable vehicles by themselves for assuring merits review because standing is a jurisdictional issue that could be re-raised or raised *sua sponte*. Granting certiorari in this case will ensure that the issue will arrive fully briefed in this court.

The fact that Virginia was the prevailing party below is no barrier to a grant of certiorari. 28 U.S.C. § 1254(1) provides that "any party to any civil or criminal case" may petition for certiorari from "[c]ases in the courts of appeals" both "before and after rendition of judgment or decree." *See also United Mine Workers of America*, 330 U.S. at 269 (former 28 U.S.C. § 347(a), now 28 U.S.C. § 1254(1), "authorizes a petition for certiorari by any party and the granting of certiorari prior to judgment in the

Circuit Court of Appeals."). Furthermore, Virginia's claim of error with respect to severance is derivative of and closely connected with the Secretary's appellate issues.

Having correctly found that the individual mandate and penalty were unconstitutional, the district court in this case turned to the question of severance. The district court recognized that, even in the absence of a severability clause, "[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." (App. at 47) (internal quotation and citation omitted). It then noted that the fully operative test can turn on the question "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. . . ." (App. at 48) (internal citation omitted). The district court also noted that another reason to decline to sever an unconstitutional provision of a statute from the remaining whole would arise if a court concluded that Congress would not have enacted the statute "in the absence of the severed unconstitutional provision. . . ." (App. at 48) (internal citation omitted). Ultimately, the district court severed the unconstitutional mandate and penalty from the remainder of the act, writing that it would "sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501." (App. at 49). Because there are no such

provisions this was error because it failed to execute even the Secretary's concessions.

The Secretary's significant concession regarding severance was that, if the mandate and penalty were found unconstitutional, other "provisions of the Act plainly cannot survive." (App. at 148). In saying this she specifically acknowledged that the "insurance industry reforms" contained in PPACA "cannot be severed from the" mandate and penalty, and therefore, must be stricken if the mandate and penalty are found to be unconstitutional. (App. at 149). Thus, at a minimum, the district court erred in not striking those elements of PPACA when it found the mandate and penalty unconstitutional.

However, the Secretary's concession should have been the beginning of the severance review and not the end. Because all financing provisions, including Medicare and Medicaid changes, were intended to operate together, they should all fall together as well. Indeed, under the legislative bargain prong of *Alaska Airlines, Inc.*, 480 U.S. at 684, PPACA should have been stricken in its entirety because it is as certain as such a thing ever could be that PPACA would not have passed at all without the unconstitutional mandate and penalty.

The decision of the Northern District of Florida striking down PPACA in its entirety has engendered further uncertainty. This too heightens the need for expedited review. Finally, it should be noticed that Virginia satisfied all four elements bearing on the

propriety of injunctive relief. Because the Secretary apparently continues to implement PPACA despite two clear declarations of unconstitutionality, injunctive relief should also be immediately considered.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari before judgment in the court of appeals should be **GRANTED** and then expanded to include all PPACA litigation pending in the courts of appeals.

Respectfully submitted,

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