No. 11-1057

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,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY,

Defendant-Appellant.

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

BRIEF OF AMICUS CURIAE KEVIN C. WALSH IN SUPPORT OF APPELLANT SEEKING REVERSAL

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IDENTITY AND INTEREST OF AMICUS CURIAE

Kevin C. Walsh is a Virginia resident and a member of the faculty at the University of Richmond School of Law. He teaches and writes in the areas of federal jurisdiction, constitutional law, and complex litigation. Walsh is the author of a forthcoming essay in the Stanford Law Review presenting previously unidentified arguments that require dismissal of Virginia's lawsuit for lack of jurisdiction.[1] These arguments were not presented by either party, despite extensive briefing below. Nor were they addressed in the District Court's two thorough opinions or in appellant's opening brief in this Court. These heretofore neglected arguments establish that the federal courts lack *statutory* subject-matter jurisdiction over State declaratory judgment actions like this one, and that Virginia's lawsuit seeks an advisory opinion outside the bounds of Article III jurisdiction. This brief presents these arguments and explains why they require reversal and dismissal.[2]

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[1] *See* Kevin C. Walsh, *The Ghost that Slew the Mandate*, 64 *Stanford Law Review* ____ (forthcoming), a*vailable at* http://papers.ssrn.com/sol3/papers.cfm ?abstract_ id=1748550 (last visited March 4, 2011).

[2] This brief takes no position on the constitutionality of the individual mandate or on the justiciability of the private-party challenges in the *Liberty University* case. No counsel for any party authored this brief in whole or in part. No person or entity, other than amicus, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of this brief. Walsh's institutional affiliation is noted for identification purposes only.

SUMMARY OF ARGUMENT

Virginia's lawsuit relies on a novel vehicle to seek a federal declaratory judgment: a declaratory state statute designed to carry Virginia into federal court for a declaratory judgment about the constitutionality of a federal law. Established Supreme Court precedent requires dismissal of the claim that has been concocted and carried into court by means of this contrivance.

There are three independent grounds for dismissing Virginia's lawsuit for lack of statutory subject-matter jurisdiction. First, the Supreme Court has held that "[t]he situation presented by a State's suit for a declaration of the validity of state law is … not within the original jurisdiction of the United States district courts."[3] This holding requires dismissal of Virginia's lawsuit, which seeks a declaration that state law is not preempted by federal law.

Second, the Supreme Court has held that there is no statutory jurisdiction over a federal declaratory judgment action unless one of the parties to the declaratory action could have brought a nondeclaratory action about the same issue against the other party.[4] That condition is not met here. Virginia challenges the individual mandate, a statutory provision not enforceable by the federal

[3] *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21-22 (1983).

[4] *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 804-05 (6th ed. 2009) (describing the holding of *Skelly Oil* and subsequent applications of the *Skelly Oil* test).

government against Virginia. The basis for this challenge is Virginia's Health Care Freedom Act, a statute not enforceable by Virginia against the federal government. Thus neither party could sue the other in federal court in a nondeclaratory action concerning the enforceability of the individual mandate. There is therefore no jurisdiction over Virginia's declaratory judgment action concerning the same issue.

Third, Congress has limited the availability of declaratory relief to "a case of actual controversy."[5] This is not such a case. Rather, Virginia's lawsuit amounts to a request for an advisory opinion about the constitutionality of the individual mandate. In the guise of a declaratory judgment action about the validity of its declaratory state statute, Virginia actually seeks a ruling about the law that would apply if and when there is an actual controversy between the federal government and a Virginia resident who seeks to avoid the obligation of the individual mandate.

This last statutory ground for jurisdictional dismissal overlaps with the case or controversy requirement of Article III.[6] As such, it provides a statutory hook for the Article III standing arguments advanced by the federal government (which are sound). But because of this overlap, this third statutory ground differs from the

[5] 28 U.S.C. § 2201.

[6] *See MedImmune, Inc. v. Genentech Inc.*, 549 U.S. 118, 127 (2007) ("[T]he phrase 'case of actual controversy' in the [Declaratory Judgment] Act refers to the types of 'Cases' and 'Controversies' that are justiciable under Article III.") (internal citation omitted).

other two in an important respect. Those two grounds enable this Court to order dismissal for lack of jurisdiction without making any constitutional determination. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case."[7] There is no reason to exempt constitutional determinations under Article III from this salutary practice of constitutional avoidance.

"Jurisdiction of the lower federal courts is … limited to those subjects encompassed within a statutory grant of jurisdiction."[8] It is inconsequential for resolution of this appeal that the parties have thus far failed to address the absence of statutory subject-matter jurisdiction. "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it."[9]

The jurisdictional analysis requiring dismissal of Virginia's lawsuit has significance far beyond this one case.[10] Other States have enacted opposition to the

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[7] *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (internal quotation marks omitted).

[8] *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 695, 701 (1982).

[9] *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

[10] One readily available indicator of its importance can be seen in Judge Vinson's decision in *Florida v. HHS*, which adopted wholesale the jurisdictional analysis for

individual mandate into state law, and have done so using the vehicle of a declaratory state statute they hope to ride into federal court to invalidate the individual mandate.[11] Moreover, health care is just one issue on which some States are pushing back against the federal government.[12]

A State cannot interpose itself between its citizens and the federal government by means of a *parens patriae* action against the federal government—as Virginia appropriately conceded below.[13] A State is not permitted to accomplish the same interposition simply by first enacting a declaratory statute to codify disagreement with federal law before repairing to federal court. Such interposition

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state standing from Judge Hudson's opinion in this case. *See Florida v. HHS*, ___ F. Supp. 2d ___, 2011 WL 285683 (N.D. Fla. 2011).

[11] Legal measures opposing various aspects of healthcare reform were introduced in over 40 state legislatures in 2009 and 2010, and Virginia was just one of seven states to enact opposition to an individual mandate into state law in 2010. *See* Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms, 2010-11*, National Conference of State Legislatures (last updated February 22, 2011), at http://www.ncsl.org/?tabid=18906. The other states enacting a mandate-exemption statute in 2010 were Arizona, Georgia, Idaho, Louisiana, Missouri, and Utah. *Id.*

[12] *See* Tenth Amendment Center, The Tenth Amendment Nullification Movement, *at* http://www.tenthamendmentcenter.com/the-10th-amendment-movement/ (providing resources for tracking state nullification legislation involving firearms regulation, marijuana laws, and cap and trade, among other issues).

[13] Mem. of Pl. in Opp'n to Mot. to Dismiss at 12 [JA 112] ("Virginia recognizes that *Massachusetts v. Mellon* stands for the proposition that States cannot sue the federal government under *parens patriae* principles . . . .").

is inconsistent with the constitutional structure of the United States.[14] It cannot be sanctioned by this Court.

ARGUMENT

Federal courts are courts of limited jurisdiction. Virginia's lawsuit is outside both statutory and constitutional limits. Because there is no statutory subject-matter jurisdiction, however, this Court need not (and therefore should not) reach any constitutional question of Article III jurisdiction.

I. There Is No Statutory Subject-Matter Jurisdiction over Virginia's Lawsuit

Virginia relies on 28 U.S.C. §§ 1331 (the grant of general federal-question jurisdiction) and 2201 (the statutory authorization for declaratory relief) for statutory jurisdiction.[15] But the Supreme Court has imposed limits on the ability of federal courts to grant declaratory relief under § 2201, and has incorporated these limits as jurisdictional limitations into § 1331.[16] The most directly applicable limit

[14] *See McCulloch v. Maryland*, 17 U.S. 316, 404 (1819) ("The Government of the Union . . . is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

[15] Compl. at 3 [JA 30].

[16] *Franchise Tax Bd.*, 463 U.S. at 18 ("Having interpreted the Declaratory Judgment Act of 1934 to include certain limitations on the jurisdiction of federal district courts to entertain declaratory judgment suits, we should be extremely hesitant to interpret the Judiciary Act of 1875 and its 1887 amendments [*i.e.*, the general grant of federal question jurisdiction] in a way that renders the limitations in the later statute nugatory.").

is set forth in *Franchise Tax Board*, which forecloses certain federal declaratory judgment actions brought by States.[17] Another limit is set forth in *Skelly Oil*, which applies to all federal declaratory judgment actions.[18] Each independently requires dismissal.

A. Franchise Tax Board *Requires Dismissal*

The Supreme Court held in *Franchise Tax Board* that "[t]he situation presented by a State's suit for a declaration of the validity of state law is … not within the original jurisdiction of the United States district courts."[19] This holding simply and squarely forecloses federal jurisdiction in this lawsuit, in which Virginia asks the court to "declare that [Virginia's Health Care Freedom Act] is a

[17] *See id.* at 21-22.

[18] *See Skelly Oil Co.*, 339 U.S. at 671-72.

[19] *Franchise Tax Bd.*, 463 U.S. at 21-22. In *Franchise Tax Board*, a California agency filed a claim in state court (which was later removed into federal court) to secure a declaration that California tax law was not preempted by ERISA. *Id.* at 5-7. The Supreme Court had previously interpreted the federal Declaratory Judgment Act to include certain limits on federal jurisdiction over declaratory judgment actions filed in federal court. *Id.* at 14-22. To prevent circumvention of those limits through removal of a state court action, the Court determined that the limitations it had previously found in the federal Act would also apply whenever a litigant sought to bring a state declaratory judgment action into federal court. *See id.* at 18-19. Because removal jurisdiction is co-extensive with original jurisdiction, the Court's holding applies not only to cases removed into federal court, but also to those filed there originally. *See id.* Most important for present purposes, the Court in *Franchise Tax Board* did more than simply expand the category of actions covered by prior limitations on federal declaratory judgments. The Supreme Court imposed a *new* limitation on jurisdiction that applies when *a State* seeks declaratory relief under § 2201. *See id.* at 21-22.

valid exercise of state power."[20] As the district court noted (in the course of analyzing a different point), the primary objective of Virginia's federal declaratory judgment lawsuit is to determine the validity of Virginia law.[21]

The Court explained in *Franchise Tax Board* that allowing federal jurisdiction over declaratory judgment suits by States seeking to validate state laws would be "removed from the spirit of necessity and careful limitation of district court jurisdiction that informed" its earlier interpretations of the Declaratory Judgment Act.[22] The underlying dispute in *Franchise Tax Board* was over a purported conflict between ERISA and state tax law.[23] But the Court did not limit the formulation of its holding to foreclosing federal jurisdiction over only those kinds of disputes, and that holding requires dismissal here.[24]

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[20] Compl. at 6 [JA 33].

[21] *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 605 (E.D. Va. 2010) (explaining that the "primary articulated objective" of the lawsuit is "to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law").

[22] *Franchise Tax Bd.*, 463 U.S. at 21-22.

[23] *Id.* at 4-7.

[24] *Cf. Missouri ex rel. Missouri Highway and Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1336 (8th Cir. 1997) ("There is a minor distinction between *Franchise Tax Board* and the instant case: that case involved a conflict between a federal statute and a state statute, while the case at bar presents a conflict between the federal Constitution and state administrative action. Nevertheless, we see no reason why the *Franchise Tax Board* holding should not apply to the case before us.").

In addition to the declaratory relief foreclosed by *Franchise Tax Board*, Virginia also asks for "such further and additional relief as the ends of justice may require including an injunction against the enforcement of § 1501 in particular and PPACA as a whole." *Id.* As this wording reveals, the request for an injunction is ancillary to the request for declaratory relief. A court cannot reach the *additional* remedy of an injunction without first making the declaration of state-law validity that *Franchise Tax Board* holds to be beyond the jurisdiction granted by Congress in § 1331. Consequently, Virginia's claim for the "further and additional relief" of an injunction cannot be independently salvaged from its fatally flawed claim for declaratory relief.[25]

Some scholars have suggested that *Franchise Tax Board* can be understood as a kind of abstention decision.[26] To resist application of *Franchise Tax Board*, then, Virginia might argue that the rationale of the rule does not apply because, unlike the claim at issue in *Franchise Tax Board*, there is no state court with authority to issue the relief Virginia seeks. This distinction is a real one. Yet it provides even more of a reason to apply the rule of *Franchise Tax Board* and dismiss Virginia's lawsuit. The tax law at issue in *Franchise Tax Board* imposed

[25] Additionally, as explained in more detail below, the federal court lacks Article III jurisdiction to issue the requested injunction.

[26] *See* Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 810-11 (6th ed. 2009).

obligations on individuals whom the state could then pursue in a state-court collection action or at least name as proper defendants in a state-court declaratory judgment action.[27] By contrast, there is no state-court action that Virginia could bring to enforce its Health Care Freedom Act. To ask a Virginia court to opine on such a law's validity in the absence of a proper defendant would be to request a forbidden advisory opinion.[28] Moving the same claim into federal court and adding the Secretary as a nominal defendant does not render the resulting opinion any less advisory.[29]

In sum, *Franchise Tax Board* forecloses statutory subject-matter jurisdiction over a State's declaratory judgment action to determine the validity of a law that a

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[27] *See Franchise Tax Bd.*, 463 U.S. at 21 (explaining that States "have a variety of means by which they can enforce their own laws in their own courts").

[28] *See*, *e.g.*, *Fairfax v. Shanklin***,** 135 S.E.2d 773, 775-76 (Va. 1964) ("[T]he courts are not constituted, and the declaratory judgment statute was not intended to vest them with authority, to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative.").

[29] This line of analysis also explains why *Franchise Tax Board* provides no support for Virginia even if it is interpreted as a decision that involves an element of deference to state forum preferences. Whatever such deference *Franchise Tax Board* might be thought to embody, Virginia cannot get around the ultimately advisory nature of its claims. *See infra* Section II. Moreover, if the District Court was wrong about the "declaratory nature" of the state law, and there existed some way in which it could be enforced against a person who sought to impose an obligation on a Virginia citizen to purchase insurance, this would still not aid Virginia's attempt to distinguish *Franchise Tax Board*. In such a case, Virginia would be acting to protect a particular individual using a *parens patriae* theory, which Virginia has appropriately acknowledged is unavailable to support its suit against the United States. Mem. of Pl. in Opp'n to Mot. to Dismiss at 12 [JA 112].

State actually could enforce in court. It would make little sense to interpret the precedent nevertheless to allow for jurisdiction over a State's declaratory judgment action to determine the validity of a state law that cannot serve as the basis of a state-court enforcement action. *Franchise Tax Board* cannot be meaningfully distinguished; it requires dismissal of Virginia's lawsuit.

B. Skelly Oil *Requires Dismissal*

The Supreme Court's decision in *Skelly Oil* also requires dismissal of Virginia's lawsuit. The *Skelly Oil* approach to § 2201 allows federal courts to exercise jurisdiction over only those actions in which either the declaratory judgment plaintiff or the declaratory judgment defendant could have brought a nondeclaratory action against the other party concerning the same issue.[30] Put another way, federal jurisdiction over a declaratory judgment action brought under § 2201 "depends on the answer to a hypothetical question: had the Declaratory Judgment Act not been enacted, would there have been a nondeclaratory action (i) concerning the same issue, (ii) between the same parties, (iii) that itself would have been within the federal courts' subject matter jurisdiction?"[31]

[30] *See Skelly Oil Co.*, 339 U.S. at 671 (stating that the Declaratory Judgment Act "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction"); Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 804-05 (6th ed. 2009).

[31] Fallon, et al., *supra*, at 804.

Here, the answer to that hypothetical question is plainly "no." Virginia possesses no right to nondeclaratory relief against the Secretary's enforcement of the individual mandate. Virginia may not seek an injunction prohibiting the Secretary's enforcement of the individual mandate against its citizens because that would be a *parens patriae* action forbidden by *Massachusetts v. Mellon*.[32] Nor may Virginia seek an injunction prohibiting the Secretary's enforcement of the individual mandate against Virginia: the individual mandate is not enforceable against Virginia, only against individuals.[33]

Injunctions do not run against statutes, but against actors. According to the Supreme Court, "[i]f a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute

[32] 262 U.S. 447, 485-86 (1923).

[33] *See* Pub. L. No. 111-148, § 1501 (imposing minimum insurance coverage requirement on "applicable individuals"); Mem. of D. in Support of Mot. to Dismiss at 1 [JA 49] ("[T]he only provision Virginia challenges in this litigation – Section 1501 of the Patient Protection and Affordable Care Act ("ACA"), which requires individuals either to obtain a minimum level of health insurance or to pay a penalty if they do not – will impose no obligations on the Commonwealth, even after the law takes effect some four years from now. The provision applies only to individuals, not the state government."); *id.* at 12 [JA 60] (stating that the individual mandate provision "does not impose any obligations whatsoever on Virginia as a state"); Mem. of Pl. in Opp'n to Mot. to Dismiss at 18-19 [JA 118-19] ("As Secretary Sebelius concedes, Virginia will not be required to pay the penalty for failure to meet the Individual Mandate. . . . Virginia will incur no direct financial liability under the challenged penalty provision."); *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 605 (E.D. Va. 2010) (stating that Virginia is "a sovereign entity not required to purchase insurance under the Patient Protection and Affordable Care Act").

notwithstanding."[34] Virginia accepts this basic principle.[35] But once this principle is applied to the individual mandate, Virginia's inability to seek injunctive relief against the Secretary's enforcement of that law against Virginia is clear. The reason is simple: If the Secretary can take no action against Virginia pursuant to the individual mandate, there is no basis for a federal court to enjoin "the acts of the official, the statute notwithstanding."[36] As already mentioned, and as its popular name suggests, the "individual mandate" does not apply to Virginia—only to individuals.

Because Virginia's lawsuit cannot satisfy the *Skelly Oil* test, it is not within the statutory subject-matter jurisdiction of the federal courts. This Court should order dismissal for that independent reason.

II. Virginia's Lawsuit Is Not "a Case of Actual Controversy"

If this Court concludes that either *Franchise Tax Board* or *Skelly Oil* requires dismissal for lack of statutory jurisdiction, it is unnecessary to reach a determination about Article III jurisdiction. But if this Court concludes that neither of these precedents bars Virginia's lawsuit, the Court still should order dismissal—

[34] *Mellon*, 262 U.S. at 488.

[35] Compl. at 7 [JA 34] (requesting "an injunction *against the enforcement* of § 1501 in particular and PPACA as a whole") (emphasis added).

[36] *Mellon*, 262 U.S. at 488.

because Virginia's lawsuit does not present a justiciable case or controversy under Article III. Rather, Virginia seeks an advisory opinion regarding the constitutionality of the individual mandate and the validity of its Health Care Freedom Act.

A. Virginia Seeks an Advisory Opinion

To ensure that the Declaratory Judgment Act would not enable courts to exceed the bounds of Article III, Congress made this remedy available only in "a case of actual controversy."[37] This statutory language is to be interpreted as co-extensive with the case or controversy limitation of Article III.[38] This Court should order dismissal because Virginia's action is an attempt to obtain an advisory opinion in the absence of a justiciable case or controversy.

For there to be an "actual controversy" cognizable under the Declaratory Judgment Act and Article III, a dispute must be "definite and concrete, touching the legal relations of parties having adverse legal interests."[39] The dispute must

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[37] 28 U.S.C. § 2201.

[38] *See MedImmune, Inc. v. Genentech Inc.*, 549 U.S. 118, 127 (2007) ("[T]he phrase 'case of actual controversy' in the [Declaratory Judgment] Act refers to the types of 'Cases' and 'Controversies' that are justiciable under Article III.") (internal citation omitted).

[39] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also id.* at 239-40 ("The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense.").

"admi[t] of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[40] By these standards, Virginia has failed to present a justiciable controversy.

Virginia's Health Care Freedom Act imposes no legal obligation, but instead purports to create an immunity from being legally obligated to buy insurance.[41] Presumably, Virginia's interest lies in seeing that this immunity is given effect in preference to the federal mandate. But both the federal mandate and the state immunity relate to the legal obligations of *individuals, not the State*, vis-à-vis the federal government. In essence, Virginia seeks a ruling about what law would apply if and when there is an actual controversy between the federal government and a Virginia resident over the individual mandate. Virginia is not a necessary party to such a controversy.[42] The present action is nothing more than an attempt to obtain an advisory opinion in advance of such an actual controversy.[43]

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[40] *Id.*; *see also MedImmune, Inc.*, 549 U.S. at 127 (adopting the foregoing descriptions of the meaning of "actual controversy").

[41] *See* Va. Code § 38.2-3430.1. ("No resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage . . . ."); *see also Virginia v. Sebelius*, 702 F. Supp. 2d 598, 605 (E.D. Va. 2010) (stating that the Virginia Health Care Freedom Act is of "a declaratory nature").

[42] Virginia would, of course, have an interest that would suffice under Rule 24 to allow it to intervene to defend its law. *See* Fed. R. Civ. P. 24; *Diamond v. Charles*, 476 U.S. 54, 65 (1986). But a right to defend a state law attacked in an existing

The Supreme Court has long forbidden this sort of litigation. *Texas v. ICC*,[44] *New Jersey v. Sargent*,[45] and *Georgia v. Stanton*,[46] are all examples of cases in which a State claimed that a particular exercise of federal legislative authority was beyond the federal government's power. In each of these cases, the Supreme Court held that a State's simple request for such a ruling "does not present a case or controversy within the range of the judicial power as defined by the Constitution."[47] Yet that is precisely what Virginia's lawsuit seeks. The lawsuit

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case is not equivalent to a right to use that state law to generate a case or controversy to attack conflicting federal law.

[43] *Cf. Intl. Soc. for Krishna Consciousness v. Los Angeles*, 611 F. Supp. 315, 318 (D.C. Cal. 1986) ("The Court has not discovered, nor have the parties cited, a single case brought by a state, city or federal government seeking, before the law is enforced, a declaratory judgment that a law is constitutional, with the exception of *Muskrat v. United States*, 219 U.S. 346 (1911). *Muskrat* established the longstanding precedent that a federal court will not, before the law is applied, declare laws to be constitutional, because by doing so the court would issue advisory opinions.").

[44] 258 U.S. 158 (1922).

[45] 269 U.S. 328 (1926).

[46] 73 U.S. 50 (1868).

[47] *Texas*, 258 U.S. at 162; *see also id.* (describing as "an abstract question of legislative power" the question of whether the matters addressed in the challenged legislation "fall within the field wherein Congress may speak with constitutional authority, or within the field reserved to the several States"); *New Jersey*, 269 U.S. at 334 (dismissing a State's bill in equity upon concluding that "its real purpose is to obtain a declaration that in making certain parts of the Federal Water Power Act … Congress exceeded its own authority and encroached on that of the state"); *id.* ("[T]he bill does not show that any right of the State, which in itself is an appropriate subject of judicial cognizance, is being, or about to be, affected prejudicially by the application or enforcement of the Act."); *Georgia*, 73 U.S. at

does not deal with the adverse legal relations of Virginia and the federal government. Indeed, it cannot: the individual mandate is not enforceable by the federal government against Virginia. Rather, Virginia's lawsuit deals with competing claims "of sovereignty, of political jurisdiction, of government"[48] that are not within judicial cognizance in this lawsuit.[49]

B. The Cases Relied upon by Virginia Involve Obligations Imposed on States or Their Officers, or Interference with Some Particular Activity of the State Itself

The District Court concluded that Virginia had standing.[50] Its justiciability analysis was incomplete, however, given that it did not address: (1) statutory subject-matter jurisdiction, (2) advisory opinion caselaw, or (3) redressability of Virginia's claimed injury. Moreover, the cases relied upon by the District Court and Virginia in support of Virginia's standing are distinguishable.

Virginia has described the *Texas* and *New Jersey* cases as presenting situations in which State claims were "abstract because no right of [the] State was

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76 (dismissing bill in equity for lack of jurisdiction because "the rights in danger … must be rights of person or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity").

[48] *Georgia*, 73 U.S. at 77.

[49] This is not to say, of course, that the constitutionality of the individual mandate is entirely beyond the purview of the federal courts. A private-party suit such as *Liberty University v. Geithner* presents distinct justiciability questions about which this brief expresses no opinion.

[50] *See Virginia v. Sebelius*, 702 F. Supp. 2d. 598, 607 (E.D. Va. 2010).

being or about to be affected."[51] And Virginia has sought to escape classification of its claim with these non-justiciable claims by pointing to its Health Care Freedom Act. But all of the cases that Virginia has identified in which States have been able to sue the federal government to avoid preemption involve obligations imposed on States or their officers, or interference with some particular activity of the State itself.

In seeking to establish its standing before the District Court, Virginia cited cases involving provisions of federal law that imposed obligations directly on the State or governmental officers within the State.[52] Because the individual mandate imposes no such obligation, however, these cases provide no support for concluding that Virginia's challenge to the individual mandate is justiciable.

Virginia also cited, and the District Court relied on, a different set of equally distinguishable cases: lawsuits brought by States challenging federal agency action under federal statutory regimes providing an explicit cause of action to challenge

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[51] Mem. of Pl. in Opp'n to Mot. to Dismiss at 12 [JA 112].

[52] *See Printz v. United States*, 521 U.S. 898, 904 (1997) (addressing constitutionality of federal statute that purported to "direct state law enforcement officers to participate … in the administration of a federally enacted regulatory scheme"); *New York v. United States*, 505 U.S. 144, 175 (1992) (addressing constitutionality of federal statute that forced upon States the choice of "either accepting ownership of waste or regulating according to the instructions of Congress").

that action, such as the Administrative Procedure Act.[53] These cases differ from Virginia's lawsuit in three important ways. First, the States in those cases relied on statutes other than the Declaratory Judgment Act to bring their claims.[54] Second, by virtue of the way in which the various statutory causes of action were defined, those cases involved the legality of a particular action by an agency of the federal government that had interfered with some particular activity of the State itself (such as issuing permits, promulgating regulations, or undertaking enforcement actions).[55] Third, by virtue of the particularized nature of these matters, they

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[53] *See Virginia v. Sebelius*, 702 F. Supp. 2d at 606-07 (citing *Alaska v. U .S. Dep't of Transp.*, 868 F.2d 441, 443 n.1 (D.C. Cir. 1989), and *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008)); Mem. of Pl. in Opp'n to Mot. to Dismiss at 16 [JA 116] (citing *Alaska*, 868 F.2d at 443-45, *Texas Ofc. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999), *Ohio v. U.S. Dep't of Transp.*, 766 F.2d 228. 232-33 (6th Cir. 1985), and *Wyoming*, 539 F.3d at 1242).

[54] *See Wyoming*, 539 F.3d at 1242-44 (engaging in judicial review of ATF determination pursuant to APA section 704, which states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"); *Texas*, 183 F.3d at 405 (engaging in judicial review of final orders of the Federal Communications Commission pursuant to the Communications Act, 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2342 and 2344); *Alaska*, 868 F.2d at 444-45 (engaging in judicial review of orders of the Department of Transportation pursuant to the APA and the Aviation Act, which includes "a body politic" or a "representative thereof" within the class of persons entitled to judicial review); *Ohio*, 766 F.2d at 232-33 (engaging in judicial review of a regulation and interpretive rule pursuant to the APA and the Hazardous Materials Transportation Act).

[55] *See Wyoming*, 539 F.3d at 1238-44 (concluding that State could challenge ATF determination regarding the legal effect of concealed weapons permits issued by the State); *Texas*, 183 F.3d at 408-09 (describing challenges to order setting terms of state regulatory and enforcement authority over various aspects of

involved an adverse officer or agency whose action could be declared void or enjoined to redress the injury that the federal government's particular challenged action had inflicted on the State.[56] None of these features is present in this case.

Virginia has no statutory basis for judicial review apart from the Declaratory Judgment Act; it complains of no particular agency action that could be directed against it; and the relief that it seeks could not, in any event, redress its asserted injury. The first two of these points have already been established above. The next section addresses the third point, that Virginia's asserted injury is not redressable by the District Court.

C. Virginia's Asserted Injury Is Not Redressable by the District Court

There is no way for the District Court to redress Virginia's asserted injury to its sovereignty without allowing Virginia to assume the forbidden status of *parens patriae* vis-à-vis the federal government.[57] "[A] plaintiff must demonstrate standing separately for each form of relief sought."[58] Yet Virginia has no standing to seek the relief of an injunction prohibiting enforcement of the mandate against

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telecommunications); *Alaska*, 868 F.2d at 442-43 (explaining how challenged Department of Transportation orders interfered with State enforcement of deceptive advertising laws against tour operators); *Ohio*, 766 F.2d at 229-33 (describing federal regulations that prohibited enforcement of state regulation requiring prenotification for shipments of hazardous materials).

[56] *See* note 55 *supra*.

[57] *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

[58] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

its citizens, because (as Virginia appropriately conceded below) "States cannot sue the federal government under *parens patriae* principles."[59] A State's suit to protect its citizens from the operation of federal law is, of course, nothing but a *parens patriae* action.[60]

Nor can Virginia get around this justiciability problem by relying on the declaratory relief it seeks. That relief would not redress Virginia's purported injury even if the District Court had statutory subject-matter jurisdiction to order it. Indeed, Judge Hudson's declaration that the individual mandate is unconstitutional had no binding legal effect on anyone subject to the individual mandate, whether in Virginia or elsewhere. The two ways it could have had a binding legal effect are as a matter of precedent or of preclusion. Yet a district court decision has no precedential effect.[61] And as a matter of preclusion, the judgment binds only the

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[59] Mem. of Pl. in Opp'n to Mot. to Dismiss at 12 [JA 112].

[60] *See Mellon*, 262 U.S., at 485 (describing *parens patriae* suits initiated by a State against the United States as "judicial proceedings to protect citizens of the United States from the operation of the statutes thereof").

[61] *See F.T.C. v. Tarriff*, 584 F.3d 1088, 1092 (D.C. Cir. 2009) ("district court decision binding on no court"); *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 458 (7th Cir. 2005) ("[A]s we have noted repeatedly, a district court decision does not have stare decisis effect; it is not a precedent."); *Threadgill v. Armstrong World Industries, Inc.*, 928 F.3d 1366, 1371 & n.7 (3d Cir. 1991) ("Even where the facts of a prior district court case are, for all practical purposes, the same as those presented to a different district court in the same district, the prior resolution of those claims does not bar reconsideration by this Court of similar contentions. The doctrine of stare decisis does not compel one district court judge to follow the decision of another.").

parties.[62] That binding effect does not amount to much here given that the sole party challenging the individual mandate is a party against whom it could not be enforced. Importantly, no nonparty litigant (such as Liberty University, the two individual plaintiffs in that case, or any other Virginia resident who might wish to invoke Virginia's Health Care Freedom Act) could take advantage of the District Court's declaratory judgment through the doctrine of non-mutual offensive issue preclusion. That doctrine is unavailable against the federal government.[63]

These redressability problems, taken together with the features of this lawsuit that distinguish it from the cases relied upon below, amount in the end to the same problem analyzed in the advisory opinion section above. Simply put, Virginia's lawsuit does not present an "actual controversy" within the meaning of the Declaratory Judgment Act or Article III. The dispute does not "'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'"[64]

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[62] *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) ("[W]e have often repeated the general rule that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process.") (quotation marks and internal citations omitted).

[63] *See United States v. Mendoza*, 464 U.S. 154, 162-63 (1984).

[64] *MedImmune , Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

CONCLUSION

Notwithstanding all the attention Virginia's lawsuit has received and all the speculation it has engendered, it is not difficult to resolve. There is no statutory subject-matter jurisdiction over Virginia's lawsuit for three independent reasons. First, Virginia seeks a declaration of the validity of state law, but the Supreme Court has held that "[t]he situation presented by a State's suit for a declaration of the validity of state law is … not within the original jurisdiction of the United States district courts."[65] Second, the Supreme Court has held that there is no statutory jurisdiction over a federal declaratory judgment action unless either the declaratory judgment plaintiff or the declaratory judgment defendant could have brought a nondeclaratory action concerning the same issue against the other party.[66] Yet the individual mandate is not enforceable by the federal government against Virginia, and Virginia's Health Care Freedom Act is not enforceable by Virginia against the federal government; these parties consequently cannot bring nondeclaratory actions against each other concerning the enforceability of the individual mandate. Third, Virginia's lawsuit presents no actual controversy under the Declaratory Judgment Act or Article III.

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[65] *Franchise Tax Bd.*, 463 U.S. at 21-22.

[66] *See Skelly Oil Co.*, 339 U.S. at 671-72; Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 805 (6th ed. 2009).

Because there is no statutory or Article III jurisdiction over Virginia's lawsuit, amicus curiae respectfully requests that the Court vacate the order of the District Court and remand with instructions to dismiss.

Dated: March 7, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The brief contains 6,374 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

Dated: March 7, 2011

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CERTIFICATE OF SERVICE

I, Kevin C. Walsh, hereby certify that on March 7, 2011, I filed and served the foregoing Brief of Amicus Curiae Kevin C. Walsh in Support of Appellant Seeking Reversal with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. I also hereby certify that I have caused eight (8) copies to be delivered to the Court by first-class mail, and have caused two (2) copies to be served upon the following counsel by first-class mail:

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