No. 10-1014

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

Brief Amicus Curiae of Physician Hospitals of America in Support of the Commonwealth of Virginia On Petition for Writ of Certiorari Before Judgment

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Physician Hospitals of America ("PHA"), by and through the undersigned counsel, by consent of the parties, submits its brief amicus curiae respectfully praying that the Court grant the Petitioner a writ of certiorari.[1] In support of the petition, PHA states as follows:

Interest of the Amicus

Physician Hospitals of America ("PHA") is a 26 U.S.C. § 501(c)(6) organization formed to educate members of the physician-owned hospital community about regulatory and legislative issues and to encourage PHA members to advocate for the rights of physician-owned hospitals. PHA has approximately 166 member hospitals in 34 different states, comprising both existing facilities and physician-owned hospitals in various stages of development. PHA member hospitals are typically enrolled as providers under Medicare and Medicaid programs, with up to 70% of their case mix stemming from Medicare and Medicaid patients. The physician owners of PHA member hospitals are

[1] Pursuant to Sup. Ct. R. 37.6, PHA certifies that no counsel for either party authored any part of this brief and that no person, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation of the brief. PHA certifies consistent with Sup. Ct. R. 37.2(a) that counsel of record for both parties have been notified more than ten days before filing of the amicus' intention to file the brief and have given their consent.

also providers under the Medicare and Medicaid programs.

PHA is committed to the sanctity of private property as guaranteed by the Constitution, especially in relation to the rights of physicians to own and operate hospitals and to provide patients with expert, cost-effective, and efficient health care. In *Physician Hospitals of America, et al. v. Sebelius*, Case No. 6:10-cv-00277-MHS, filed June 3, 2010, in the U.S. District Court for the Eastern District of Texas, Tyler Division, PHA, along with a member hospital, is challenging the constitutionality of § 6001 of the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub L. No. 11-148, 124 Stat. 119 (2010), which singles out for negative treatment physician-owned hospitals from among all those owned by persons of any other profession. Section 6001 retroactively prohibits planned, approved, and commenced facility expansion at approximately 58 Medicare-certified hospitals solely because they are owned by physicians, and further prevents the development of an additional 84 physician-owned hospitals that would be otherwise eligible for Medicare certification.

PHA has an interest in protecting its members directly, and the public indirectly, from any unconstitutional healthcare legislation, and thus it has an interest in supporting the Commonwealth of Virginia in this action.

PHA's members have a compelling interest in seeing the Court grant a writ—each day this litigation continues its membership is further

harmed. Members who wish to build or expand hospitals are prevented from doing so. PHA's members are American citizens who wish to invest their personal capital to expand their businesses, create jobs, and serve the public. They are prevented from doing so by the specter of an ultra vires act of Congress.

Summary of the Argument

In the case below, the Commonwealth of Virginia, by its Attorney General Kenneth T. Cuccinelli, II, sued the Secretary of the Department of Health and Human Services in her official capacity, seeking to preclude her from enforcing PPACA. The U.S. District Court for the Eastern District of Virginia entered summary judgment for the Commonwealth, finding that § 1501 of PPACA was unconstitutional. However, the court did not void PPACA in its entirety, holding instead that only § 1501 and "directly-dependent provisions which make specific reference to Section 1501," were stricken. *Virginia v. Sebelius*, 728 F. Supp. 2d. 768,790 (E.D. Va. 2010). The Secretary has appealed the district court's ruling that § 1501 is unconstitutional to the U.S. Court of Appeals for the Fourth Circuit. The Commonwealth has cross-appealed on the issues of severability, scope of severability, and remedy, asking the Fourth Circuit to strike PPACA completely. Both appeals raise important questions worthy of this Court's prompt consideration on their merits.

The Court should take the unusual step of granting a writ of certiorari at this stage under Rule 11 of the Rules of the Supreme Court because the question of the Act's Constitutionality is one of imperative public importance with great economic and social consequences, having the potential to affect almost every American. The implementation necessary under PPACA is gargantuan in detail and

expense. The Secretary has admitted that striking PPACA after implementation would threaten serious harm. Yet implementation is proceeding apace, increasing the threat with each passing day.

This litigation centers on § 1501 of the Act, which requires virtually every American to purchase health insurance or pay a penalty. That provision is not within Congress' power to enact. In seeking to regulate inactivity, rather than economic activity, its purported constitutional foundation reaches far beyond this Court's Commerce Clause jurisprudence. Because this mandate to purchase health insurance is not a permissible objective under the Commerce Clause, the Necessary and Proper Clause is of no help to PPACA's defenders. Similarly, Congress' taxing power cannot justify the mandate and its associated penalty -- principally because Congress itself considered exercising that power in enacting the mandate but declined to do so. For these reasons and as set out more fully below, your amicus urges the Court to grant a writ.

Reasons Why a Writ Should be Granted

I. The Constitutionality of § 1501 is a Question of Imperative Public Importance

Both district courts that have held § 1501 unconstitutional have observed that the question of whether Congress may exercise its power to regulate Commerce to govern inactivity, in this case to purchase health insurance when one is not otherwise inclined to do so, is one of first impression. *See Virginia v. Sebelius*, 702 F. Supp. 2d 598, 612 (E.D. Va. 2010) ("As previously mentioned, the Commerce Clause aspect of this debate raises issues of national significance. The position of the parties are widely divergent and at times novel. The guiding precedent is informative, but inconclusive."); *Florida v. United States HHS*, 716 F. Supp. 2d 1120, 1163 (N.D. Fla. 2010) ("[The] case law is instructive, but ultimately inconclusive because the Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent.")

It is unquestionably the role of this Court to decide important Constitutional questions—particularly those with national import. *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 291-292 (2008) (Roberts, C.J., dissenting) ("this Court is the final arbiter of federal law"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 604 (1998)("[C]ourts cannot allow a legislature's conclusory belief in

constitutionality, however sincere, to trump incontrovertible unconstitutionality"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."); *see, also, State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (U.S. 1989). This case is one of pure Constitutional construction—involving an as-applied challenge to a sweeping and novel federal statute.

The Court should take the admittedly extraordinary step of granting a writ at this stage because the Constitutionality of the individual mandate is a question of overarching national importance, and its resolution is one which will brook no delay. The Secretary has in fact conceded this point in no uncertain terms while arguing against immediate implementation of the declaratory judgment issued by the United States District Court for the Northern District of Florida. There, the Secretary submitted that implementation of that court's order, "would threaten serious harm to many Americans currently benefitting from provisions of the Affordable Care Act that are already in effect and would significantly interfere with defendants' statutory duty to implement the

Act as Congress directed." (Def's Motion to Clarify, filed in No. 3:10-cv-91 in the N.D. Fl., Feb. 17, 2011). The court there put the issue in even more stark terms:

> [B]usinesses, families, and individuals are having to expend time, money, and effort in order to comply with all of the Act's requirements. Further, I do not doubt that --- assuming that my ruling is eventually affirmed --- the plaintiffs will sustain injury if the Act continues to be implemented. Reversing what is presently in effect (and what will be put into effect in the future) may prove enormously difficult. Indeed, one could argue that was the entire point in front-loading certain of the Act's provisions in the first place. **It could also be argued that the Executive Branch seeks to continue the implementation, in part, for the very reason that the implemented provisions will be hard to undo once they are fully in place.**

(Order on Def's Motion to Clarify, March 3, 2011 No. 3:10-cv-91, N.D. Fl., slip opinion p. 17) (emphasis added) (treating the defendants' motion as a motion for a stay and granting the stay conditioned on the defendants seeking expedited appellate review within seven calendar days). The Secretary may receive an unfair advantage over the Commonwealth

of Virginia if permitted to rapidly implement as much of PPACA as possible, so she can later argue that unwinding it would be too burdensome. The Court should grant a writ sooner rather than later to prevent any attempt to influence the analysis of later equitable relief.

Further, the governors of 28 states have written a public letter to the president asking the government to consent to expedited review.

> Given the daunting and costly financial and regulatory burdens that our states and the private sector will face in implementing PPACA over the coming years, particularly during this unprecedented budgetary time, public interest requires expediting a final resolution of the litigation to give certainty as soon as possible. We should not endure years of litigation in the circuit courts, when the Supreme Court can promptly provide finality. This resolution can help prevent the states and the private sector from undertaking potentially unnecessary measures and expenses. More importantly, our businesses, health care providers, and citizens of our great nation need to know as soon as possible whether all or part of the law will be upheld or stricken, so they know their options and obligations.

Letter from Governors to President Obama, Feb. 9, 2011, available at http://www.heartland.org/custom/semod_policybot/pdf/29327.pdf, last visited March 7, 2011.

In addition, at least one of the plaintiff states in the *Florida* litigation has declined to implement PPACA based on having been a prevailing party in an action challenging its constitutionality. *See* Alaska Governor Refuses to Enact Health-Care Law, WSJ.com, http://online.wsj.com/article/SB10001424052748704657704576150730638265932.html, last visited March 7, 2011. Such uncertainty is further evidence that the Court should take the extraordinary step of granting a writ at this stage of the litigation.

The important Constitutional questions raised by the enactment of PPACA and clearly at issue in this litigation may define the role of government in the coming years and bear upon important questions of life and death. Your amicus respectfully urges the Court to serve the public interest by cutting short the Secretary's dilatory tactics and promptly considering the question of whether § 1501 of PPACA is a permissible exercise of Congress' express powers and, if not, whether it is severable from the rest of PPACA. Judge Vinson's words summarize the point quite succinctly:

> [A]lmost every argument that the defendants have advanced speaks much more persuasively to why the case should be immediately appealed and pursued in

> the most expeditious and accelerated manner allowable. As both sides have repeatedly emphasized throughout this case, the Act seeks to comprehensively reform and regulate more than one-sixth of the national economy. It does so via several hundred statutory provisions and thousands of regulations that put myriad obligations and responsibilities on individuals, employers, and the states. It has generated considerable uncertainty while the Constitutionality of the Act is being litigated in the courts. *The sooner this issue is finally decided by the Supreme Court, the better off the entire nation will be.*

Florida v. United States HHS, No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 22464 at *38 (N.D. Fla. Mar. 3, 2011) (emphasis added).

II. Because § 1501 is Unconstitutional, the Court will Ultimately Need to Decide This Case in Any Event

There is no basis in the Constitution for the mandate to purchase insurance found in § 1501. The Secretary cannot prevail on the merits, and awaiting Fourth Circuit review needlessly consumes judicial resources at a time when a speedy decision is imperative.

A. Section 1501 is Ultra Vires Under the Commerce Clause

Section 1501 is unconstitutional because it purports to exact a financial penalty against individual Americans who choose not to purchase health insurance. It is of course tautological that in our federal system, Congress may enact legislation only pursuant to its enumerated powers. An act of Congress which exceeds the scope of these powers is a nullity.

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-177 (1803).

This Court's cases over the last 75 years have drastically expanded Congress' power to regulate interstate commerce. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Gonzalez v. Raich*, 545 U.S. 1 (2005). However, the Court has also been quite clear that the Commerce power has limits. *See United States v. Lopez*, 514 U.S. 549, 556-57 (1995) ("But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits"). In fact, the Court has explicitly rejected, on more than one occasion, the idea that the Commerce Clause conveys plenary authority to Congress. *See Id.* at 566 ("We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (Thomas, J. concurring); *United States v. Morrison*, 529 U.S.598, 617 (2000) (same).

In order for § 1501 to be within Congress' powers, this Court would have to hold exactly that: that Congress is possessed of a national police power. If Congress can exercise its power under the Commerce Clause to draft a citizen into commerce so it can then regulate his participation in that commerce, then there is no principled limit to the Commerce power. If there is no distinction between

activity and inactivity, then citizens are subject to conscription for any Congressional purpose, whether that be to purchase health insurance, buy a gym membership, eat a daily regimen of health food, or purchase a General Motors automobile. Such an interpretation of the Commerce Clause would spell the end of federalism. The Tenth Amendment would be reduced to just so much vestigial language, the rest of Art. I § 8 would be rendered mere excess verbiage, and the limited national government envisioned by the framers would be fully and finally transformed into an institution with absolute power to regulate every aspect of our lives.

The Secretary has also repeatedly suggested that even if the Commerce power is limited to the regulation of economic activity (and not the inactivity of declining to purchase health insurance), § 1501 is allowable under the Necessary and Proper Clause. This argument fails, however, because under the test applied by this Court in *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010), a statute must be "reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." The Necessary and Proper Clause is not an independent grant of authority, and thus to suggest that it saves § 1501 merely begs the question of whether that section is *otherwise* a permissible exercise of Congress' enumerated powers.

Fortunately, this Court has repeatedly affirmed that federalism is alive and well. There are

and must be limits to the national government's powers in our federal system. In service to those principles, this Court should grant Petitioners a writ and reaffirm its prior holding that the Commerce Clause may not be expanded so as to confer upon Congress a national police power. As the district court wrote: "Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far." *Virginia v. Sebelius*, 702 F. Supp. 2d. 598, 612 (2010). To preserve the structural federalism essential to our Constitution, the Court should grant a writ and settle the question as soon as possible.

B. Section *1501 is Not a Valid Exercise of the Taxing Power*

The Secretary has argued in the District Court (and in other fora) that the mandate to purchase insurance is actually a tax on not purchasing insurance, and as such is a permissible exercise of Congress' power to lay and collect taxes. This argument has repeatedly failed because it has no merit.

First, Congress did not purport to pass the mandate to purchase insurance pursuant to the taxing power. This matters because this Court has given weight to what power Congress purports to exercise when it enacts legislation. In *Sozinsky v. United States*, 300 U.S. 506 (1937), for example, the Court considered whether provisions of the National Firearms Act that provided for confiscatory taxation

of certain classes of firearms were a valid exercise of the taxing power. Concluding that, on its face, the National Firearms Act appeared to be a valid tax, the Court held that it would not look behind Congress's purported exercise of the taxing power. *Id.* at 513. The import of *Sozinsky* is that courts should not lightly disregard Congress's purported motive in passing a piece of legislation. Here, § 1501 does not purport to be a tax. The Secretary cannot prevail on the theory that, even though Congress *explicitly provided* that § 1501 is an attempt to exercise the Commerce power, it is really a tax.

Second, the record evidence shows that Congress considered and *rejected* exercising its taxing power. The House of Representatives included a provision parallel to § 1501 in an earlier version of PPACA that failed to pass the Senate. *See* H.R. 3962, 111th Cong. (2009). That failed bill, however, explicitly claimed to exercise Congress's taxing power in order to compel individuals to purchase insurance:

> In the case of any individual who does not meet the requirements of subsection (d) at any time during the taxable year, there is hereby imposed a ***tax*** equal to 2.5 percent of the excess of— (1) the taxpayers modified adjusted gross income for the taxable year, over (2) the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

Id. (emphasis added).

This language did not survive the legislative process. Instead, Congress attempted to exercise its power under the Commerce Clause—an exercise which, as shown above, must fail. The words of Chief Justice Marshall are especially helpful here:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

Child Labor Tax Case, 259 U.S. 20, 40 (1922) (*quoting McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 423 (1819)).

C. Section *1501 is Not Severable and the PPACA is Invalid in its Entirety*

The Secretary has argued that even if § 1501 fails, the rest of PPACA should continue to operate. It is worth noting that despite its ponderous length, PPACA does not contain a severability provision.[2] Having concluded that the individual mandate is invalid, courts have been faced with the unenviable

[2] Previous versions of the Act did contain a severability provision, but the final version of the Act did not.

task of parsing a vast legislative pronouncement in an effort to assess the viability of each of its many provisions. Such a task is hardly the proper role of the judiciary. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 330 (2006) ("mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting [the statute in question] to conform it to constitutional requirements.")

The standard to be applied, should a court choose to do so, is simply stated. This Court will ask whether it is evident that the legislature would not have enacted the remaining provisions independently of that which is invalid. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-3162 (2010). Further, this Court considers whether the remaining provisions are "incapable of functioning independently." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987). Application of this standard here is simply not practical. PPACA's provisions are interdependent in many ways, and it is beyond the competence of the federal courts to rewrite legislation or make judgments properly made by the legislature.

Both district courts that have reached this question have declined to parse the various provisions of PPACA for severability. *See Virginia v. Sebelius*, 728 F. Supp. 2d. 768,790 (E.D. Va. 2010) ("It would be virtually impossible within the present record to determine whether Congress would have passed this bill, encompassing a wide variety of topics related and unrelated to heath care, without

Section 1501. . . Accordingly, the Court will sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501"); *Florida v. U. S. Dept. of Health and Human Svcs.*, No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822 at *132 (N.D. Fl. Jan. 31, 2011) ("Severing the individual mandate from the Act along with the other insurance reform provisions -- and in the process reconfiguring an exceedingly lengthy and comprehensive legislative scheme -- cannot be done.").

Because § 1501 of PPACA is unconstitutional, the proper course is for the Court to strike down the entire Act.

Conclusion

For these reasons, your amicus respectfully urges the Court to grant a writ and promptly decide these important questions.

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