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 for Amici Curiae Liberty University, Michele Waddell and Joanne Merrill In Favor of Neither Party

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INTEREST OF AMICI CURIAE[1]

Amici Liberty University, Michele Waddell and Joanne Merrill are plaintiffs in *Liberty University, et. al, v. Geithner, et. al.*, 2010 WL 4860299 (W.D. Va 2010) ("*L.U. v. Geithner*"), which, like Petitioner's case, is a challenge to portions of the Patient Protection and Affordable Care Act of 2009 Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) (the "Act"). Amici's case. like Petitioner's, is on appeal at the Fourth Circuit Court of Appeals, Case No. 10-2347, and is set for oral argument on the same day before the same panel during the week of May 10, 2011 as is Petitioner's case.

Amici have raised Commerce Clause and Necessary and Proper Clause challenges to the individual insurance mandate, Section 1501 of

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this Amicus Brief, and such consents are being filed with the Court simultaneously with the filing of this Brief. Notice has been given to the parties.

the Act, as has Petitioner. However, Amici have also challenged the employer insurance mandate, Section 1513 of the Act, and have raised First Amendment, Fifth Amendment and statutory challenges to both mandates. Amici's more personal and extensive interests in the repercussions arising from the Mandates provide additional information and viewpoints that should be considered when determining whether expedited review should be granted. Amici's interests will be significantly affected by this Court's decision, particularly in light of the concurrent oral argument schedule set before the Fourth Circuit.

Amici respectfully submit this Amicus Curiae Brief to provide this Court with information and arguments to aid its consideration of this Petition.

INTRODUCTION

On the day that President Obama signed the Act into law, Amici filed their complaint in the Western District of Virginia. *L.U. v. Geithner*, 2010 WL 4860299 at *1. Amici sought declaratory and injunctive relief on the grounds that the Act, and, in particular, the Individual and Employer Mandates, exceeded Congress' enumerated powers under the Commerce Clause and Necessary and Proper Clause. *Id.* Amici also alleged that the Mandates violate

their rights to free speech, association and free exercise under the First Amendment, violate the Establishment Clause of the First Amendment, violate the Equal Protection Clause of the Fifth Amendment, violate the prohibition against unallocated direct or capitation taxes, violate the Guarantee Clause and violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1(a)-(b). *Id.* at *2.

On November 30, 2010, the District Court granted the Administration's Rule 12(b)(6) motion to dismiss all causes of action. *Id.* at *49. The court ruled that the Individual and Employer Mandates are valid exercises of Congress' Commerce Clause powers under this Court's decisions in *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) and *Gonzales v. Raich,* 545 U.S. 1, 16-17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) and found that the other claims lacked merit.

Two weeks later, Judge Hudson of the Eastern District of Virginia reached the opposite conclusion, finding that *Wickard* and *Gonzales* did not support Congress' attempted expansion of its Commerce Clause authority. *Commonwealth of Va. v. Sebelius*, 728 U.S. 768, 780 (ED Va. 2010).

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

Id. No such step is taken when individuals do not purchase health insurance, so *Wickard* and *Gonzales* do not support the mandate. *Id.* In fact, "this broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence." *Id.* at 781.

Judge Hudson's ruling created an intra-circuit conflict regarding the constitutionality of the Individual Mandate that is now in the hands of the Fourth Circuit. However, since Amici's case also challenges the Employer Mandate and Amici also alleged that the Mandates violate their rights to free speech, association and free exercise under the First Amendment, violate the Establishment Clause

of the First Amendment, violate the Equal Protection Clause of the Fifth Amendment, violate the prohibition against unallocated direct or capitation taxes, violate the Guarantee Clause and violate RFRA, it poses additional questions for appellate review.

Both cases are set for oral argument, seriatim, before the same Fourth Circuit panel on the same day during the oral argument sitting the week of May 10, 2011. (Case 10-2347 Doc. 24, Case 11-1057, Doc. 24). That will place the cases on the same timing track for possible review by this Court. Simultaneous consideration of both cases would serve the interests of efficient and comprehensive resolution of the issues of great national interest that have been raised by Petitioner and Amici. Taking Petitioner's case off of that track without also taking Amici's would create the possibility of conflicting, inconsistent rulings and duplicative determination by this Court. Amici are not taking a position on whether expedited review is necessary under these circumstances, but that if such review is granted, Amici believe that their case should also be included in the expedited review and be argued separately from Petitioner's.

As of June 30, 2010, the Fourth Circuit was ranked first among the circuit courts for

the shortest median time between the filing of the notice of appeal and final disposition of a case. (United States Court of Appeals Judicial Caseload Profile, available at http://www.uscourts.gov.cgi-bin/cmsa2010Jun (last visited February 14, 2011)). As of September 30, 2010, the Fourth Circuit was ranked second, with a median time of 9.1 months. (United States Court of Appeals Judicial Caseload Profile, available at http://www.uscourts.gov.cgi-in/cmsa2010Sep.p1 (last visited February 14, 2011)). If the court follows that trend with these cases and takes no longer than the median time for resolution, then a ruling could be anticipated on or about September 1, 2011(nine months after Amici's notice of appeal dated December 1, 2010). That would mean that both cases could be considered by this Court during its October term. In light of the intervening summer recess and usual time frame for briefing and oral argument, Amici believe that by-passing the Fourth Circuit would save five to six months.

Amici's case and Petitioner's case are related, but all of the constitutional challenges to the Act cannot be fully resolved unless both cases are considered. Therefore, Amici respectfully request that, should the Court agree to grant the petition and expedite review,

then Amici's case should also be included in the review.

LEGAL ARGUMENT

I. THE CONSTITUTIONALITY OF THE ACT IS OF PROFOUND NATIONAL IMPORTANCE AND SHOULD BE DETERMINED ONLY AFTER EXAMINATION OF THE FULL ARRAY OF CONSTITUTIONAL CHALLENGES AGAINST THE ACT.

What is at stake in this case is not merely whether portions of the Act are constitutional, but how far Congress can intrude into the private lives of citizens without exceeding their limited authority under Article I, §8 of the Constitution. Petitioner, Amici and others challenging the Act have addressed that concept in the context of the Individual Mandate,[2] but Amici have gone farther. Amici question not only how far Congress can intrude into private individuals' rights under the Commerce Clause, but also how far Congress

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[2] *See also, Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 893 (ED Mich. 2010), Sixth Circuit Court of Appeals Case No. 10-2388; *Florida v. Dep't of Health and Human Servs.*, 2011 WL 285683 (N.D. Fla. 2011).

can intrude into employers' rights under the Commerce Clause, and whether the mandates violate their rights to free speech, association and free exercise under the First Amendment, violate the Establishment Clause of the First Amendment, violate the Equal Protection Clause of the Fifth Amendment, violate the prohibition against unallocated direct or capitation taxes, violate the Guarantee Clause and violate RFRA.

As Judge Hudson said in his opinion granting Petitioner's Motion for Summary Judgment, the Individual Mandate "appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark." *Commonwealth of Va. v. Sebelius*, 728 U.S. at 775.

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

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

Id. at 771.

Judge Steeh of the Eastern District of Michigan similarly observed that the question of whether Congress has the authority to enact the Individual Mandate "arguably presents an issue of first impression." *Thomas More Law Center v. Obama,* 720 F.Supp.2d 882, 893 (ED Mich. 2010).

> The Supreme Court has always required an economic or commercial component in order to uphold an act under the Commerce Clause. The Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity.

Id. Judge Vinson of the Northern District of Florida agreed with Judge Steeh that Congress is seeking to expand its constitutional authority

by enacting the Individual Mandate, but disagreed with him about whether Congress' actions are valid. *Florida v. Dep't of Health and Human Servs.*, 2011 WL 285683 (N.D. Fla. 2011). This Court has never addressed the activity/inactivity distinction "because, until now, Congress had never attempted to exercise its Commerce Clause power in such a way before." *Id.* at *21.

> It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting–as was done in the Act–that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce" [*see* Act § 1501(a)(1)], it is not hyperbolizing to suggest that Congress could do almost anything it wanted.

Id. at *22 (emphasis in original).

Indeed, well before it passed the Act and its mandates, Congress was alerted that it was seeking an unprecedented expansion of its

Commerce Clause authority. As far back as 1994, Congress was told that "the imposition of an individual mandate, or a combination of an individual and employer mandate would be an unprecedented form of federal action."[3] More recently, but still eight months before the Act was adopted, the Congressional Research Service told Congress that it was not clear whether a mandate could be valid under the Commerce Clause.[4] "Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance."[5] "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether

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[3] Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance,* at 1, August 1994.

[4] Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* at 3 July 2009.

[5] *Id.*

Congress may use this clause to require an individual to buy a good or service."[6]

As these sources attest, the question of whether Congress can impose individual or employer health insurance mandates cuts to the core of the Constitution's concept of enumerated powers. The varying conclusions of the courts reviewing the question point to the significance of determining how far this Court's Commerce Clause precedents can be expanded by Congress. Petitioner's case and the other cases decided in Michigan and Florida have addressed that question in terms of the Individual Mandate, but not as to the Employer Mandate. Amici's case is the only one that has addressed the question of whether Commerce Clause precedents addressing the terms and conditions of employment can be expanded to include mandating that employers offer health insurance.

In addition, Amici's case is the only case which addresses the other constitutional rights affected by the Act, rights which were described in the Congressional Research Service's analysis. The analysts noted that insurance mandates could raise questions about invasion of privacy or similar fundamental rights, which

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[6] *Id.*

could trigger due process and/or equal protection claims under the Fifth Amendment.[7] They also observed that requiring that individuals purchase health insurance might conflict with certain parties' religious beliefs, which would trigger free exercise and/or Establishment Clause claims.[8] The analysts also noted that religious exemptions from insurance mandates could raise Establishment Clause questions regarding preferring or burdening particular religious beliefs.[9] The report further noted that a mandate and religious exemptions could also create free exercise issues under RFRA.[10]

Amici have raised precisely those claims and thereby widened the scope of constitutional review of the Act beyond the enumerated powers claims raised by Petitioner and others. *L.U. v. Geithner*, 2010 WL 4860299 at *2. Those additional claims should be included in any review of the Act in order to ensure that there can be a consistent and determinative resolution regarding whether the Act is constitutionally valid. Consequently, if this Court should agree to accept and expedite

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7 *Id.* at 9-12.

8 *Id.* at 13-17.

9 *Id.*

10 *Id.*

review of the Act, it should include Amici's case in its order.

II. THE GOAL OF OBTAINING PROMPT, FINAL AND CONSISTENT RESOLUTION OF MATTERS OF GREAT PUBLIC IMPORTANCE WOULD BEST BE SERVED BY CONSIDERING AMICI'S CASE ALONG WITH THE COMMONWEALTH'S CASE IF THIS COURT SHOULD GRANT EXPEDITED REVIEW.

In the limited instances when this Court has granted expedited review under Rule 11, it has done so in order to resolve matters of great public importance that touch on questions of constitutional interpretation and present conflicts between courts and/or between branches of the government. *See e.g., United States v. Nixon*, 418 U.S. 683, 686-687 (1974) (granting both parties' petitions for certiorari before judgment on the question of whether executive privilege can be used to avoid responding to a congressional subpoena). This Court has found that such circumstances warrant by-passing intermediate appellate review in the interest of obtaining a prompt resolution. *Id.* Petitioner asserts that its case presents these concerns in the form of the

conflicts between the Individual Mandate and this Court's Commerce Clause jurisprudence and between the mandate and a state law that prohibits compelling Virginia citizens to purchase health insurance. (Petition for Certiorari before Judgment at 4-5). Amici's case brings the conflict between the Individual Mandate and the Commerce Clause into even sharper focus by illustrating the intra-circuit conflict created by the contradictory rulings between Judge Moon in the Western District and Judge Hudson in the Eastern District of Virginia. Amici's case also provides evidence of additional conflicts between the Employer Mandate and the Commerce Clause and between the mandates and individual and employer rights under the First and Fifth amendments and RFRA.

Reviewing Amici's case in concert with Petitioner's case would enable this Court to comprehensively review the full array of legal challenges and promote judicial efficiency by avoiding piecemeal review. *See id.* at 690 (discussing Congress' strong policy against piecemeal reviews). It would also further the Court's interests in disposing of cases addressing similar issues in a consistent fashion and having uniform application of principles set forth in its decisions. *United States v. Ohio Power Co.*, 353 U.S. 98, 98-99

(1957) (per curiam). This Court has frequently brought together multiple comparable cases to further those interests. *See e.g., Gratz v. Bollinger*, 539 U.S. 244 (2003) (granting certiorari before judgment in order to simultaneously consider two cases addressing admissions policies at the University of Michigan); *Porter v. Dicken*, 328 U.S. 252 (1946) (granting certiorari before judgment to consider two cases dealing with rent control issues); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (considering multiple cases dealing with wage and price controls on coal mines). The constitutional challenges to the Act present a similar situation, and this Court should similarly agree to hear Amici's case simultaneously with Petitioner's case if the Court should grant Petitioner's request.

CONCLUSION

The public importance of the challenges to the Act and the potential for piecemeal, inconsistent rulings if only one of the challenges is heard in an expedited manner points to the need to have Amici's case heard at the same time as Petitioner's case if this Court should grant Petitioner's request.

Amici respectfully request that this Court adopt Petitioner's recommendation that, should

it grant expedited review of Petitioner's case, it should also bring Amici's case and the other pending cases up for review at the same time.

February, 2011.

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