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).

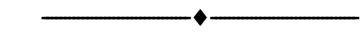
On November 30, 2010, the United State District Court for the Western District of Virginia in *Liberty University v. Geithner*, 2010 WL 4860299, No. 6:10cv15 (W.D. Va. Nov. 30, 2011), found that the claims of Liberty University and two individuals conferred standing upon them and were ripe for adjudication. 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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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

MEMORANDUM OPINION
(Cross Motions for Summary Judgment)

(Filed Dec. 13, 2010)

In this case, the Commonwealth of Virginia (the "Commonwealth"), through its Attorney General, challenges the constitutionality of the pivotal enforcement mechanism of the health care scheme adopted by Congress in the Patient Protection and Affordable Care Act ("ACA" or "the Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010). At issue is Section 1501 of the Act, commonly known as the Minimum Essential Coverage Provision ("the Provision"). The Minimum Essential Coverage Provision requires that

every United States citizen, other than those falling within specified exceptions, maintain a minimum level of health insurance coverage for each month beginning in 2014. Failure to comply will result in a penalty included with the taxpayer's annual return. As enacted, Section 1501 is administered and enforced as a part of the Internal Revenue Code.

In its Complaint, the Commonwealth seeks both declaratory and injunctive relief. Specifically, the Commonwealth urges the Court to find that the enactment of Section 1501 exceeds the power of Congress under the Commerce Clause and General Welfare Clause of the United States Constitution. Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision is in direct conflict with Virginia Code Section 38.2-3430.1:1 (2010), commonly referred to as the Virginia Health Care Freedom Act, thus implicating the Tenth Amendment.

As part of the relief sought, the Commonwealth also requests prohibitory injunctive relief barring the United States government from enforcing the Minimum Essential Coverage Provision within its territorial boundaries.

The case is presently before the Court on Motions for Summary Judgment filed by both parties pursuant to Federal Rule of Civil Procedure 56. Both sides have again filed well-researched memoranda supplying the Court with a thorough analysis of the controlling issues and pertinent jurisprudence. The

Court heard oral argument on October 18, 2010. As this Court previously cautioned, this case does not turn on the wisdom of Congress or the public policy implications of the ACA. The Court's attention is focused solely on the constitutionality of the enactment.

A review of the supporting memoranda filed by each party yields no material facts genuinely in issue and neither party suggests to the contrary. The dispute at hand is driven entirely by issues of law.[1]

The present procedural posture of this case is best summarized by the penultimate paragraph of this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss:

> 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

[1] The Secretary takes issue with the Commonwealth's characterization of aspects of the ACA, its economic impact, and the legislative intent underlying Va. Code Section 38.2-3430.1:1. These disputed facts are neither substantive nor essential to issue resolution, and consequently do not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986).

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

(Mem. Op. 2, Aug. 2, 2010, ECF No. 84.)

I.

The Secretary, in her Memorandum in Support of Defendant's Motion for Summary Judgment, aptly sets the framework of the debate: "[t]his case concerns a pure question of law, whether Congress acted within its Article I powers in enacting the ACA." (Def.'s Mem. Supp. Mot. Summ. J. 17, ECF No. 91.) At this final stage of the proceedings, with some refinement, the issues remain the same.

Succinctly stated, the Commonwealth's constitutional challenge has three distinct facets. First, the Commonwealth contends that the Minimum Essential Coverage Provision, and affiliated penalty, are beyond the outer limits of the Commerce Clause and associated Necessary and Proper Clause as measured by U.S. Supreme Court precedent. More specifically, the Commonwealth argues that requiring an otherwise unwilling individual to purchase a good or service from a private vendor is beyond the boundaries of congressional Commerce Clause power. The Commonwealth maintains that the failure, or refusal, of its citizens to elect to purchase health

insurance is not economic activity historically subject to federal regulation under the Commerce Clause.

Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision cannot be sustained as a legitimate exercise of the congressional power of taxation under the General Welfare Clause. It argues that the Provision is mischaracterized as a tax and is, in actuality, a penalty untethered to an enumerated power. Congress may not, in the Commonwealth's view, exercise such power to impose a penalty for what amounts to passive inactivity.

Lastly, the Commonwealth asserts that Section 1501 is in direct conflict with the Virginia Health Care Freedom Act. Its Attorney General argues that the enactment of the Minimum Essential Coverage Provision is an unlawful exercise of police power, encroaches on the sovereignty of the Commonwealth, and offends the Tenth Amendment to the U.S. Constitution.

The Secretary prefaces her response with an acknowledgement that the debate over the constitutionality of the ACA has evolved into a polemic mix of political controversy and legal analysis. When viewed from a purely legal perspective, the Secretary maintains that the requirement that most Americans obtain a minimum level of health insurance coverage or pay a tax penalty "is well within the traditional bounds of Congress's Article I powers." (Def.'s Mem. Supp. 1.)

Her argument begins with an explanation of the reformative impact of the health care regime created by the Act. "[T]he Act is an important, but incremental, advance that builds on prior reforms of the interstate health insurance market over the last 35 years." (Def.'s Mem. Supp. 1.) The Secretary points to congressional findings that the insurance industry has failed to take corrective action to eliminate barriers which prevent millions of Americans from obtaining affordable insurance. To correct this systemic failure in the interstate health insurance market, Congress adopted a carefully crafted scheme which bars insurers from denying coverage to those with preexisting conditions, and from charging discriminatory premiums on the basis of medical history.

In order to guarantee the success of these reforms, the Secretary maintains that Congress properly exercised its powers under the Commerce Clause, or alternatively the Necessary and Proper Clause, to adopt a regulatory mechanism to effectuate these health care market reform measures, namely the Minimum Essential Coverage Provision. "[B]ecause the Act regulates health care financing [it] is quintessential economic activity." (Def.'s Reply Mem. 3, ECF No. 132.)

Moreover, the Secretary rejects the Commonwealth's contention that the implementation of the Minimum Essential Coverage Provision through the Necessary and Proper Clause violates state sovereignty. Since the penalty mechanism does

not compel state officials to carry out a federal regulatory scheme, she maintains that it does not implicate the Tenth Amendment.

The Secretary also disputes the logic behind the Commonwealth's contention that the Provision compels health care market participation by individuals who do not wish to purchase insurance. She dismisses the notion that uninsured people can sit passively on the market sidelines. Her reasoning flows from the observation that

> the large majority of the uninsured regularly migrate in and out of insurance coverage. That is, the uninsured, as a class, often make, revisit, and revise economic decisions as to how to finance their health care needs. Congress may regulate these economic actions when they substantially affect interstate commerce. . . . Insurance-purchase requirements have long been fixtures in the United States Code.

(Def.'s Mem. Supp. 2.)

Both the Secretary's argument in defense of the Provision and the apparent underlying rationale of Congress are premised on the facially logical assumption that every individual at some point in life will need some form of health care. "No person can guarantee that he will divorce himself entirely from the market for heath care services." (Def.'s Mem. Opp. Mot. Summ. J. 1, ECF No. 96.) "[N]o person can guarantee that he will never incur a sudden, unanticipated need for expensive care; and very few

persons, absent insurance, can guarantee that they will not shift the cost of that care to the rest of society." (Def.'s Reply Mem. 2.) In the Secretary's view, failure to appreciate this logic is the fatal flaw in the Commonwealth's position.[2]

On a third front, the Secretary defends the Minimum Essential Coverage Provision as a valid exercise of Congress's independent authority to lay taxes and make expenditures for the general welfare. Contrary to earlier representations by the Legislative and Executive branches, the Secretary now states unequivocally that the Provision is a tax, published in the Internal Revenue Code, and enforced by the Internal Revenue Service. The Secretary notes that "[i]ts penalty operates as an addition to an individual's income tax liability on his annual tax return, which is calculated by reference to income." (Def.'s Mem. Supp. 2.) The Secretary also cites projections that it will raise $4 billion annually in general revenue. She takes issue with the Commonwealth's position that there is a legal

[2] In *Florida ex rel. McCollum v. US. Dep't of Health & Human Servs.,* Judge Vinson aptly captures the theoretic underpinning of the Secretary's argument. "Their argument on this point can be broken down to the following syllogism: (1) because the majority of people will at some point in their lives need and consume healthcare services, and (2) because some of the people are unwilling or unable to pay for those services, (3) Congress may regulate everyone and require that everyone have specific, federally-approved insurance." 716 F. Supp. 2d 1120, 1162 (N.D. Fla. 2010).

distinction between penalties that serve regulatory purposes and other forms of revenue raising taxation. In her opinion, any such legal distinction has long been abandoned by the Supreme Court.[3]

Finally, the Secretary highlights several precepts of legal analysis which she suggests should guide the Court in reviewing the issues raised. First, she cautions the Court to remember that the standard for facial challenges establishes a high hurdle. It requires the Commonwealth to demonstrate that there are no possible circumstances in which the Provision could be constitutionally applied. *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). In other words, they "must show that the [statute] cannot operate constitutionally under any circumstance." *West Virginia v. U.S. Dep't of Health & Human Servs.,* 289 F.3d 281, 292 (4th Cir. 2002). Proof of a single constitutional application is all that is necessary in her view. In summary, she explains

> for Virginia's facial challenge to succeed under its theory, this Court would have to conclude that no uninsured individual would ever use or be charged for medical services, and that no uninsured individual would ever

[3] Because the Minimum Essential Coverage Provision is incorporated into the Internal Revenue Code, and technically under the purview of the Secretary of the Treasury, Secretary Sebelius, at this late stage, maintains that the Secretary of the Treasury is a necessary party, whose absence as such warrants dismissal. This aspect of her motion was rejected by a separate Memorandum Order (Dk. No. 152) dated October 13, 2010.

> make an active decision whether to purchase insurance. Because such a showing cannot be made, Virginia's facial challenge must fail.

(Def.'s Mem. Opp. 19.)

On this issue, the Secretary holds the weaker hand. The cases she relies upon, *Salerno* and *West Virginia,* which are styled as facial challenges, focus on the impact or effect of the enactment at issue. The immediate lawsuit questions the authority of Congress – at the bill's inception – to enact the legislation. The distinction is somewhat analogous to subject matter jurisdiction, the power to act ab initio. By their very nature, almost all constitutional challenges to specific exercises of enumerated powers, particularly the Commerce Clause, are facial. "When . . . a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face*." *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 743, 123 S. Ct. 1972, 1986 (2003) (Scalia, J., dissenting); *see also City of Boerne v. Flores,* 521 U.S. 507, 516, 117 S. Ct. 2157, 2162 (1997). A careful examination of the Court's analysis in *Lopez* and *Morrison* does not suggest the standard articulated in *Salerno.* In both *Lopez* and *Morrison,* the Court declared the statute under review to be legally stillborn without consideration of its effect downstream.

In fact, the viability of the *Salerno* dictum cited by the Secretary has been questioned by the Court in

City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849 (1999). "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." *Id.* at 55 n.22, 119 S. Ct. at 1858 n.22. *See also Fargo Women's Health Org. v. Schafer,* 507 U.S. 1013, 1013, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring in denial of stay and injunction); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1458 (8th Cir. 1995).

Even if the Commonwealth is held to the higher standard of proof, unconstitutionality in all applications, it could be met if the enforcement mechanism is itself unconstitutional. Importantly, it is not the effect on individuals that is presently at issue – it is the authority of Congress to compel *anyone* to purchase health insurance. An enactment that exceeds the power of Congress to adopt adversely affects everyone in every application. Indeed, the Minimum Essential Coverage Provision touches every American citizen required to file an annual IRS Form 1040 or 1040A.[4]

Second, the Secretary correctly asks the Court to be mindful that it must presume the constitutionality

[4] The Commonwealth also contends that the only application at issue is the conflict with the Virginia Health Care Freedom Act. The Court, however, need not specifically reach this issue.

of federal legislation. *Gibbs v. Babbitt,* 214 F.3d 483, 490 (4th Cir. 2000). Third, she reminds the Court that the task at hand is not to independently review the facts underlying the decision of Congress to exercise its Article I authority to enact legislation. Reviewing courts are confined to a determination of whether a rational basis exists for such congressional action. *See Gonzales v. Raich,* 545 U.S. 1, 22, 125 S. Ct. 2195, 2208 (2005).

II.

In this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss, the Court recognized that the Secretary's application of the Commerce Clause and General Welfare Clause appeared to extend beyond existing constitutional precedent. It was also noted that each side had advanced some authority arguably supporting the theory underlying their position. Accordingly, the Court was unable to conclude at that stage that the Complaint failed to state a cause of action. At this point, the analysis proceeds to the next level. To prevail, the Commonwealth, as Plaintiff, must make "a plain showing that Congress has exceeded its constitutional bounds." *Gibbs,* 214 F.3d at 490 (internal citation omitted). To win summary judgment, the Secretary must convince the Court to the contrary.

Under Federal Rule of Civil Procedure 56(c)(2), summary judgment should be granted "if the

pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.,* 597 F.3d 570, 576 (4th Cir. 2010) (quoting Fed. R. Civ. P. 56(c)(2)). "The moving party is 'entitled to judgment as a matter of law' when the nonmoving party fails to make an adequate showing on an essential element for which it has the burden of proof at trial." *News & Observer Publ'g Co.,* 597 F.3d at 576; *see Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 805-06, 119 S. Ct. 1597, 1603 (1999). Aside from sparring over representations of marginal consequence, there do not appear to be any material facts genuinely at issue. This case turns solely on issues of law. Both parties acknowledge that resolution by summary judgment is appropriate.

III.

Turning to the merits, this Court previously noted that the Minimum Essential Coverage Provision appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark. The Court also acknowledged the finite well of jurisprudential guidance in surveying the boundaries of such power. The historically-accepted contours of Article I Commerce Clause power were restated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 150, 91 S. Ct. 1357, 1359 (1971). The *Perez* Court divided traditional Commerce Clause

powers into three distinct strands. First, Congress can regulate the channels of interstate commerce. *Id.* Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* It appears from the tenor of the debate in this case that only the third category of Commerce Clause power is presently at issue.

Critical to the Secretary's argument is the notion that an individual's decision not to purchase health insurance is in effect "economic activity." (Def.'s Mem. Supp. 35.) The Secretary rejects the Commonwealth's implied premise that a person can simply elect to avoid participation in the health care market. It is inevitable, in her view, that every individual – today or in the future – healthy or otherwise – will require medical care. She adds that a large segment of the population is uninsured and "consume[s] tens of billions of dollars in uncompensated care each year." (Def.'s Mem. Opp. 14.) The Secretary maintains that the irrefutable facts demonstrate that "[t]he conduct of the uninsured – their economic decision as to how to finance their health care needs, their actual use of the health care system, their migration in and out of coverage, and their shifting of costs on to the rest of the system when they cannot pay – plainly is economic activity." (Def.'s Mem. Opp. 16-17.)

The Secretary relies on what is commonly referred to as an aggregation theory, which is

conceptually based on the hypothesis that the sum of individual decisions to participate or not in the health insurance market has a critical collective effect on interstate commerce. Congress may regulate even intrastate activities if they are within a class of activities that, in the aggregate, substantially affect interstate commerce. In support of this argument, the Secretary relies on the teachings of the Supreme Court in *Gonzales,* wherein the Court noted that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Gonzales,* 545 U.S. at 17, 125 S. Ct. at 2205-06 (citing *Perez,* 402 U.S. at 154, 91 S. Ct. at 1361). In other words, her argument is premised on the theoretical effect of an aggregation or critical mass of indecision on interstate commerce.

The core of the Secretary's primary argument under the Commerce Clause is that the Minimum Essential Coverage Provision is a necessary measure to ensure the success of its larger reforms of the interstate health insurance market.[5] The Secretary emphasizes that the ACA is a vital step in transforming a currently dysfunctional interstate health insurance market. In the Secretary's view, the key elements of health care reform are coverage of those with preexisting conditions and prevention of discriminatory premiums on the basis of medical

[5] The Secretary seems to sidestep the independent freestanding constitutional basis for the Provision.

history. These features, the Secretary maintains, will have a material effect on the health insurance underwriting process, and inevitably, the cost of insurance coverage. Therefore, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to "implode." Unless everyone is required by law to purchase health insurance, or pay a penalty, the revenue base will be insufficient to underwrite the costs of insuring individuals presently considered as high risk or uninsurable. Therefore, under the Secretary's reasoning, since Congress has the power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, the power to make the regulation effective by enacting the Minimum Essential Coverage Provision. *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 118-19, 62 S. Ct. 523, 525-26 (1942).

The Secretary seeks legal support for her aggregation theory in the Supreme Court's holding in *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82 (1942) and *Gonzales.* She maintains that the central question is whether there is a rational basis for concluding that the class of activities at issue, when "taken in the aggregate," substantially affects interstate commerce. *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2208; *Wickard,* 317 U.S. at 127-28. In other words, "[w]here the class of activities is regulated and that class is within reach of federal power, the courts

have no power 'to excise, as trivial, individual instances' of the class." *Gonzales,* 545 U.S. at 23, 125 S. Ct. at 2209 (quoting *Perez,* 402 U.S. at 154, 91 S. Ct. at 1361); *United States v. Malloy,* 568 F.3d 166, 180 (4th Cir. 2009), *cert. denied,* 130 S. Ct. 1736 (2010).

In *Wickard,* the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm. The Court reasoned that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. *Wickard* is generally acknowledged to be the most expansive application of the Commerce Clause by the Supreme Court, followed by *Gonzales.*

At issue in *Gonzales* was whether the aggregate effect of personal growth and consumption of marijuana for medicinal purposes under California law had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause. The Supreme Court concluded that "Mike the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales,* 545 U.S. at 18-19, 125 S. Ct. at 2206-07.

The Secretary emphasizes that the Commonwealth's challenge fails to appreciate the significance of the overall regulatory scheme and program at issue. Quoting from *Gonzales,* the Secretary notes that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." (Def.'s Mem. Supp. 19 (quoting *Gonzales,* 545 U.S. at 17, 125 S. Ct. at 2206).) Furthermore, the Secretary adds that "[f]or the provisions of '[a] complex regulatory program' to fall within [Congress's] commerce power, '[i]t is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.'" (Def.'s Mem. Opp. 9 (quoting *Gibbs,* 214 F.3d at 497).)

When reviewing congressional exercise of the Commerce Clause powers, the Secretary cautions that a court "need not itself measure the impact on interstate commerce of the activities Congress sought to regulate, nor need the court calculate how integral a particular provision is to a larger regulatory program. The court's task instead is limited to determining 'whether a rational basis exists' for Congress's conclusions."[6] (Def.'s Mem. Supp. 19

[6] In response to footnote 1 in the Court's Memorandum Opinion denying Defendant's Motion to Dismiss, the Secretary addresses the effect of the McCarran-Ferguson Act on the power of Congress to regulate the business of insurance under the

(Continued on following page)

(quoting *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2208).)

Because the Minimum Essential Coverage Provision is the linchpin which provides financial viability to the other critical elements of the overall regulatory scheme, the Secretary concludes that its adoption is within congressional Commerce Clause powers. She emphasizes that Congress "rationally found that a failure to regulate the decision to delay or forego insurance – i.e., the decision to shift one's costs on to the larger health care system – would undermine the 'comprehensive regulatory regime.'" (Def.'s Mem. Supp. 27 (quoting *Gonzales,* 545 U.S. at

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Commerce Clause. The Act expressly declared that the regulation and taxation of the business of insurance, and all who engage in it, should be subject to the laws of the several states unless Congress specifically states the contrary. 15 U.S.C. § 1012. *Life Partners, Inc. v. Morrison,* 484 F.3d 284, 292 (4th Cir. 2007) *cert. denied,* 552 U.S. 1062 (2007).

The Secretary points out that where Congress exercises that power, its enactment controls over any contrary state law. *Humana, Inc. v. Forsyth,* 525 U.S. 299, 306, 119 S. Ct. 710, 716 (1999). Specifically, the Secretary maintains that the ACA reforms the insurance industry by preventing insurers from denying or revoking coverage for those with preexisting conditions and by protecting individuals with such conditions from being charged discriminatory rates. These provisions, which are effectuated by the Minimum Essential Coverage Provision, in the Secretary's view, regulate the business of insurance.

The Commonwealth counters, however, that an individual's decision not to purchase insurance is not within the logical ambit of the business of insurance.

27, 125 S. Ct. at 2211).) Therefore, the Secretary posits that because the guaranteed coverage and rate discrimination issues are unquestionably within the Commerce Clause powers, the mechanism chosen by Congress to effectuate those reforms, the Minimum Essential Coverage Provision, is also a proper exercise of that power – either under the Commerce Clause or the associated Necessary and Proper Clause.

IV.

The Secretary characterizes the Minimum Essential Coverage Provision as the vital kinetic link that animates Congress's overall regulatory reform of interstate health care and insurance markets. "[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States v. Comstock,* 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819). The Secretary maintains that because Congress has rationally concluded "that the minimum coverage provision is necessary to make the other regulations in the Act effective," it is an appropriate exercise of the Necessary and Proper Clause. (Def.'s Mem. Supp. 29.) Again, the Secretary contends that the determination of whether the means adopted to attain its legislative goals are rationally related is reserved for Congress alone.

Burroughs v. United States, 290 U.S. 534, 547-48, 54 S. Ct. 287, 291 (1934).

Although the Necessary and Proper Clause vests Congress with broad authority to exercise means, which are not themselves an enumerated power, to implement legislation, it is not without limitation. As the Secretary concedes, the means adopted must not only be rationally related to the implementation of a constitutionally-enumerated power, but it must not violate an independent constitutional prohibition. *Comstock,* 130 S. Ct. at 1956-57. Whether the Minimum Essential Coverage Provision, which requires an individual to purchase health insurance or pay a penalty, is borne of a constitutionally-enumerated power, is the core issue in this case. As the Supreme Court noted in *Buckley v. Valeo*, "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, . . . so long as the exercise of that authority does not offend some other constitutional restriction." 424 U.S. 1, 132, 96 S. Ct. 612, 688 (1976) (internal citation omitted). The Commonwealth argues that the Provision offends a fundamental restriction on Commerce Clause powers.

In their opposition, the Commonwealth focuses on what it perceives to be the central element of Commerce Clause jurisdiction – economic activity. The Commonwealth distinguishes what was deemed to be "economic activity" in *Wickard* and *Gonzales,* namely a voluntary decision to grow wheat or cultivate marijuana, from the involuntary act of

purchasing health insurance as required by the Provision. In *Wickard* and *Gonzales,* individuals made a conscious decision to grow wheat or cultivate marijuana, and consequently, voluntarily placed themselves within the stream of interstate commerce. Conversely, the Commonwealth maintains that the Minimum Essential Coverage Provision compels an unwilling person to perform an involuntary act and, as a result, submit to Commerce Clause regulation.

Drawing on the logic articulated in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995) and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740 (2000), which limited the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that actually affect interstate commerce, the Commonwealth contends that a decision not to purchase a product, such as health insurance, is not an economic *activity.* In *Morrison,* the Court noted that "[e]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 608, 120 S. Ct. at 1748-49. The Court in *Morrison* also pointed out that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id* at 614, 120 S. Ct. at 1752. Finally, in *Morrison,* the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate

commerce." *Id.* at 617, 120 S. Ct. at 1754. The Commonwealth urges a similar analysis in this case.

The Commonwealth does not appear to challenge the aggregate effect of the many moving parts of the ACA on interstate commerce. Its lens is narrowly focused on the enforcement mechanism to which it is hinged, the Minimum Essential Coverage Provision.

The Commonwealth argues that the Necessary and Proper Clause cannot be employed as a vehicle to enforce an unconstitutional exercise of Commerce Clause power, no matter how well intended. Although the Necessary and Proper Clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers, its authority is not unbridled. As Chief Justice John Marshall observed in *McCulloch,* "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch,* 17 U.S. (4 Wheat.) at 421.

More recently, in restating the limitations on the scope of the Necessary and Proper Clause, the Supreme Court defined the relevant inquiry, "we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock,* 130 S. Ct. at 1956. If a person's decision not to purchase health insurance at a particular point in time does

not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

The Secretary, in rebuttal, faults the Commonwealth's reasoning as overly simplistic. She argues that the Commonwealth's theory is dependent on which method a person chooses to finance their inevitable health care expenditures. If the costs are underwritten by an insurance carrier, it is activity; if the general public pays by default, it is passivity. She maintains that under the Commonwealth's reasoning, the former is subject to Commerce Clause powers, while the latter is not. The Secretary also points out that under the Commonwealth's approach, "it [is] unclear whether an individual became 'passive,' and therefore supposedly beyond the reach of the commerce power, if he dropped his policy yesterday, a week ago, or a year ago." (Def.'s Mem. Opp. 18.) She characterizes the Commonwealth's logic as untenable.

The Secretary also rejects the notion that the imposition of a monetary penalty for failing to perform an act is outside the spirit of the Constitution. She offers two examples to highlight the point. In the context of Superfund regulation, a property owner cannot avoid liability for allowing contamination on his property by claiming that he was only "passive." Mere ownership of contaminated property under the Superfund Act triggers an obligation to undertake remedial measures. *Nurad,*

Inc. v. Wm. E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992). Moreover, a property owner cannot defeat an action to take a parcel of his land under the power of eminent domain, simply by passively taking no action. *Berman v. Parker,* 348 U.S. 26, 33, 75 S. Ct. 98, 103 (1954).

In addition, the Secretary points out that sanctions have historically been imposed for failure to timely file tax returns or truthfully report or pay taxes due, as well as failure to register for the selective service or report for military duty. The Commonwealth, however, counters that most of the examples presented are directly related to a specific constitutional provision – empowering Congress to assess taxes and to provide and maintain an Army and Navy, U.S. Const. art. I, § 8, or requiring compensation for exercising the power of eminent domain. U.S. Const. amend. V. In the case of the landowner sanctioned for contamination of his property, liability largely stemmed from an active transaction of purchase. In contrast, no specifically articulated constitutional authority exists to mandate the purchase of health insurance.

V.

Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within constitutional bounds. Salutatory goals and creative drafting have never been sufficient to offset

an absence of enumerated powers. As the Supreme Court noted in *Morrison*, "[e]ven [our] modern-era of precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 608, 120 S. Ct. at 1748-49 (quoting *Lopez,* 514 U.S. at 556-57, 115 S. Ct. at 1628). Congressional findings, no matter how extensive, are insufficient to enlarge the Commerce Clause powers of Congress. *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752.

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.

In *Morrison* and *Lopez,* however, the Supreme Court tightened the reins and insisted that the perimeters of legislation enacted under Commerce Clause powers square with the historically-accepted contours of Article I authority delineated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 91 S. Ct. 1357 (1971). Pertinent to the immediate case, the Court in *Perez* stated that Congress has the power to regulate *activities* that substantially affect interstate commerce. *Id.* at 150, 91 S. Ct. at 1359. In *Perez,* the Court upheld a federal prohibition on extortionate credit transactions, even though the

specific transaction in question had not occurred in interstate commerce.

The Court in *Lopez* and *Morrison* constrained the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that had a demonstrable effect on interstate commerce. In *Lopez,* the Court found that the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm in a school zone, exceeded Congress's Commerce Clause authority. First, the Court held that the statute by its terms had nothing to do with commerce or any sort of economic enterprise. Second, it concluded that the act could not be sustained "under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez,* 514 U.S. at 561, 115 S. Ct. at 1631.

Later in *Morrison,* the Court concluded that the Commerce Clause did not provide Congress with the authority to impose civil remedies under the Violence Against Women Act. Despite extensive factual findings regarding the serious impact that gender-motivated violence has on victims and their families, the Court concluded that it was insufficient by itself to sustain the constitutionality of Commerce Clause legislation. *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752. The Court in *Morrison* ultimately rejected the argument that Congress may regulate noneconomic, violent criminal conduct based solely on

that conduct's aggregated effect on interstate commerce. *Id.* at 617, 120 S. Ct. at 1754.

In surveying the legal landscape, several operative elements are commonly encountered in Commerce Clause decisions. First, to survive a constitutional challenge the subject matter must be economic in nature and affect interstate commerce, and second, it must involve activity. Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity. The constitutional viability of the Minimum Essential Coverage Provision in this case turns on whether or not a person's decision to refuse to purchase health care insurance is such an activity.

In her argument, the Secretary urges an expansive interpretation of the concept of activity. She posits that every individual in the United States will require health care at some point in their lifetime, if not today, perhaps next week or even next year. Her theory further postulates that because near universal participation is critical to the underwriting process, the collective effect of refusal to purchase health insurance affects the national market. Therefore, she argues, requiring advance purchase of insurance based upon a future contingency is an activity that will inevitably affect interstate commerce. Of course, the same reasoning could apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject

to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence.

The power of Congress to regulate a class of activities that in the aggregate has a substantial and direct effect on interstate commerce is well settled. *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2209. This even extends to noneconomic activity closely connected to the intended market. *Hoffman v. Hunt,* 126 F.3d 575, 587-88 (4th Cir. 1997). But these regulatory powers are triggered by some type of self-initiated action. Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.[7] In doing so, enactment of the Minimum Essential Coverage Provision exceeds the Commerce Clause powers vested in Congress under Article I.

Because an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally

[7] The collective effect of an aggregate of such inactivity still falls short of the constitutional mark.

deployed when tethered to a lawful exercise of an enumerated power. *See Comstock,* 130 S. Ct. at 1956-57. As Chief Justice Marshall noted in *McCulloch,* it must be within "the letter and spirit of the constitution." 17 U.S. (4 Wheat.) at 421. The Minimum Essential Coverage Provision is neither within the letter nor the spirit of the Constitution. Therefore, the Necessary and Proper Clause may not be employed to implement this affirmative duty to engage in private commerce.

VI.

On an alternative front, the Secretary contends that the Minimum Essential Coverage Provision is a valid exercise of Congress's independent taxation power under the General Welfare Clause in Article 1.[8] Despite pre-enactment representations to the contrary by the Executive and Legislative branches, the Secretary now argues that the Minimum Essential Coverage Provision is, in essence, a "tax penalty." The Secretary notes that the Provision is codified in the Internal Revenue Code and the penalty, if applicable, is reported and paid as a part of an individual's annual tax return.

Because the Provision is purportedly a product of congressional power of taxation, judicial review is

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[8] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare." U.S. Const. art. I, § 8, cl. 1.

generally narrow and limited. *United States v. Ptasynski,* 462 U.S. 74, 84, 103 S. Ct. 2239, 2245 (1983). Relying on *United States v. Aiken,* 974 F.2d 446 (4th Cir. 1992), the Secretary asserts that the power of Congress to lay and collect taxes, duties, and excises under Article I, Section 8 of the U.S. Constitution, requires only that it be a revenue raising measure and that the associated regulatory provisions bear a "reasonable relation" to the statute's taxing power. *Id.* at 448; *see also Sonzinsky v. United States,* 300 U.S. 506, 513, 57 S. Ct. 554, 555-56 (1937) (involving whether a levy on the sale of firearms described as a tax and passed by Congress's taxing power was in fact a tax). According to the Secretary, the power of Congress to tax for the general welfare is checked only by the electorate. "Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *United States v. Kahrigher,* 345 U.S. 22, 31, 73 S. Ct. 510, 515 (1953), *overruled on other grounds, Marchetti v. United States,* 390 U.S. 39, 88 S. Ct. 697 (1968).

The Secretary also reiterates that Congress may use its power under the tax clause even for purposes that would exceed its power under other provisions of Article I. *United States v. Sanchez,* 340 U.S. 42, 44, 71 S. Ct. 108, 110 (1950). As an example, the Secretary highlights the assessment of estate taxes. Congress has the authority to impose inheritance taxes but lacks power under the Commerce Clause to regulate the administration of estates.

The Secretary takes issue with the Commonwealth's contention that the Minimum Essential Coverage Provision is a penalty, rather than a tax, and that there is a legal distinction between the two. "In passing on the constitutionality of a tax law [the court is] 'concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.'" *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 363, 61 S. Ct. 586, 588 (1941) (internal citation omitted).

Initially she points out that the Provision has all the historic attributes of a tax. First and foremost, the Provision generates revenue forecast to be approximately $4 billion annually to be paid into the general treasury. She argues that this falls squarely within the classic definition of a tax, namely, "a . . . burden, laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. 213, 224, 116 S. Ct. 2016, 2113 (1996) (quoting *New Jersey v. Anderson,* 203 U.S. 483, 492, 27 S. Ct. 137, 140 (1906)).[9] The income threshold for the penalty to apply under the Minimum Essential Coverage Provision is based on the statutory level requiring individuals to file income tax returns and is calculated by reference to the individual's household

[9] A penalty, on the other hand, imports the notion of a punishment for an unlawful act or omission. *Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. at 224, 116 S. Ct. at 2113.

income for the given year. If the penalty applies, the taxpayer reports it on his return for that year. The penalty becomes an additional income tax liability. 26 U.S.C. § 5000A(b)(2). The Secretary therefore maintains that Congress treated the Minimum Essential Coverage Provision as an exercise of its taxing power in addition to its commerce power.

The Secretary also dismisses the Commonwealth's contention that the Provision is a penalty as opposed to a tax. She concedes that the Provision has a regulatory purpose, but adds that "[e]very tax is in some measure regulatory" to the extent "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky,* 300 U.S. at 513, 57 S. Ct. at 555. She also emphasizes that courts have abandoned the antiquated distinction between revenue raising taxes and regulatory penalties. *Bob Jones Univ. v. Simon,* 416 U.S. 725, 741 n.12, 94 S. Ct. 2038, 2048 (1974). Although Section 1501 variously employs the terms "tax" and "penalties," "the labels used do not determine the extent of the taxing power." *Simmons v. United States,* 308 F.2d 160, 166 n.21 (4th Cir. 1962).

Furthermore, despite the Commonwealth's insistence to the contrary, the Secretary argues that courts have upheld the exercise of congressional taxing power even when its regulatory intent or purpose extends beyond its Commerce Clause authority. "From the beginning of our government the courts have sustained taxes although imposed

with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *Sanchez,* 340 U.S. at 45, 71 S. Ct. at 110. The Commonwealth's analysis is further flawed, in her view, because their foundational bedrock of supporting authority consists of long discarded criminal as opposed to regulatory cases. The Minimum Essential Coverage Provision does not impose a criminal punishment.

Therefore, the Secretary maintains that because the Minimum Essential Coverage Provision in fact generates revenue and its regulatory features are rationally related to the goal of requiring every individual to pay for the medical services they receive, which is within the ambit of Commerce Clause powers, the Provision must be upheld.

The Commonwealth urges the Court to reject the Secretary's simplistic analysis that casts aside a wealth of historical tax clause jurisprudence. The Commonwealth does not dispute that the principles it relies upon as controlling have been rarely deployed in recent years, but the scope of congressional power under review is without modern counterpart. The Commonwealth also disagrees that the penalty provision in question meets the classic characteristics of a tax – or was intended by Congress to be a tax. The text of Section 1501 unequivocally states that it is a product of the Commerce Clause, not the General Welfare Clause. Moreover, any revenue generated is

merely incidental to a violation of a regulatory provision.

Irrespective of labels, the Commonwealth contends that the federal government is seeking to smuggle an unconstitutional exercise of the Commerce Clause past judicial review in the guise of a tax. In the Commonwealth's view, this legislative tactic offends the letter and spirit of the Constitution. "[T]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate." (Tr. 81:18-21, July 1, 2010 (*citing Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20, 37, 42 S. Ct. 449, 450 (1922))); *see United States v. Butler,* 297 U.S. 1, 68, 56 S. Ct. 312, 320 (1936); *Linder v. United States,* 268 U.S. 5, 17, 45 S. Ct. 446, 448-49 (1925). "[A] 'purported tax' that is actually a penalty to force compliance with a regulatory scheme must be tied to an enumerated power other than the taxing power." (Pl.'s Reply Mem. 11, ECF No. 117.)

The Attorney General of Virginia specifically asks the Court to closely examine the viability of the Secretary's core premise that the terms "tax" and "penalty" are legally synonymous and interchangeable. The Commonwealth maintains that the mainstay of the Secretary's taxation argument founders on the shoals of this faulty assumption. This notion of interchangeable is apparently derived from a footnote in *Bob Jones University*

> It is true that the Court [in earlier cases] drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. Even if such distinctions have merit, it would not assist petitioner [in this case], since its challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which are clearly intended to raise revenue.

Bob Jones Univ., 416 U.S. at 741 n.12, 94 S. Ct. at 2048 n.12 (internal citations omitted).

The Secretary argues that this cursory footnote disarms the precedential impact of an entire body of constitutional law governing regulatory penalties. In the Commonwealth's view, the Secretary has misconstrued the import and precedential effect of this footnote, which should be accorded no more dignity than dicta. To support this contention, the Commonwealth directs the Court's attention to a contrary position articulated by the Supreme Court in *United States v. La Franca.* "The two words [tax versus penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca,* 282 U.S. 568, 572, 51 S. Ct. 278, 280 (1931); *see also Reorganized CF&I*

Fabricators of Utah, Inc., 518 U.S. at 224, 116 S. Ct. at 2112.[10]

The Attorney General of Virginia maintains that the distinction between a tax and a penalty may be subtle, but is nonetheless significant. He adds that the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause because it must be in aid of an enumerated power. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940); *United States v. Butler,* 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936).

Despite the Secretary's characterization of such cases as superannuated, the Commonwealth hastens to reply that they have never been overruled by the U.S. Supreme Court. In fact, the Commonwealth points out that the holding in the *Child Labor Tax Case* was restated with approval by the Supreme Court in 1994 in *Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 114 S. Ct. 1937 (1994). "Yet we have also recognized that '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 regulation and punishment.'" *Id.* at 779, 114 S. Ct. at

[10] In rejoinder, the Secretary notes that the term "penalty" defined and discussed in *Reorganized CF&I Fabricators of Utah, Inc.* referred to a payment as a penalty for an unlawful act, not a noncompliance sanction, as here.

1946 (*citing Child Labor Tax Case,* 259 U.S. at 38). The Commonwealth argues that this is such a case.

The Commonwealth also discounts the significance of Congress's use of the term "tax" in the ACA and the placement of the Minimum Essential Coverage Provision in the Internal Revenue Code. "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision of this title. . . ." 26 U.S.C. § 7806(b).

The Commonwealth emphasizes that the best evidence of congressional intent is the language chosen by that legislative body. In the Minimum Essential Coverage Provision (26 U.S.C. § 5000A(b)(1)) Congress specifically denominated this payment for failure to comply with the mandate as a "penalty." "Because the PPACA penalty is an exaction for an omission – one that if it operated perfectly would produce no revenue – it is a penalty as a matter of law. . . ." (Pl.'s Mem. Opp. Mot. Summ. J. 28, ECF No. 95.)

During oral argument on the Secretary's Motion to Dismiss, the Deputy Assistant Attorney General of the United States informed the Court that because the Provision in fact generated revenue, and its regulatory features were rationally related to the goal of requiring every individual to pay for the medical services they receive, "that's the end of the ballgame." (Tr. 44:11, July 1, 2010.) The Commonwealth

maintains that the question of whether a provision is a penalty or tax is a question of law for the Court to resolve, relying on *Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. at 224-26, 116 S. Ct. 2113-14 and *La Franca,* 282 U.S. at 572, 51 S. Ct. at 280.

Because the noncompliance penalty provision in Section 1501 lacks a bona fide intention to raise revenue for the general welfare, the Commonwealth argues that it does not meet the historical criteria for a tax. Furthermore, the resulting regulatory tax, untethered to an enumerated power, is an unconstitutional encroachment on the state's power of regulation under the Tenth Amendment. *See Butler,* 297 U.S. at 68, 56 S. Ct. at 320; *Child Labor Tax Case,* 259 U.S. at 37-38, 42 S. Ct. at 451. While the Provision may have the incidental effect of raising revenue, the Commonwealth maintains that its clear intended purpose is to exercise prohibited police power to compel individuals to enter into private commercial transactions.

VII.

The Minimum Essential Coverage Provision reads in pertinent part: "[i]f a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) [mandatory insurance coverage] . . . there is hereby imposed on the taxpayer a penalty. . . ." 26 U.S.C. § 5000A(b)(1). Although purportedly grounded in the General Welfare Clause, the notion that the generation of revenue was a

significant legislative objective is a transparent afterthought. The legislative purpose underlying this provision was purely regulation of what Congress misperceived to be economic activity. The only revenue generated under the Provision is incidental to a citizen's failure to obey the law by requiring the minimum level of insurance coverage. The resulting revenue is "extraneous to any tax need." *See Kahriger,* 345 U.S. at 31, 73 S. Ct. at 515.[11] The use of the term "tax" appears to be a tactic to achieve enlarged regulatory license.

Compelling evidence of the intent of Congress can be found in the Act itself. In the preface to Section 1501, Congress specifically recites the constitutional basis for its actions and includes requisite findings of fact. "The individual . . . [mandate] is commercial and economic in nature, and substantially affects interstate commerce. . . ." 42 U.S.C. § 18091(a)(1). The Secretary is correct that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary." *Sanchez,* 340

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[11] In *Florida ex rel. McCollum,* 716 F. Supp. 2d at 1137-38, Judge Vinson perceptively notes that the Provision fails to mention any revenue generating purposes, characteristic of most tax clause enactments. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 841, 115 S. Ct. 2510, 2522 (1995).

U.S. at 44, 71 S. Ct. at 110 (internal citations omitted). The sources cited by the Secretary to support this proposition, however, are readily distinguishable from the immediate case. Unlike the mandate at hand, in *Sanchez* and *Sonzinsky,* the enactment in question purported on its face to be an exercise of the taxing power.

In concluding that Congress did not intend to exercise its powers of taxation under the General Welfare Clause, this Court's analysis begins with the unequivocal denials by the Executive and Legislative branches that the ACA was a tax. In drafting this provision, Congress specifically referred to the exaction as a penalty. "[T]here is hereby imposed on the taxpayer a penalty . . . " 26 U.S.C. § 5000A(b)(1). Earlier versions of the bill in both the House of Representatives and the Senate used the more politically toxic term "tax" when referring to the assessment for noncompliance with the insurance mandate. *See* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009); Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009); and America's Healthy Future Act, S. 1796, 111th Cong. (2009). Each of these earlier versions specifically employed the word "tax" as opposed to "penalty" as the sanction for noncompliance.

In the final version of the ACA enacted by the Senate on December 24, 2009, the term "penalty" was substituted for "tax" in Section 1501(b)(1). A logical inference can be drawn that the substitution of this critical language was a conscious and deliberate act

on the part of Congress. *See Russello v. United States,* 464 U.S. 16, 23-24, 104 S. Ct. 296, 300-301 (1983); *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). This shift in terminology during the final hours preceding an extremely close floor vote undermines the contention that the terms "penalty" and "tax" are synonymous.[12]

It is also significant to note that unlike the term "penalty" used in Section 1501(b)(1), other sections of the ACA specifically employ the word "tax." Section 9009 imposes a tax on the sale of any taxable medical device by the manufacturer, producer, or importer. Section 9001 imposes a tax on high-cost, employer-sponsored health care coverage. Section 9015 imposes a tax on certain high-income taxpayers. Finally, Section 10907 imposes a tax on any indoor tanning service. The legislature's apparent careful choice of words supports the conclusion that the term "tax" was not used indiscriminately. As the Supreme Court observed in *Duncan v. Walker*, "it is well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' 533 U.S. 167, 173, 121 S. Ct. 2120, 2125 (2001) (internal citations omitted).

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[12] The Secretary's use of the newly-coined expression "tax penalty" adds little to the debate.

This Court is also not persuaded that the placement of the Minimum Essential Coverage Provision in the Internal Revenue Code under "miscellaneous excise taxes" has the significance claimed by the Secretary. The Internal Revenue Code itself clearly states that such placement does not give rise to any inference or presumption that the exaction was intended to be a tax. *See* 26 U.S.C. § 7806(b). Given the anomalous nature of this Provision, it is equally plausible that Congress simply docked the Provision in a convenient harbor.

This Court is therefore unpersuaded that Section 1501(b)(1) is a bona fide revenue raising measure enacted under the taxing power of Congress. As the Supreme Court pointed out in *La Franca*, "[t]he two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty, it cannot be converted into a tax by the simple expedient of calling it such." *La Franca,* 282 U.S. at 572, 515 S. Ct. at 280. The penalizing feature of this so-called tax has clearly "los[t] its character as such" and has become "a mere penalty with the characteristics of regulation and punishment." *Kurth Ranch,* 511 U.S. at 799, 114 S. Ct. at 1946 (citing *Child Labor Tax Case,* 259 U.S. at 28, 42 S. Ct. at 451). No plausible argument can be made that it has "the purpose of supporting the Government." *Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. at 224, 116 S. Ct. at 2113 (quoting *New Jersey v. Anderson,* 203 U.S. 483, 492, 27 S. Ct. 137, 140 (1906)).

Having concluded that Section 1501(b)(1) is, in form and substance, a penalty as opposed to a tax,[13] it must be linked to an enumerated power other than the General Welfare Clause. *See Sunshine Anthracite Coal Co.,* 310 U.S. at 393, 60 S. Ct. at 912; *Butler,* 297 U.S. at 61, 56 S. Ct. at 317; *Child Labor Tax Case,* 259 U.S. at 38, 42 S. Ct. at 451. Notwithstanding criticism by the pen of some constitutional scholars, the constraining principles articulated in this line of cases, while perhaps dormant, remains viable and applicable to the immediate dispute. Although they have not been frequently employed in recent years, this absence appears to be more a product of the unprecedented nature of the legislation under review than an abandonment of established principles.

It is clear from the text of Section 1501 that the underlying regulatory scheme was conceived as an exercise of Commerce Clause powers. This is supported by specific factual findings purporting to demonstrate the effect of the health care scheme on interstate commerce. In order for the noncompliance penalty component to survive constitutional challenge, it must serve to effectuate a valid exercise of an enumerated power – here

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[13] If allowed to stand as a tax, the Minimum Essential Coverage Provision would be the only tax in U.S. history to be levied directly on individuals for their failure to affirmatively engage in activity mandated by the government not specifically delineated in the Constitution.

the Commerce Clause. *Sunshine Anthracite Coal Co.,* 310 U.S. at 393, 60 S. Ct. at 912.

Earlier in this opinion, the Court concluded that Congress lacked power under the Commerce Clause, or associated Necessary and Proper Clause, to compel an individual to involuntarily engage in a private commercial transaction, as contemplated by the Minimum Essential Coverage Provision. The absence of a constitutionally viable exercise of this enumerated power is fatal to the accompanying sanction for noncompliance. The Deputy Assistant Attorney General of the United States intimated as much during oral argument on the Defendant's Motion to Dismiss, "if it is unconstitutional, then the penalty would fail as well." (Tr. 21:10-11, July 1, 2010.)

A thorough survey of pertinent constitutional case law has yielded no reported decisions from any federal appellate courts extending the Commerce Clause or General Welfare Clause to encompass regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce or role in a global regulatory scheme. The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police powers. At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose to participate.

Article I, Section 8 of the Constitution confers upon Congress only discrete enumerated governmental powers. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people. *See* U.S. Const. amend. X; *Printz v. United States,* 521 U.S. 898, 919, 117 S. Ct. 2365, 2376-77 (1997).

On careful review, this Court must conclude that Section 1501 of the Patient Protection and Affordable Care Act – specifically the Minimum Essential Coverage Provision – exceeds the constitutional boundaries of congressional power.

VIII.

Having found a portion of the Act to be invalid, the Section 1501 requirement to maintain minimum essential health care coverage, the Court's next task is to determine whether this Section is severable from the balance of the enactment. Predictably, the Secretary counsels severability, and the Commonwealth urges wholesale invalidation. The Commonwealth's position flows in part from the Secretary's frequent contention that Section 1501 is the linchpin of the entire health care regimen underlying the ACA. However, the bill embraces far more than health care reform. It is laden with provisions and riders patently extraneous to health care – over 400 in all.

The most recent guidance on the permissible scope of severance is found in *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 130 S. Ct. 3138 (2010). "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any 'problematic portions while leaving the remainder intact.'" *Id.* at 3161 (quoting *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 328-29, 126 S. Ct. 961, 967 (2006)). Because "[t]he unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co. v. Corp. Comm'n of Okla.,* 286 U.S. 210, 234, 52 S. Ct. 559, 565 (1932), "the 'normal rule' is 'that partial, rather than facial, invalidation is the required course.'" *Free Enter. Fund,* 130 S. Ct. at 3161 (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S. Ct. 2794, 2802 (1985)).

The teachings of *Free Enterprise* are a direct descendent of the rule restated in *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 107 S. Ct. 1476 (1987). "The standard for determining the severability of an unconstitutional provision is well established: '[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.'" *Id.* at 684, 107 S. Ct. at 1480 (quoting *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S. Ct. 612, 677 (1976)).

In applying this standard, the Court must also consider 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. *Alaska Airlines,* 480 U.S. at 685, 107 S. Ct. at 1480. Finally, in evaluating severability, the Court must determine whether in the absence of the severed unconstitutional provision, Congress would have enacted the statute. *Id.* at 685, 107 S. Ct. at 1480. Given the vagaries of the legislative process, "this inquiry can sometimes be 'elusive.'" *Free Enter. Fund,* 130 S. Ct. at 3161 (quoting *I.N.S. v. Chadha,* 462 U.S. 919, 932, 103 S. Ct. 2764, 2774 (1983)).

The final element of the analysis is difficult to apply in this case given the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote. 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. Even then, the Court's conclusions would be speculative at best. Moreover, without the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.

Therefore, this Court will hew closely to the time-honored rule to sever with circumspection, severing any "problematic portions while leaving the

remainder intact." *Ayotte,* 546 U.S. at 329, 126 S. Ct. at 967. Accordingly, the Court will sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501.[14]

IX.

The final issue for resolution is the Commonwealth's request for injunctive relief enjoining implementation of Section 1501 – at least until a higher court acts. In reviewing this request, the Commonwealth urges this Court to employ the traditional requirements for injunctive relief articulated in *Monsanto Co. v. Geerston Seed Farms,* 130 S. Ct. 2743, 2756 (2010). This case, however, turns on atypical and uncharted applications of constitutional law interwoven with subtle political undercurrents. The outcome of this case has significant public policy implications. And the final word will undoubtedly reside with a higher court.

Aside from scant guiding precedent on the central issues, there are no compelling exigencies in this case. The key provisions of Section 1501 – the only aspect of the ACA squarely before this Court – do not take effect until 2013 at the earliest. Therefore,

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[14] A court's ability to rewrite legislation is severely constrained and best left to the legislature. "[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options [to amend legislation] going forward." *Free Enter. Fund,* 130 S. Ct. at 3162.

the likelihood of any irreparable harm pending certain appellate review is somewhat minimal. Although the timely implementation of Section 1501 might require each side to take some initial preparatory steps in the ensuing months, none are irreversible.

Historically, federal district courts have been reluctant to invoke the extraordinary remedy of injunctive relief against federal officers where a declaratory judgment is adequate. "[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." *Comm. on the Judiciary of the United States House of Representatives v. Miers,* 542 F.3d 909, 911 (D.C. Cir. 2008); *see also Smith v. Reagan,* 844 F.2d 195, 200 (4th Cir. 1988); *Sanchez-Espinoza v. Regan,* 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). The Commonwealth appears to concede that if the Secretary is duty-bound to honor this Court's declaratory judgment, there is no need for injunctive relief. (Pl.'s Reply Mem. 19.) In this Court's view, the award of declaratory judgment is sufficient to stay the hand of the Executive branch pending appellate review.

X.

In the final analysis, the Court will grant Plaintiffs Motion for Summary Judgment and deny Defendant's similar motion. The Court will sever

Section 1501 from the balance of the ACA and deny Plaintiffs request for injunctive relief.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Dec. 13, 2010
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

ORDER
(Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment)

(Filed Dec. 13, 2010)

THIS MATTER is before the Court on Motions for Summary Judgment filed by both parties (Dk. Nos. 88, 90) on September 3, 2010, pursuant to Federal Rule of Civil Procedure 56. For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's Motion is GRANTED as to its request for declaratory relief and DENIED as to its request for injunctive relief, and Defendant's Motion is DENIED.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Dec. 13, 2010
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

MEMORANDUM OPINION
(Defendant's Motion to Dismiss)

(Filed Aug. 2, 2010)

This is a narrowly-tailored facial challenge to the constitutionality of Section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). This provision, in essence, requires individuals to either obtain a minimum level of health insurance coverage or pay a penalty for failing to do so. According to the Complaint, which seeks declaratory and injunctive relief, the enactment of Section 1501 not only exceeds the power of Congress under the Commerce Clause

and General Welfare Clause of the United States Constitution, but is also directly at tension with Virginia Code Section 38.2-3430.1:1 (2010), commonly referred to as the Virginia Health Care Freedom Act.

The case is presently before the Court on Defendant's Motion to Dismiss, filed pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). Both sides have filed extensive and thoroughly researched memoranda supporting their respective positions. The Court heard oral argument on July 1, 2010. Although this case is laden with public policy implications and has a distinctive political undercurrent, at this stage the sole issues before the Court are subject matter jurisdiction and the legal sufficiency of the Complaint.

I.

In the Complaint, the Commonwealth of Virginia (the "Commonwealth") assails Section 1501 (or "Minimum Essential Coverage Provision") on a number of fronts. First, the Commonwealth contends that requiring an otherwise unwilling individual to purchase a good or service from a private vendor is beyond the outer limits of the Commerce Clause. In the Commonwealth's view, the failure – or refusal – of its citizens to elect to purchase health insurance is not "economic activity" and therefore not subject to federal regulation under the Commerce Clause. Succinctly put, the Commonwealth defies the Secretary to point to any Commerce Clause

jurisprudence extending its tentacles to an individual's decision not to engage in economic activity. Furthermore, they argue that since Section 1501 exceeds this enumerated power, Congress cannot invoke either the Necessary and Proper Clause or its taxation powers to regulate such passive economic inactivity.

Alternatively, the Commonwealth maintains that Section 1501 is in direct conflict with the Virginia Health Care Freedom Act. The Commonwealth argues that the enactment of Section 1501 therefore encroaches on the sovereignty of the Commonwealth and offends the Tenth Amendment to the Constitution.

The Defendant in this case is Kathleen Sebelius, in her official capacity as Secretary of the Department of Health and Human Services (the "Secretary"). The Secretary's Motion to Dismiss, filed under both Fed. R. Civ. P. 12(b)(1) and (b)(6), has several distinct strands. The Secretary argues initially that the Attorney General of Virginia, in his official capacity, lacks standing to challenge Section 1501, thereby depriving this Court of subject matter jurisdiction. Because the mandatory insurance provision is not effective until 2014, the Secretary also maintains that the issues are not ripe for immediate resolution.

With respect to the merits, the Secretary contends that the Complaint lacks legal vitality and therefore fails to state a cause of action. She asserts

that the Minimum Essential Coverage Provision is amply supported by time-honored applications of Congress's Commerce Clause powers and associated regulatory authority under the Necessary and Proper Clause. The theoretical foundation for the Secretary's position is predicated on factual findings by Congress that Section 1501 is the central ingredient of a complex health care regulatory scheme. Its core underpinning is the notion that every individual will need medical services at some point. Everyone, voluntarily or otherwise, is therefore either a current or future participant in the health care market.

To underwrite this health care scheme and guarantee affordable coverage to every individual, the cost of providing these services must be defrayed from some source, particularly as to the individuals who are uninsured. To address the annual deficit caused by uncompensated medical services, which according to the Secretary is approximately $43 billion, Congress included the penalty provision in Section 1501 to coax all individuals to purchase insurance. Because Section 1501, like the Act as a whole, regulates decisions about how to pay for services in the health care market and the insurance industry, the Secretary reasons that it necessarily affects interstate commerce.

Lastly, the Secretary contends that Section 1501 is a valid exercise of Congress's independent authority to use its taxing and spending power under the General Welfare Clause. Therefore, she argues that this action is barred by the Anti-Injunction Act.

II.

Turning first to the standing issue, relying on *Massachusetts v. Mellon,* 262 U.S. 447, 43 S. Ct. 597 (1923), the Secretary argues that the Attorney General's prosecution of this case, on behalf of the citizens of the Commonwealth of Virginia, is barred by the long-standing doctrine of "*parens patriae*." *Id.* at 485, 43 S. Ct. at 600. In *Mellon,* the U.S. Supreme Court noted that because citizens of an individual state are also citizens of the United States, "[i]t cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Id.* The Court further stated in *Mellon* that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.* at 485-86, 43 S. Ct. at 600. Therefore, the Secretary contends that a state does not have standing as *parens patriae* to bring an action against the federal government. *Id.*; *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 610 n.16, 102 S. Ct. 3260, 3270 (1982).

The Secretary further maintains that the congressional enactment at issue, Section 1501, imposes no obligation on the Commonwealth as a sovereign. The Secretary marginalizes the conflict between Section 1501 and the Virginia Health Care Freedom Act as a political policy dispute manufactured for the sole purpose of creating standing. The resulting abstract policy dispute causes

no imminent injury to the sovereign and is thus insufficient to support standing to challenge a federal enactment. *Mellon,* 262 U.S. at 484-85, 43 S. Ct. at 600.

On the other hand, the Commonwealth views the task at hand differently. In prosecuting the immediate action, the Commonwealth, through its Attorney General, is not simply representing individual citizens, it is defending the constitutionality and enforceability of its duly enacted laws. The Commonwealth maintains that its standing to defend its legislative enactments is a fossilized principle uniformly recognized by the U.S. Supreme Court, citing *Diamond v. Charles,* 476 U.S. 54 (1986).

> "[T]he power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 601, 102 S. Ct. 3260, 3265-66, 73 L. Ed. 2d 995 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club v. Morton,* 405 U.S. [727,] 740, 92 S. Ct. [1361,] 1369 [(1972)], in defending the standards embodied in that code.

Diamond, 476 U.S. at 65, 106 S. Ct. at 1705.

The Commonwealth draws a clear distinction between this case and those relied upon by the Secretary. The Commonwealth argues that it is not prosecuting this case in a *parens patriae,* or

quasi-sovereign capacity. In the immediate case, the Commonwealth is exercising a core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause. Unlike *Mellon,* irrespective of its underlying legislative intent, the Virginia statute is directly in conflict with Section 1501 of the Patient Protection and Affordable Care Act.[1]

A subsidiary element of the Secretary's argument that this Court lacks subject matter jurisdiction is the alleged absence of any imminent injury to sovereign interest. The Commonwealth counters that the conflict between federal and state law is "immediate and complete with respect to the legal principles at issue." (Pl.'s Mem. Opp'n Mot. Dismiss 4.) By way of

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[1] In 1945, Congress passed the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.,* in reaction to the U.S. Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S. Ct. 1162 (1944). The Act expressly declared that the continued regulation and taxation of the business of insurance, and all who engage in it, should be subject to the laws of the several states unless Congress specifically states the contrary. *Life Partners, Inc. v. Morrison,* 484 F.3d 284, 292 (4th Cir. 2007), *cert. denied,* 2007 U.S. Lexis 12349 (Dec. 3, 2007); *see also Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 430, 66 S. Ct. 1142, 1155 (1946). The Secretary argues that the language of Section 1501 is sufficient to imply an intent on the part of Congress to in effect preempt any state regulation to the contrary. The Commonwealth appears to disagree. (Tr. 48-49, July 1, 2010.) The demarcation between state and federal responsibility in this area will require further development in future proceedings in order to adequately address the Commonwealth's Tenth Amendment argument.

further elucidation, the Commonwealth contends that it has already begun taking steps to prepare for the implementation of the Patient Protection and Affordable Care Act. It asserts that "officials are presently having to deviate from their ordinary duties to begin the administrative response to the changes in federal law as they cascade through the Medicaid and insurance regulatory systems." (Pl.'s Mem. Opp'n Mot. Dismiss 4.)

The next facet of the Secretary's challenge to the Court's subject matter jurisdiction in this case invokes the Anti-Injunction Act, 26 U.S.C. § 7421(a).[2] The Anti-Injunction Act provides, in pertinent part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Secretary argues that the restraining effect of this Act is broad enough to include payments which are labeled a

[2] By implication, this argument would also include parallel provisions in the Declaratory Judgment Act, 28 U.S.C. § 2201(a). "Though the Anti-Injunction Act concerns federal courts' subject matter jurisdiction and the tax-exclusion provision of the Declaratory Judgment Act concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive." *In re Leckie Smokeless Coal Co.,* 99 F.3d 573, 583 (4th Cir. 1996). "In light of the two provisions' coextensive nature, a finding that one of the two statutes does not bar the debtors in the instant cases from seeking and obtaining free and clear orders will necessitate a finding that the other statute does not pose an obstacle either." *Id.* at 584.

"penalty rather than a tax," as the Secretary styles the assessment in this case for failure to purchase the requisite insurance coverage. (Def.'s Mem. Supp. Mot. Dismiss 16.) Because the Secretary maintains that the immediate action constitutes an abatement of a tax liability or penalty, she claims the District Court lacks jurisdiction. The Secretary's position is that the only appropriate relief vehicle for a citizen seeking to challenge the penalty provisions of Section 1501 would be to pay the required penalty and sue for a refund. *See Bob Jones Univ. v. Simon,* 416 U.S. 725, 736, 94 S. Ct. 2038, 2046 (1974).

The Commonwealth urges a more narrow interpretation of the Anti-Injunction Act. The Commonwealth contends that the word "person" used in the operative portion of the Anti-Injunction Act does not include a state. The U.S. Supreme Court, as well as the Fourth Circuit, has almost uniformly held that the word "person" appearing in a federal statute should not be interpreted as including a state. There is a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 780, 120 S. Ct. 1858, 1866 (2000); *see also Va. Office for Prot. & Advocacy v. Reinhard,* 405 F.3d 185, 189 (4th Cir. 2005). "The presumption is, of course, not a hard and fast rule of exclusion, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Vt. Agency of Natural Res.,* 529 U.S. at 781, 120 S. Ct. at 1867 (internal citations omitted). The Commonwealth

argues that the Secretary has failed to overcome the requisite presumption because she cannot point to any persuasive authority that the Anti-Injunction Act applies to states. Therefore, the Commonwealth argues that the Anti-Injunction Act does not apply to its prosecution of this case.

Alternatively, the Commonwealth contends that the claims advanced in this case fall squarely within an exception to the Anti-Injunction Act recognized in *South Carolina v. Regan,* 465 U.S. 367, 104 S. Ct. 1107 (1984). In *Regan,* the Supreme Court observed that the Anti-Injunction Act was not intended to bar "actions brought by aggrieved parties for whom [Congress] has not provided an alternative remedy." *Id.* at 378, 104 S. Ct. at 1114. Because the Commonwealth contends that only the sovereign has standing to seek judicial vindication of its own statutes, it claims the effect of the Anti-Injunction Act would be to deny the Commonwealth a remedy to address the effect of the federal enactment at issue.

Although the Commonwealth's contention that the term "person" in the Anti-Injunction Act does not apply to states may be well-founded, this Court believes it is clear that the *Regan* exception applies in this case.[3] As the Supreme Court held in *Regan,* the

[3] This Court can also not ignore the fact that the Commonwealth's Complaint does not challenge the penalty provision of the Patient Protection and Affordable Care Act, though the two undeniably act in tandem. Instead, the

(Continued on following page)

Anti-Injunction Act "was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." *Id.* at 381, 104 S. Ct. at 1115; *see also In re Leckie Smokeless Coal Co.,* 99 F.3d at 584. Additionally, the *Regan* Court emphasized that, "the indicia of congressional intent – the [Anti-Injunction] Act's purposes and the circumstances of its enactment – demonstrate that Congress did not intend the Act to apply where an aggrieved party would be required to depend on the mere possibility of persuading a third party to assert his claims." *Regan,* 465 U.S. at 381, 104 S. Ct. at 1115. However, "[b]ecause of the strong policy animating the Anti-Injunction Act, and the sympathetic, almost unique, facts in *Regan,* courts have construed the *Regan* exception very narrowly. . . ." *Judicial Watch, Inc. v. Rossotti,* 317 F.3d 401, 408 n.3 (4th Cir. 2003).

Despite this narrow interpretation, this Court finds the justification for allowing an exception to the Anti-Injunction Act in *Regan* applies with equal strength to the circumstances in this case. First, the Supreme Court found that "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Regan,* 465 U.S. at 380, 104 S. Ct. at 1115 (citing *Singleton v. Wulff,* 428 U.S. 106, 114, 96 S. Ct. 2868, 2874 (1976)).

Complaint exclusively attacks the constitutionality of the mandate to purchase health care insurance.

Thus, in this case, without standing to defend the constitutionality of a state's right to create and enforce its own legal code, an individual taxpayer would be unable to assert the constitutional rights of the Commonwealth. Second, "to make use of this remedy the State 'must first be able to find [an individual] willing to subject himself to the rigors of litigation against the Service, and then must rely on [him] to present the relevant arguments on [its] behalf.'" *Id.* (citing *Bob Jones,* 416 U.S. at 747 n.21, 94 S. Ct. at 2051). Due to the magnitude, cost, and *sui generis* interest of Virginia in this case, even if standing was not an issue, it appears the Commonwealth would be hard-pressed to find a suitable party to argue the case on its behalf.

Third, and perhaps most importantly, "[b]ecause it is by no means certain that the State would be able to convince a taxpayer to raise its claims, reliance on the remedy suggested by the Secretary would create the risk that the Anti-Injunction Act would entirely deprive the State of any opportunity to obtain review of its claims." *Id.* at 380-81, 104 S. Ct. at 1115. Applying this logic to the Commonwealth, as a sovereign entity not required to purchase insurance under Section 1501, Virginia will never be assessed the fine imposed under the Patient Protection and Affordable Care Act, and consequently, never afforded an opportunity to pay the penalty and request a refund. Therefore, this Court concludes that "[b]ecause Congress did not prescribe an alternative

remedy for the plaintiff in this case, the Act does not bar this suit." *Id.* at 381, 104 S. Ct. at 1115-16.

Although this lawsuit has the collateral effect of protecting the individual interests of the citizens of the Commonwealth of Virginia, its primary articulated objective is to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law. Despite its declaratory nature, it is a lawfully-enacted part of the laws of Virginia. The purported transparent legislative intent underlying its enactment is irrelevant. The mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.[4] As the U.S. Supreme Court noted in *Alfred L. Snapp & Son, Inc.,* it is common ground that states have an interest as sovereigns in exercising "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc.,* 458 U.S. at 601, 102 S. Ct. at 3265. With few exceptions, courts have uniformly held that individuals do not have standing to bring a Tenth Amendment claim. *Kennedy v. Allera,* ___ F.3d ___, 2010 WL 2780188, at *8 (4th Cir. July 15, 2010) (citing *Brooklyn Legal*

[4] Federal courts have long recognized the duty of state Attorneys General to defend the laws of their states. *See* Fed. R. Civ. P. 5.1(a)(2) (requiring that any party challenging the constitutionality of a state statute serve notice on the state Attorney General).

Servs. Corp. B v. Legal Servs. Corp., 462 F.3d 219, 234-36 (2d Cir. 2006)).

The power of the Attorney General to prosecute claims on behalf of the state he or she represents remains unsettled despite centuries of legal debate.[5] This is particularly true in cases involving suits against the federal government. *See Alaska v. U.S. Dep't of Transp.,* 868 F.2d 441, 443 n.1 (D.C. Cir. 1989). Reviewing courts, in their standing analysis, have distinguished cases where the individual interests of citizens are purely at stake from those in which the interest of the state, as a separate body politic, is implicated. The former is distinguished by legal commentators from the latter as quasi-sovereignty as opposed to sovereignty. While standing jurisprudence in the area of quasi-sovereign or *parens patriae* standing defies simple formulation, courts have uniformly held that "where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed, wholly apart from the alleged general harm." *Ctr. for Biological Diversity v. U.S. Dep't of Interior,* 563 F.3d 466, 476-77

[5] Given the stake states have in protecting their sovereign interests, they are often accorded "special solicitude" in standing analysis. *Massachusetts v. EPA,* 549 U.S. 497, 520, 127 S. Ct. 1438, 1455 (2007).

(D.C. Cir. 2009) (citing *Massachusetts v. EPA,* 549 U.S. 497, 127 S. Ct. 1438 (2007)).[6]

Closely analogous to the immediate case is *Wyoming ex rel. Crank v. United States,* 539 F.3d 1236 (10th Cir. 2008). There the State of Wyoming sought declaratory and injunctive relief against a decision of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, which determined that a Wyoming statute purportedly establishing a procedure to expunge domestic violence misdemeanor convictions, in order to restore lost firearms rights, would not have the intended effect under federal law. As in the immediate case, the United States challenged the Article III standing of the State of Wyoming to seek judicial relief from the conflicting federal regulation. The Tenth Circuit held that Wyoming's stake in the controversy was sufficiently adverse to warrant Article III standing.

Relying on the teachings of *Alfred L. Snapp & Son, Inc.,* the Tenth Circuit observed that the states have a legally protected sovereign interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which]

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[6] Of course, Article III standing has other elements. A plaintiff must demonstrate: (i) an injury-in-fact that is both concrete and particularized, as well as actual or imminent; (ii) an injury that is traceable to the conduct complained of; and (iii) an injury that is redressable by a decision of the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

involves the power to create and enforce a legal code." *Wyoming,* 539 F.3d at 1242 (quoting *Alfred L. Snapp & Son, Inc.,* 458 U.S. at 601, 102 S. Ct. at 3265). "Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong. Accordingly, we conclude that Wyoming has sufficiently alleged an injury-in-fact. . . ." *Id.* at 1242 (internal citations omitted).

This Court finds the Tenth Circuit's standing analysis in *Wyoming* to be sound and adopts its principled and logical reasoning in this case. The Commonwealth, through its Attorney General, satisfies Article III's standing requirements under the facts of this case.

III.

Resolution of the standing issue resolves only a single strand of the case or controversy requirements of Article III subject matter jurisdiction. The matter must also be ripe for adjudication. In other words, the claim must be sufficiently mature and issues sufficiently defined and concrete to create an actual justiciable controversy. *See Blanchette v. Conn. Gen. Ins. Corps. (Reg'l Rail Reorganization Act Cases),* 419 U.S. 102, 138-39, 95 S. Ct. 335, 356 (1974). "[R]ipeness is peculiarly a question of timing. . . ." *Id.* at 140, 95 S. Ct. at 357. It implicates both constitutional limitations and prudential consideration. *Reno v. Catholic Soc. Servs. Inc.,* 509 U.S. 43, 57 n.18, 1135 S. Ct. 2485, 2496 (1993). In

determining whether a claim is ripe for judicial review, courts evaluate "'the fitness of the issues for judicial decision' and 'the hardship of withholding court consideration.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758, 1767 n.2 (2010) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 805, 808, 123 S. Ct. 2026, 2031 (2003)). "The burden of proving ripeness falls on the party bringing suit." *Miller v. Brown,* 462 F.3d 312, 319 (4th Cir. 2006).

This element of the Secretary's argument is closely intertwined with her contention that Virginia has not demonstrated that it will suffer a hardship from the provision it challenges because the Minimum Essential Coverage Provision does not go into effect until 2014. This lack of immediate impact, in her view, renders the Commonwealth's challenge premature. To support this contention, the Secretary relies principally on *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S. Ct. 803 (1966). *Katzenbach* involved a suit to enjoin enforcement of certain provisions of the Voting Rights Act of 1965, particularly those sections providing civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act. The *Katzenbach* Court found those sections of the statute imposing criminal penalties to be premature for constitutional review, but held that the regulatory portions were ripe for judicial consideration.

It is important to note that the Supreme Court has historically drawn a distinction between the

ripeness analysis employed for criminal statutes as opposed to other regulatory enactments. *Reg'l Rail Reorganization Act Cases,* 419 U.S. at 143 n.29, 95 S. Ct. at 358. Unlike a regulatory statute, the decision to initiate criminal prosecutions resides within the discretion of prosecutors – and allows for citizens to voluntarily bring their conduct within the bounds of the law. *Id.* The Minimum Essential Coverage Provision presently before the Court lacks criminal remedies. In fact, it specifically waives criminal prosecution or sanctions for failure to pay a penalty levied by the Act. 26 U.S.C. § 5000A(g)(2)(A). Therefore, neither prosecutorial discretion nor self-regulated citizen conduct considerations are present here. With certain delineated exceptions, 26 U.S.C. § 5000A(a) mandates that a citizen purchase, or otherwise obtain insurance, or face a monetary assessment. The central issue in this case is the Commonwealth's sovereign interest in upholding the Virginia Health Care Freedom Act. The issues presented are purely legal and further development of the factual record would not clarify the issues for judicial resolution. *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 581, 105 S. Ct. 3325, 3333 (1985).

While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. This provision will compel scores of people who are not currently enrolled to evaluate and

contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements.

More importantly, the Commonwealth must revamp its health care program to ensure compliance with the enactment's provisions, particularly with respect to Medicaid. This process will entail more than simple fine tuning. Unquestionably, this regulation radically changes the landscape of health insurance coverage in America.

The Supreme Court, and the preponderance of reviewing courts of appeals, have not been reticent to consider the constitutionality of legislative enactments prior to their date of effectiveness when the resulting alleged injury is impending and more than a "mere possibility." *See Pierce v. Soc'y of Sisters,* 268 U.S. 510, 45 S. Ct. 571 (1925) (ruling a year prior to the challenged law's date of effectiveness was permissible); *see also Virginia v. Am. Booksellers Ass'n.,* 484 U.S. 383, 392-93, 108 S. Ct. 636, 642-43 (1988) (upholding a pre-enforcement challenge to a state law on First Amendment grounds). Again, the alleged injury in this case is the collision between state and federal law. Neither the White House nor Congress has given any indication that the Minimum Essential Coverage Provision at issue will not be

enforced, and the Court sees no reason to assume otherwise. *Am. Booksellers Ass'n.,* 484 U.S. at 393, 108 S. Ct. at 643. Nor do the facts before the Court here present a "hypothetical" case, *United States v. Raines,* 362 U.S. 17, 22, 80 S. Ct. 519, 523 (1960), or a "remote and abstract . . . inquiry." *Int'l Longshoremen's Union, Local 37 v. Boyd,* 347 U.S. 222, 224, 74 S. Ct. 447, 448 (1954).

The issues in this case are fully framed, the underlying facts are well settled, and the case is accordingly ripe for review. The Commonwealth has therefore satisfied all requirements of Article III standing.

IV.

Turning to the merits of the Complaint, it is important to keep in mind that the Court's mission at this stage is narrow. To survive a Rule 12(b)(6) challenge, a complaint need only state a legally viable cause of action. "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992), *cert. denied,* 510 U.S. 828, 114 S. Ct. 93 (1993). In reviewing a 12(b)(6) motion, the complaint must be construed in the light most favorable to the plaintiff, assuming its factual allegations to be true. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984).

This time-honored standard is a bit more difficult to apply in the context of this case. The congressional enactment under review – the Minimum Essential Coverage Provision – literally forges new ground and extends Commerce Clause powers beyond its current high watermark. Counsel for both sides have thoroughly mined relevant case law and offered well reasoned analyses. The result, however, has been insightful and illuminating, but short of definitive. While this Court's decision may set the initial judicial course of this case, it will certainly not be the final word.

The historically-accepted contours of Article I Commerce Clause power were restated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 150, 91 S. Ct. 1357, 1359 (1971). First, Congress can regulate the channels of interstate commerce. *Id.* Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* It appears from the argument and memoranda of counsel that only the third category is implicated in the case at hand.

In arguing that an individual's decision not to purchase health insurance is in effect "economic activity," the Secretary relies on an aggregation theory. In other words, the sum of individual decisions to participate or not in the health insurance market has a critical effect on interstate commerce.

The Secretary's argument is drawn in large measure from the teachings of the Supreme Court in *Gonzales v. Raich,* 545 U.S. 1, 125 S. Ct. 2195 (2005), wherein the Court noted:

> [O]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. . . . In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."

Gonzales, 545 U.S. at 17, 125 S. Ct. at 2205-06 (quoting *United States v. Lopez,* 514 U.S. 549, 558, 115 S. Ct. 1624, 1629 (1995)).

In the Secretary's view, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the health care regime to "implode." At oral argument, the Deputy Assistant Attorney General of the United States, on behalf of the Secretary, described the collective effect of the Minimum Essential Coverage Provision as the critical element of the national health care scheme, "[a]nd what the [congressional] testimony was, was if you do the preexisting condition exclusion and no differential health care

status, without a minimum coverage type provision, it will inexorably drive that market into extinction. And what somebody said more succinctly was, the market will implode." (Tr. 33:7-13, July 1, 2010.)

To support this argument, the Secretary compared the market impact of the universal insurance requirement to regulation of wheat harvested for personal consumption or marijuana grown for personal use. In *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82 (1942), acknowledged by most constitutional scholars as the most expansive application of the Commerce Clause, the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm. The Court reasoned that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. The Court concluded:

> [The fact that] appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. . . . But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.

Wickard, 317 U.S. at 127-28, 63 S. Ct. at 90-91.

Similarly, in *Gonzales v. Raich,* the Supreme Court concluded that the aggregate effect of personal growth and consumption of marijuana for medicinal purposes, pursuant to California law, had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause. "Like the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales,* 545 U.S. at 18-19, 125 S. Ct. at 2206-07.

In response, the Commonwealth highlights what it perceives to be the critical distinction between the line of cases relied upon by the Secretary and the Commerce Clause application presently before the Court. What the Supreme Court deemed to be "economic activity" in *Wickard* and *Raich* necessarily involved a voluntary decision to perform an act, such as growing wheat or cultivating marijuana. The Commonwealth argues that this critical element is absent in the regulatory mechanism established in the Minimum Essential Coverage Provision. This provision, the Commonwealth maintains, requires a person to perform an involuntary act and as a result, submit to Commerce Clause regulation. The Commonwealth continues that neither the U.S. Supreme Court nor any circuit court of appeals has

upheld the extension of Commerce Clause power to encompass economic inactivity.

Drawing on the logic articulated in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995), and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740 (2000), which limited the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that actually affect interstate commerce, the Commonwealth contends that a decision not to purchase a product, such as health insurance, is not an economic activity. It is a virtual state of repose – or idleness – the converse of activity. At best, Section 1501 regulates future activity in anticipation of need.

In *United States v. Morrison,* the Court acknowledged that its "interpretation of the Commerce Clause has changed as our Nation has developed. . . . [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 607-08, 120 S. Ct. at 1748-49 (quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S. Ct. 615 (1937)). The Court in *Morrison* also noted that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752. Finally, in *Morrison,* the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that

conduct's aggregate effect on interstate commerce." *Id.* at 617, 120 S. Ct. at 1754.

The Commonwealth further maintains that the Secretary's position finds no sustenance in the Necessary and Proper Clause. U.S. Const. art. I, § 8. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. The Commonwealth draws the Court's attention to several observations of the Supreme Court in the recent case of *United States v. Comstock,* 130 S. Ct. 1949 (2010). The Court in *Comstock* began its analysis by quoting Chief Justice Marshall in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Comstock,* 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

In commenting on Chief Justice Marshall's remarks, the Court in *Comstock* noted that:

> [W]e have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. . . . [T]he relevant inquiry is simply whether the

> means chosen are 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.

Id. at 1956-57 (internal citations omitted).

The Commonwealth maintains that even if a congressional enactment is noble and legitimate, the means adapted to enforce it under the Necessary and Proper Clause must be within the letter and spirit of the Constitution. In other words, it must have a firm constitutional foundation rooted in Article I. The goals of those portions of the Patient Protection and Affordable Care Act directly pertinent to health care, i.e., universal health insurance coverage, no exclusion of persons with preexisting conditions, a requirement that all people receiving health care pay for such services in a timely fashion, etc., are laudable. The Commonwealth argues, however, that the Necessary and Proper Clause cannot be employed as a vehicle to enforce an unconstitutional exercise of Commerce Clause power, no matter how well intended. If a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically, an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

In rebuttal, the Secretary reiterates her position that a person cannot simply elect to avoid participation in the health care market. It is

inevitable, in her view, that every person – today or in the future – healthy or otherwise – will require medical care. The Minimum Essential Coverage Provision simply provides a vehicle for prompt and dependable payment for such services if and when rendered. The Secretary also rejects the notion that the imposition of a monetary penalty for failing to perform a lawful act is alien to the spirit of the Constitution. The Secretary points out that sanctions have historically been imposed for failure to timely file tax returns or truthfully report or pay taxes due, as well as failure to register with the Selective Service or report for military duty. These examples, as the Commonwealth aptly notes, are directly tethered to a specific constitutional provision empowering Congress to assess taxes and provide and maintain an Army and Navy. U.S. Const. art. I, § 8. No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so.

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. Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far. At this juncture, the Court is not persuaded that the Secretary has demonstrated that the Complaint fails to state a cause of action with respect to the

Commerce Clause element. This portion of the Complaint advances a plausible claim with an arguable legal basis.

V.

The final aspect of the Secretary's Rule 12(b)(6) challenge raises an even closer and equally unsettled issue under congressional taxing powers. Contrary to pre-enactment representations by the Executive and Legislative branches, the Secretary now argues alternatively that the Minimum Essential Coverage Provision is a product of the government's power to tax for the general welfare. (Tr. 19:16-17, July 1, 2010.) This is of course supported by the placement of the penalty provisions within the Internal Revenue Code. Because the Secretary contends that the Minimum Essential Coverage Provision is an exercise of the less bridled power of Congress to tax, this element of the argument presents a much closer question than the preceding Commerce Clause debate.

The Secretary suggests that the constitutional analysis under the Tax Clause involves only two factors. Relying on *United States v. Aiken,* 974 F.2d 446 (4th Cir. 1992), she asserts that the power of Congress to lay and collect taxes, duties, and excises, under Article I, Section 8 of the U.S. Constitution, requires only that it be a revenue-raising measure and that the associated regulatory provisions bear a reasonable relation to the statute's taxing purpose.

Id. at 448; *see also Sonzinsky v. United States,* 300 U.S. 506, 513, 57 S. Ct. 554, 555-56 (1937); *United States v. Doremus,* 249 U.S. 86, 39 S. Ct. 214 (1919). According to the Secretary, the power of Congress to tax for the general welfare is checked only by the electorate. "Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *United States v. Kahriger,* 345 U.S. 22, 31, 73 S. Ct. 510, 515 (1953), *overruled on other grounds, Marchetti v. United Sales* [sic]*,* 390 U.S. 39, 88 S. Ct. 697 (1968). The Secretary points out that the power of Congress to use its taxing and spending power under the General Welfare Clause has long been recognized as extensive. *McCray v. United States,* 195 U.S. 27, 56-59, 24 S. Ct. 769, 776-78 (1904). Furthermore, the Secretary notes that Congress may use its power under the Tax Clause even for purposes that would exceed its powers under other provisions of Article I. *United States v. Sanchez,* 340 U.S. 42, 44, 71 S. Ct. 108, 110 (1950).

Therefore, the Secretary argues that because the Minimum Essential Coverage Provision in fact generates revenue and its regulatory features are rationally related to the goal of requiring every individual to pay for the medical services they receive, "that's the end of the ballgame." (Tr. 44:11, July 1, 2010.)

Initially, in response, the Commonwealth contends that the noncompliance penalty provision in Section 1501 does not meet the historical criteria for

a tax.[7] Aside from being referred to in Section 1501 at Section 5000A(b)(1) as a "penalty," the clear purpose of the assessment is to regulate conduct, not generate revenue for the government.[8] In fact, the Commonwealth adds that if there is full compliance – if everyone purchases health insurance as required – this provision will generate no revenue. The Commonwealth's doubt as to its purported purpose is heightened further by the prefatory language of Section 1501 which describes it as a derivative of the Commerce Clause. The Solicitor General of Virginia correctly noted during oral argument that the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause – it must be in aid of an enumerated power. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940); *United States v. Butler,* 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936).

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[7] "[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. 213, 224, 116 S. Ct. 2106, 2112 (1996) (internal citations omitted). On the other hand, a penalty imports the notion of a punishment for an unlawful act or omission. *Id.* "The two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca,* 282 U.S. 568, 572, 51 S. Ct. 278, 280 (1931).

[8] In contrast, the Commonwealth points out that elsewhere in the Act, Congress specifically described levies as taxes, such as Sections 9001, 9004, 9015, and 9017.

Although the Commonwealth concedes that the power of Congress to tax exceeds its ability to regulate under the Commerce Clause, it is not without limitation. "[T]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate." (Tr. 81:18-21, July 1, 2010 (citing *Bailey v. Drexel Furniture Co. (Child Labor Tax Case),* 259 U.S. 20, 37, 42 S. Ct. 449, 450 (1922).) To amplify its point, the Commonwealth focuses the Court's attention on a series of cases in which the Supreme Court struck down certain "regulatory taxes" as an unconstitutional encroachment on the state's power of regulation under the Tenth Amendment. *See Butler,* 297 U.S. at 68, 56 S. Ct. at 320; *Linder v. United States,* 268 U.S. 5, 17-18, 45 S. Ct. 446, 449 (1925); *Child Labor Tax Case,* 259 U.S. at 35, 42 S. Ct. at 451. In commenting on the limitations on the power of Congress to levy taxes to promote the general welfare, the Court in *Butler* noted that, "despite the breadth of the legislative discretion, our duty to hear and to render, judgment remains. If the statute plainly violates the stated principle of the Constitution, we must so declare." *Butler,* 297 U.S. at 67, 56 S. Ct. at 320; *see also Kahriger,* 345 U.S. at 29, 73 S. Ct. at 513.[9]

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[9] Citing commentaries from a number of constitutional scholars, the Secretary maintains that this line of cases has fallen into desuetude. The Commonwealth counters that none of these cases have been overruled by the U.S. Supreme Court.

By analogy, the Commonwealth argues that the Minimum Essential Coverage Provision not only invokes rights reserved to the states, but also seeks to compel activity beyond the reach of Congress. As discussed above, the division of responsibility for regulating insurance between the Commonwealth and the federal government, to the extent relevant, is yet to be adequately staked out in this case.

The centerpiece of the Complaint at issue is its contention that Congress lacks the authority to regulate economic inactivity. Lacking such power to regulate a person's decision not to participate in interstate commerce, logically, the Commonwealth argues, Congress would not have the power to tax or impose a penalty for such inactivity. This, of course, is the core issue in this case.

To bolster its position, the Commonwealth suggests that a careful survey of constitutional history yields no basis for such extension of Tax Clause powers. In its Memorandum in Opposition to Motion to Dismiss, the Commonwealth observes that "historically, direct taxes were taxes on persons or things, while duties, imposts, and excises have never meant a tax on a decision not to purchase or not to do something unrelated to a larger voluntary business or other undertaking." (Pl. Mem. Opp'n Mot. Dismiss 32.)

In her opposition, the Secretary rejoins that the Commonwealth misinterprets the limitations of Congress's power under the Tax Clause. "[A] tax

statute [does not] necessarily fall because it touches on activities which Congress might not otherwise regulate." *Sanchez,* 340 U.S. at 44, 71 S. Ct. at 110. For example, the Secretary argues that Congress can tax inheritances even though the regulation of estates and inheritances is beyond Congress's Commerce Clause powers. *Knowlton v. Moore,* 178 U.S. 41, 59-60, 20 S. Ct. 747, 755 (1900). The Secretary stresses that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *Sanchez,* 340 U.S. at 44, 71 S. Ct. at 110. "[A] tax is not any the less a tax because it has a regulatory effect. . . ." *Sonzinsky,* 300 U.S. at 513, 57 S. Ct. at 556 (internal citations omitted).

Casting aside many aspects of the Commonwealth's argument, the Secretary contends that in the final analysis, the Minimum Essential Coverage Provision falls within Congress's extensive general welfare authority. She also underscores that decisions of how best to provide for the general welfare are for the representative branches, not for the courts. *Helvering v. Davis,* 301 U.S. 619, 640, 57 S. Ct. 904, 908 (1937). "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky,* 300 U.S. at 513-14, 57 S. Ct. at 556.

In enacting Section 1501 of the Patient Protection and Affordable Care Act, Congress made extensive findings on the substantial effect of

decisions to purchase health insurance on the vast interstate health care market. These findings alone, in the Secretary's view, provide more than adequate support for her contention that the penalty (or tax) at issue is rationally related to the objective of maintaining a financially viable health care market by requiring everyone to pay for the services they receive. She adds, through counsel, "[t]hat consuming health care services without paying for them is activity, plain and simple." (Tr. 92:12-14, July 1, 2010.) In this context, a consumer's failure to act is a clear burden on interstate commerce.

The Secretary appeared to concede during oral argument, however, that if the ability to require the Minimum Essential Coverage Provision is not within the letter and spirit of the Constitution, than the penalty necessarily fails. As the Deputy Assistant Attorney General of the United States appeared to note in his response to the Court, "if it is unconstitutional, then the penalty would fail as well." (Tr. 21:10-11, July 1, 2010.)

VI.

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. Given the presence of some authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this stage that the Complaint fails to state a cause of action.[10]

The Secretary's Motion to Dismiss will therefore be denied. Resolution of the controlling issues in this case must await a hearing on the merits.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Aug. 2, 2010
Richmond, VA

[10] "It is well-established that defendants bear the burden of proving that plaintiffs' claims fail as a matter of law." *Bennett v. MIS Corp.,* 607 F.3d 1076, 1091 (6th Cir. 2010). "Under Rule 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated." James Wm. Moore, et al., *Moore's Federal Practice* § 12.34(1)(a) (3d ed. 2010).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	Civil Action No. 3:10CV188-HEH

ORDER
(Denying Defendant's Motion to Dismiss)

(Filed Aug. 2, 2010)

THIS MATTER is before the Court on Defendant's Motion to Dismiss (Dk. No. 21), filed on May 24, 2010. For the reasons stated in the accompanying Memorandum Opinion, the Defendant's Motion to Dismiss is DENIED.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Aug. 2, 2010
Richmond, VA

FILED: January 20, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1057(L)
(3:10-cv-00188-HEH)

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

v.

RAY ELBERT PARKER; AMERICAN CENTER FOR LAW & JUSTICE ET AL.; PHYSICIAN HOSPITALS OF AMERICA; SMALL BUSINESS MAJORITY FOUNDATION, INCORPORATED; CENTER FOR AMERICAN PROGRESS; FEDERAL RIGHTS PROJECT NATIONAL SENIOR CITIZENS LAW CENTER; WASHINGTON LEGAL FOUNDATION; LIBERTY GROUP; CONSTITUTIONAL LAW PROFESSORS; CATO INSTITUTE; LANDMARK LEGAL FOUNDATION; RANDY E. BARNETT, Professor; COMPETITIVE ENTERPRISE INSTITUTE; W. SPENCER CONNERAT, III; STEVEN J. WILLIS; PACIFIC LEGAL

FOUNDATION; YOUNG INVINCIBLES; WILLIAM P. BARR; EDWIN MEESE, III; RICHARD L. THORNBURGH; EVE ELLINGWOOD, a/k/a Cohen Sternlight, Judge, Retired; AMERICAN CIVIL RIGHTS UNION; AMERICANS FOR FREE CHOICE IN MEDICINE; MOUNTAIN STATES LEGAL FOUNDATION; VIRGINIA ORGANIZING

Movants

No. 11-1058
(3:10-cv-00188-HEH)

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia

Plaintiff-Appellant

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity

Defendant-Appellee

v.

RAY ELBERT PARKER; AMERICAN CENTER FOR LAW & JUSTICE ET AL.; PHYSICIAN HOSPITALS OF AMERICA; SMALL BUSINESS MAJORITY FOUNDATION, INCORPORATED; CENTER FOR AMERICAN PROGRESS; FEDERAL RIGHTS PROJECT NATIONAL SENIOR CITIZENS LAW CENTER; WASHINGTON LEGAL FOUNDATION; LIBERTY GROUP; CONSTITUTIONAL LAW

PROFESSORS; CATO INSTITUTE; LANDMARK LEGAL FOUNDATION; RANDY E. BARNETT, Professor; COMPETITIVE ENTERPRISE INSTITUTE; W. SPENCER CONNERAT, III; STEVEN J. WILLIS; PACIFIC LEGAL FOUNDATION; YOUNG INVINCIBLES; WILLIAM P. BARR; EDWIN MEESE, III; RICHARD L. THORNBURGH; EVE ELLINGWOOD, a/k/a Cohen Sternlight, Judge, Retired; AMERICAN CIVIL RIGHTS UNION; AMERICANS FOR FREE CHOICE IN MEDICINE; MOUNTAIN STATES LEGAL FOUNDATION; VIRGINIA ORGANIZING

Movants

ORDER

The Court consolidates Case No. 11-1057 and Case No. 11-1058. The appellant in Case No. 11-1057 shall be considered the appellant for purposes of the consolidated appeals and shall proceed first at briefing and at oral argument. Entry of appearance forms and disclosure statements filed by counsel and parties to the lead case are deemed filed in the secondary case.

For the Court – By Direction

/s/ Patricia S. Connor, Clerk

Filed: January 20, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517
www.ca4.uscourts.gov

DOCKETING NOTICE –
APPEAL FROM DISTRICT COURT

No. 11-1057, *Commonwealth of Virginia v. Kathleen Sebelius*
3:10-cv-00188-HEH

This case has been placed on the Court's docket under the above-referenced number, which should be used on papers subsequently filed in this Court.

Counsel are responsible for ensuring that documents are timely filed by actual receipt as required in the appropriate clerk's office. Noncompliance with jurisdictional deadlines will prevent the Court from considering the case, and failure to meet other deadlines may result in dismissal for failure to prosecute or in imposition of sanctions. *See* Local Rules 45, 46(g).

In cases in which more than one attorney represents a party, future notices will be sent only to attorneys who have entered an appearance as counsel of record; other attorneys will be removed from the case.

Counsel are responsible for ensuring that social security numbers, juvenile names, dates of birth, and financial account numbers are redacted from any documents filed with the Court and that any sealed materials are filed in accordance with the enclosed ***Memorandum on Sealed and Confidential Materials***. Counsel must obtain an Appellate CM/ECF Filer Account as outlined in the ***Notice Regarding Implementation of CM/ECF***; electronic filing is mandatory for counsel in all Fourth Circuit cases effective June 1, 2008.

Counsel must file the initial forms required upon docketing, as set forth in the following table of forms, in the clerk's office within **14 days** of the date of this notice. The forms can be completed and printed or saved in electronic form.

Click on a link to display the required form; all forms are also available at www.ca4.uscourts.gov.

Form:	**Required From:**	**Required Number:**
Appearance of Counsel	Counsel of record for any party to the appeal (If not admitted to this Court, counsel must complete and submit an ***application for admission***.)	Original only

Disclosure Statement	All parties to a civil or bankruptcy case and all corporate defendants in a criminal case (not required from the United States, from indigent parties, or from state or local governments in pro se cases)	Original only
Docketing Statement	Appellant's counsel (not required after Rule 5 grant of permission to appeal)	Original only
Transcript Order	Appellant, only if ordering transcript (not required from appellee)	Attach to docketing statement
CJA 24	Appellant, only if transcript is at court expense under Criminal Justice Act (not required from appellee)	Attach to docketing statement

I will be the case manager for this case. Please contact me at the number listed below if you have any questions regarding your case.

RJ Warren
Deputy Clerk
804-916-2702

CONSTITUTIONAL PROVISIONS

Article I, § 8, clauses 1 and 3 of the United States Constitution provides in relevant part:

The Congress shall have power to lay and collect taxes . . . to pay the debts and provide for the . . . general welfare of the United States; but all duties imposts and excises shall be uniform throughout the United States;

* * *

To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes;

* * *

STATUTORY PROVISIONS

Excerpts from the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

Sec. 1501. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

(a) Findings. – Congress makes the following findings:

(1) In general. – The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) Effects on the national economy and interstate commerce. – The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $ 2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $ 4,700,000,000,000 in 2019. Private health insurance spending is projected to be $ 854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in

interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. According to the Congressional Budget Office, the requirement will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(F) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a

significant role in regulating health insurance which is in interstate commerce.

(G) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(H) Administrative costs for private health insurance, which were $ 90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) Supreme Court ruling. – In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation. (b) In General. – Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:

"CHAPTER 48 – MAINTENANCE OF MINIMUM ESSENTIAL COVERAGE

"Sec. 5000A. Requirement to maintain minimum essential coverage.

"Sec. 5000A. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

"(a) Requirement To Maintain Minimum Essential Coverage. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

"(b) Shared Responsibility Payment. –

"(1) In general. – If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).

"(2) Inclusion with return. – Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

"(3) Payment of penalty. – If an individual with respect to whom a penalty is imposed by this section for any month –

"(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

"(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

"(c) Amount of Penalty. –

"(1) In general. – The penalty determined under this subsection for any month with respect to any individual is an amount equal to 1/12 of the applicable dollar amount for the calendar year.

"(2) Dollar limitation. – The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to all individuals for whom the taxpayer is liable under subsection (b)(3) shall not exceed an amount equal to 300 percent the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

"(3) Applicable dollar amount. – For purposes of paragraph (1) –

"(A) In general. – Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $ 750.

"(B) Phase in. – The applicable dollar amount is $ 95 for 2014 and $ 350 for 2015.

"(C) Special rule for individuals under age 18. – If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

"(D) Indexing of amount. – In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $ 750, increased by an amount equal to –

"(i) $ 750, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting 'calendar year 2015' for 'calendar year 1992' in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $ 50, such increase shall be rounded to the next lowest multiple of $ 50.

"(4) Terms relating to income and families. – For purposes of this section –

"(A) Family size. – The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

"(B) Household income. – The term 'household income' means, with respect to any taxpayer for any taxable year, an amount equal to the sum of –

"(i) the modified gross income of the taxpayer, plus

"(ii) the aggregate modified gross incomes of all other individuals who –

"(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

"(II) were required to file a return of tax imposed by section 1 for the taxable year.

"(C) Modified gross income. – The term 'modified gross income' means gross income –

"(i) decreased by the amount of any deduction allowable under paragraph (1), (3), (4), or (10) of section 62(a),

"(ii) increased by the amount of interest received or accrued during the taxable year which is exempt from tax imposed by this chapter, and

"(iii) determined without regard to sections 911, 931, and 933.

"(D) Poverty line. –

"(i) In general. – The term 'poverty line' has the meaning given that term in section 2110(c)(5) of the Social Security Act (42 U.S.C. 1397jj(c)(5)).

"(ii) Poverty line used. – In the case of any taxable year ending with or within a calendar year, the poverty line used shall be the most recently published poverty line as of the 1st day of such calendar year.

"(d) Applicable Individual. – For purposes of this section –

"(1) In general. – The term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

"(2) Religious exemptions. –

"(A) Religious conscience exemption. – Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is a member of a recognized religious sect or division thereof described in section 1402(g)(1) and an adherent of established tenets or teachings of such sect or division as described in such section.

"(B) Health care sharing ministry. –

"(i) In general. – Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

"(ii) Health care sharing ministry. – The term 'health care sharing ministry' means an organization –

"(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

"(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

"(III) members of which retain membership even after they develop a medical condition,

"(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

"(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

"(3) Individuals not lawfully present. – Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

"(4) Incarcerated individuals. – Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

"(e) Exemptions. – No penalty shall be imposed under subsection (a) with respect to –

"(1) Individuals who cannot afford coverage. –

"(A) In general. – Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

"(B) Required contribution. – For purposes of this paragraph, the term 'required contribution' means –

"(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored

plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

"(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

"(C) Special rules for individuals related to employees. – For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination shall be made by reference to the affordability of the coverage to the employee.

"(D) Indexing. – In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding

calendar year and 2013 over the rate of income growth for such period.

"(2) Taxpayers with income under 100 percent of poverty line. – Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than 100 percent of the poverty line for the size of the family involved (determined in the same manner as under subsection (b)(4)).

"(3) Members of Indian tribes. – Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

"(4) Months during short coverage gaps. –

"(A) In general. – Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

"(B) Special rules. – For purposes of applying this paragraph –

"(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

"(ii) if a continuous period is greater than the period allowed under subparagraph (A), no

exception shall be provided under this paragraph for any month in the period, and

"(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods. The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

"(5) Hardships. – Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

"(f) Minimum Essential Coverage. – For purposes of this section –

"(1) In general. – The term 'minimum essential coverage' means any of the following:

"(A) Government sponsored programs. – Coverage under –

"(i) the Medicare program under part A of title XVIII of the Social Security Act,

"(ii) the Medicaid program under title XIX of the Social Security Act,

"(iii) the CHIP program under title XXI of the Social Security Act,

"(iv) the TRICARE for Life program,

"(v) the veteran's health care program under chapter 17 of title 38, United States Code, or

"(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers).

"(B) Employer-sponsored plan. – Coverage under an eligible employer-sponsored plan.

"(C) Plans in the individual market. – Coverage under a health plan offered in the individual market within a State.

"(D) Grandfathered health plan. – Coverage under a grandfathered health plan.

"(E) Other coverage. – Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

"(2) Eligible employer-sponsored plan. – The term 'eligible employer-sponsored plan' means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is –

"(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

"(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

"(3) Excepted benefits not treated as minimum essential coverage. – The term 'minimum essential coverage' shall not include health insurance coverage which consists of coverage of excepted benefits –

"(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

"(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

"(4) Individuals residing outside United States or residents of territories. – any applicable individual shall be treated as having minimum essential coverage for any month –

"(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

"(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

"(5) Insurance-related terms. – Any term used in this section which is also used in title I of the

Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

"(g) Administration and Procedure. –

"(1) In general. – The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

"(2) Special rules. – Notwithstanding any other provision of law –

"(A) Waiver of criminal penalties. – In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

"(B) Limitations on liens and levies. – The Secretary shall not –

"(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

"(ii) levy on any such property with respect to such failure."

"(c) Clerical Amendment. – The table of chapters for subtitle D of the Internal Revenue Code of 1986 is amended by inserting after the item relating to chapter 47 the following new item:

"CHAPTER 48 – Maintenance of Minimum Essential Coverage."

"(d) Effective Date. – The amendments made by this section shall apply to taxable years ending after December 31, 2013.

STATE STATUTORY PROVISION

Virginia Code § 38.2-3430.1:1, provides that:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

PUBLIC LAW 111-148 [H.R. 3590]
MAR. 23, 2010
PATIENT PROTECTION
AND AFFORDABLE CARE ACT

111 P.L. 148; 124 Stat. 119;
2010 Enacted H.R. 3590; 111 Enacted H.R. 3590

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title. – This Act may be cited as the "Patient Protection and Affordable Care Act".

(b) Table of Contents. – The table of contents of this Act is as follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity, Defendant.	Civil Action No. 3:10-cv-00188-HEH

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 23, 2010)

* * *

[Following a discussion of remedies and severability, and noting the following if the court "were to rule in Virginia's favor at the merits stage":]

Under these principles, some provisions of the Act plainly cannot survive. As defendants repeatedly have made clear – in passages that Virginia inflates beyond their obvious meaning – insurance industry

reforms in Section 1201 such as guaranteed-issue and community-rating will stand or fall with the minimum coverage provision. As noted, these reforms within Section 1201 protect the 57 million Americans with pre-existing medical conditions by requiring insurers to issue policies to those persons at non-discriminatory rates. As Virginia correctly recognizes (Pl.'s Mem. 26-27), these regulations of the interstate insurance market must be coupled with the minimum coverage provision in order to be effective. Absent a minimum coverage provision, the guaranteed-issue and community-rating reforms in Section 1201 would cause many to drop coverage, leading to a spiral of increased premiums and a shrinking risk pool – the insurance market will "implode." Because Congress would not have intended this result, these reforms cannot be severed from the minimum coverage provision.[14]

* * *

[14] This link establishes that the minimum coverage provision is constitutional, however, as Congress has the power to enact measures to ensure the vitality of its broader regulations of interstate commerce. *See Dean*, 670 F. Supp. 2d at 460.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II	}	Civil Action No. 3:10 CV 188
v.	}	
KATHLEEN SEBELIUS	}	October 18, 2010

COMPLETE TRANSCRIPT OF MOTIONS BEFORE THE HONORABLE HENRY E. HUDSON UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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UNITED STATES DISTRICT COURT

* * *

[88] So what the government has quote, unquote, conceded, is that there are a number of specific provisions that the – particularly 2701, 2702, 2704, which are the guaranteed issues, they are the parts of the Bill that really impose the most core commerce – reforms on insurance companies; the preexisting conditions, lifetime caps, and things of that nature. But those are the provisions really for the reasons that we've said the two are necessary, those really couldn't stand. That they would create exactly the kind of market implosion that we talked about, and we're consistent about that.

* * *

[89] MR. GERSHENGORN: Your Honor, the only ones that we think necessarily fall are those – the three that I mentioned. The others, there are – it's clear that the Medicaid one doesn't fall. I think that the others would require a further analysis that I don't think, quite frankly, either side has done in the briefing before this Court.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,	)	
Plaintiff,	)	**Civil Action No. 3:10cv188**
v.	)	
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 3, 2010)

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* * *

II. COMMONWEALTH'S STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 56(b), the Commonwealth submits the following statement of facts believed to be undisputed.

1. At the 2010 Regular Session of the Virginia General Assembly, Virginia Code § 38.2-3430.1:1, the Health Care Freedom Act, was enacted with the assent of the Governor. (Doc. 1 at 1 ¶ 1; Doc. 87 at 1 ¶ 2).

2. That statute provides:

   > No resident of this Commonwealth, regardless of whether he has or is

> eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

(Doc. 1 ¶ 3; Doc. 87 at 1 ¶ 3).

3. Subsequently, PPACA was enacted into law. 124 Stat. 119, 1029 (2010).

4. Congress expressly stated that the mandate and penalty were essential elements of the act without which the statutory scheme cannot function. (PPACA § 1501; § 10106).

5. The Federal act contains no severability clause. (PPACA *passim*).

6. Kathleen Sebelius in her official capacity is presently responsible for administering PPACA. (PPACA *passim*; Doc. 1 at 3 ¶ 8; Doc. 87 at 2 ¶ 8).

7. Before the act was passed, the Senate Finance Committee asked the Congressional Research Service to opine on the constitutionality of the individual mandate. The Service replied: "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 Congress may use this Clause to require an individual to purchase a good or a service." Cong. Research Serv. *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis 3* (2009). Similar advice was given by the Congressional Budget Office in connection with the Clinton administration health care initiative. *See The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, CBO Memorandum, at 1 (August 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf ("A

mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.").

8. PPACA passed the Senate on a party line vote with considerable minority protest. *See, e.g.*, Cong. Rec. Nov. 2, 2009 S10965 (no bill); *id.*, S10973 (bill being drafted behind closed doors); *id.*, Nov. 17, 2009 S11397 ("The majority leader has had in his office a secret bill that he is working on that we have not seen yet."); *id.*, S11401 (No Child Left Behind got 7 weeks on the floor – "We don't even have a bill yet"); *id.*, Nov. 19, 2009 S11819 (bill is a shell, not the real one); *id.*, Nov. 30, 2009 S11982 (Official debate begins); *id.*, Dec. 3, 2009 S12263 (bill has been on floor for 3 days and never has been in committee); *id.*, Dec. 5, 2009 S12487 (majority will not slow down); *id.*, Dec. 11, 2009 S12981 ("We are going to have three Democratic amendments and one Republican amendment voted on, and the Democrats wrote the bill"); *id.*, S12977 (votes on amendments blocked; "In the meantime, this backroom deal that is being cut, which we

haven't seen – supposedly it has been sent to the CBO to see what it would cost"); *id.*, Dec. 14, 2009 S13144 ("There is somewhere in this building a hidden bill, known as the manager's amendment, which is being drafted by one or two or three people . . . "); *id.*, Dec. 17, 2009 S13344 (bill is not being given the legislative time it deserves because the polls show a majority of Americans are against it and thus it has become a political nightmare for the majority who now simply want to ram it through before Christmas even though "no one outside the majority leader's conference room has seen it yet"); *id.*, Dec. 22, 2009 S13756 (Nebraska deal); *Id.*, Mar. 10, 2010 H1307 (reconciliation being used because bill could not re-pass the Senate).

9. In contrast, the General Assembly of Virginia passed several identical versions of the Virginia Health Care Freedom Act ("HCFA") 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. *See* SB 417 Individual health insurance coverage; resident of State shall not be required to obtain a policy, *available at* http://leg.state.va.us/cgi-bin/legp504.exe?101+sum+SB417. At the time of passage of the HCFA, the Virginia House of Delegates contained 59 Republicans, 39 Democrats and 2 Independents, while the Virginia Senate contained 22 Democrats and 18 Republicans. See attached Declarations of Bruce Jamerson and Susan Schaar.

10. Although the mandate does not take effect for several years, PPACA imposes immediate and continuing burdens on Virginia. (Aff. Sec'y Hazel) (Doc. 28).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity Defendant.	Civil Action No. 3:10-cv-00188-HEH

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

(Filed Sep. 23, 2010)

* * *

Response to Plaintiff's
Statement of Material Facts

1. The Secretary does not dispute that the Virginia legislature has enacted Virginia Code § 38.2-3430.1:1, but disputes that the statute is more than declaratory. In any event, the statute is not material. State law cannot revoke powers granted by the Constitution to Congress. *Raich*, 545 U.S. at 29 ("Just

as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress' plenary commerce power.") (internal citations omitted); *see also Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress").

2. The Secretary does not dispute that Virginia has accurately quoted the text of Virginia Code § 38.2-3430.1:1. For the reasons stated in paragraph 1 above, this fact is not material.

3. The Secretary does not dispute that Congress has enacted the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

4. The Secretary disputes this statement, as it mischaracterizes the cited material. The Secretary does not dispute the findings that Congress actually made. Congress found that, without a minimum coverage provision, the insurance market reforms in the Act, such as the ban on denying coverage to persons because of pre-existing conditions or charging more on the basis of those conditions, would amplify existing incentives for individuals to "wait to purchase health insurance until they needed care," thereby shifting greater costs onto third parties. ACA, §§ 1501(a)(2)(I), 10106(a). Congress accordingly found that the minimum coverage provision "is an essential part of [the Act's] larger regulation of economic activity,"

and that its absence "would undercut Federal regulation of the health insurance market." *Id.* §§ 1501(a)(2)(H), 10106(a). Congress did not find that the minimum coverage provision was essential to every element of the ACA.

5. The Secretary does not dispute that no single provision of the ACA explicitly addresses severability. This statement is not material, however, for the reasons discussed below at pages 29-33.

6. The Secretary disputes this statement. She is responsible for the administration of a number of the provisions of the ACA. However, the Secretary of the Treasury administers the minimum coverage provision at issue in this suit. ACA, § 1501(b) (adding 26 U.S.C. § 5000A(g)); *see* 26 U.S.C. § 7801(a). The Secretary of the Treasury is not a party in this suit.

7. The Secretary disputes this statement. The Senate Finance Committee asked the Congressional Research Service ("CRS") to prepare a report addressing the constitutionality of the minimum coverage provision, and CRS concluded in its report that Congress could use its power under the General Welfare Clause to enact the minimum coverage provision. The Secretary disputes that the minimum coverage provision is "unprecedented." This statement, in any event, is not material.

8. The Secretary does not dispute that the Senate adopted the ACA by a vote of 60-39, and the House of Representatives adopted it by a vote of 219-212. This fact, however, is not material. The

constitutionality of a statute adopted by a majority vote of both Houses of Congress and signed by the President does not turn on the partisan affiliations of the proponents or the opponents of the statute.

9. The Secretary does not dispute that the Virginia legislature has enacted Virginia Code § 38.2-3430.1:1. This fact is not material, however, nor are the party affiliations of the Virginia legislators who voted for and against this legislative statement of position, for the reasons set forth in paragraphs 1 and 8 above.

10. The Secretary disputes this statement. The minimum coverage provision does not impose any burdens or obligations on Virginia as a state. Any actions that Virginia may undertake as a state pursuant to other provisions of the ACA are irrelevant to its standing to challenge the minimum coverage provision. "[A] plaintiff must establish that he has standing to challenge *each provision* of [a statute] by showing that he was injured by application of *those provisions*." *Covenant Media of S.C. v. City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007) (emphasis added).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity Defendant.	Civil Action No. 3:10-cv-00188-HEH

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

(Filed Sep. 3, 2010)

* * *

Statement of Undisputed Material Facts

1. Congress gave detailed consideration to the structure of the reforms of the interstate health insurance market that it enacted in the ACA, as shown by the more than fifty hearings that it held on the subject in the 110th and 111th Congresses alone. *See* H.R. REP. NO. 111-443, pt. II, at 954-68 (2010) (Ex. 1). The following facts well exceed a rational

basis for Congress to conclude that it had authority under Article I of the Constitution to enact the ACA, and in particular, the minimum coverage provision:[1]

I. The Widespread Lack of Insurance Coverage in the Interstate Market

2. In 2009, the United States spent more than 17 percent of its gross domestic product on health care. Pub. L. No. 111-148 ("ACA"), §§ 1501(a)(2)(B), 10106(a).[2]

3. Notwithstanding these expenditures, 45 million people – an estimated 15% of the population – went without health insurance for some portion of 2009. Absent the new statute, that number would have climbed to 54 million by 2019. CONG. BUDGET OFFICE ("CBO"), KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 11 (Dec. 2008)

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[1] This is Court does not independently review the facts underlying Congress's conclusion that it had the Article I authority to enact a statute. The Court's task instead is to determine "whether a 'rational basis' exists" for Congress to so conclude. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995)). The "legislative facts" underlying the conclusion are accordingly not subject to courtroom proof. *See* FED. R. EVID. 201 advisory committee's note; *see also Maersk Line Ltd. v. Care*, 271 F. Supp. 2d 818, 821 n.1 (E.D. Va. 2003).

[2] Although Congress is not required to set forth particularized findings of an activity's effect on interstate commerce, when, as here, it does so, courts "will consider congressional findings in [their] analysis." *Raich*, 545 U.S. at 21.

[hereinafter KEY ISSUES] (Ex. 2); *see also* CBO, THE LONG-TERM BUDGET OUTLOOK 21-22 (June 2009) (Ex. 3).

4. The pervasive lack of insurance has occured [sic] because "[t]he market for health insurance . . . is not a well-functioning market." COUNCIL OF ECONOMIC ADVISERS ("CEA"), THE ECONOMIC CASE FOR HEALTH CARE REFORM 16 (June 2009) (submitted into the record for *The Economic Case for Health Reform: Hearing Before the H. Comm. on the Budget*, 111th Cong. 5 (2009)) [hereinafter THE ECONOMIC CASE] (Ex. 4). There are several features that are unique to the national health insurance market that have caused that market to fail, and that have prevented many from obtaining needed insurance.

5. Health insurance is a unique market. With rare exceptions, individuals cannot make a personal choice to eliminate the current or potential future consumption of health care services. Nor can individuals reliably predict whether they or their families will need health care. They may go without health care for many years, then unexpectedly suffer a debilitating injury or disease and suddenly incur high or even catastrophic health care costs. *See* J.P. Ruger, *The Moral Foundations of Health Insurance*, 100 Q.J. MED. 53, 54-55 (2007) (Ex. 5). This combination of universal need and unavoidable uncertainty gave rise to the private health insurance industry, as well as federal programs such as Medicare and Medicaid, and federal regulation under statutes such as ERISA, COBRA, EMTALA, and

HIPAA. In this market, everyone is a participant because everyone, in one way or another, is faced with managing the financial risks associated with unpredictable future health care costs. Katherine Baicker & Amitabh Chandra, *Myths and Misconceptions About U.S. Health Insurance*, 27 HEALTH AFFAIRS w533, w534 (2008) (Ex. 6); Jonathan Gruber, PUBLIC FINANCE AND PUBLIC POLICY 442-28 (3d ed. 2009) (Ex. 7).

6. When a person does fall ill, he is effectively assured of at least a basic level of care, without regard to his insured status. Under the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, for example, hospitals that participate in Medicare and offer emergency services are required to stabilize any patient who arrives, regardless of whether he has insurance or otherwise can pay for that care. CBO, KEY ISSUES, at 13. In addition, most hospitals are nonprofit organizations that "have some obligation to provide care for free or for a minimal charge to members of their community who could not afford it otherwise." *Id.* For-profit hospitals "also provide such charity or reduced-price care." *Id*.

7. Because of the availability of this backstop of free care, many persons have an incentive not to obtain insurance, knowing that they will not bear the full cost of their decision to attempt to pay for their health care needs out-of-pocket. THE ECONOMIC CASE, at 17. *See also* Bradley Herring, *The Effect of the Availability of Charity Care to the Uninsured on the*

Demand for Private Health Insurance, 24 J. OF HEALTH ECON. 225, 226 (2005) (Ex. 8).

8. Most individuals make economic decisions whether to attempt to pay for their anticipated health care needs through insurance, or to attempt (often unsuccessfully) to pay out-of-pocket. In making these decisions, individuals weigh the cost of insurance against the cost of their potential out-of-pocket expenses. *See* Mark V. Pauly, *Risks and Benefits in Health Care: The View from Economics*, 26 HEALTH AFFAIRS 653, 657-58 (2007) (Ex. 9).

9. Individuals regularly revisit these economic decisions whether to purchase insurance or attempt to finance their health care needs through another manner. Movement in and out of insured status is "very fluid." Of those who are uninsured at some point in a given year, about 63% have coverage at some other point during the same year. CBO, HOW MANY PEOPLE LACK HEALTH INSURANCE AND FOR HOW LONG?, 4, 9 (May 2003) (Ex. 10); *see also* KEY ISSUES, at 11.

10. Empirical studies document the universal need for, and use of, health care services. Far from being inactive bystanders, the vast majority of the population – even of the uninsured population – has participated in the health care market by receiving medical services. *See* June E. O'Neill & Dave M. O'Neill, *Who Are the Uninsured?: An Analysis of America's Uninsured Population, Their Characteristics, and Their Health*, 20-22 (2009) (Ex.

11) (94% of even long-term uninsured have received some level of medical care); see also National Center for Health Statistics, HEALTH, UNITED STATES, 2009 at 318 (2010) (for 2007, 62.6% of uninsured at a given point in time had at least one visit to a doctor or emergency room within the year) (Ex. 12).

11. The health insurance market is also unique due to the extreme distribution of risk within the market. The large majority of medical expenditures are incurred by a small percentage of the population. "About 20 percent of the population accounts for 80 percent of health spending," with "the sickest one-percent accounting for nearly one-quarter of health expenditures." H.R. REP. NO. 111-443, pt. II, at 990 (internal quotation omitted).

II. Insurance Industry Incentives to Deny Coverage Under Prior Law

12. Because of the extremely uneven distribution of risk, insurers seek to exclude those they deem most likely to incur expenses. *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance*, 110th Cong. 51-52 (2008) (statement of Mark Hall, Professor of Law and Public Health, Wake Forest Univ.) (Ex. 13). That is, they adopt practices designed – albeit imperfectly – to "cherry-pick healthy people and to weed out those who are not as healthy." H.R. REP. NO. 111-443, pt. II, at 990 (internal quotation omitted).

13. These practices include medical underwriting, or the individualized review of an insurance applicant's health status. This practice is costly, resulting in administrative fees that are responsible for 26 to 30 percent of the cost of premiums in the individual and small group markets. ACA, §§ 1501(a)(2)(J), 10106(a). Medical underwriting yields substantially higher risk-adjusted premiums or outright denial of insurance coverage for an estimated one-fifth of applicants, a portion of the population that is most in need of coverage. CBO, KEY ISSUES, at 81.

14. These practices also include: denial of coverage for those with pre-existing conditions, even minor ones; exclusion of pre-existing conditions from coverage; higher, and often unaffordable, premiums based on the insured's medical history; and rescission of policies after claims are made. *Id.* These practices are often harsh and unfair for consumers, in that "many who need coverage cannot obtain it, and many more who have some type of insurance may not have adequate coverage to meet their health care needs." *Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways and Means,* 111th Cong. 53 (2009) (Linda Blumberg, Senior Fellow, Urban Inst.) (Ex. 14). Insurers often revoke coverage even for relatively minor pre-existing conditions. *Consumer Choices and Transparency in the Health Insurance Industry: Hearing Before the S. Comm. on Commerce, Science & Transp.,* 111th Cong.

29-30 (2009) (Karen Pollitz, Research Professor, Georgetown Univ. Health Policy Inst.) (Ex. 15).

15. More than 57 million Americans have some pre-existing medical condition, and thus, absent reform, risk denial or rescission of insurance coverage. Families USA Foundation, *Health Reform: Help for Americans with Pre-Existing Conditions*, at 2 (2010) (Ex. 16). Given that insurers operate in interstate commerce and can gauge their participation in state markets based on the nature of regulation there, *see* Sara Rosenbaum, *Can States Pick Up the Health Reform Torch?,* 362 NEW ENGL. J. MED. e29, at 3 (2010) (Ex. 17), Congress concluded that there was a need for regulatory protection at a national level.

III. The Substantial Economic Effects of the Lack of Insurance Coverage

16. Aside from these issues of cost and consumer protection, Congress found that the widespread inability of Americans to obtain affordable coverage, or to obtain coverage at all, also has significant additional economic effects. For example, 62 percent of all personal bankruptcies are caused in part by medical expenses. ACA, §§ 1501(a)(2)(G), 10106(a).

17. Moreover, the uncertainty that many Americans experience as to whether they can obtain coverage also constrains the labor market. The phenomenon of "job lock," in which employees avoid changing employment because they fear losing

coverage, is widespread. Employees are 25% less likely to change jobs if they are at risk of losing health insurance coverage in doing so. THE ECONOMIC CASE at 36-37; *see also* Gruber, PUBLIC FINANCE AND PUBLIC POLICY at 431.

18. Insurance industry reform to guarantee coverage would alleviate "job lock" and increase wages, in the aggregate, by more than $10 billion annually, or 0.2% of the gross domestic product. THE ECONOMIC CASE at 36-37.

19. One result of industry practices that deny, impede, or raise the cost of insurance coverage is that many millions of people are uninsured. In the aggregate, the uninsured shift much of the cost of their care onto other persons. The uninsured continue to receive health care services, but empirical evidence shows they pay only a small portion of the cost. For example, one estimate found that hospitals collect from uninsured patients on average only 10% of the cost of their care. Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 665 n.121 (2008) (Ex. 18).

20. This phenomenon is not limited to the uninsured with the lowest incomes. On average, uninsured persons with incomes of more than 300% of the federal poverty level pay for less than one half of the cost of the medical care that they receive. Herring, 24 J. OF HEALTH ECON. at 229-30.

21. The costs of "uncompensated care" for the uninsured fall on other participants in the health care market. In the aggregate, that cost shifting amounted to $43 billion in 2008, about 5 percent of overall hospital revenues. CBO, KEY ISSUES, at 114. Indeed, this figure may underestimate the cost shifting. One study estimated that the uninsured in 2008 collectively received $86 billion in care during the time they lacked coverage, including $56 billion in services for which they did not pay, either in the form of bad debts or in the form of reduced-cost or free charitable care. Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs* 2008, 27 HEALTH AFFAIRS w399, w401 (2008) (Ex. 19); CBO, KEY ISSUES, at 114; *see also* CBO, NONPROFIT HOSPITALS AND THE PROVISION OF COMMUNITY BENEFITS 1-2 (2006) (Ex. 20).

22. Public funds subsidize these costs. For example, through Disproportionate Share Hospital payments, the federal government paid for tens of billions of dollars in uncompensated care for the uninsured in 2008 alone. Congress determined that preventing or reducing cost-shifting would lower these public subsidies. H.R. REP. NO. 111-443, pt. II, at 983; *see also* THE ECONOMIC CASE, at 8.

23. The remaining costs in the first instance fall on health care providers, which in turn "pass on the cost to private insurers, which pass on the cost to families." ACA, § 1501(a)(2)(F), 10106(a). This cost-shifting effectively creates a "hidden tax" reflected in

fees charged by health care providers and premiums charged by insurers. CEA, ECONOMIC REPORT OF THE PRESIDENT 187 (Feb. 2010) (Ex. 21); *see also* H.R. REP. NO. 111-443, pt. II, at 985 (2010); S. REP. NO.111-89, at 2 (2009) (Ex. 22).

24. When premiums increase as a result of cost-shifting by the uninsured, more people who see themselves as healthy make the economic calculation not to buy, or to drop, coverage. For many, this economic calculation leads them to wait to obtain coverage until they grow older, when they anticipate greater health care needs. *See* CBO, KEY ISSUES at 12 (percentage of uninsured older adults in 2007 was roughly half the percentage of uninsured younger adults). *See also* M.E. Martinez & R.A. Cohen, *Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey, January-June 2009*, National Center for Health Statistics, at 2 (Dec. 2009) (Ex. 23); U.S. Census Bureau, Census Population Survey, *Annual Social and Economic Supplement* (2009) (Table H101, data on coverage status by age) (available at www.census.gov/hhes/www/cpstables/032009/health/h01_001.htm) (Ex. 24).

25. This self-selection further narrows the risk pool, which, in turn, further increases the price of coverage for the insured. The result is a self-reinforcing "premium spiral." *Health Reform in the 21st Century: Insurance Market Reforms* at 118-19 (2009) (American Academy of Actuaries); see also H.R. REP. NO. 111-443, pt. II, at 985.

26. This premium spiral particularly hurts small employers, due to their relative lack of bargaining power. *See* H.R. REP. NO. 111-443, pt. II, at 986-88; THE ECONOMIC CASE at 37-38; *see also 47 Million and Counting* at 36 (Raymond Arth, Nat'l Small Business Ass'n) (noting need for insurance reform and minimum coverage provision to stem rise of small business premiums).

IV. The Reforms of the Affordable Care Act

27. To address the economic effects of these market failures, as well as to protect consumers, the Patient Protection and Affordable Care Act comprehensively "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." ACA, §§ 1501(a)(2)(A), 10106(a). The comprehensive reform has five main components.

28. First, to address inflated premiums in the individual and small-business insurance market, Congress established health insurance Exchanges "as an organized and transparent marketplace for the purchase of health insurance where individuals and employees (phased-in over time) can shop and compare health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (internal quotation omitted). Exchanges review premiums, coordinate participation and enrollment in health plans, implement

procedures to certify qualified health plans, and educate consumers. ACA, § 1311.

29. Second, the Act builds on the existing system of employer-based health insurance, in which most individuals receive coverage as part of employee compensation. *See* KEY ISSUES, at 4-5. It creates tax incentives for small businesses to purchase health insurance for employees, and imposes penalties on certain large businesses that do not provide employees adequate coverage. ACA, §§ 1421, 1513.

30. Third, the Act provides financial assistance to support the purchase of coverage for a large portion of the uninsured population. As Congress understood, nearly two-thirds of the uninsured are in families with income less than 200 percent of the federal poverty level, H.R. REP. NO. 111-443, pt. II, at 978; *see also* KEY ISSUES, at 27, while 4 percent of those with income greater than 400 percent of the poverty level are uninsured. KEY ISSUES, at 11. The Act reduces this gap by providing premium tax credits for individuals and families with income between 100 and 400 percent of the federal poverty line, ACA, §§ 1401-02, and expands eligibility for Medicaid to individuals with income below 133 percent of the federal poverty level beginning in 2014. *Id.* § 2001.

31. Fourth, the Act removes barriers to insurance coverage. As noted above, a variety of insurance industry practices have increased premiums for or denied coverage to those with the greatest health care

needs. Most significantly, the Act bars insurers from refusing to cover individuals with pre-existing medical conditions. ACA, § 1201. The Act also prevents insurers from rescinding coverage for any reason other than fraud or intentional misrepresentation, or declining to renew coverage based on health status. *Id*. §§ 1001, 1201. Further, with limited exceptions, the Act prohibits insurers from charging higher premiums on the basis of the insured's prior medical history. *Id*. § 1201. And it prohibits caps on the coverage available to a policyholder in a given year or over a lifetime. *Id*. §§ 1001, 10101(a).

32. Finally, the Act requires that all Americans, with specified exceptions, maintain a minimum level of health insurance coverage, or pay a penalty. ACA, §§ 1501, 10106 (as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1002, 124 Stat. 1029, 1032).

V. The Minimum Coverage Provision as an Essential Part of the Act's Insurance Industry Reforms

33. Congress found that this minimum coverage provision "is an essential part of this larger regulation of economic activity," and that its absence "would undercut Federal regulation of the health insurance market." *Id*. §§1501(a)(2)(H), 10106(a). That judgment rested on a number of Congressional findings. Congress found that, by "significantly

reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums." *Id.* §§ 1501(a)(2)(F), 10106(a). Conversely, and importantly, Congress also found that, without the minimum coverage provision, the reforms in the Act, such as the ban on denying coverage or charging more based on pre-existing conditions, would amplify existing incentives for individuals to "wait to purchase health insurance until they needed care," thereby further shifting costs onto third parties. *Id*. §§ 1501(a)(2)(I), 10106(a). Congress thus determined that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id*.

34. These Congressional findings are amply supported. The new "guaranteed issue" and "community rating" requirements under Section 1201 of the Act ensure that all Americans can obtain coverage subject to no coverage limits and despite the pre-existing conditions they may have at that time. ACA, § 1201. Because these new insurance regulations would allow individuals to "wait to purchase health insurance until they needed care," *id.*, §§ 1501(a)(2)(I), 10106(a), they would increase the incentives for individuals to "make an economic and financial decision to forego health insurance coverage" until their health care needs become substantial, *id*. §§ 1501(a)(2)(A), 10106(a).

35. Individuals who would make that decision would take advantage of the ACA's reforms by joining a coverage pool maintained in the interim through premiums paid by other market participants. Without a minimum coverage provision, this market timing would increase the costs of uncompensated care and the premiums for the insured pool, creating pressures that would "inexorably drive [the health insurance] market into extinction." *Health Reform in the 21st Century: Insurance Market Reforms*, at 13 (Uwe Reinhardt, Ph.D., Professor of Political Economy, Economics, and Public Affairs, Princeton University); *see also* William H. Frist, *An Individual Mandate for Health Insurance Would Benefit All*, U.S. NEWS & WORLD REPORT (Sept. 28, 2009) (politics.usnews.com/opinion/articles/2009/09/28/frist-an-individual-mandate-for-health-insurance-would-benefit-all.html) (Ex. 25).

36. This danger is not merely theoretical, but instead is borne out in the experience of states that have attempted "guaranteed issue" and "community rating" reforms without an accompanying minimum coverage provision. After New Jersey enacted a similar reform, its individual health insurance market experienced higher premiums and decreased coverage. *See* Alan C. Monheit, et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23 HEALTH AFFAIRS 167, 168 (2004) (Ex. 26) (describing potential for "adverse selection death spiral" in a market with guaranteed issue); *see also Health Reform in the 21st Century: Insurance Market Reforms* at 101-02 (Dr. Reinhardt).

37. Likewise, after New York enacted a similar reform, "the market for individual health insurance in New York has nearly disappeared." Stephen T. Parente & Tarren Bragdon, *Healthier Choice: An Examination of Market-Based Reforms for New York's Uninsured*, MEDICAL PROGRESS REPORT NO. 10 at i (Manhattan Institute, Sept. 2009) (Ex. 27).

38. In contrast, Massachusetts enacted "guaranteed issue" and "community rating" reforms, coupled with a minimum coverage provision. Its reforms have succeeded. Since 2006, the average individual premium in Massachusetts has decreased by 40%, compared to a 14% *increase* in the national average. Jonathan Gruber, Mass. Inst. of Tech., *The Senate Bill Lowers Non-Group Premiums: Updated for New CBO Estimates*, at 1 (Nov. 27, 2009) (available at www.whitehouse.gov/files/documents/Gruber_Report_4.pdf) (Ex. 28). *See also* Letter from Mitt H. Romney, Governor of Massachusetts, to State Legislature at 1-2 (Apr. 12, 2006) (Ex. 29) (signing statement for Massachusetts bill, noting need for insurance coverage requirement to prevent cost-shifting by the uninsured).

39. In short, "fundamental insurance-market reform is impossible" if the guaranteed issue and community-rating reforms are not coupled with a minimum coverage provision. Jonathan Gruber, *Getting the Facts Straight on Health Care Reform*, 316 NEW ENG. J. OF MED. 2497, 2498 (2009) (Ex. 30). This is because "[a] health insurance market could never survive or even form if people could buy their

insurance on the way to the hospital." *47 Million and Counting*, at 52 (Prof. Hall). Accordingly, Congress found that the minimum coverage provision is "essential" to its broader effort to regulate health insurance industry underwriting practices that have prevented many from obtaining health insurance, ACA, §§ 1501(a)(2)(I), (J), 10106(a).

40. The minimum coverage provision also addresses the unnecessary costs created by the insurance industry's practice of medical underwriting. "By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums," and is therefore "essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs." ACA, §§ 1501(a)(2)(J), 10106(a).

VI. The Revenue-Raising Effect of the Minimum Coverage Provision

41. The CBO projects that the reforms in the Act will reduce the number of uninsured Americans by approximately 32 million by 2019. Letter from Douglas W. Elmendorf, Director, CBO, to the Hon. Nancy Pelosi, Speaker, U.S. House of Representatives 9 (Mar. 20, 2010) (Ex. 31) [hereinafter CBO Letter to Rep. Pelosi].

42. It further projects that the Act's combination of reforms and tax credits will reduce the average premium paid by individuals and families in the individual and small-group markets. *Id*. at 15; CBO, AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 23-25 (Nov. 30, 2009) (Ex. 32).

43. CBO estimates that the interrelated revenue and spending provisions in the Act – specifically taking into account revenue from the minimum coverage provision – will yield net savings to the federal government of more than $100 billion over the next decade. CBO Letter to Rep. Pelosi at 2.

44. In particular, the CBO estimates that the minimum coverage provision would produce about $4 billion in annual revenue once it is fully in effect. CBO Letter to Rep. Pelosi at tbl. 4 at 2.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,	)	
Plaintiff,	)	**Civil Action No. 3:10cv188**
v.	)	
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE SECRETARY'S MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 23, 2010)

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September 3, 2010

* * *

II. RESPONSE TO STATEMENT OF FACTS

1. Commonwealth agrees that the alleged facts upon which the Secretary relies are not adjudicative facts. (Doc. 91 at 16 n.1.). As a consequence, disagreements concerning her alleged legislative facts are no bar to summary judgment. The Commonwealth denies that any hearings were held or any reports issued with respect to the Senate bill that passed on Christmas Eve 2009.

2. Commonwealth agrees that reviewing courts "'will consider legislative findings.'" (Doc. 91 at 16 n.1.). However, the secrecy, haste and parliamentary brutality associated with the passage of PPACA

(Doc. 89 at 12-13 ¶ 8) should lead this Court to reject the premise that Congress took a hard look at the basis for its claimed power. The Congressional Research Service had warned that the mandate was unprecedented (Doc. 89 at 12 ¶ 7), and it is doubtful that a majority of those voting for it on a party line division had read the mammoth bill that emerged for their abbreviated consideration.

3-12. Commonwealth denies that sources extraneous to § 1501 of PPACA are "'legislative facts'" in the sense that they compose any part of the legislative history of PPACA. Nor can it be shown that they were before or in the mind of the majorities that passed PPACA. They are also not entitled to deference as information that Congress might have believed to be true under a rational basis test. (Doc. 91 at 16 n.1.) The Commerce Clause rational basis test recognized in *Raich* and *Lopez* should not be confused with the deferential due process rational basis test of *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955). *See United States v. Comstock*, 176 L. Ed. 2d 878, 900-01 (2010) (Kennedy, J., concurring). Rather, the Commerce Clause rational basis test as it relates to the scope of the Commerce Clause asks whether Congress has a rational basis for believing that "respondents' activities, taken in the aggregate, substantially affect interstate commerce." *Raich*, 545 U.S. at 22. Because

there are no activities at issue here, the test is not satisfied and the sources extraneous to PPACA cited in support of the Secretary's argument are legally irrelevant.

13. See responses 2 and 3-12.

14-15. See response to 3-12.

16. See response to 2.

17-22. See response to 3-12.

23. See responses 2 and 3-12.

24-26. See response to 3-12.

27-34. See responses 2 and 3-12. The Commonwealth of Virginia further responds that PPACA speaks for itself with respect to its operative provisions.

35-38. See response to 3-12.

39-40. See response to 27-34.

41. See response to 3-12.

* * *

APPEAL, CLOSED

U.S. District Court
Eastern District of Virginia – (Richmond)
CIVIL DOCKET FOR CASE
#: 3:10-cv-00188-HEH

Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II v. Sebelius
Assigned to:
District Judge Henry E. Hudson
Case in other court: USCA, 11-01057
USCA, 11-01058
Cause: 28:1331 Federal Question

Date Filed: 03/23/2010
Date Terminated: 12/13/2010
Jury Demand: None
Nature of Suit: 950 Constitutional – State Statute
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
03/23/2010	1	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF against Kathleen Sebelius; filing fee paid $ 350, receipt number 34683007662; filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Civil Cover Sheet, # 2 Receipt)(cmcc,) (Entered: 03/23/2010)
03/23/2010	2	Summons Issued as to Kathleen Sebelius, U.S. Attorney and U.S.

		Attorney General. Delivered to counsel. (cmcc,) (Entered: 03/23/2010)
03/23/2010	3	ORDER that the undersigned recuses himself from presiding over this action. It is hereby ORDERED that the Clerk reassign this action to another judge in accord with the standard assignment system. Signed by District Judge Robert E. Payne on 3/23/2010. Copies to counsel.(cmcc,) (Entered: 03/23/2010)
03/23/2010		Case reassigned by standard assignment system to District Judge Henry E. Hudson. District Judge Robert E. Payne no longer assigned to the case. (Reassigned pursuant to Order entered 3/23/2010.) (cmcc,) (Entered: 03/23/2010)
03/25/2010	4	Certificate of Reporting Service by Kathleen Sebelius. Kathleen Sebelius served on 3/23/2010, answer due 5/24/2010. (cmcc,) (Entered: 03/26/2010)
04/30/2010	5	ORDER SETTING PRETRIAL CONFERENCE – Initial Pretrial Conference set for 6/3/2010 at 9:15 AM before District Judge Henry E. Hudson (rpiz) (Entered: 04/30/2010)
04/30/2010	6	SCHEDULING ORDER with Attachment # 1 Pretrial Schedule A (signed by District Judge Henry E. Hudson on 4/30/2010) (rpiz) (Entered: 04/30/2010)

05/05/2010	7	MOTION re 6 Scheduling Order *and Brief in Support Thereof* by Kathleen Sebelius. (Attachments: # 1 Proposed Order)(Hambrick, Jonathan) (Entered: 05/05/2010)
05/05/2010	8	RESPONSE to Motion re 7 MOTION re 6 Scheduling Order *and Brief in Support Thereof* filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Proposed Order)(McCullough, Stephen) (Entered: 05/05/2010)
05/05/2010	9	MOTION for Erika Myers to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	10	MOTION for Joel McElvain to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	11	MOTION for Sheila Lieber to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	12	MOTION for Ian Gershengorn to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010		Notice of Correction: Plaintiff counsel has been advised to include the complete signature block on the certificate of service

		on future documents. (cmcc,) (Entered: 05/06/2010)
05/06/2010	13	ORDER granting 7 Defendant's Motion to Modify the Scheduling Order, which the Court will construe as a Motion to Extend Time; the Defendant shall file her Answer or otherwise respond to the Complaint on or before May 24, 2010; if the Defendant files a motion to dismiss the Complaint, the time for filing an Answer shall be deferred until fourteen days after a ruling on that motion to dismiss. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/06/2010)
05/07/2010	14	ORDER granting 9 Motion for Pro hac vice. Appointed Erika Myers for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	15	ORDER granting 10 Motion for Pro hac vice. Appointed Joel McElvain for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	16	ORDER granting 11 Motion for Pro hac vice. Appointed Sheila M. Lieber for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on

		5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	17	ORDER granting 12 Motion for Pro hac vice. Appointed Ian Gershengorn for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/19/2010	18	MOTION for Leave to File Excess Pages *and Brief in Support Thereof* by Kathleen Sebelius. (Attachments: # 1 Proposed Order)(Hambrick, Jonathan) (Entered: 05/19/2010)
05/19/2010	19	MOTION *to Establish Briefing Schedule* by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/19/2010)
05/19/2010	20	ORDER re: 18 Motion for Leave to Exceed the Page Limitations imposed by Local Civil Rule 7(F); that Defendant is GRANTED leave to file a memorandum in support of her motion to dismiss not to exceed 45 pages; it is FURTHER ORDERED that Plaintiff is GRANTED leave to file a memorandum in opposition to defendant's motion to dismiss not to exceed 45 pages; and it is FURTHER ORDERED that Plaintiff shall file its opposition to Defendant's motion to dismiss on or before 06/07/2010, and defendant shall file her reply brief in support of her motion to

		dismiss on or before 06/22/2010. Signed by District Judge Henry E. Hudson on 05/19/2010. (walk,) (Entered: 05/19/2010)
05/24/2010	21	MOTION to Dismiss by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/24/2010)
05/24/2010	22	Memorandum in Support re 21 MOTION to Dismiss filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/24/2010)
06/03/2010	23	ORDER regarding hearing dates for oral argument: 1) Defendant's Motion to Dismiss – July 1, 2010 at 10:00 a.m.; 2) Motions for Summary Judgment – October 18, 2010 at 9:00 a.m.; parties to set briefing schedule for Motions for Summary Judgment, with briefs due fourteen days before the October 18, 2010 hearing date; all amicus filings are due fourteen days before the hearing date which the specific brief addresses. Signed by District Judge Henry E. Hudson on 6/3/2010. Copies to counsel.(cmcc,) (Entered: 06/03/2010)
06/03/2010	24	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Initial Pretrial Conference held on 6/3/2010. Hearing on deft's Motion to Dismiss scheduled for

		7/1/2010 at 10:00 a.m. Hearing on Motions for Summary Judgment scheduled for 10/18/2010 at 9:00 a.m.; all briefs due 14 days prior to hearing date. (rpiz) (Entered: 06/03/2010)
06/04/2010	25	TRANSCRIPT of Proceedings held on 6/3/2010, before Judge Henry E. Hudson. Court Reporter/Transcriber Krista Liscio, Telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/6/2010. Redacted Transcript Deadline set for 8/4/2010. Release of Transcript Restriction set for 9/2/2010.(liscio, krista) (Entered: 06/04/2010)
06/04/2010	26	MOTION for Leave to File Amicus Curiae Brief by Ray Elbert Parker. (Attachments: # 1 Proposed Amicus Brief – Received, # 2 Cover Letter)(cmcc,) (Entered: 06/04/2010)
06/07/2010	27	Notice of Filing of Official Transcript re: 25 Transcript. (cmcc,) (Entered: 06/07/2010) 06/07/2010 28 RESPONSE in Opposition re 21 MOTION to Dismiss filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1

		Affidavit Exhibit A)(Getchell, Earle) (Entered: 06/07/2010)
06/07/2010	29	NOTICE of Appearance by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/07/2010)
06/07/2010	30	Financial Interest Disclosure Statement (Local Rule 7.1) by American Center for Law & Justice et al.. (May, Colby) (Entered: 06/07/2010)
06/07/2010	31	MOTION for Leave to File *Amici Brief* by American Center for Law & Justice et al.. (Attachments: # 1 Proposed Amici Brief, # 2 Proposed Order)(May, Colby) (Entered: 06/07/2010)
06/08/2010	32	CERTIFICATE of Service re 29 Notice of Appearance by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/08/2010)
06/08/2010	33	CERTIFICATE of Service re 30 Financial Disclosure Statement by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/08/2010)
06/09/2010	34	NOTICE of Attorney Withdrawal of Appearance re: Erika L. Myers by Kathleen Sebelius (Hambrick, Jonathan) Modified on 6/9/2010 to edit.(cmcc,). (Entered: 06/09/2010)

06/10/2010	35	ORDER granting 26 Motion for Leave to File Amicus Curiae Brief submitted by Ray Elbert Parker; this Motion is GRANTED and the Clerk is directed to file the pro se movant's Friend of the Court Amicus Curiae Brief. Signed by District Judge Henry E. Hudson on 6/10/2010. Copies to counsel and movant, Ray Elbert Parker. (cmcc,) (Entered: 06/10/2010)
06/10/2010	36	Amicus Curiae Brief ("Friend of the Court Amicus Curiae Brief") entered by Ray Elbert Parker (filed pursuant to Order entered 6/10/2010). (cmcc,) (Entered: 06/10/2010)
06/10/2010	37	ORDER granting 31 Motion for Leave to File a Brief as Amici Curiae supporting Plaintiff's opposition to the Defendant's motion to dismiss, by amici American Center for Law and Justice, United States Representatives Paul Broun, Todd Akin, Rob Bishop, John Boehner, Michael Burgess, Dan Burton, Eric Cantor, Mike Conaway, Mary Fallin, John Fleming, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Bob Goodlatte, Jeb Hensarling, Walter Jones, Steve King, Doug Lamborn, Robert Latta, Michael McCaul, Cathy McMorris Rodgers, Jerry Moran, Mike Pence, Jean Schmidt, Lamar Smith, Todd Tiahrt, and Zach Wamp,

		and the Constitutional Committee to Challenge the President and Congress on Health Care; IT IS ORDERED that the motion for leave to file a brief as amici curiae is granted and FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered on the docket of the above-captioned matter. Signed by District Judge Henry E. Hudson on 6/10/2010. Copies to counsel and pro se amicus. (cmcc,) (Entered: 06/10/2010)
06/10/2010	38	Response *Amici Brief* filed by Todd Akin, American Center for Law and Justice, Rob Bishop, John Boehner, Paul Broun, Michael Burgess, Dan Burton, Eric Cantor, Mike Conaway, Constitutional Committee to Challenge the President and Congress on Health Care, Mary Fallin, John Fleming, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Bob Goodlatte, Jeb Hensarling, Walter Jones, Steve King, Doug Lamborn, Robert Latta, Michael McCaul, Jerry Moran, Mike Pence, Cathy McMorris Rodgers, Jean Schmidt, Lamar Smith, Todd Tiahrt, Zach Wamp. (May, Colby) (Entered: 06/10/2010)
06/15/2010	39	MOTION for Leave to File *Amicus Curiae Brief* by Physician Hospitals of America. (Attachments: # 1 Memorandum of Law in Support,

		# 2 Proposed Brief)(Fender, Matthew) (Entered: 06/15/2010)
06/16/2010		Notice of Correction: Movant counsel will refile document 39 with the signature on the document matching the filing user's login (required by CM/ECF Policies and Procedures); the memorandum in support will be filed as a separate document. (cmcc,) (Entered: 06/16/2010)
06/16/2010	40	MOTION for Leave to File *Amicus Curiae Brief (refiled)* by Physician Hospitals of America. (Attachments: # 1 Proposed Amicus Brief)(Oostdyk, Scott) (Entered: 06/16/2010)
06/16/2010	41	Memorandum in Support re 40 MOTION for Leave to File *Amicus Curiae Brief (refiled)* filed by Physician Hospitals of America. (Oostdyk, Scott) (Entered: 06/16/2010)
06/16/2010	42	ORDER granting a Motion for Leave to Participate as Amicus Curiae (Dk. No. 39) in Opposition to Defendant's Motion to Dismiss; this Motion is GRANTED and Movant is directed to file its Brief of Amicus Curiae Physician Hospitals of America in Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/16/2010. Copies to counsel. (cmcc,) (Entered: 06/16/2010)

06/16/2010	43	Memorandum *Amicus Curiae Brief* filed by Physician Hospitals of America. (Oostdyk, Scott) (Entered: 06/16/2010)
06/17/2010	44	MOTION for Leave to File *Amicus Curiae Brief* by Small Business Majority Foundation, Inc.. (Attachments: # 1 Proposed Amicus Brief, # 2 Memorandum of Law in Support, # 3 Financial Disclosure, # 4 Proposed Order, # 5 Certificate of Service)(Young, John) (Entered: 06/17/2010)
06/17/2010	45	MOTION and Memorandum in Support for Leave to File *Brief Amici Curiae* by Center for American Progress, Federal Rights Project National Senior Citizens Law Center. (Attachments: # 1 Brief Amici Curiae, # 2 Proposed Order)(France, Angela) Modified on 6/17/2010 to edit event (cmcc,). (Entered: 06/17/2010)
06/17/2010		Notice of Correction: Movant counsel will refile certain attachments to document 44 as separate documents as required by CM/ECF Policies and Procedures. (cmcc,) (Entered: 06/17/2010)
06/17/2010	46	MOTION for Leave to File *Amicus Curiae Brief* by Washington Legal Foundation. (Attachments: # 1 Exhibit Proposed Amicus Brief,

		# 2 Proposed Order)(Samp, Richard) (Entered: 06/17/2010)
06/17/2010	47	NOTICE of Appearance by Richard Abbott Samp on behalf of Washington Legal Foundation (Samp, Richard) (Entered: 06/17/2010)
06/17/2010	48	Memorandum in Support re 44 MOTION for Leave to File *Amicus Curiae Brief* filed by Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	49	Financial Interest Disclosure Statement (Local Rule 7.1) by Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	50	CERTIFICATE OF SERVICE by Small Business Majority Foundation, Inc. re 44 MOTION for Leave to File *Amicus Curiae Brief*. (cmcc,) (Entered: 06/17/2010)
06/17/2010	51	ORDER granting a Motion for Leave to File Brief Amici Curiae (Dk. No. 44) in Support of Defendant's Motion to Dismiss; the Motion is GRANTED and Movants are directed to file the Brief Amici Curiae of Small Business Majority Foundation, Inc. and The Main Street Alliance in Support of Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)

06/17/2010	52	MOTION for Leave to Appear Amicus Curiae by Liberty Group. (Attachments: # 1 Proposed Brief, # 2 Proposed Order)(Forest, John) (Entered: 06/17/2010)
06/17/2010	53	NOTICE of Appearance by Andrew Abbott Nicely on behalf of Constitutional Law Professors (Nicely, Andrew) (Entered: 06/17/2010)
06/17/2010	54	MOTION for Leave to File *Amicus Curiae Brief In Support of the Defendant's Motion to Dismiss* by Constitutional Law Professors. (Attachments: # 1 Amicus Brief of Constitutional Law Professors, # 2 Proposed Order)(Nicely, Andrew) (Entered: 06/17/2010)
06/17/2010	55	Response *Brief Amici Curiae* filed by Main Street Alliance, Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	56	NOTICE of Appearance by George William Norris, Jr on behalf of Cato Institute (Norris, George) (Entered: 06/17/2010)
06/17/2010	57	Financial Interest Disclosure Statement (Local Rule 7.1) by Cato Institute. (Norris, George) (Entered: 06/17/2010)
06/17/2010	58	MOTION for Leave to File *Amici Memorandum* by Cato Institute, Competitive Enterprise Institute, and Prof. Randy E. Barnett. (Norris,

		George) Modified to edit parties (cmcc,). (Entered: 06/17/2010)
06/17/2010	59	Memorandum *of Amici Cato Institute, Competitive Enterprise Institute and Prof. Randy E. Barnett Supporting Plaintiff's Opposition to Defendant's Motion to Dismiss* to 28 Response in Opposition to Motion filed by Cato Institute. (Norris, George) (DOCUMENT RECEIVED, NOT FILED, PENDING LEAVE OF COURT) Modified on 6/17/2010 (cmcc,). (Entered: 06/17/2010)
06/17/2010	60	ORDER granting a Motion for Leave to File Amicus Curiae Brief in Opposition to Defendant's Motion to Dismiss (Dk. No. 46), submitted by the Washington Legal Foundation; the Motion is GRANTED and Movant is DIRECTED to file its Brief of Washington Legal Foundation as Amicus Curiae in Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	61	ORDER granting Motion for Leave to File Brief of Amici Curiae by the March of Dimes Foundation, et al., in Support of Defendant's Motion to Dismiss (Dk. No. 45); the Motion is GRANTED and Movants are DIRECTED to file their Brief of Amici Curiae in Support of Defendant's

		Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	62	ORDER granting Motion for Leave to Participate as Amicus Curiae in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss (Dk. No. 52), submitted by Liberty Guard; this Motion is GRANTED and Movant is DIRECTED to file its Amicus Curiae Brief in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	63	ORDER granting Motion for Leave to File Amicus Curiae Brief in Support of Defendant's Motion to Dismiss (Dk. No. 54), submitted by constitutional law professors Jack M. Balkin, Gillian E. Metzger, and Trevor W. Morrison; the Motion is GRANTED and Movants are DIRECTED to file their Amicus Curiae Brief of Constitutional Law Professors in Support of Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	64	MOTION for Leave to File Supplement for Amicus Curiae Party by Ray Elbert

		Parker. (Attachments: # 1 Proposed Memorandum by Amicus Curiae Party)(cmcc,) (Entered: 06/17/2010)
06/17/2010	65	MOTION for Leave to File *Brief Amicus Curiae* by Landmark Legal Foundation. (Attachments: # 1 Exhibit Brief Amicus Curiae, # 2 Proposed Order)(St. George, Timothy) (Entered: 06/17/2010)
06/18/2010	66	ORDER GRANTING 58 Motion by Movants Cato Institute, et al. for Leave to Participate as Amici Curiae and Movants are DIRECTED to file their Memorandum as Amici Curiae Supporting Plaintiff's Opposition to Defendant's Motion to Dismiss. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. (walk,) (Entered: 06/18/2010)
06/18/2010	67	ORDER GRANTING 64 Motion for Leave to File Supplement Motion for Amicus Curiae Party, submitted by Ray Elbert Parker, Pro Se. The Clerk is DIRECTED to file Petitioner's Brief. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. Copy mailed to Mr. Parker. (walk,) (Entered: 06/18/2010)
06/18/2010	68	Brief Amicus Curiae in Support of Plaintiff's Opposition re: 21 MOTION to Dismiss filed by Liberty Guard. (Forest, John) Modified to edit (cmcc,). (Entered: 06/18/2010)

06/18/2010	69	Brief of Amici Curiae Supporting Plaintiff's Opposition to 21 Defendant's Motion to Dismiss by Cato Institute, Competitive Enterprise Institute and Prof. Randy E. Barnett. (Norris, George) Modified to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	70	Brief Amicus Curiae in Support to 21 MOTION to Dismiss filed by Constitutional Law Professors Jack M. Balkin, Gillian E. Metzger, and Trevor W. Morrison. (Nicely, Andrew) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	71	ORDER GRANTING 65 Motion by Movant Landmark Legal Foundation for Leave to Participate as Amicus Curiae and Movant is DIRECTED to file its Brief Amicus Curiae in Opposition to Defendant's Motion to Dismiss. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. (walk,) (Entered: 06/18/2010)
06/18/2010	72	Brief Amicus Curiae in Opposition re 21 MOTION to Dismiss filed by Washington Legal Foundation. (Samp, Richard) Modified to edit(cmcc,). (Entered: 06/18/2010)
06/18/2010		Notice of Correction re: Document 47; the filing user has been requested to file a separate Certificate of Service

		and to link the filing to Document 47. (walk,) (Entered: 06/18/2010)
06/18/2010	73	CERTIFICATE of Service re 47 Notice of Appearance by Richard Abbott Samp on behalf of Washington Legal Foundation (Samp, Richard) (Entered: 06/18/2010)
06/18/2010	74	Brief Amicus Curiae *in Opposition to Motion to Dismiss* filed by Landmark Legal Foundation. (St. George, Timothy) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	75	Brief Amici Curiae of The March of Dimes Foundation, The American Association of People with Disabilities, The ARC of the United States, Breast Cancer Action, Families USA, the Family Violence Prevention Fund, Friends of Cancer Research, Mental Health America, National Breast Cancer Coalition, The National Organization for Rare Disorders, The National Partnership for Women & Families, National Patient Advocate Foundation, The National Senior Citizens Law Center, The National Women's Law Center, The Ovarian Cancer National Alliance, Raising Women's Voices for the Health Care We Need, and United Cerebral Palsy, in Support of Motion to Dismiss filed by Center for American Progress, Federal Rights

		Project National Senior Citizens Law Center. (France, Angela) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010		Notice of Correction: Amici counsel was contacted re: document 59, Amici Brief, regarding CM/ECF Policies and Procedures for documents needing leave of court. No action is necessary at this time. (cmcc,) (Entered: 06/22/2010)
06/21/2010	76	Supplemental Brief by Amicus Curiae Petitioner filed by Ray Elbert Parker (filed pursuant to Order entered 6/18/2010). (cmcc,) (Entered: 06/21/2010)
06/22/2010	77	Reply to 21 MOTION to Dismiss filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Statutory Materials)(Hambrick, Jonathan) (Entered: 06/22/2010)
06/23/2010	78	RESPONSE to Motion re 64 MOTION for Leave to File filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 06/23/2010)
06/24/2010		Set Deadlines/Hearings as to 21 Motion to Dismiss: Motion Hearing set for 7/1/2010 at 10:00 AM before District Judge Henry E. Hudson (rpiz) (Entered: 06/24/2010)
06/30/2010	79	Amicus Curiae "Reply to Plaintiff's Memorandum of June 23, 2010 in

		Opposition to Dismiss Without Prejudice or Alternatively, for a Change of Venue" filed by Ray Elbert Parker. (cmcc,) (Entered: 06/30/2010)
07/01/2010	80	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Motion Hearing held on 7/1/2010 re 21 Motion to Dismiss filed by Kathleen Sebelius. Argument heard. Motion taken under advisement by Court; Memorandum Opinion to enter. (rpiz) (Entered: 07/02/2010)
07/08/2010	81	TRANSCRIPT of Proceedings held on July 1, 2010, before Judge Henry E. Hudson. Court Reporter/Transcriber Krista Liscio, Telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber. Redaction Request due 8/9/2010. Redacted Transcript Deadline set for 9/7/2010. (liscio, krista) (Entered: 07/08/2010)
07/08/2010	82	Notice of Filing of Official Transcript re 81 Transcript. (cmcc,) (Entered: 07/08/2010)
07/09/2010	83	Amicus Curiae Post Trial Memorandum in Support of Opposition to Defendant's Motion to Dismiss filed by Ray Elbert Parker. (cmcc,) (Entered: 07/12/2010)

08/02/2010	84	MEMORANDUM OPINION. Signed by District Judge Henry E. Hudson on 8/2/2010. Copies to counsel of record.(cmcc,) (Entered: 08/02/2010)
08/02/2010	85	ORDER regarding Defendant's Motion to Dismiss (Dk. No. 21), filed May 24, 2010; for reasons stated in the accompanying Memorandum Opinion, the Defendant's Motion to Dismiss is DENIED. Signed by District Judge Henry E. Hudson on 8/2/2010. Copies to counsel of record. (cmcc,) (Entered: 08/02/2010)
08/10/2010	86	CONSENT ORDER on the briefing schedule for the Motions for Summary Judgment to be filed by the parties; consistent with the Court's June 3, 2010 Order, the parties have conferred and agreed on such a schedule and accordingly it is ORDERED, AJUDGED and DECREED by the Court (see Order for details). Signed by District Judge Henry E. Hudson on 8/10/2010. Copies to counsel.(cmcc,) (Entered: 08/10/2010)
08/16/2010	87	ANSWER to 1 Complaint, by Kathleen Sebelius.(Hambrick, Jonathan) (Entered: 08/16/2010)
09/03/2010	88	MOTION for Summary Judgment by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 09/03/2010)

09/03/2010	89	Memorandum in Support re 88 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Affidavit, # 2 Affidavit)(Getchell, Earle) (Entered: 09/03/2010)
09/03/2010	90	MOTION for Summary Judgment by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 09/03/2010) 09/03/2010 91 Memorandum in Support re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Exhibits)(Hambrick, Jonathan) (Entered: 09/03/2010) Jonathan) (Entered: 09/03/2010)
09/03/2010	91	Memorandum in Support re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Exhibits)(Hambrick, Jonathan) (Entered: 09/03/2010)
09/07/2010		Set Deadlines/Hearings as to 88 Motion for Summary Judgment by Commonwealth of Virginia and 90 Motion for Summary Judgment by Kathleen Sebelius: Motions Hearing set for 10/18/2010 at 9:00 AM before District Judge Henry E. Hudson (rpiz) (Entered: 09/07/2010)
09/17/2010	92	MOTION ("Optional") for Leave to File Amicus Brief by W. Spencer

		Connerat, III. (cmcc,) (Entered: 09/17/2010)
09/21/2010	93	ORDER granting 92 Optional Motion for Leave to File Amicus Brief by W. Spencer Connerat, III; the Clerk is directed to file Movant's Optional Motion for Leave to File Amicus Brief as Movant's Brief as Amicus Curiae Supporting Plaintiff. Signed by District Judge Henry E. Hudson on 9/21/2010. Copies to counsel and Connerat. (cmcc,) (Entered: 09/21/2010)
09/21/2010	94	Amicus Brief in Support of Plaintiff filed by W. Spencer Connerat, III (filed pursuant to Order entered 9/21/2010). (cmcc,) (Entered: 09/21/2010)
09/23/2010	95	Memorandum in Opposition re 90 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 09/23/2010)
09/23/2010	96	Opposition to 88 MOTION for Summary Judgment filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 09/23/2010)
09/30/2010	97	NOTICE of Appearance by Patrick Michael McSweeney on behalf of Randy E. Barnett, Cato Institute, Competitive Enterprise Institute (McSweeney, Patrick) (Entered: 09/30/2010)

09/30/2010	98	NOTICE of Appearance by Patrick Michael McSweeney on behalf of Steven J. Willis (McSweeney, Patrick) (Entered: 09/30/2010)
09/30/2010		Notice of Correction: Local counsel for Pacific Legal Foundation has been advised to file notice of appearance. (cmcc,) (Entered: 10/01/2010)
09/30/2010	99	MOTION for Timothy Sandefur to appear Pro hac vice by Pacific Legal Foundation. (Attachments: # 1 Receipt)(cmcc,) (Entered: 10/01/2010)
09/30/2010	100	MOTION for Luke Anthony Wake to appear Pro hac vice by Pacific Legal Foundation. (Attachments: # 1 Receipt)(cmcc,) (Entered: 10/01/2010)
10/01/2010	101	MOTION for Leave to File *BRIEF IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT* by Young Invincibles. (Attachments: # 1 Proposed Order Proposed Order, # 2 Exhibit Amicus Brief) (Walter, Brett) (Entered: 10/01/2010)
10/01/2010	102	MOTION for Leave to File *Amicus Curiae Memorandum in Support of Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for Summary Judgment* by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute. (Attachments: # 1 Proposed Memorandum

		Supporting Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for Summary Judgment, # 2 Proposed Order)(McSweeney, Patrick) (Entered: 10/01/2010)
10/01/2010	103	ORDER granting a Motion for Leave to File Brief of Amicus Curiae Young Invincibles, supporting Defendant's Motion for Summary Judgment (Dk. No. 101) ; ORDERED that the motion for leave to file a brief as amicus curiae is granted and FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered. Signed by District Judge Henry E. Hudson on 10/1/2010. Copies to counsel. (cmcc,) (Entered: 10/01/2010)
10/01/2010	104	Brief Amicus Curiae in Support of Defendant's Motion for Summary Judgment filed by Young Invincibles. (cmcc,) (Entered: 10/01/2010)
10/01/2010	105	ORDER granting Motion for Leave to File Amicus Curiae Memorandum supporting Plaintiff's Motion for Summary Judgment and opposing Defendant's Motion for Summary Judgment by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute (Dk. No. 102); it is ORDERED that the motion for leave to file a brief as amici curiae is granted. Signed by District Judge Henry E. Hudson on 10/1/2010.

		Copies to counsel. (cmcc,) (Entered: 10/01/2010)
10/01/2010	106	Memorandum as Amici Curiae Supporting Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for summary Judgment filed by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute. (cmcc,) (Entered: 10/01/2010)
10/04/2010	107	NOTICE of Appearance by Robert Luther, III on behalf of Americans for Free Choice in Medicine and Pacific Legal Foundation (Luther, Robert) (Entered: 10/04/2010)
10/04/2010	108	MOTION for Leave to File *Amicus Brief in Support of Plaintiff's Motion for Summary Judgment* by Washington Legal Foundation. (Attachments: # 1 Proposed Order Granting Motion for Leave, # 2 Exhibit Proposed Amicus Brief)(Samp, Richard) (Entered: 10/04/2010)
10/04/2010	109	NOTICE of Appearance by Tara Lynn Renee Zurawski on behalf of William P. Barr, Edwin Meese, III, Richard L. Thornburgh (Zurawski, Tara) (Entered: 10/04/2010)
10/04/2010	110	NOTICE of Appearance by Edwin Louis Fountain on behalf of William P. Barr, Edwin Meese, III, Richard L. Thornburgh (Fountain, Edwin) (Entered: 10/04/2010)

10/04/2010	111	MOTION for Leave to *File Amicus Curiae Brief* by Physician Hospitals of America. (Attachments: # 1 Memorandum Of Law in Support, # 2 Exhibit Proposed Amicus Brief) (Oostdyk, Scott) (Entered: 10/04/2010)
10/04/2010	112	MOTION for Extension *of Time to File a Motion for Leave to Participate as Amici Curiae* by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Fountain, Edwin) (Entered: 10/04/2010)
10/04/2010	113	Memorandum in Support re 112 MOTION for Extension *of Time to File a Motion for Leave to Participate as Amici Curiae* filed by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Attachments: # 1 Proposed Order)(Fountain, Edwin) (Entered: 10/04/2010)
10/04/2010	114	MOTION for Leave to File *Amicus Curiae Brief in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* by American Civil Rights Union. (Attachments: # 1 Proposed Order, # 2 Exhibit Proposed amicus brief)(Gray, Daniel) (Entered: 10/04/2010)
10/04/2010	115	Financial Interest Disclosure Statement (Local Rule 7.1) by American Civil Rights Union. (Gray, Daniel) (Entered: 10/04/2010)

10/04/2010	116	NOTICE of Appearance by Richard B. Rogers on behalf of American Civil Rights Union (Rogers, Richard) (Entered: 10/04/2010)
10/04/2010	117	REPLY to Response to Motion re 88 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 10/04/2010)
10/04/2010	118	Brief in Support *Amicus Curiae Brief of Constitutional Law Professors In Support of the Secretary's Motion For Summary Judgment* filed by Jack M. Balkin, Gillian E. Metzger, Trevor W. Morrison. (Nicely, Andrew) (Entered: 10/04/2010)
10/04/2010	119	ORDER GRANTING Plaintiff's 111 Motion for Leave to Participate as Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment; Movant Physician Hospitals of America is directed to file its Brief of Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment. Signed by District Judge Henry E. Hudson on 10/1/2010. (lhin,) (cmcc,). (Entered: 10/04/2010)
10/04/2010	120	ORDER GRANTING the American Civil Rights Union's 114 Motion for Leave to File Amicus Curiae Brief; upon receipt of this Order, counsel for the American Civil Rights Union shall electronically file the brief

		Signed by District Judge Henry E. Hudson on 10/4/2010. (lhin,) (Entered: 10/04/2010)
10/04/2010	121	ORDER GRANTING 112 Motion by the Former U.S. Attorneys General William Barr, Edwin Meese, III and Dick Thornburg [sic] for an Extension of Time to Seek Leave to File a Brief as amici curiae. It is FURTHER ORDERED that Movants shall file their motion seeking leave to participate as amici curiae by 10/08/2010. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/04/2010)
10/04/2010	122	Memorandum *in Support of Plaintiff's 88 Motion for Summary Judgment and in Opposition to Defendant's 90 Motion for Summary Judgment* filed by Physician Hospitals of America. (Oostdyk, Scott). Modified docket entry on 10/05/2010. (walk,). (Entered: 10/04/2010)
10/04/2010	123	ORDER GRANTING 108 Motion by amici curiae Washington Legal Foundation and several constitutional law scholars for Leave to File an amici curiae Brief in support of Plaintiff's Motion for Summary Judgment. The Clerk shall cause the proposed brief to be filed and entered on the docket. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/04/2010)

10/04/2010	124	NOTICE of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/04/2010)
10/04/2010	125	Brief by Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant to the Court's Order dated 10/04/2010. (walk,) (Entered: 10/04/2010)
10/04/2010	126	MOTION for Leave to File *Amicus Brief and Brief in Support* by Mountain States Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Amicus Brief)(Pendley, William) (Entered: 10/04/2010)
10/04/2010	127	MOTION for Leave to File *Brief Amicus Curiae* by Pacific Legal Foundation. (Luther, Robert) (Entered: 10/04/2010)
10/04/2010	128	NOTICE of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/04/2010)
10/04/2010	129	Brief in Support *of Commonwealth of Virginia* filed by Americans for Free Choice in Medicine and Pacific Legal Foundation. (Luther, Robert). PLEASE NOTE: Received verbal notification from counsel Robert Luther, III that "Pro Hac Vice Pending" listed under his name on page one of the document is a typographical error.

		Mr. Luther is counsel of record and doesn't have a Pro Hac Vice application pending before the Court. (walk,). (Entered: 10/04/2010)
10/04/2010	130	MOTION for Leave to File *Brief Amicus Curie* [sic] *in Support of Plaintiff's Motion for Summary Judgment* by Landmark Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Exhibit Brief Amicus Curiae)(St. George, Timothy) (Entered: 10/04/2010)
10/04/2010	131	Brief in Support to 88 MOTION for Summary Judgment *by Plaintiff and in Opposition to 90 MOTION for Summary Judgment by Defendant* filed by American Civil Rights Union. (Rogers, Richard) (Entered: 10/04/2010)
10/04/2010	132	REPLY to Response to Motion re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 10/04/2010)
10/04/2010	133	MOTION for Leave to File *Amicus Curiae Brief* by Virginia Organizing. (Attachments: # 1 Exhibit Amicus Brief, # 2 Affidavit Amicus Brief Exhibit 1)(Bennett, Leonard) (Entered: 10/04/2010)
10/04/2010	134	Memorandum in Support re 133 MOTION for Leave to File *Amicus Curiae Brief* filed by Virginia Organizing. (Bennett, Leonard) (Entered: 10/04/2010)

10/04/2010	135	Financial Interest Disclosure Statement (Local Rule 7.1) by Virginia Organizing. (Bennett, Leonard) (Entered: 10/04/2010)
10/05/2010	136	ORDER GRANTING 126 Motion by Mountain States Legal Foundation for Leave to File Amicus Curiae Brief in Support of Plaintiff's Motion for Summary Judgment. The Clerk shall cause the proposed brief to be filed and entered on the docket. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	137	Amicus Curiae Brief by Mountain States Legal Foundation in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant to the Court's Order dated 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	138	ORDER GRANTING 127 Motion for Leave to File Amicus Curiae for Americans for Free Choice in Medicine and Pacific Legal Foundation and they are directed to file their Brief of Amicus Curiae in Support of Plaintiff's 88 Motion for Summary Judgment. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 122; the filing user should have

		selected the filing event "Memorandum in Support," instead of "Memorandum." The docket text has been corrected and the document has been linked to 88 and 90 motions. (walk,) (Entered: 10/05/2010)
10/05/2010	139	ORDER GRANTING 133 Motion for Leave to File Brief of Amicus Curiae Virginia Organizing in Support of Defendant's Motion for Summary Judgement and Movant Virginia Organizing is directed to file its Brief of Amicus Curiae in Support of Defendant's Motion for Summary Judgment. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	140	ORDER GRANTING 130 Motion of amicus Landmark Legal Foundation for leave to file a brief as amicus curiae supporting Plaintiff's motion for summary judgment. It is FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered on the docket. Signed by District Judge Henry E. Hudson on 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	141	Amicus Curiae Brief of Landmark Legal Foundation in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant

		to the Court's Order dated 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 124; the filing user has been requested to file a separate Certificate of Service and link it to document 124. (walk,). The filing user has also been requested to file a separate Certificate of Service for Document 128 which appears to be a duplicate of Document 124 . (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 130; the filing user's login does not match the signature on the document. The filing user must refile the document with the filing user's signature block, or the attorney whose signature block appears on the document must refile the document. (walk,) (Entered: 10/05/2010)
10/05/2010	142	CERTIFICATE of Service re 124 Notice of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/05/2010)
10/05/2010	143	CERTIFICATE of Service re 128 Notice of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/05/2010)
10/05/2010	144	MOTION by Eve Ellingwood to Intervene. (Attachments: # 1 Exhibit A, # 2 Exhibit B1, # 3 Exhibit B2, # 4

		Exhibit C, # 5 Exhibit D, and # 6 Exhibit E). (walk,) (Entered: 10/05/2010)
10/05/2010	145	Amended MOTION for Leave to File *Breif* [sic] *Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment* by Landmark Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Amicus Brief)(St. George, Timothy) (Entered: 10/05/2010)
10/06/2010	146	ORDER DENYING 144 Motion by Eve Ellington for Intervention. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/06/2010. Copy mailed to Movant. (walk,) (Entered: 10/06/2010)
10/08/2010	147	NOTICE by Kathleen Sebelius re 90 MOTION for Summary Judgment *of Supplemental Authority* (Attachments: # 1 Supplement Supplemental Authority)(Hambrick, Jonathan) (Entered: 10/08/2010)
10/08/2010	148	MOTION for Leave to File *Brief as Amici Curiae* by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Zurawski, Tara) (Entered: 10/08/2010)
10/08/2010	149	Memorandum in Support re 148 MOTION for Leave to File Brief as Amici Curiae filed by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Attachments: # 1 Proposed Amici Curiae Brief, # 2

		Proposed Order) (Zurawski, Tara) (Entered: 10/08/2010)
10/08/2010	150	ORDER granting 148 Motion for Leave to File Brief as Amici Curiae; the Clerk shall cause the proposed brief to be filed. Signed by District Judge Henry E. Hudson on 10/8/10. (jtho,) (Entered: 10/08/2010)
10/12/2010	151	Memorandum of Amici Curiae, Former United States Attorneys General William Barr, Edwin Meese, Dick Thornburgh, in Support *OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Amici Curiae)* . (Zurawski, Tara) Modified on 10/12/2010 to edit(cmcc,). (Entered: 10/12/2010)
10/13/2010	152	ORDER that, in her Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, the Secretary, at this late stage, asserts that the Commonwealth's failure to join the Secretary of the Treasury as an indispensible party entitles her to judgment; the Court is not persuaded that the Secretary of the Treasury is a necessary party. Defendant's request for judgment for failure to join the Secretary of the Treasury is DENIED (see Order for details). Signed by District Judge Henry E. Hudson on 10/13/2010. Copies to counsel of record.(cmcc,) (Entered: 10/13/2010)

10/15/2010	153	NOTICE by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II re 88 MOTION for Summary Judgment *Plaintiff's Notice of Supplemental Authority* (Attachments: # 1 Exhibit)(Getchell, Earle) (Entered: 10/15/2010)
10/15/2010	154	ORDER granting 99 Motion for Pro hac vice. Timothy Sandefur appointed for Amici Americans for Free Choice in Medicine and Pacific Legal Foundation. Signed by District Judge Henry E. Hudson on 10/15/2010. Copies to counsel. (cmcc,) (Entered: 10/15/2010)
10/15/2010	155	ORDER granting 100 Motion for Pro hac vice. Luke Anthony Wake appointed for Americans for Free Choice in Medicine and Pacific Legal Foundation. Signed by District Judge Henry E. Hudson on 10/15/2010. Copies to counsel. (cmcc,) (Entered: 10/15/2010)
10/18/2010	156	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Motion Hearing held on 10/18/2010 re 88 Motion for Summary Judgment filed by Commonwealth of Virginia and 90 Motion for Summary Judgment filed by Kathleen Sebelius. Argument heard. Matter taken under advisement by Court; Memorandum Opinion to enter. (rpiz) (Entered: 10/18/2010)

11/07/2010	157	TRANSCRIPT of proceedings held on October 18, 2010 before Judge Henry E. Hudson. Court Reporter/ Transcriber Krista Liscio, telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 12/7/2010. Redacted Transcript Deadline set for 1/7/2011. Release of Transcript Restriction set for 2/5/2011.(liscio, krista) (Entered: 11/07/2010)
11/08/2010	158	Notice of Filing of Official Transcript re 157 Transcript. (cmcc,) (Entered: 11/08/2010)
11/24/2010	159	ORDER DENYING Motion by amicus curiae W. Spencer Connerat, III for leave to file the Motion for Summary Judgment and Warrant for Arrest, as well as any further filings in this action (please see Order for additional information). The Clerk is directed to lodge the aforementioned document in the Clerk's Office in the event that a notice of appeal if filed regarding this Order. It is so ORDERED. Signed by District Judge Henry E. Hudson on 11/24/2010. Copy mailed to Mr. Connerat. (walk,) (Entered: 11/24/2010)

12/03/2010	160	NOTICE by Kathleen Sebelius re 90 MOTION for Summary Judgment *of Supplemental Authority* (Attachments: # 1 Supplemental Authority) (Hambrick, Jonathan) (Entered: 12/03/2010)
12/13/2010	161	MEMORANDUM OPINION. Signed by District Judge Henry E. Hudson on 12/13/2010. (walk,) (Entered: 12/13/2010)
12/13/2010	162	ORDER that Plaintiff's 88 Motion for Summary Judgment is GRANTED as to its request for declaratory relief and DENIED as to its request for injunctive relief, and Defendant's 90 Motion for Summary Judgment is DENIED. It is so ORDERED. Signed by District Judge Henry E. Hudson on 12/13/2010. (walk,) (Entered: 12/13/2010)
01/18/2011	163	NOTICE OF APPEAL by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 01/18/2011)
01/18/2011	164	NOTICE OF APPEAL by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 01/18/2011)
01/18/2011	165	USCA Appeal Fees received $ 455, receipt number 34683011385, re 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II (lbre,) (Entered: 01/18/2011)

01/19/2011	166	Transmission of Notice of Appeal to US Court of Appeals re 163 Notice of Appeal. (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (lbre,) (Entered: 01/19/2011)
01/19/2011	167	Transmission of Notice of Appeal to US Court of Appeals re 164 Notice of Appeal. (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (lbre,) (Entered: 01/19/2011)
01/20/2011		USCA Case Number 11-1057, Case Manager R.Warren, for 163 Notice of Appeal filed by Kathleen Sebelius. (lbre,) (Entered: 01/20/2011)
01/20/2011		USCA Case Number 11-1058, Case Manager R.Warren, for 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (lbre,) (Entered: 01/20/2011)
01/20/2011	168	ORDER of USCA as to 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II, 163 Notice of Appeal filed by Kathleen Sebelius : The Court consolidates Case No. 11-1057(L) and Case No. 11-1058. (lbre,) (Entered: 01/20/2011)