No. 11-420

IN THE
Supreme Court of the United States

VIRGINIA, *ex rel.* Kenneth T. Cuccinelli, II, *Petitioner*,
v.
KATHLEEN SEBELIUS, Secretary of Health and Human Services, *Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, Former Virginia Delegate Dick Black, Downsize DC Foundation, DownsizeDC.org, Inc., Gun Owners of America, Inc., Gun Owners Foundation, The Liberty Committee, Arizona State Chapter of the Association of American Physicians and Surgeons, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and The Lincoln Institute for Research and Education in Support of Petitioner

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

**Counsel of Record*
Attorneys for Amici Curiae
November 3, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Delegate Bob Marshall (R-13) is a senior member of the Virginia House of Delegates and was the Chief Patron of the Virginia Health Care Freedom Act which undergirds the current litigation. **Former Delegate Dick Black** was a member of the Virginia House of Delegates from 1998 to 2006. Both Delegates have worked against federal usurpation of powers reserved to the states and to the people under the Tenth Amendment.

Downsize DC Foundation ("DDCF"), **Gun Owners Foundation** ("GOF"),[2] **U.S. Justice Foundation, Conservative Legal Defense and Education Fund** ("CLDEF"), and **The Lincoln Institute for Research and Education** ("Lincoln")

---

[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] In resolving the standing issue, the U.S. District Court for the Eastern District of Virginia below (702 F.Supp.2d 598, 606) (Aug. 2, 2010) and the U.S. Court of Appeals for the Fourth Circuit below (2011 U.S. App. LEXIS 18632, pp. *17, *18, *20) (Sept. 8, 2010) analyzed the important case of Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236 (10th Cir. 2008), involving a usurpation of state authority by the Bureau of Alcohol, Tobacco, Firearms and Explosives. The Petition for Certiorari also relies on Wyoming, pp. 14, 15, 16, 18, 21, 23, 26. *Amicus* GOF filed *amicus* briefs in both the district court and in the court of appeals in that case. http://lawandfreedom.com/site/constitutional/GOF%20 Wy%20Amicus%2010th.pdf.

are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). **DownsizeDC.org, Inc.** ("DDC"), **Gun Owners of America, Inc.** ("GOA"), and **The Liberty Committee** are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). **Arizona State Chapter of the Association of American Physicians and Surgeons**, a professional association exempt from federal income tax under IRC section 501(c)(6). Each is interested in the public policy process, the proper construction of state and federal constitutions and statutes, and questions related to human and civil rights secured by law.

Amici Marshall, DDCF, GOF, CLDEF, Lincoln, GOA, and The Liberty Committee filed an *amicus curiae* brief in this case in the court of appeals below.[3] *Amici* have filed *amicus curiae* briefs in other important cases.[4]

---

[3] Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, *et al.*, U.S. Court of Appeals, 4th Cir., Nos. 11-1057 & 1058 (Apr. 4, 2011) ("Marshall *Amicus Curiae* Brief") http://lawandfreedom.com/site/health/ VA_v_Sebelius_Amicus.pdf.

[4] For example, in its Petition for Certiorari, the Commonwealth relies upon Bond v. United States, 564 U.S. __, 131 S.Ct. 2355 (2011), another case in which *Amici* GOF, GOA, and CLDEF filed an *amicus curiae* brief. http://lawandfreedom.com/site/constitutional/Bond_Amicus.pdf.

STATEMENT OF THE CASE

On September 8, 2011, the U.S. Court of Appeals for the Fourth Circuit adopted the position of the federal government, concluding that the Commonwealth of Virginia has no standing to challenge the minimum coverage provision of the "**Patient Protection and Affordable Care Act**" ("PPACA") (Pub. L. 111-148), on the theory that 26 U.S.C. section 5000A(a) concerns only individuals, not states. *See* Commonwealth of Virginia *ex rel.* Cuccinelli v. Sebelius, 2011 U.S. App. LEXIS 18632 ("Cuccinelli"), p. *12.

In its Petition for Certiorari, filed September 30, 2011, the Commonwealth supports its standing to sue with the General Assembly's enactment of the "**Virginia Health Care Freedom Act**" ("VHCFA"), with this case having been filed by the Attorney General in his role to defend such legislative enactments. *See* Petition for Writ of Certiorari ("Petition"), pp. 3, 18.

Delegate **Bob Marshall**, *amicus curiae* herein and a senior member of the Virginia House of Delegates, was the **Chief Patron** of Virginia Health Care Freedom Act, which he offered in the House of Delegates on January 13, 2010, as H.B. 10.[5] His was the first bill prefiled on this subject (on Dec. 7, 2009), and the only bill termed the "Virginia Health Care

[5] Virginia's Legislative Information Service, 2010 Session, http://lis.virginia.gov/cgi-bin/legp604.exe?101+sum+HB10

Freedom Act."[6] The Health Care Freedom Act (2010 Acts of the Assembly, Chapter 818) was codified, and reads in pertinent part, as follows:

> **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. [Sec. 38.2-2430.1:1, Code of Virginia (emphasis added).]

SUMMARY OF ARGUMENT

This Petition presents to this Court a clash between a federal law mandating the individual purchase of its approved healthcare insurance, and a state law securing to state residents the freedom to choose whether or not to purchase such insurance. The court below, however, declined to address the constitutional question posed on the ground that Virginia — suing on behalf of its Attorney General — had suffered no

---

[6] Senate legislation also was enacted in Virginia under different titles: S. 283, Frederick M. Quayle (R-13) (2010 Acts of the Assembly Ch. 106); S. 311, Stephen H. Martin (R-11) (2010 Acts of the Assembly Ch. 107), and S. 417, Jill Holtzman Vogel (R-27) (2010 Acts of the Assembly Ch. 108).

injury, the mandate having obligated only individuals living in Virginia, not the Commonwealth itself.

To reach this conclusion, the court of appeals below belittled Virginia's claim that the injury suffered was to its sovereign police power, reserved to it by the Tenth Amendment. Instead, the court dismissed the Virginia Health Care Freedom Act as a nullity, regulating nothing, and serving only as a nonbinding political statement — a contrivance designed solely to nullify a federal law. In doing so, the court failed to perform its constitutional role as mediator between two competing sovereigns.

Virginia's Petition also presents a case wherein the court of appeals has decided an important federal conflict with the principles of federalism recently reaffirmed by this Court in Bond v. United States, *supra*.

First, the court below assumed that Virginia has "no legitimate interest" to protect the liberty of its citizens from a law enacted by Congress outside its enumerated powers. This assumption conflicts directly with the statement in Bond that "[f]ederalism secures the freedom of the individual [by] allow[ing] States to respond, through the enactment of positive law ... without having to rely solely upon the political processes that control a remote central power." *Id*., at 2364.

Second, the court below assumed that the Virginia Health Care Freedom Act was not a genuine exercise of its power as an independent and sovereign state.

The court of appeals wrongfully assumed that, unless the Virginia statute restrained individual choice, it did not deserve to be recognized as an exercise of power reserved to the States. But as this Court stated in Bond, the "federal system preserves the integrity, dignity, and residual sovereignty of the States ... to ensure that States function as political entities in their own right." *Id*.

ARGUMENT

I. THE COURT OF APPEALS DECISION LACKS RESPECT FOR THE PRINCIPLES OF FEDERALISM UPON WHICH OUR NATION IS BASED.

A. According to the Court Below, No One May Challenge the Constitutionality of PPACA's Individual Mandate.

Pending before the court below were two very different cases challenging the constitutionality of the individual mandate in what is popularly known as "Obamacare" — officially named the "Patient Protection and Affordable Care Act" ("PPACA"):

- the instant case brought by the Commonwealth of Virginia, *ex rel*. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia (No. 11-1057 & 1058), and

- an action brought by Liberty University, Inc., *et al*. (No. 10-2347).

The court of appeals dismissed both challenges on the same day — September 8, 2011 — without reaching the merits in either case.

In the Liberty University case, the court of appeals characterized the individual mandate as a "tax,"[7] and ruled that the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"), barred judicial review of PPACA's individual mandate. Liberty University, Inc., *et al.* v. Geithner, *et al.*, 2011 U.S. App. LEXIS 18618, p. *16.

In the instant case, the court of appeals observed that "Virginia may well be exempt from the AIA bar..." (Cuccinelli, at 14 n.1), but then determined that Virginia had no standing to bring a challenge to the individual mandate requirement of PPACA.[8]

As a result of these twin rulings, the party which the court of appeals believed had standing was barred by statute from obtaining a ruling on the merits, while the party not barred by statute did not have standing. If the court of appeals were correct, the result would be a Catch-22 — no one could challenge the constitutionality of PPACA's individual mandate in a

---

[7] The Fourth Circuit stands alone in this view, which was not embraced by either the Sixth Circuit decision or the Eleventh Circuit decision which are the subjects of other Petitions for Certiorari pending in this Court (Sup. Ct. Nos. 11-117, 11-393, 11-398, and 11-400).

[8] In each case, the court of appeals vacated the judgment of the district court, remanding the case with instructions to dismiss each case for lack of subject-matter jurisdiction. Cuccinelli, p. *12; Liberty Univ., p. *57.

federal court.

To reach such an impasse, the court of appeals should have had strong legal reasons not to exercise its power of judicial review. Instead, its opinion in this case evidenced hostility both to the role of state legislatures and to long-standing principles of federalism.

B. The Court of Appeals Demonstrated a Lack of Respect for the Virginia Health Care Freedom Act, Virginia's Elected Officials, and Virginia's Constitutional Challenge.

Dismissive of the challenge brought by the Commonwealth and the role of the Virginia General Assembly, the court treated VHCFA as if it were a nullity:

> the VHCFA **regulates nothing**.... Instead, it simply **purports to immunize** Virginia citizens from federal law. In doing so, the VHCFA reflects **no** exercise of 'sovereign power,' .... [T]he **only apparent function** of the VHCFA is to **declare Virginia's opposition** to a federal insurance mandate.... [I]f we were to adopt Virginia's standing theory, each state could become a roving constitutional **watchdog**.... [Cuccinelli, pp. *21-*27 (emphasis added).]

Additionally, the court below gratuitously mischaracterized VHCFA as an unauthorized act designed "to nullify federal law...." Cuccinelli, p. *21.

VHCFA never declared PPACA unconstituitonal. However, judicial refusal to consider the validity of state challenges to unconstitutional laws may very well serve as a springboard to interposition and actual nullification by states when told by the courts they have no other option. *See generally* Marshall *Amicus Curiae* Brief, p. 5, for discussion of James Madison's Virginia Resolutions, Dec. 21, 1798, The Founder's Constitution, Vol 5, p. 135.

Further, the court of appeals denigrates the Commonwealth's interest in the constitutionality of the individual mandate because that mandate does not apply to states, but only to individuals. The court avers that the Commonwealth "lacks the 'personal stake' in this case essential to 'assure that concrete adverseness which sharpens the presentation of issues,'" giving rise to the possibility that "Virginia's litigation approach might well diverge from that of an individual to whom the challenged mandate actually does apply." Cuccinelli, p. *28. This is unsupported speculation belied by the arguments made by the Attorney General of Virginia and the vigor with which he has pressed this case in the courts.

Lastly, the court below casts aspersions upon the Commonwealth's effort, citing a case in which standing was denied "to prevent state 'bureaucrats' and 'publicity seekers' from 'wresting control of litigation from the people directly affected.'" *Id.*, p. *29. The members of the Virginia General Assembly, the Governor, and the Attorney General are elected officials of the Commonwealth, not unelected bureaucrats. Unless there is clear evidence to the

contrary, as elected state officials in the American system of federalism, they are to be treated as:

> not only vigilant but suspicious and jealous **guardians of the rights of the citizens, against encroachments from the Federal government** [who] will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE but, if necessary, the ARM of their discontent. [A. Hamilton, Federalist No. 26, G. Carey & J. McClellan, edts., The Federalist, p. 134 (1990) (capitalization original, bold added). *See also* A. Hamilton, Federalist No. 28, p. 141.]

By including charges about bureaucrats, publicity seekers, and nullification, the court of appeals has passed beyond the bounds of judicial reasoning, into the political arena, diminishing public confidence in the basis of its decision. When a sovereign state acts through its elected officials to enact a statute that conflicts with a federal statute that may be unconstitutional, it is not a matter to be disregarded, but to be seriously considered and resolved. In enacting VHCFA, the people of Virginia have spoken through their elected representatives. That statute has meaning and deserves the respect of the federal government — including federal judges.

C. Virginia's Challenge to PPACA's Individual Mandate Is Fully Consistent with the Principles of Federalism.

The court of appeals construed VHCFA and this suit as an attack on the sovereignty of the federal government: "A state has no interest in the rights of its individual citizens sufficient to justify such an **invasion of federal sovereignty**." Cuccinelli, p. *18 (emphasis added). If the United States exceeded its enumerated powers in enacting PPACA, it passed a law that is void — a nullity — not an invasion of national sovereignty, but an intrusion on state sovereignty. *See* Bond v. United States, 564 U.S. __, 131 S.Ct. 2355, 2367 (2011) (Ginsburg J., concurring).

Viewed broadly, the Commonwealth of Virginia's Petition for Certiorari seeks to have this Court resolve the question whether Congress has exceeded its enumerated powers, and thereby has intruded on the reserved powers of Virginia and its people. In response to such a request, federal courts are performing one of their most important functions.

The court of appeals utterly failed to perform its duty "[t]o preserve the even balance" of this "Republic['s] dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different." South Carolina v. United States, 199 U.S. 437, 448 (1905).

Twenty years ago, this Court articulated this

historic legacy of "dual sovereigns"[9]:

> "[T]he people of each State compose a **State**, having its own government, and endowed with **all the functions essential to separate and independent existence**,' ... '[w]ithout the States in union there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent **autonomy** to the States, through their union under the Constitution, but it may be not unreasonably said that **the preservation of the States**, and the maintenance of their governments, **are as much within the design and care of the Constitution as the preservation of** the Union and the maintenance of **the National government**. The Constitution, in all its provisions, looks to an indestructible Union, composed of **indestructible States**. [Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (emphasis added) (citations omitted).]

In contrast, the court of appeals spoke disdainfully

---

[9] "[F]ederalism is important because it speaks not only to the delineation of authority between the national government and the states, but to the overarching concept of limited government and the preservation of individual liberty." E.W. Hickok, Why States?: The Challenge of Federalism (Heritage Fdn. 2007), p. 3. *See also* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 435 (1793); Martin v. Hunter's Lessee, 24 U.S. (1 Wheat.) 304, 325-26 (1816); McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 410 (1819) ; Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868); and Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1870).

about Virginia's standing claim, falsely accusing the Commonwealth's General Assembly and Governor of having "enact[ed] a statute declaring its opposition to federal law [to] convert the federal judiciary into a 'forum' for the vindication of a state's 'generalized grievances about the conduct of government.'" Cuccinelli, p. *26. In truth, however, VHCFA was not enacted to provoke a constitutional seminar on federalism. Rather, it is a serious effort to address a single policy issue well-suited to meet the particularity requirements of a "case" or "controversy" suitable for the exercise of judicial power. *See* A. LaCroix, The Ideological Origins of American Federalism, p. 141 (Harvard Press: 2010) ("The hallmark of adjudication is *specificity*: particular parties bring a particular dispute before a decision-making body, which then issues a ruling that applies primarily to the particular case at hand and, secondarily, as a precedent to aid in deciding future cases that materially resemble that case.").

The *amicus curiae* brief filed (by most of the *amici* here) in the court below[10] reminded the court that the role of the federal judiciary was made clear to the people during the ratification debates on the Constitution:

> [I]n case the Congress shall misconstrue ... part of the Constitution, and exercise powers not warranted by its true meaning ... the success of the usurpation will depend on the executive and

---

[10] *See* Marshall *Amicus Curiae* Brief, pp. 8-10.

> **judiciary departments**, which are to expound and give effect to the legislative acts.... [J. Madison, Federalist No. 44, G. Carey & J. McClellan, edts., The Federalist, *supra*, p. 233 (1990) (emphasis added).]

This profound responsibility of the judiciary has been acknowledged by this Court. In 1905, Justice Brewer, in South Carolina v. United States, 199 U.S. 437 (1905), explained the concept in these terms:

> There are certain matters ... in which the State is supreme, and in respect to them the National Government is powerless. **To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this** — a duty often-times of great delicacy and difficulty. [*Id.*, p. 448 (emphasis added).]

It is this preeminent duty, disregarded by the court below, that this Court is now asked to perform.

II. THE COURT OF APPEALS RULING THAT VIRGINIA HAS NO STANDING CONFLICTS WITH THIS COURT'S DECISION IN BOND v. UNITED STATES.

Agreeing with the national Government, the court of appeals ruled that the Commonwealth of Virginia has no standing to contest the constitutionality of the individual mandate to purchase federally-approved

health care insurance under PPACA because the mandate (i) "imposes no obligations on ... Virginia," the mandate "apply[ing] only to individual persons, not states"[11]; and (ii) does not interfere with the exercise of any sovereign state power, there being no "enforcement mechanism" provided for in the VHCFA, the act "regulat[ing] nothing and provid[ing] for the administration of no state program." *Id.*, pp. *13, *21. According to the court, Virginia has no sovereign state interest in the individual liberties of its people in relation to the national government, the latter government functioning as the American people's sole *parens patriae*. *See id.,* pp. *17-*18. Rather, according to the court below, Virginia's sovereign interest can lie only in the exercise of its police powers to limit individual freedom by administering a government program compelling individual behavior and restricting individual choice. *See id.,* pp. *19-*23. On this ground, the court concluded that because "the VHCFA does not confer on Virginia a sovereign interest in challenging the [PPACA] individual mandate ... Virginia lacks standing to challenge the individual mandate, [that] mandate threaten[ing] no interest in the 'enforceability' of the VHCFA." *Id.*, p. *19.

The court's reasoning is profoundly mistaken, in direct conflict with the principles of American federalism reaffirmed just this past summer in Bond v. United States, *supra*, at 11 — an opinion brought to the court of appeals' attention by the Commonwealth

---

[11] Cuccinelli, pp. *13-*14, *16.

well before the court of appeals issued its opinion,[12] but completely disregarded by that court. *See generally* Cuccinelli, *supra*.

A. As a Sovereign State, Virginia Has Standing to Protect the Liberties of Its People.

The court of appeals maintains that "a state possesses **no legitimate interest** in protecting its citizens from the government of the United States." Cuccinelli, p. *18 (emphasis added). In support of this startling proposition, the court relies entirely on Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923). Mellon, however, was a suit filed explicitly on behalf of the citizens of the state in *parens patriae*, whereas Virginia has filed this action on behalf of its Attorney General. *See* Petition, p. 18. The distinction is not semantic, but substantive. Virginia has brought this cause of action in relation to the Attorney General's official responsibility to enforce the laws of the Commonwealth in furtherance of his duty to discharge his dual oath to support both the Constitution of Virginia and the Constitution of the United States. As the Petition rightly points out, this case is "**not** asserting an injury tied to the rights and benefits of [its] individual[citizens]." *Id.* Indeed, the Commonwealth has not brought this action on behalf of any individual Virginian to enable that person to determine whether he need obey the federal mandate. Rather, as Virginia asserts in its Petition:

---

[12] *See* Petition, p. 5.

> Virginia seeks to defend its **sovereign power to regulate** the persons and entities within its boundaries with respect to the power to mandate the purchase of health insurance — a power that Virginia alleges that it possesses and the United States lacks. [*Id.* (emphasis added). *See also* p. 21.]

The court of appeals, however, suggests that the enactment of VHCFA "serves merely as a smokescreen for Virginia's attempted vindication of its citizens' interests...." Cuccinelli, p. *19. But the court made no such finding, having stated only hypothetically — "**if** the VHCFA serves merely as a smokescreen ... **then** settled precedent bars this action." *Id.* (emphasis added). Indeed, any such finding, had it been made, would be unsupported by the record. In support of its claim of sovereignty, Virginia directed the court of appeals' attention to the passage of VHCFA which (i) lays down a general rule prohibiting any mandate requiring an individual to purchase health care insurance in the Commonwealth — whether issued by an employer, the Commonwealth, or the federal government; and (ii) provides for exceptions to this rule for a court or Department of Social Services order imposing the purchase of such insurance on "a party in a judicial or administrative hearing." *Id.,* pp. 2, 19.

Had the court of appeals sought out proper principles of federalism — so recently restated in Bond — it would have discovered that, under the system of federalism created by the United States Constitution, States are expected to take the initiative to challenge Congressional usurpations of state powers at the

expense of individual liberty. As the Bond Court stated:

> **Federalism** secures the **freedom of the individual**. It allows **States to respond, through the enactment of positive law**, to the initiative of those who seek a voice in shaping the destiny of their own times **without** having to rely solely upon the **political processes that control a remote central power**. [Bond, 131 S.Ct. at 2364 (emphasis added).]

The enactment of VHCFA is a perfect illustration of a state playing its expected role in the American federal system. In December 2009, three full months before the enactment of PPACA, Virginia State Delegate Bob Marshall prefiled a bill termed the "Virginia Health Care Freedom Act" which he thereafter offered on January 13, 2010 as H.B. 10.

This bill, and others, responded, in part, to the threat of a nationwide mandate to purchase a government-prescribed health care insurance policy. In March 2010, the Virginia General Assembly enacted VHCFA to secure the existing freedom of its citizens to buy or not to buy an individual health care insurance policy based on each sovereign citizen's choice, free from any government or employer mandate.

VHCFA serves as a proper predicate to federal judicial review of the constitutionality of a federal statute which both (i) exceeds Congress's enumerated powers and (ii) violates the Tenth Amendment's

reservation of the Commonwealth's police power[13] governing the obligation of contracts and the health and welfare of its citizenry.[14] Thus, when a state legislature passes a bill, and the Governor signs that bill into law, and that state law allegedly conflicts with a duly enacted federal statute, federal courts can know that the State has suffered an "injury in fact,"presenting a genuine "case" or "controversy." Under such circumstances, a federal court is obliged to decide which government has jurisdiction, as contemplated by Article III, Section 2 of the U.S. Constitution.[15] Indeed, as this Court reiterated in Bond:

> Federalism ... **protects the liberty** of all persons within a State by ensuring that **law enacted in excess of delegated governmental power cannot direct or control their actions**.... By **denying any one government complete jurisdiction** over all the concerns of public life, **federalism protects the liberty of the individual** from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." [*Id.*, 131 S.Ct. at 2359, 2364 (emphasis added).]

---

[13] *See* United States v. Morrison, 529 U.S. 598, 617 (2000) ("'The Constitution ... withholds from Congress a plenary police power'").

[14] *See* T. Cooley, A Treaties on Constitutional Limitations, pp. 710-12, 722 (5th ed., Little, Brown: 1883).

[15] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), cited below in Marshall *Amicus Curiae* Brief, p. 9.

The court of appeals would deprive the States of any such active role, flatly asserting that a "state has **no** interest in the rights of individual citizens to justify ... an invasion of federal sovereignty"[16] — as if the Article VI supremacy clause granted to Congress the power, to the exclusion of the federal courts and the States, to decide whether the PPACA individual mandate unconstitutionally deprived American citizens of their liberties. Nothing could be further from the truth. As Professor Alison L. LaCroix explains in her recent important work on the origins of American federalism:

> Taken together, the Supremacy Clause and Article III communicated that American federalism would emanate from a national judicial power and be based on a body of substantive "law of the land," indeed, the very body of substantive law that contained the Supremacy Clause. [A. LaCroix, The Ideological Origins of American Federalism, pp. 168-69.]

Instead of granting Congress supervisory power over state legislatures (*see id.,* pp. 148-49), the proposal to vest Congress with a veto on state laws (*id.*, pp. 132-68) was discarded in favor of elevating the judiciary as "the principal institution" to "mediate" between the national and state governments. *Id.,* p. 169.

The court of appeals' decision to deny standing to the Commonwealth of Virginia also betrays this

---

[16] *See* Cuccinelli, p. *18 (emphasis added).

Court's vision of a federal system wherein "'freedom is enhanced by the creation of two governments, not one'"[17]:

> In choosing to ordain and establish the Constitution, the people insisted upon a **federal structure** for the very purpose of **rejecting** the idea that the **will of the people** in all instances is **expressed by the central power**, the one most remote from their control. [Alden, 527 U.S. at 759 (emphasis added).]

B. As a Sovereign State, Virginia Has Standing to Protect Its Prerogatives and Responsibilities Reserved by the Tenth Amendment.

The court of appeals assumes that the duly-enacted VHCFA is a facade — not a "real" statute — just a "declar[ation], without legal effect, that the federal government cannot apply insurance mandates to Virginia's citizens." Cuccinelli, p. *22. That assumption is belied by the statutory text (*see* Petition, p. 2), which prohibits an individual mandate — whether it is required by the Commonwealth of Virginia (or any of its political subdivisions) or by the federal government — thereby proscribing both "Romneycare" and "Obamacare." Additionally, it prohibits an employer from requiring, as a condition of employment, the acquisition of any sort of health insurance policy. *See* Petition, p. 19. It permits such

---

[17] *See* Bond, 131 S.Ct. at 2364, quoting from Alden v. Maine, 527 U.S. 706, 758 (1999).

a mandate only if it is issued by a court or the Department of Social Services, and even then the mandate is limited to a person who is a party to a judicial or administrative proceeding. *See* Petition, p. 2. The VHFCA prohibitions are "enforceable by private suit or by the Attorney General of Virginia by way of injunction." Petition, p. 19.

Summarily rejecting the statute's plain meaning, and the Commonwealth's representation that VHCFA created a state cause of action, the court further proclaimed that "the VHCFA does nothing more than announce an unenforceable policy goal of protecting Virginia's residents from federal insurance requirements." *Id.*, p. *24. Thus, the court concluded that VHCFA was not an actual exercise of Virginia's sovereign power, but a political ploy designed to transform a "generalized grievance" into a synthetic "case" or "controversy" to test the constitutionality of the PPACA individual mandate. *See* Cuccinelli, pp. *24-*28.

To the contrary, VHCFA establishes for Virginia a binding, free market policy governing the purchase of individual health care coverage, laying down a rule prohibiting both employer and government-imposed mandates, enforceable by private parties and the attorney general. By enacting VHCFA into law, the Commonwealth of Virginia chose freedom over regulation, acting independently in exactly the way that States were — and are — supposed to act, in the American federal system:

The **powers** reserved to the **several States** will

> extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. [J. Madison, *Federalist No. 45,* reprinted in The Federalist, *supra*, p. 241 (emphasis added).]

Indeed, as this Court in Bond observed:

> The federal structure allows local policies "more sensitive to the diverse needs of a heterogenous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." [Bond, 131 S.Ct. at 2364.]

Thus, in the words of Justice Louis Brandeis, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And while federal courts may pass constitutional judgment upon the states in the exercise of their residual powers, courts "must be ever on [their] guard, lest [they] erect [their] prejudices into legal principles." *Id.*

Such appears to be the case here. Had VHCFA (i) "regulated" the behavior of individuals by compelling, or otherwise limiting, the purchase of health insurance, and (ii) "provided for the

administration of a state program" governing such behavior, the court of appeals apparently would have had no problem finding that Virginia "possess[ed] sovereign standing." *See* Cuccinelli, pp. *20-*21. Rather than respecting freedom of choice and individual liberty as a legitimate state government policy, the court faulted Virginia because, in its opinion, "the VHCFA regulates **nothing** and provides for the administration of **no** state program." Cuccinelli, p. *21 (emphasis added). Thus, the court concluded that VHCFA could not possibly be anything but a raw attempt to "immunize Virginia citizens from federal law" (*id.*), which the court concluded was "no exercise of 'sovereign power,' for Virginia lacks the sovereign authority to nullify federal law." *Id.*

In violation of Justice Brandeis's admonition, the court below allowed its policy "prejudices" in favor of a statist solution to the health care market to be elevated into a "legal principle" to deny judicial review to the Commonwealth which embraced a policy of personal liberty and freedom of choice. Surely the powers of States secured by the Tenth Amendment, as well as the States' standing in federal court to defend those powers from an unconstitutional exercise of power by Congress, do not turn on whether a State has chosen an intrusive, command-based, regulatory approach to the payment for health care services consistent with PPACA, or a freedom of choice, free market solution as secured by VHCFA.

Instead of protecting the Constitution's federal system, the court of appeals' opinion denigrates it, demonstrating hostility to Virginia's policy choice,

showing utter disregard for Virginia's proffered purpose and construction of VHCFA, and conflicting with this Court's observation in Bond:

> The allocation of powers in our federal system preserves the **integrity, dignity, and residual sovereignty of the States**. The federal balance is, in part, an end in itself, to ensure that **States function as political entities in their own right**. [Bond, 131 S.Ct. at 2364 (emphasis added).]

According to the Government and the court of appeals, however, because the PPACA individual mandate does not apply to Virginia as an entity, but only to individual persons, only an individual has standing to challenge the constitutionality of the PPACA's individual mandate as an intrusion upon the powers of the states. *See* Cuccinelli, pp. *13, *16, *22. The court has it backwards. The PPACA's individual mandate "displaces" Virginia's "public policy" enacted in VHCFA, just as surely as the federal felony chemical weapons statute in Bond displaced the Pennsylvania criminal code. Bond, 131 S.Ct. at 2366. To be sure, the question in Bond was whether an individual charged with violating a federal statute had standing to challenge the constitutionality of that statute as "'a massive and unjustifiable expansion of federal law enforcement into state-regulated domain.'" *Id.* But there would have been no doubt that the State in Bond would have had standing to contest the invasion of the federal government into local activities traditionally governed by the exercise of the state's police powers. *See* Missouri v. Holland, 252 U.S. 416

(1920). As the Bond Court observed, the individual citizen's standing is **not** independent from the "sovereign" interest of the State, but "concomitant" with it:

> Impermissible interference with state sovereignty is not within the enumerated powers of the National Government ... and action that exceeds the National Government's enumerated powers **undermines the sovereign interests of States**.... The **unconstitutional action can cause concomitant injury to persons in individual cases**. [Bond, 131 S.Ct. at 2366 (emphasis added).]

The court of appeals is mistaken to have assumed otherwise, shutting the courthouse door to the Commonwealth, and seemingly leaving it ajar (with respect to standing only) for an individual person directly subject to the PPACA mandate. *See* Cuccinelli, pp. *28-*29. The lesson of Bond is to the contrary. While this Court opened the door in Bond to judicial review of a personal claim of loss of individual liberty caused by the enforcement of a statute allegedly enacted outside the powers delegated to Congress, it does not follow that the door is shut to the State, the legal interest of which is to protect its sovereign and independent authority from Congress's unconstitutional usurpation. *Id.*, at 2366-67.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

Attorneys for Amici Curiae
**Counsel of Record*
November 3, 2011