Nos. 11-1057 & 11-1058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II
in his official capacity as Attorney General of Virginia,
Plaintiff-Appellee/Cross Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services,
in her official capacity,
Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

***AMICUS CURIAE* BRIEF OF THE**
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF PLAINTIFF-APPELLEE
COMMONWEALTH OF VIRGINIA
AND AFFIRMANCE AND REVERSAL OF THE COURT BELOW

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CORPORATE DISCLOSURE STATEMENT

The ACRU states that it is a non-profit, non-stock corporation organized under Section 501(c)(3) of the Internal Revenue Code. The ACRU further states that it issues no stock, and that it has no parents, trusts, subsidiaries, or affiliates that have issued shares of stock or debt securities to the public. Moreover, no publicly held corporation has an interest in the outcome of this litigation due to the ACRU's participation.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice

[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the rights to property and to Due Process of Law protected by the Fifth Amendment. The source of the authority to file is the decision of the officers of the ACRU.

ARGUMENT

I. THE INDIVIDUAL MANDATE REGULATES INDIVIDUALS NOT PARTICIPATING IN INTERSTATE COMMERCE FOR HEALTH INSURANCE.

The individual mandate compels the uninsured who are not participating in the interstate market for health insurance to purchase comprehensive health insurance complying with all of the benefit mandates and other requirements of the Patient Protection and Affordable Care Act[2] ("PPACA"), from insurance companies validated by the federal government as providing the required insurance. The Defendants rely upon the Commerce Clause as the enumerated power supposedly delegating authority to the federal government for this regulatory compulsion.

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

As the Supreme Court stated in the seminal case of *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), up until now the reach of the Commerce Clause has been limited to delegating the power to regulate (1) "use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." But an uninsured individual is not using the channels of interstate commerce for health insurance, is not involved with any instrumentality of interstate commerce in regard to health insurance, and is not engaged in any "activity" at all in regard to health insurance. Therefore, the Commerce Clause does not delegate the power to impose the individual mandate forcing individuals to enter the market and purchase health insurance.

The District Court below, *Virginia v. Sebelius*, No. 3:10-cv-188 (E.D. Va. August 2, 2010) recognized this in denying Defendants' motion to dismiss on this issue, saying, "Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far." Slip Op. at 25. The Court reiterated, "No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so." Slip Op. at 24. The court in *State of Florida v. United States Department of Health and Human Services,* No. 3:10-cv-91-RV/EMT, (N.D. Fla., October 14, 2010) reached the same conclusion, saying in regard to the individual mandate, "[T]he Commerce

Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent.” Slip Op. at 61.

The individual mandate goes beyond the previous outer limits of Commerce Clause jurisprudence in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzalez v. Raich*, 545 U.S. 1 (2005). The farmer in *Wickard* affirmatively acted in the voluntary activity to farm and produce wheat which was part of the national, and therefore interstate, stock of wheat. The aggregate of all farmers such as Filburn who consumed their own grown wheat consequently substantially affected the interstate commerce in wheat under the economic laws of supply and demand. Moreover, part of Filburn’s “consumption” of his own wheat was to feed it to his farm animals, who produced milk, poultry, and eggs, that he sold in interstate commerce. 317 U.S. at 114. The parties in *Wickard*, in fact, stipulated that such consumption by farmers of their own home grown wheat amounted to more than 20% of domestic U.S. consumption of wheat. Id. at 125, 127.

Similarly, in *Raich*, the defendant affirmatively acted to grow and produce marijuana, which was part of the total interstate stock of the drug. The majority accepted similar Congressional findings that the aggregate supply of home grown marijuana substantially affected interstate commerce in the drug under the immutable economic laws of supply and demand.

But the individual mandate in the present case compels and regulates entirely uninsured individuals who have taken no voluntary, affirmative act at all in regard to health insurance. The Florida District Court in *Florida v. HHS* recognized this distinction as well in denying Defendant's Motion to Dismiss on this issue. Slip Op. at 63.

This was recognized as well by the Congressional Budget Office (CBO) in considering the budget treatment of the individual mandate in the Clinton Administration's health care proposals. The CBO said at the time,

> 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. Secondly, it would require people to purchase a specific service that would be heavily regulated by the federal government.

The Budgetary Treatment of an Individual Mandate to Buy Health Insurance, CBO Memorandum, at 1 (August, 1994). Similarly, the opinion of the Congressional Research Service regarding the individual mandate of the PPACA, provided in response to a request from the Senate Finance Committee, stated,

> 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 service.

Cong. Research Serv., *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* at 3 (2009).

Indeed, to extend the Commerce Clause as far as the Defendants seek would leave no principled limit to the federal government's power to regulate under the Commerce Clause. If Congress can compel an individual who is not even participating in interstate commerce in the good or service at issue to purchase the good or service from another citizen or business, which purchase it then regulates in great detail, where is the limit? The federal government could then require individuals to purchase cars from auto companies it has bailed out, or nationalized. It could require individuals to purchase insurance from companies who contributed to the President's reelection campaign. It could require individuals to purchase goods or services from companies that are unionized by the President's supporters. It could mandate that individuals buy and take certain vitamins or nutritional supplements.

That is several roads too far from the original Commerce Clause power which, as James Madison explained,

> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

The Founder's Constitution, Vol. 2, Art. I, Section 8, Clause 3 (Commerce). That is why the Supreme Court in *Lopez* has already rejected the notion of unlimited Commerce Clause power, holding that it will strike down regulation under the Commerce Clause which leaves no principled limit to federal power under the Clause. The Court said, "the Constitution's enumeration of powers does not presuppose something not enumerated and that there will never be a distinction between what is truly national and what is truly local." 514 U.S. at 567-68. Justice Kennedy added further in concurrence in *Lopez* in terms quite apt for the present case, "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or another level of Government has tipped the scales too far." Id. at 578.

Indeed, the unlimited Commerce Clause power Defendants claim here would be indistinguishable from a national police power, with the federal government authorized to regulate and enforce order to advance any vision of the general welfare, morals, health, and safety. As the Court indicated in *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006), "protection of the lives, limbs, health, comfort and quiet of all persons" falls within state police power. Historically, that has encompassed commands to act to achieve these ends, such as vaccinations and school attendance laws, which are precisely analogous to the individual mandate at issue in the present case.

But if the federal government were considered to hold such a national police power, then the concept of enumerated, delegated powers to the federal level, with traditional government powers otherwise remaining with the states, would then be obliterated. That is why the Supreme Court held in *United States v. Morrison*, 529 U.S. 598. 618-619 (2000), "We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." (emphasis in original).

II. THE INDIVIDUAL MANDATE COMPELS INDIVIDUALS TO PURCHASE HEALTH INSURANCE SOLD ONLY WITHIN COMPLETELY INTRASTATE MARKETS BY LAW, AND SO DOES NOT INVOLVE REGULATION OF INTERSTATE COMMERCE FOR THIS REASON AS WELL.

Lawyers not steeped in health policy will not recognize how jarring the idea that the individual mandate involves regulation of the "interstate market in health insurance" will seem to those actually engaged in the business of such insurance. The individual mandate again involves a requirement that individuals and families without employer provided health insurance purchase the mandated health insurance directly in the market. *But there is no interstate market in such health insurance* for individuals and families.

By law, individuals and families seeking health insurance on their own, rather than through their employer, operate in what is called the individual insurance market. In that market, such individuals and families can only buy health insurance authorized, issued and regulated within their state. Such individuals and families cannot under current law buy health insurance across state lines. *See Testimony of J. Robert Hunter, Director of Insurance, Consumer Federation of America, Before the Committee on the Judiciary of the United States Senate*, October 14,2009*; Letter of Richard J. Hillman, Director, Financial Markets and Community Investment, Government Accountability Office (GAO) to Michael G. Oxley, Chairman, Committee on Financial Services, House of Representatives*, July 28, 2005*;* Chris Sagers, *Much Ado About Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort, 28* YALE LAW AND POLICY REVIEW *325* (2010).

Those who live in New Jersey, for example, cannot buy the much less expensive health insurance sold in Pennsylvania. Those who live in Texas cannot buy health insurance sold in Oklahoma. Those who live in California can fly to Las Vegas to gamble in the casinos there, but they can't buy health insurance sold in Nevada while they are there.

That is why the statement, "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause," *United States v. South-Eastern Underwriters, Ass'n,* 322 U.S. 533 (1944), does not apply to the health insurance that the individual mandate compels individuals and families to buy. The individual mandate compels individuals and families to purchase health insurance which is sold only within completely intrastate markets by law, and so does not involve regulation of interstate commerce for this reason as well.

Multistate employers providing insurance to their workers either through a health insurer or through self-insurance under ERISA do cross state lines in the business of insurance. The examples of federal regulation the Defendants cite generally involve this interstate employer health insurance market.

III. THE INDIVIDUAL MANDATE CANNOT BE JUSTIFIED UNDER THE NECESSARY AND PROPER CLAUSE.

The Necessary and Proper Clause is not a loophole that allows the federal government to exercise authority beyond the delegated, enumerated powers of the Constitution. As the Court held in *Jinks v. Richland Co.*, 538 U.S. 456, 464 (2003), the Necessary and Proper Clause may not be used "as a pretext for the accomplishment of objects not entrusted to the [federal] government." *Accord: McCulloch v. Maryland*, 17 U.S. 316 (1819); *United States v. Comstock*, 130 S. Ct. 1949 (2010)(Necessary and Proper Clause does not grant the federal government a general police power, which is reserved to the states); *Lopez*, 514 U.S. at 564 ("[I]f we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without the power to regulate.").

Just as argued above in regard to the Commerce Clause, if Congress can force those not even participating in health insurance markets to purchase health insurance with detailed benefits and features as specified by the federal government, from health insurance companies specified as providing the mandated insurance, then all limits to the scope of federal power will have been obliterated. That would obliterate as well all distinctions between federal power and state power, and any scope for state sovereignty, with the federal government granted the unlimited police power the Supreme Court has always ruled belonged to the states and not the federal authority. *E.g.*, *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 923 (1997)("When a 'la[w]…for carrying into Execution' the Commerce Clause violates the principle of State sovereignty…it is not a 'La[w]…*proper* for carrying into Execution the Commerce Clause.'" (emphasis in original)). The reach of the Necessary and Proper Clause is also circumscribed by the Ninth and Tenth Amendments.

The Defendants argue that the individual mandate is necessary for the entire regulatory scheme of the PPACA to work, or even to function. That is because of the Act's regulatory requirements for guaranteed issue and community rating.

The Act requires all insurers to cover all pre-existing conditions and issue health insurance to everyone that applies, no matter how sick they are when they first apply or how costly they may be to cover. *PPACA, Sections 2702, 2704, 2705.* This is what is known as guaranteed issue. The Act also prohibits insurers from varying their rates based on the medical condition or illnesses of applicants. Insurers can only vary rates within a limited range for age, geographic location, and family size. *PPACA, Section 2701*. This regulatory requirement is known as modified community rating.

Under these regulatory requirements, younger and healthier people delay buying insurance, knowing they are guaranteed coverage at standard rates after they become sick. Sick people show up applying for an insurer's health coverage for the first time with very costly illnesses such as cancer and heart disease, which the insurer must then cover and pay for. This means the insurer's covered risk pool includes more costly sick people and fewer less costly healthy people, so the costs per person covered soar. The insurer then has to raise rates sharply for everyone just to be sure to have enough money to pay all of the policy's benefits.

Those higher rates encourage even more healthy people to drop their insurance, leaving the remaining pool even sicker and more costly on average, which requires even higher premiums, resulting in a financial death spiral for the insurers and the insurance market.

The PPACA tries to counter this problem by adopting the individual and employer mandates, seeking to require everyone to be covered and contributing to the pool at all times. Without these mandates, the Defendants argue, those who would remain uninsured would substantially affect the interstate market for health insurance, by allowing the remaining regulatory requirements to cause soaring health insurance premiums through the above process and ultimately a financial death spiral. That is why the individual mandate as well as the employer mandate are necessary and proper to the Act's overall regulatory scheme for the interstate health insurance markets, under the Defendants' argument.

But the individual mandate will ultimately not solve the problems that the Defendants identify, and, therefore, the argument that it is necessary and proper under the PPACA is further in dispute. The PPACA under its own terms and language does not sufficiently enforce the mandates for them to work to solve the fundamental problem with the PPACA's regulatory requirements. Individuals who violate the mandate are required to pay $695 per family member, up to a maximum of $2,085 per family. *PPACA, Sections 1501, 1502*. The penalty for employers is $2,000 - $3,000 per worker. *PPACA, Sections 1511, 1513*. But qualifying health insurance coverage will cost $15,000 per year by 2016, much more even than the $12,000 or more per year that is a typical cost for employer provided coverage today. *E.g.*, John Goodman, *Four Trojan Horses,* Health Alert, National Center for Policy Analysis, April 15, 2010.

Workers and employers can save too much by just foregoing the coverage and paying the penalty, if they are caught and forced to pay it. Moreover, the Act expressly states that criminal penalties will not apply for failing to pay the fine, and it cannot be enforced by imposing liens on the taxpayer's property, so the penalties are not even enforceable. *PPACA, Section 1501.* But such individuals can still buy insurance after they or a member of their family gets sick.

This is why the American Academy of Actuaries warned in regard to the PPACA's mandates,

> [T]he financial penalties associated with the bill's individual mandates are fairly weak compared to coverage costs….In particular, younger individuals in states that currently allow underwriting and wider premium variations by age could see much higher premiums than they face currently (and may have chosen to forego). The premiums for young and healthy individuals would likely be high compared to the penalty, especially in the early years, but even after fully phased in, thus likely leading to many to forgo coverage.

American Academy of Actuaries*, Letter to The Honorable Nancy Pelosi and The Honorable Harry Reid, Re: Patient Protection and Affordable Care Act (H.R. 3590) and Affordable Health Care for America Act (H.R. 3962),* January 14, 2010, at 4-5.

And this is why studies have concluded that insurance premiums would rise sharply under the PPACA's regulatory requirements. PriceWaterhouseCoopers, *Impact Potential of Health Reform on the Cost of Private Health Insurance Coverage,* October, 2009; Wellpoint, Inc., *Impact of Health Reform on Premiums,* October, 2009; Merrill Mathews, *Should We Abandon Risk Assessment in Health Insurance,"* Issues and Answers No. 154, Council for Affordable Health Insurance, May, 2009; Congressional Budget Office, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act,* Letter to the Honorable, Evan Bayh, November 30, 2009; Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended,* April 22, 2010.

Further confirmation that the mandates will not work is shown by the experience of Massachusetts, where even though the state's individual mandate is enforced, it still doesn't work to solve the problem. As the Defendants themselves suggest, Massachusetts adopted reforms quite similar to the PPACA in 2006, with guaranteed issue, community rating, and individual and employer mandates. Since then health insurance premiums in Massachusetts have accelerated faster than the national average, and the state now suffers the highest health insurance costs in the nation. Grace Marie Turner and Tara Persico, *Massachusetts' Health Reform Plan: Miracle or Muddle?,* Galen Institute, July, 2009; Michael Tanner, *Massachusetts Miracle or Massachusetts Miserable: What the Failure of the "Massachusetts Model" Tells Us about Health Care Reform,* Cato Institute

Briefing Papers No. 112, June 9, 2009; Greg Scandlen, *Three Lessons from Massachusetts,* National Center for Policy Analysis, Brief Analysis No. 667, July 28, 2009; Sally C. Pipes, *Mass Health Meltdown Is Your Future*, Pacific Research Institute, May 25, 2010; Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain, Policy Analysis No. 657,* Cato Institute, January, 2010.

Harvard-Pilgrim, one of the top insurers in Massachusetts, reported that between April 2008 and March 2009, about 40% of its new enrollees dropped their coverage in less than five months, but incurred about $2,400 in monthly medical expenses, about 600% higher than normal. *"The Massachusetts Health Mess,"* The Wall Street Journal, July 11, 2009. This indicates that many in the state are waiting until they need expensive medical care to buy insurance, then dropping it after the insurer pays the costs, knowing they can always get coverage later when they need further expensive care. See also Grace Marie Turner, *"The Failure of RomneyCare,"* The Wall Street Journal, March 17, 2010("There is growing evidence that many people are gaming the system by purchasing health insurance when they need surgery or other expensive medical care, then dropping it a few months later.").

Consequently, the individual mandate will not work to solve the problems caused by the regulatory framework of the PPACA. That mandate, therefore, is not necessary and proper to the overall regulatory scheme of the PPACA.

The Defendants argue further that the individual mandate is necessary and proper because while the uninsured forego health insurance, they do not forego medical care. Too often, however, they are unable to pay for that care. The cost of that uncompensated care is then shifted to others, either to the public through higher insurance premiums, or to the federal government through programs to help hospitals cover these losses. The Defendants allege that the cost of such uncompensated care amounted to $43 billion in 2008.

This issue needs to be put in context. Total annual health expenditures in the U.S. run at $2.5 trillion per year. Sally C. Pipes, *The Truth About Obamacare,* (Wash D.C., Regnery, 2010), at 23. The cost-shifting the Secretary argues is so troubling runs at about 2% of those total expenditures.

A far bigger source of cost-shifting is the federal government itself. Medicaid payments to doctors and hospitals serving the poor under the program are so meager that many of the poor face great difficulty in even finding essential care. *Pipes,* at 76-79. Medicare payments are so low that in 2008, two-thirds of hospitals were already losing money on Medicare patients. Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Projected Medicare*

Expenditures under an Illustrative Scenario with Alternative Payment Updates to Providers, August 5, 2010, at 7. A study conducted by one of the nation's top actuarial firms, Milliman, Inc., concluded that cost shifting to private insurance due to the low compensation paid to doctors and hospitals by Medicaid and Medicare raised the cost of private health insurance by $88.5 billion per year, or $1,788 for an average family of four. Will Fox, FSA, MAAA, and John Pickering, FSA.MAAA, *Hospital and Physician Cost Shift: Payment Level Comparison of Medicare, Medicaid, and Commercial Payers,* Milliman, Inc., December, 2008. That is twice the amount of cost-shifting due to uncompensated care from the uninsured that the Secretary says the individual mandate is necessary to stop.

Moreover, the PPACA greatly increases that cost-shifting arising from Medicaid and Medicare underpayments, in two ways. First, it sharply expands Medicaid to 24 million new beneficiaries by 2015, an increase of over 50%. Richard S. Foster, Chief Actuary, Centers for Medicaid and Medicare Services, *Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended,* April 22, 2010. That will result in far more Medicaid underpayments to be cost shifted.

Secondly, the PPACA sharply cuts the payments to doctors and hospitals even further, to the tune of nearly $3 trillion at least over the first 20 years of full implementation. Senate Budget Committee, Minority Staff, *Budget Perspective:*

The Real Deficit Effect of the Democrats' Health Package, March 23, 2010. Our calculations based on the 2009 Annual Report of the Medicare Board of Trustees are even higher. Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, *The 2010 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds,* August 5, 2010; Peter Ferrara and Larry Hunter, *"How ObamaCare Guts Medicare," Wall Street Journal*, September 9, 2010. Such compensation reductions would shatter all records in cost shifting.

If the PPACA is making a much bigger cost shifting problem caused by government so much worse, then how can the individual mandate be necessary to address the far more minor private uncompensated care problem?

IV. CONGRESS CAN ACHIEVE ALL THE SOCIAL GOALS MEANT TO BE ADDRESSED THROUGH THE INDIVIDUAL MANDATE THROUGH ALTERNATIVE MEANS THAT ARE FULLY CONSTITUTIONAL.

Congress cannot use unconstitutional means to achieve desirable social goals in any event. But when Congress has a choice between alternative policies to achieve desirable ends, one of which is constitutional and the other not, it does not have policy discretion. It can only choose the constitutional course. In the present case, Congress can choose alternative means to achieve all the social goals meant to be addressed through the individual mandate. So even if the individual mandate is unconstitutional, that does not mean that anyone has to suffer without essential health care.

For example, each state can set up a high risk pool for the uninsured in the state who have become too sick to obtain new health insurance in the marketplace. Individuals who cannot purchase private health insurance as a result would obtain coverage from the risk pool. They would each pay what they reasonably can for such coverage based on their income. The pools would be subsidized by the general taxpayers to cover remaining costs. J.P. Wieske and Merrill Matthews, *Understanding the Uninsured and What to Do about Them,* Council for Affordable Health Insurance, 2007; NASCHIP, *Comprehensive Health Insurance for High-Risk Individuals: A State-by-State Analysis,* 22nd Edition, 2008-2009, Denver, 2008; Peter Ferrara, *The Obamacare Disaster: An Appraisal of the Patient Protection and Affordable Care Act*, Heartland Policy Study No. 128, Heartland Institute, Chicago, Ill., August, 2010.

This solution would not produce the unstable markets and soaring insurance premiums of guaranteed issue and community rating. Yet the true needs of the uninsured would be covered, at only a fraction of the costs of the PPACA's policies. Several states have already experimented with such risk pools. *NASCHIP, supra.* And the PPACA actually sets up a version of them to provide essential coverage for those in need before the Act's much more costly individual mandate, guaranteed issue, and community rating go into effect. Such risk pools can be designed to serve all the needs of the uninsured who become uninsurable, and fully funded to the extent necessary, without violating the Constitution.

Superior alternative solutions within constitutional bounds can also be devised for the problem of cost-shifting due to uncompensated care. The federal government can provide grants to states to establish low cost, quick, collection procedures to enable doctors and hospitals to efficiently collect more of their legitimate charges from those who do have the resources to pay them. New garnishment laws can be established to allow slower, more feasible payment of medical debts over time. The medical costs for the uninsured who cannot make any significant contribution towards their expenses are a general social responsibility, and should be subsidized out of general taxes to the extent the costs are greater than doctors and hospitals can reasonably be expected to absorb as an accommodation to the needy who become sick.

V. THE INDIVIDUAL MANDATE CANNOT BE SEVERED, THEREFORE THE WHOLE PPACA MUST BE FOUND UNCONSTITUTIONAL.

The PPACA does not include a severance clause. Consequently, if the individual mandate is found unconstitutional, the question becomes whether the remaining parts of the PPACA can still remain fully operative as law and function as Congress intended, and whether Congress would have passed the PPACA without the individual mandate. *Alaska Airlines v. Brock*, 480 U.S. 678 (1987); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010); J.A. 1113.

The answer in both cases is indisputably no. The Secretary herself has repeatedly argued in this court and in other courts across the country that the PPACA cannot function without the individual mandate. E.g., J.A. 51, 901, 902. The reason is as described above. Without the individual mandate, the guaranteed issue and community rating regulatory provisions of the Act will cause a financial death spiral in the insurance industry, as healthy people wait until they are sick to buy the guaranteed coverage, leaving only highly costly sick people in the insurance pool. That causes rates to soar, causing even more of the healthy to leave coverage. If regulation required fire insurers to issue policies to people whose houses were already on fire at standard rates, the fire insurance pool would include only all burned down houses, which would obviously be dysfunctional. That financial death spiral would cause the costs of other provisions of the PPACA to soar, such as the subsidies for purchase of health insurance on the Exchanges, which would be even more costly than expected, and the costs for the Medicaid expansion, where more people would qualify given the decline of private insurance.

Indeed, the PPACA itself in its very statutory language recognized the essential role of the individual mandate in the statute's overall framework, saying in Section 1501(a)(2)(I),

> "[I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care….The [individual mandate] 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."

As the court in *Alaska Airlines* said, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently…." 480 U.S. at 684.

Moreover, as *Alaska Airlines* also recognized, in the absence of a statutory severance clause the entire statute must be struck down if Congress would not have enacted the statute without the unconstitutional provision. 480 U.S. at 678. Virginia is quite right that the narrow margin of passage of the PPACA greatly increases the probability that Congress would not have passed the PPACA without the individual mandate. The loss of that provision so centrally affects the entire structure of the Act that without it the entire structure must fall. Trying to determine what could be salvaged would embroil the Court in rewriting the statutory policy and framework to govern one-sixth of the entire U.S. economy.

The District Court in *State of Florida v. United States Department of Health and Human Services,* No. 3:10-cv-91-RV/EMT, (N.D. Fla., January 31, 2011) recognized the validity of exactly these arguments in striking down the entire PPACA. The court said,

> "[O]n the unique facts of this particular case, the record seems to strongly indicate that Congress would not have passed the Act in its present form if it had not included the individual mandate. This is because the individual mandate was indisputably essential to what Congress was ultimately seeking to accomplish. It was, in fact, the keystone or lynchpin of the entire health reform effort."

(Slip Op. at 67). Indeed, the court's analysis of the legislative history of the PPACA concluded that the absence of a severability clause in the Act was intentional, reflecting Congress's judgment that the PPACA was not functional without the individual mandate. (Slip Op. at 67-68). The court added,

> "Severing the individual mandate from the Act along with the other insurance reform provisions – and in the process reconfiguring an exceedingly lengthy and comprehensive legislative scheme – cannot be done consistent with the principles set out above. Going through the 2,700-page Act line-by-line, invalidating dozens (or hundreds) of some sections while retaining dozens (or hundreds) of others, would not only take considerable time and extensive briefing, but it would, in the end, be tantamount to rewriting a statute in an attempt to salvage it, which is foreclosed by *Ayotte, supra*. Courts should not even attempt to do that….The interoperative effects of a partial deletion of legislative provisions are often unforeseen and unpredictable. For me to try and 'second guess' what Congress would want to keep is almost impossible."

(Slip Op. at 72-73). The court consequently rightly concluded,

> "In the final analysis, this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one

> essential piece (the individual mandate) is defective and must be removed. It cannot function as originally designed. There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions—which, as noted, were the chief engines that drove the entire legislative effort—for me to try and dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone. Such a quasi-legislative undertaking would be particularly inappropriate in light of the fact that any statute that might conceivably be left over after this analysis is complete would plainly not serve Congress' main purpose and primary objective in passing the Act….The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker."

(Slip Op. at 73-74).

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should affirm the ruling of the court below on the unconstitutionality of the individual mandate, and reverse the ruling on severance, striking down the PPACA in its entirety as unconstitutional.

Dated: April 4, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief has been prepared with Microsoft Word 14-point Times New Roman proportionally spaced typeface, and that the text of the brief contains 5,717 words.

/s/ Peter Ferrara
Peter Ferrara

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2011, I filed and served the foregoing,

**MOTION OF AMERICAN CIVIL RIGHTS UNION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEFIN SUPPORT OF
PLAINTIFF-APPELLEE COMMONWEALTH OF VIRGINIA
AND AFFIRMANCE AND REVERSAL OF THE COURT BELOW**

and

***AMICUS CURIAE* BRIEF OF THE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF PLAINTIFF-APPELLEE
COMMONWEALTH OF VIRGINIA
AND AFFIRMANCE AND REVERSAL OF THE COURT BELOW**

by causing a copy to be electronically filed and served via the appellate CM/ECF system. I also hereby certify that I have caused 8 paper copies to be delivered to the court by Federal Express.

/s/ Peter Ferrara
Peter Ferrara