No. 11-420

In the Supreme Court of the United States

VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL OF VIRGINIA, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
ANISHA S. DASGUPTA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, requires that, beginning in 2014, non-exempted individuals maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. 5000A. The question presented is: Whether the court of appeals correctly held that petitioner, the Commonwealth of Virginia, lacks standing to challenge the minimum coverage provision.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 8
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982) 6, 8, 10

Bowen v. *Public Agencies*, 477 U.S. 41 (1986) 6

Chardon v. *Fumero Soto*, 462 U.S. 650 (1983) 14

Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 10

Diamond v. *Charles*, 476 U.S. 54 (1986) 7

Florida v. *United States Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), petitions for cert. pending, Nos. 11-393 & 11-398 (filed Sept. 28, 2011), No. 11-400 (filed Sept. 27, 2011) 8, 15, 16, 17

Liberty University, Inc. v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011) . . . 16, 17

Maine v. *Taylor*, 477 U.S. 131 (1986) 10

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 6, 8, 10, 11, 12, 15

Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 5, 6, 8

Cases—Continued: Page

Missouri v. *Illinois*, 180 U.S. 208 (1901) 8
New York v. *United States*, 505 U.S. 144 (1992) 6, 10
Ohio v. *United States Dep't of Transp.*, 766 F.2d 228 (6th Cir. 1985) 13
Oregon v. *Mitchell*, 400 U.S. 112 (1970) 10
Printz v. *United States*, 521 U.S. 898 (1997) 10
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 10
Texas Office of Pub. Util. Counsel v. *FCC*, 183 F.3d 393 (5th Cir. 1999) 12
Thomas More Law Ctr. v. *Obama*, 651 F.3d 529 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011) 17
United States v. *IBM Corp.*, 517 U.S. 843 (1996) 14
United States v. *Richardson*, 418 U.S. 166 (1974) 12
Wyoming v. *United States*, 539 F.3d 1236 (10th Cir. 2008) 7, 12

Constitution and statutes:

U.S. Const. Art. I 6, 15
Anti-Injunction Act, 26 U.S.C. 7421(a) 8, 16, 17, 18
Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 2
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 2
26 U.S.C.A. 36B 3
26 U.S.C.A. 45R 2
26 U.S.C.A. 4980H 3
26 U.S.C.A. 5000A 4

Statutes—Continued: Page

26 U.S.C.A. 5000A(a) 4, 8
26 U.S.C.A. 5000A(b)(2) 4
26 U.S.C.A. 5000A(c)(1) 4
26 U.S.C.A. 5000A(c)(2) 4
26 U.S.C.A. 5000A(e)(2) 4
26 U.S.C.A. 5000A(f) 4
26 U.S.C.A. 5000A(g) 4
42 U.S.C.A. 300gg 4
42 U.S.C.A. 300gg-1(a) 3
42 U.S.C.A. 300gg-3(a) 3
42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII) 3
42 U.S.C.A. 1396d(b) 3
42 U.S.C.A. 1396d(y)(1) 3
42 U.S.C.A. 18031 3
Va. Code Ann. § 38.2-3430.1:1 (Supp. 2011) 5, 9

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 14
Governor McDonnell Signs Virginia Healthcare Freedom Act Legislation (Mar. 24, 2010), http://www.governor.virginia.gov/news/viewRelease.cfm?id=88 5

In the Supreme Court of the United States

No. 11-420

VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL OF VIRGINIA, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is not yet reported but is available at 2011 WL 3925617. The opinion of the district court denying respondent's motion to dismiss (Pet. App. 98-135) is reported at 702 F. Supp. 2d 598, and the opinion of the district court granting petitioner's motion for summary judgment (Pet. App. 45-97) is reported at 728 F. Supp. 2d 768.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] to address a profound and enduring crisis in the market for health care, which accounts for more than 17% of the Nation's gross domestic product. Millions of people do not have health insurance. As a result, they consume health care services for which they do not pay, shifting billions of dollars of health care costs to other market participants. The result is higher insurance premiums that, in turn, make insurance unaffordable to even more people. At the same time, insurance companies use restrictive underwriting practices to deny coverage or charge more to millions of people because of pre-existing medical conditions.

In the Affordable Care Act, Congress addressed these problems through a comprehensive program of economic regulation and tax measures. The Act includes provisions designed to make affordable health insurance more widely available, to protect consumers from restrictive insurance underwriting practices, and to reduce the amount of uncompensated medical care.

First, the Act builds upon the existing nationwide system of employer-based health insurance that is the principal private mechanism for financing health care. The Act establishes new tax incentives for small businesses to purchase health insurance for their employees, 26 U.S.C.A. 45R,[2] and, under certain circumstances, will

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] Because the Affordable Care Act has not yet been codified in the United States Code, this brief ~~will~~ cites to the United States Code An-

impose assessable payments on large employers that do not offer adequate coverage to full-time employees, 26 U.S.C.A. 4980H (the employer-responsibility provision).

Second, the Act provides for the creation of health-insurance exchanges to allow individuals, families, and small businesses to leverage their collective buying power to obtain health insurance at rates that are competitive with those of typical large employer group plans. 42 U.S.C.A. 18031. The Act also offers federal tax credits to assist eligible households with incomes from 133% to 400% of the federal poverty level to purchase insurance through the exchanges. 26 U.S.C.A. 36B.

Third, the Act expands eligibility for Medicaid to cover individuals under age 65 with income below 133% of the federal poverty level. 42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII). The Act provides that the federal government will pay 100% of the expenditures required to cover these newly eligible Medicaid beneficiaries through 2016. 42 U.S.C.A. 1396d(y)(1). The federal government's share thereafter will decline slightly and level off at 90% in 2020 and beyond—far above the usual federal matching rates for Medicaid. Compare *ibid.* with 42 U.S.C.A. 1396d(b) (50% to 83%).

Fourth, the Act regulates insurers by prohibiting industry practices that have prevented individuals from obtaining and maintaining health insurance. Beginning in 2014, the Act will bar insurers from refusing coverage because of a pre-existing medical condition, 42 U.S.C.A. 300gg-1(a), 300gg-3(a) (the guaranteed issue-provision),

---

notated (U.S.C.A.) for ease of reference. All such citations are either to the 2011 Edition or the 2011 Supplement of the U.S.C.A.

thereby guaranteeing access to insurance to many previously unable to obtain it. The Act will also bar insurers from charging higher premiums based on a person's medical history, 42 U.S.C.A. 300gg (the community-rating provision), requiring instead that premiums generally be based on community-wide criteria.

Fifth, the Act amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of health insurance must pay a tax penalty. 26 U.S.C.A. 5000A (the minimum coverage provision). That provision, which takes effect in 2014, 26 U.S.C.A. 5000A(a), may be satisfied through enrollment in an employer-sponsored insurance plan; an individual market plan, including one offered through a new health-insurance exchange; a grandfathered health plan; a government-sponsored program such as Medicare or Medicaid; or similar federally recognized coverage, 26 U.S.C.A. 5000A(f).

The amount of the tax penalty owed under the minimum coverage provision is calculated as a percentage of household income, subject to a floor and capped at the price of the forgone insurance coverage. The penalty is reported on the individual's federal income tax return for the taxable year and is assessed and collected in the same manner as certain other assessable tax penalties under the Internal Revenue Code. Individuals who are not required to file income tax returns for a given year are not required to pay the tax penalty. 26 U.S.C.A. 5000A(b)(2), (c)(1) and (2), (e)(2) and (g).

2. On March 10, 2010—13 days before enactment of the Affordable Care Act—the Virginia General Assembly passed a statute providing that "[n]o resident of this Commonwealth * * * shall be required to obtain or maintain a policy of individual insurance coverage ex-

cept as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding." Va. Code Ann. § 38.2-3430.1:1 (Supp. 2011) (referred to by petitioner as the "Virginia Health Care Freedom Act" or "VHCFA"). The day after the Affordable Care Act was enacted, Virginia's governor held a signing ceremony for the VHCFA, where he stated that the expansion of access to health care "should not be accomplished through an unprecedented federal mandate on individuals that we believe violates the U.S. Constitution." *Governor McDonnell Signs Virginia Healthcare Freedom Act Legislation* (Mar. 24, 2010), http://www.governor.virginia.gov/news/viewRelease.cfm?id=88. Virginia's attorney general said at the signing ceremony that the statute was enacted "as a result" of Virginians' "opposition to the new federal health care law." *Ibid.*

The same day the Affordable Care Act was signed into law, petitioner filed suit against respondent in the United States District Court for the Eastern District of Virginia, asking the district court to "declare that § 38.2-3430.1:1 is a valid exercise of state power" because Congress lacked the power to enact the minimum coverage provision. Compl. 6 (prayer for relief).

Respondent moved to dismiss the complaint for lack of standing because the minimum coverage provision applies only to individuals, not States, and a State does not have *parens patriae* standing to assert the interests of its citizens in a suit against the United States. Pet. App. 102 (citing, *inter alia*, *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923)). The district court denied the motion to dismiss. *Id*. at 133. The court acknowledged that Virginia's statute is merely "declaratory," but held that petitioner could nonetheless sue the federal govern-

ment "to defend the [Virginia statute] from the conflicting effect of an allegedly unconstitutional federal law." *Id.* at 110.

On cross-motions for summary judgment, the district court held that the minimum coverage provision is not a valid exercise of Congress's Article I powers. Pet. App. 88-90.

3. The court of appeals vacated the judgment of the district court and remanded with instructions to dismiss for lack of subject-matter jurisdiction. Pet. App. 44.[3] The court noted that the minimum coverage provision applies only to individuals and "imposes no obligations on the sole plaintiff, Virginia." *Id.* at 30. The court of appeals likewise noted that the minimum coverage provision "imposes none of the obligations on Virginia that, in other cases, have provided a state standing to challenge a federal statute." *Id.* at 33. It explained that the minimum coverage provision "does not directly burden Virginia, does not commandeer Virginia's enforcement officials, and does not threaten Virginia's sovereign territory." *Ibid.* (citing *Bowen* v. *Public Agencies*, 477 U.S. 41, 50 n.17 (1986), *New York* v. *United States*, 505 U.S. 144 (1992), and *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007)). The court noted that "Virginia makes no claim to standing on these bases." *Ibid.*

The court further observed that it was common ground that a State cannot bring a *parens patriae* suit to assert the rights of its citizens against the United States, Pet. App. 34 (citing *Mellon*, 262 U.S. at 485-486, and *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458

[3] Prior to the court of appeals' decision, this Court denied petitioner's petition for a writ of certiorari before judgment. See 131 S. Ct. 2152 (2011).

U.S. 592, 610 n.16 (1982)), and that petitioner did not seek to premise standing on this theory.

Instead, the court explained, "[w]hat Virginia maintains is that it has standing to challenge the individual mandate solely because of the asserted conflict between that federal statute" and the VHCFA. Pet. App. 33. The court noted that in some cases a federal statute may "hinder[] a state's exercise of [its] sovereign power to 'create and enforce a legal code'" in a way that "at least arguably inflicts an injury sufficient to provide a state standing to challenge the federal statute." *Id.* at 34 (citing *Wyoming* v. *United States*, 539 F.3d 1236, 1242 (10th Cir. 2008), and *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986)). The court concluded, however, that the minimum coverage provision "threatens no interest in the 'enforceability' of the VHCFA." *Id.* at 35. It explained that "the VHCFA regulates nothing and provides for the administration of no state program." *Id.* at 37. "Instead, it simply purports to immunize Virginia citizens from federal law." *Ibid.*

Moreover, the court reasoned, the minimum coverage provision "does not affect Virginia's ability to enforce the VHCFA." Pet. App. 37. "Rather, the Constitution itself withholds from Virginia the power to enforce the VHCFA against the federal government." *Ibid.* The court noted that "the VHCFA merely declares, without legal effect, that the federal government cannot apply insurance mandates to Virginia's citizens." *Ibid.* The court concluded that "[t]his non-binding declaration does not create any genuine conflict with the individual mandate, and thus creates no sovereign interest capable of producing injury-in-fact." *Ibid.* In light of its jurisdictional holding, the court did not reach the merits of petitioner's challenge to the minimum cover-

age provision. *Id.* at 31; see also *id.* at 31 n.1 (declining to reach question whether Anti-Injunction Act, 26 U.S.C. 7421(a), bars petitioner's claim).

DISCUSSION

The court of appeals correctly held that petitioner lacks standing to challenge the constitutionality of the minimum coverage provision of the Affordable Care Act, which applies to individuals, not States. The court's holding does not conflict with any decision of this Court or of any other court of appeals and does not warrant plenary review by this Court. We suggest, however, that the petition in this case be held pending the disposition of *United States Department of Health & Human Services* v. *Florida*, No. 11-398 (filed Sept. 28, 2011) (*Florida*), and related certiorari petitions, then disposed of after the Court resolves that case.

1. The court of appeals correctly held that petitioner lacks standing to challenge the minimum coverage provision. The minimum coverage provision applies only to "individual[s]," 26 U.S.C.A. 5000A(a), not to States. It thus may be challenged only by individuals who meet the usual standing requirements, such as the individual plaintiff in *Florida*.

a. As petitioner recognizes, this Court's precedents provide that a State may not sue the federal government "to protect her citizens from the operation of federal statutes." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007); see also *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (*Snapp & Son*) ("[a] State does not have standing as *parens patriae* to bring an action against the Federal Government") (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923), and *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901)).

Petitioner disavows reliance on *parens patriae* standing and argues, instead, that it seeks to vindicate a sovereign interest in having the courts opine on the constitutionality of Virginia Code Annotated § 38.2-3430.1:1 (Supp. 2011).[4] That statute declares that no Virginia resident "shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the [Virginia] Department of Social Services." *Ibid.* Petitioner contends that the minimum coverage provision frustrates the operation of the state statute, thereby giving petitioner a judicially cognizable interest in the invalidation of the federal law.

Petitioner's enactment of a "declaratory" statute (Pet. App. 110) does not transform the interest it seeks to assert from an invalid *parens patriae* interest into a valid sovereign interest. The fact remains that the minimum coverage provision regulates individuals, not States, and only those individuals may assert their interest in not being so regulated. To be sure, petitioner's statute codifies its litigation position that the federal government cannot constitutionally require Virginia citizens to maintain health insurance coverage, but it does not alter the true nature of the interests being asserted. As the court of appeals observed, a State does not "acquire some special stake in the relationship between its citizens and the federal government merely by memorializing its litigation position in a statute." *Id.* at 40.

---

[4] Before the court of appeals, petitioner disclaimed any basis for standing other than its statute. See Oral Argument Audio File 33:50, *Virginia* v. *Sebelius*, No. 11-1057 (May 10, 2011) (Argument Recording) ("I'm resting my claim on my statute."), http://www.ca4.uscourts.gov/OAarchive/OAlist.asp.

The minimum coverage provision imposes none of the burdens on petitioner that, in other cases, have provided a State standing to challenge federal action. Pet. App. 32-33. For example, in *Massachusetts*, this Court held that the State could challenge EPA's failure to regulate greenhouse gas emissions because "rising seas," caused in part by those emissions, would injure Massachusetts "in its capacity as a landowner" and "have already begun to swallow Massachusetts' coastal land." 549 U.S. at 522-523. A State also may challenge a measure that commands the State itself to take action. See, *e.g.*, *Printz* v. *United States*, 521 U.S. 898 (1997) (federal law required state and local law enforcement officers to conduct background checks on prospective handgun purchasers); *New York* v. *United States*, 505 U.S. 144 (1992) (federal law required State to take title to nuclear waste or enact federally approved regulations). And a State may challenge a federal law that prohibits specified state action. *E.g.*, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (federal law prohibited States from using literacy tests or durational residency requirements in elections); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (federal law prohibited State from enforcing certain provisions of its voting laws).

In some circumstances, a State has a sovereign interest in "the continued enforceability of its own statutes." *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986); see *Snapp & Son*, 458 U.S. at 601. This interest is not implicated here because the minimum coverage provision does not affect any cognizable enforcement interest of petitioner. "It is manifest that the enactment of [a] state law could not override the constitutional authority of the Federal Government." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 223 (1938); see *ibid.* ("The State could not add

to or detract from that authority."). Petitioner thus has no valid sovereign interest in purporting to interfere with the federal government's enforcement of federal law with respect to Virginia citizens. While petitioner claims that it "seeks to defend its sovereign power to regulate the persons and entities within its boundaries," Pet. 18, it fails to recognize that the United States is not among the "entities" that it has a valid interest in regulating. Accordingly, a conflict exists between state and federal law in this case only to the extent that petitioner seeks to "protect her citizens from the operation of" the federal statute. *Massachusetts*, 549 U.S. at 520 n.17. That, this Court has held, is exactly "what *Mellon* prohibits." *Ibid.*

As the court of appeals explained (and petitioner expressly acknowledged below), petitioner's theory of standing would permit a State to enact a statute declaring its opposition to *any* federal policy or statute and thereby create standing for itself to sue the federal government to challenge it. See Pet. App. 41 & n.3.[5] For example, a State "could enact a statute codifying its constitutional objection to the CIA's financial reporting practices and proceed to litigate the sort of 'generalized grievance[]' about federal administration that [this Court] has long held to be 'committed to the . . . politi-

[5] When counsel for petitioner was asked during the court of appeals oral argument whether it was petitioner's "view that a State could challenge any statute, any federal statute, in court as long as the state first passed a law disagreeing with that statute," he responded that "the answer is yes." Argument Recording 23:33-23:51; see also *id.* at 28:47-29:18 (counsel acknowledging that under petitioner's theory of standing, States that passed statutes disagreeing with Social Security Act and National Labor Relations Act would have standing to challenge those statutes in federal court).

cal process.'" *Id.* at 41 (quoting *United States* v. *Richardson*, 418 U.S. 166, 179-180 (1974)). Likewise, petitioner "could enact a statute declaring that 'no Virginia resident shall be required to pay Social Security taxes' and proceed to file a lawsuit challenging the Social Security Act." *Ibid.* Petitioner's standing theory would therefore open the floodgates to purely "symbolic" litigation between States and the United States, turning the federal courts into "convenient for[a] for policy debates." *Massachusetts*, 549 U.S. at 547 (Roberts, C.J., dissenting).

b. Petitioner contends that the decision below conflicts with decisions of other courts of appeals upholding "state sovereign standing." Pet. 14-15. There is no conflict, as each of the cases cited by petitioner involved a material federal impact on a State's actual regulation of individuals or (non-federal) entities. See Pet. App. 36 ("[I]n each case relied on by [petitioner], in which a state was found to possess sovereign standing, the state statute at issue regulated behavior or provided for the administration of a state program.").

In *Wyoming* v. *United States*, 539 F.3d 1236, 1239 (10th Cir. 2008), the issue was whether the State's procedure for expunging convictions of domestic-violence misdemeanors satisfied the conditions of a federal law permitting firearm possession by persons whose misdemeanor convictions had been expunged or set aside. The State's standing to sue arose from a federal agency's refusal to give the State's own expungement procedures legal effect under the federal law, 539 F.3d 1240-1241, not from the State's mere disagreement with a federal law's direct application to private individuals, as in this case. In *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 417 (5th Cir. 1999), a federal

statute established criteria for States to apply in assessing a telecommunication carrier's eligibility for a federal subsidy, and a federal agency, in a regulatory order, ruled that States could not impose additional requirements. States injured by the federal agency's order sued to obtain clarification of their authority to regulate carriers under the federal statute. Similarly, in *Ohio* v. *United States Department of Transportation*, 766 F.2d 228, 229 (6th Cir. 1985), the State challenged a federal agency's authority to promulgate "a federal regulation which by its terms" preempted a state statute requiring "prenotification of shipment into or through the State of any large quantity of special nuclear material or by-product material." Thus, unlike here, the State's own regulatory program was directly impacted.

2. Petitioner contends that the court of appeals erred in interpreting the VHCFA, "contrary to the construction placed upon it by the chief law officer of the Commonwealth of Virginia," as "merely symbolic and therefore not a real law capable of giving rise to a sovereign injury." Pet. i. That contention does not merit this Court's review.

The district court characterized the Virginia statute as merely "declaratory," Pet. App. 110, and the court of appeals observed that the VHCFA "regulates nothing and provides for the administration of no state program," instead "simply purport[ing] to immunize Virginia citizens from federal law," *id.* at 37. Petitioner objects to these characterizations, contending that the provision could be "enforceable by private suit or by the Attorney General of Virginia by way of injunction" against entities other than the United States, such as private employers that, as a result of the statute, could not "requir[e] insurance as a condition of employment."

Pet. 19. Petitioner cites no example of the statute actually being enforced in this way. In any event, this Court rarely grants review of "decisions of federal courts of appeals alleged to be in conflict with applicable state law," Eugene Gressman et al., *Supreme Court Practice* 261 (9th ed. 2007), and it typically defers to a regional court of appeals' interpretation of state law within its jurisdiction, see, *e.g.*, *Chardon* v. *Fumero Soto*, 462 U.S. 650, 654 n.5 (1983). Review of petitioner's claim regarding the meaning of Virginia law is not warranted.

Moreover, the court of appeals' analysis did not turn on the view that petitioner's statute was merely declaratory. As the court of appeals explained, the minimum coverage provision does not affect petitioner's ability to enforce the VHCFA against Virginia "private employers or localities" that, hypothetically, might run afoul of it by somehow attempting to require individuals to obtain insurance. Pet. App. 38. The minimum coverage provision in the Affordable Care Act applies only to individuals, not to private employers or localities that could be potential objects of enforcement of the VHCFA under petitioner's view. Petitioner therefore suffers no injury with respect to possible applications of the VHCFA to private employers or localities, even if petitioner is correct that such applications exist.

3. Finally, petitioner appears to ask this Court to overrule *Mellon* so that States would have unfettered authority to "challeng[e] an enactment of the United States on enumerated powers grounds." Pet. i; see Pet. 22-26. "[E]ven in constitutional cases," *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (brackets in origi-

nal) (citation omitted). No such special justification is present here. *Mellon* was favorably cited in opinions joined by all nine Justices just four years ago, see *Massachusetts*, 549 U.S. at 520 n.17; see *id.* at 539 (Roberts, C.J., dissenting), and there is no indication in the Court's recent standing jurisprudence that the Court would be inclined to overrule that case and open the federal courthouse doors to the kind of "symbolic" litigation (*id.* at 546-547 (Roberts, C.J., dissenting)) by States that would result, see pp. 11-12 & n.5, *supra*.

4. For the foregoing reasons, this case does not warrant review. The underlying question of the constitutionality of the minimum coverage provision—which the court of appeals did not reach in this case—is one of undoubted importance, and the federal government has filed a petition for a writ of certiorari in the *Florida* case asking the Court to decide it.[6] Unlike this case, *Florida* involves a plaintiff (Mary Brown) whom a court of appeals found had standing to challenge the minimum coverage provision. See *Florida* v. *United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243-1244 (11th Cir. 2011), petitions for cert. pending, Nos. 11-393 & 11-398 (filed Sept. 28, 2011), No. 11-400 (filed Sept. 27, 2011). Because of the presence of a threshold jurisdictional question here that is absent in *Florida*, the Court should grant the federal government's petition in *Florida* to address the constitutionality of the minimum coverage provision (the fourth and fifth questions presented in this petition, see Pet. i-ii). Moreover, there is

---

[6] Petitioner's contentions that Congress lacked the power under Article I of the Constitution to enact the minimum coverage provision, see Pet. 29-34, are incorrect for the reasons stated in the government's certiorari petition in *Florida*. See Pet. at 14-29, *Florida*, *supra*. We will not repeat those arguments here.

no basis for granting the petition in this case to address severability questions (Pet. ii) because the federal government has agreed that the Court should grant the petitions filed by the state and private parties in *Florida* to consider those issues as well. See Fed. Gov't Resp. Br. at 26-33, *National Fed'n of Indep. Bus.* v. *Sebelius*, Nos. 11-393 & 11-400 (Oct. 17, 2011).

Because all parties to *Florida* agree that at least one of the individual plaintiffs in that case (Mary Brown) has standing to challenge the minimum coverage provision, the Court should be able to address the provision's constitutionality without determining whether the state parties in that case have standing to challenge that provision. That was the approach of the Eleventh Circuit in *Florida*; it declined to resolve the question of state standing to challenge the minimum coverage provision because it found that individual plaintiff Brown had standing. See 648 F.3d at 1243-1244.

It is possible that the question of state standing to challenge the minimum coverage provision could arise in *Florida*, depending on whether and how the Court addresses the question of the applicability of the Anti-Injunction Act, 26 U.S.C. 7421(a), to the pre-enforcement challenges in that case. But that standing question, should it arise, would be best addressed in *Florida*.

In a decision issued the same day as the one petitioner challenges here, the Fourth Circuit held that pre-enforcement challenges to the minimum coverage provision asserted by private plaintiffs are barred by the Anti-Injunction Act. See *Liberty University, Inc.* v. *Geithner*, No. 10-2347, 2011 WL 3962915, *4-*16 (Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct.

7, 2011).[7] The federal government disagrees with the Fourth Circuit's conclusion that the Anti-Injunction Act precludes pre-enforcement challenges to the minimum coverage provision. See Gov't Resp. Br. at 16-21, *Liberty University*, *supra* (Oct. 18, 2011). Nonetheless, the federal government has suggested that the Court address the applicability of the Anti-Injunction Act in the context of the *Florida* case. See *id.* at 15-16; Pet. at 32-34, *Florida*, *supra*.

The States in *Florida* contend that the Anti-Injunction Act "does not apply to States in the same manner as it applies to individual taxpayers," and that "[e]ven assuming the [Anti-Injunction Act] might bar some challenges to the [minimum coverage provision] (and the States maintain it does not), it would not bar the States' challenge." State Resp. Br. at 14, *Florida*, *supra* (Oct. 17, 2011). The federal government disagrees with the States' argument that there is any legally relevant distinction between them and private plaintiffs for purposes of the Anti-Injunction Act's applicability to pre-enforcement challenges to the minimum coverage provision. See Fed. Gov't Reply Br. at 7-9, *Florida*, *supra* (Oct. 26, 2011).

If the Court in *Florida* were to conclude that the Anti-Injunction Act bars the pre-enforcement challenge to the minimum coverage provision asserted by individual plaintiff Mary Brown, it might then address the state parties' state-specific arguments regarding the Anti-Injunction Act, the state parties' standing to challenge the minimum coverage provision, or both. The

---

[7] But see *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 539-540 (6th Cir. 2011) (holding the Anti-Injunction Act does not bar a challenge to minimum coverage provision), petition for cert. pending, No. 11-117 (filed July 26, 2011).

federal government does not believe that the States in *Florida* have standing to challenge the minimum coverage provision. If the Court were to find it necessary to address state standing to challenge the minimum coverage provision, however, it may do so in *Florida*. There is accordingly no reason to grant review of that question here. Instead, this petition should be held for the Court's disposition of the *Florida* case.

CONCLUSION

The Court should hold the petition in this case pending the disposition of the government's petition for a writ of certiorari in *Department of Health & Human Services* v. *Florida*, No. 11-398 (filed Sept. 28, 2011), and then dispose of this petition as appropriate in light of the Court's decision in that case.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ANISHA S. DASGUPTA
Attorneys

NOVEMBER 2011