

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 11-11021-HH

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants/Appellants/Cross-Appellees,

v.

STATE OF FLORIDA, by and through
Attorney General Pam Bondi, et al.,
Plaintiffs/Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Florida

Plaintiffs/Appellees' Petition for Hearing En Banc

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
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Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the State Plaintiffs/Appellees provide the following certificate of interested persons:

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State of Colorado, by and through, John W. Suthers, Attorney General
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March 10, 2011

ATTORNEY STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether Congress exceeded its constitutional authority in enacting the Patient Protection and Affordable Care Act (the “Act”), which includes an “individual mandate” provision requiring all Americans (with limited exceptions) to obtain federally-approved health insurance or pay a monetary penalty?

2. Whether the grounds upon which the district court determined that the individual mandate was non-severable, which included the federal government’s view that the individual mandate is absolutely necessary for the Act’s insurance market reforms to work and Congress’s express decision to remove a severability clause from the Act’s final version, supports invalidation of the entire Act.

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONSi

ATTORNEY STATEMENT xii

TABLE OF CONTENTS..... xiii

TABLE OF CITATIONSxiv

STATEMENT OF THE ISSUES.....xvi

STATEMENT OF THE COURSE OF PROCEEDINGS, DISPOSITION,
AND FACTS 1

ARGUMENT6

 I. The constitutionality of the individual mandate and its severability
 present issues of exceptional importance warranting en banc review7

CONCLUSION 11

CERTIFICATE OF SERVICE16

TABLE OF CITATIONS

CASES

<u>Cone Corp. v. Hillsborough Cnty.</u> , 995 F.2d 185 (11th Cir. 1993)	8, 9
<u>Garcia v. San Antonio Metro. Auth.</u> , 469 U.S. 528 (1985)	4
<u>Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.</u> , 2011 WL 223010 (M.D. Pa. Jan. 24, 2011)	3, 8
<u>Liberty Univ., Inc. v. Geithner</u> , __ F. Supp. 2d __, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010)	4
<u>Maryland v. Wirtz</u> , 392 U.S. 183 (1968)	4
<u>Mead v. Holder</u> , No. 11-5047 (D.C. Cir.)	8, 10
<u>Thomas More Law Ctr. v. Obama</u> , 720 F. Supp. 2d 882 (E.D. Mich. 2010)	3, 7, 8
<u>U.S. Citizens Assoc. v. Sebelius</u> , __ F. Supp. 2d __, 2010 WL 4947043 (N.D. Ohio Nov. 22, 2010)	3
<u>U.S. v. American-Foreign S. S. Corp.</u> , 363 U.S. 685 (1960)	9
<u>Virginia v. Sebelius</u> , 728 F. Supp. 2d 768 (E.D. Va. 2010)	3, 8

FEDERAL CONSTITUTIONAL PROVISIONS & STATUTES

U.S. Const. art I, § 8.....4
U.S. Const. art. I, §§ 2 and 9.....2
28 U.S.C. § 46(b)9
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat.
119 (2010), amended by Health Care and Education Reconciliation Act of
2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the “Act”)*passim*

OTHER AUTHORITIES

Fed. R. App. P. 26.1 iii
Fed. R. App. P. 357
Fed. R. Civ. P. 12(b)2
11th Cir. R. 35-37

STATEMENT OF THE ISSUES

1. Whether Congress exceeded its constitutional authority in enacting the Patient Protection and Affordable Care Act (the “Act”), which includes an “individual mandate” provision requiring all Americans (with limited exceptions) to obtain federally-approved health insurance or pay a monetary penalty?
2. Whether the grounds upon which the district court determined that the individual mandate was non-severable, which included the federal government’s view that the individual mandate is absolutely necessary for the Act’s insurance market reforms to work and Congress’s express decision to remove a severability clause from the Act’s final version, supports invalidation of the entire Act?

**STATEMENT OF THE COURSE OF PROCEEDINGS,
DISPOSITION, AND FACTS**

This appeal is unprecedented in its scope, scale, and importance. It involves a constitutional challenge by over half the States of this Nation against a massive piece of legislation that affects virtually everyone and every business; it also imposes immense and unparalleled fiscal obligations on the States. The federal act is extraordinary in terms of its effect on the future of federal-state relations.

It arises out of expedited litigation brought by twenty-six states (the “Plaintiff States” or “State Appellees”), the National Federation of Independent Business (“NFIB”), and two private citizens (“Individual Plaintiffs”) (collectively the “Plaintiffs”) challenging the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the “ACA” or “Act”). Named as defendants are the United States Department of Health and Human Services, the Department of Treasury, the Department of Labor, and their respective secretaries (collectively the “Defendants”).

The Plaintiffs’ Amended Complaint contained six counts asserting the Act was unconstitutional because:

- (1) the requirement in section 1501 of the Act that all citizens (with limited exceptions), beginning in 2014 must obtain federally-approved health insurance or pay a monetary penalty (the

- “individual mandate”) exceeds Congress’s authority under the Commerce Clause, violates the Constitution’s federalism and dual-sovereignty principles and the Ninth and Tenth Amendments (Count I);
- (2) the individual mandate and penalty violate the Fifth Amendment right of individuals to make healthcare decisions for themselves (Count II);
 - (3) alternatively, if the penalty imposed for failing to comply with the individual mandate is found to be a tax, it is an unconstitutional unapportioned capitation or direct tax in violation of U.S. Const. art. I, §§ 2 and 9, and the Ninth and Tenth Amendments (Count III);
 - (4) it unlawfully coerces and commandeers the States by forcing them to alter, expand, and assume additional liability and expense of the Medicaid program in violation of core federalism and dual-sovereignty principles in the Constitution, article IV, section 4, and the Ninth and Tenth Amendments (Count IV);
 - (5) it commandeers the States to administer and support elements of the ACA’s provision for state-specific insurance exchanges in violation of federalism and dual-sovereignty principles, Article I, and the Ninth and Tenth Amendments (Count V); and
 - (6) it requires states to provide health insurance to all state workers who work more than 30 hours/week (the “employer mandate”) and penalizes or taxes States based upon plan attributes and coverage decisions made by their employees, in violation of federalism and dual-sovereignty principles, Article I, and the Ninth and Tenth Amendments (Count VI).

See generally Am. Compl. (Doc. 42). Defendants moved to dismiss four of the counts for lack of jurisdiction (under Rule 12(b)(1)), and all six for failure to state a claim upon which relief can be granted (Rule 12(b)(6)). (Doc. 55)

The district court partially granted the motion on Rule 12(b)(6) grounds as to Counts II, III, V, and VI. (Doc. 79 at 65) Count II was dismissed because the district court concluded that individuals possess no fundamental right that would render the individual mandate unconstitutional. (Doc. 79 at 60) As to Count III, the court rejected Defendants' argument that the individual mandate penalty was "a tax" that could not be challenged via the Anti-Injunction Act. (Doc. 79 at 24-26, 57-58) This conclusion mooted Plaintiffs' claim that if it were a tax, it would be an unconstitutional tax. *Id.*¹ On Count V, the Court's order accepted Defendants' reading of the ACA that States may choose voluntarily whether to support and administer various facets of the ACA's insurance exchange regime; under this construction the Act escaped commandeering problems. (Doc. 79 at 50) As to Count VI, the court concluded that the federal government could require States to offer health insurance benefits to state officers and workers and could directly tax or penalize States under the ACA's employment regime under established

¹ The district court subsequently noted that every court to consider the Taxing Clause justification for the individual mandate (even those ruling for the government) had rejected it, including Anti-Injunction Act arguments. (Doc. 150 at 4 n.4 (citing *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 2011 WL 223010, at *9-*12 (M.D. Pa. Jan. 24, 2011); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 786-88 (E.D. Va. 2010); *Liberty Univ., Inc. v. Geithner*, ___ F. Supp. 2d ___, 2010 WL 4860299, at *9-*11 (W.D. Va. Nov. 30, 2010); *U.S. Citizens Assoc. v. Sebelius*, ___F. Supp. 2d ___, 2010 WL 4947043, at *5 (N.D. Ohio Nov. 22, 2010); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 890-91 (E.D. Mich. 2010)).

Supreme Court precedent. (Doc. 79 at 46 (citing *Garcia v. San Antonio Metro. Auth.*, 469 U.S. 528 (1985) and *Maryland v. Wirtz*, 392 U.S. 183 (1968))

On January 31, 2011, the district court granted summary judgment for the Plaintiffs on Count I,² holding the individual mandate provision of the Act unconstitutional; it declared the remainder of the Act void because the individual mandate was not severable. (Doc. 150) It also issued a final judgment. (Doc. 151)

The district court’s analysis concluded that the individual mandate went beyond Congress’s authority under the Commerce Clause and the Necessary and Proper Clause (U.S. Const. art I, § 8) by attempting to regulate “inactivity” as commerce. (Doc. 150 at 56, 63) The court further concluded that the individual mandate could not be severed from the rest of the Act because of its complex and intertwined provisions and its threshold importance to the entire Act, as conceded by the federal government:

the defendants have acknowledged that the individual mandate and the Act’s health insurance reforms, including the guaranteed issue and community rating, rise or fall together as these reforms “cannot be severed from the [individual mandate].” See, e.g., Def. Opp. at 40. As explained in my order on the motion to dismiss: “the defendants concede that [the individual mandate] is absolutely necessary for the

² The district court sided with the federal government on Count IV because “existing caselaw is inadequate to support” a Spending Clause coercion claim. (Doc. 150 at 10) The court took note of the federal government’s tremendous exertion of “power over the states” due to its spending might, but concluded that “states have little recourse to remaining the very junior partner in this [Medicaid] partnership.” (*Id.* at 12)

Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss.”

(*Id.* at 63-64; 71) Moreover, the district court noted that Congress specifically, and presumably intentionally, decided to delete the “severability clause” that had been included in an earlier House-passed version of the Act. (*Id.* at 67-68)

Finally, the district court entered a declaratory judgment in Plaintiffs' favor (Doc. 151), which the court deemed to be the functional equivalent of an injunction against further implementation of the Act. (Doc. 150 at 69) When Defendants sought clarification of the district court's order, which the court deemed the equivalent of a stay request; the court ultimately stayed its order contingent upon the federal government's filing of its notice of appeal within seven days and seeking expedited review by this Court. (Doc. 167, 169) The Plaintiffs have filed concurrently with this Petition a response to the Defendants' motion for expedition, which proposes the same expedited briefing set forth here in this Petition; the State Plaintiffs have filed a protective notice of cross-appeal to ensure the preservation of issues decided adversely to them below.

ARGUMENT

Hearing en banc is warranted in this exceptional and time sensitive³ case involving constitutional issues of first impression that have national importance and urgency. A common thread in all pending appeals involving the constitutionality of the Patient Protection and Affordable Care Act is the need for expedited, but thorough, review of the issues presented. These dual goals can be met in this case due to the fortuity that the Court's next scheduled en banc sitting is the week of June 6, 2011,⁴ which dovetails with the expedited briefing schedule proposed by Plaintiffs.⁵

³ Plaintiffs note that their request is time sensitive (*see* 11th Cir. R. 27-1(b)(1)) because a slightly expedited briefing schedule is necessary for this Court to hear this matter en banc at its sitting the week of June 6, 2011.

⁴ En banc review is requested only for the week of June 6, 2011. If en banc review is available only at a later date, such as the en banc sitting scheduled in the Fall of 2011, it is not requested because the goal of expedited review would not be met. Instead, panel review and resolution at the earliest practicable date is requested.

⁵ The Plaintiffs have contemporaneously filed their response to the Defendants' request for expedition, setting forth the following proposed briefing schedule that would enable en banc hearing during the week of June 6, 2011:

Defendants' Initial Brief	April 18 th
Plaintiffs' Answer/Initial Brief on Cross-Appeal	May 9 th
Defendants' Reply/Answer Brief on Cross-Appeal	May 23 rd

This expedited three-brief schedule is premised on convenience to the Court and Plaintiffs fully addressing cross-appeal matters in their May 11th brief. If the Court allows, and time permits, it is suggested that the State Plaintiffs be afforded a reply (Continued...)

I. The constitutionality of the individual mandate and its severability present issues of exceptional importance warranting en banc review.

Hearing en banc is warranted in this case because the challenge to the constitutionality of the Act is an issue of exceptional importance. *See* Fed. R. App. P. 35; 11th Cir. R. 35-3. Indeed, this case is the first that was filed to challenge the constitutionality of the individual mandate of the Act, which will require that everyone (with limited exceptions) must purchase federally-approved health insurance or be subject to a monetary penalty. Challenges to the Act have been brought throughout the country, resulting in district courts rendering differing rulings; some strike down the mandate as unconstitutional, while others uphold it. The net result is substantial uncertainty and the urgent need for judicial resolution and clarity for the benefit of the people and businesses subject to the Act's provisions. Given the significant expenditures being incurred by the federal government, States, businesses, and individuals across the nation, in an effort to comply with the provisions in the Act, the need to resolve this matter in an expeditious manner is imperative.

In addition, as Appellants' motion to expedite described, in each of the cases where an appeal has been lodged involving the constitutionality of the ACA and its

brief on cross-their appeal on May 30th, which would be one week prior to the June 6th en banc sitting.

individual mandate,⁶ the parties and appellate courts have deemed the important issues to warrant expedited review. As the district court noted at the outset of this litigation, the “citizens of this country have an interest in having this case resolved as soon as practically possible.” (Doc. 18 at 4) He reemphasized this point in his clarification order, noting it “is very important to everyone in this country that this case move forward as soon as practically possible.” (Doc. 167 at 19-20)

While time is of the essence, so too is ensuring appellate review by all members of this Court. If the United States Supreme Court decides to grant certiorari, it will no doubt benefit institutionally from thorough appellate review on the matter. Where an appeal is expedited for resolution – and time is available for en banc hearing, as it appears fortuitously to be in this case – the Supreme Court would benefit from the full court’s views.

In this regard, this Court has noted the “special importance of cases decided by the en banc court to establishing law of the circuit” where exceptionally important issues are at stake. *Cone Corp. v. Hillsborough Cnty.*, 995 F.2d 185, 186 (11th Cir. 1993). Initial review by a panel might, under ordinary circumstances where timing is not so critical and the issues less compelling, suffice to move a

⁶ See Appellants’ Motion for Expedition at 5 (discussing *Commonwealth of Va. v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir.); *Liberty Univ., Inc. v. Geithner*, No. 10-2347 (4th Cir.); *Thomas More Law Ctr. v. Obama*, No. 10-2388 (6th Cir.); *Mead v. Holder*, No. 11-5047 (D.C. Cir.)).

case progressively closer to Supreme Court review, by allowing time for the panel to decide the case and then for either party to seek en banc rehearing of the panel's decision. Here, however, this ordinary process is likely to prove unworkable or unpredictable given the urgency and importance of resolving the issues presented.

Further, this Court's en banc sitting already scheduled for early June provides the Court with the opportunity to both (a) expedite the matter, as all parties now say is warranted; and (b) allow each active member of the Court to participate fully in the adjudication of issues of exceptional importance from the outset of the appeal. En banc review eliminates the possibility of delay arising from a later request for en banc rehearing of a panel opinion.

As the Supreme Court noted fifty-one years ago, en banc courts "are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 689 (1960).⁷ It is respectfully urged that this case is one for which an en banc hearing is warranted, enabling each member of the Court to participate fully on the exceptional issues presented. In short, the confluence of the Court's en banc sitting in June and the exceptionally important issues presented are

⁷ The Court applied the prior version of § 46(b) that limited en banc review to active judges.

compelling grounds for en banc hearing under the extraordinary circumstances this case presents.

Resolution of this case is of national significance as it puts at issue both the constitutionality of the mandate and its severability (by which the district court invalidated the entire Act). This weighs in favor of en banc review, which would allow the Court's ten active judges to weigh in on both aspects of the district court's ruling. Specifically, the district court narrowed its ruling to the question of whether Congress has the constitutional power to regulate "inactivity," here the failure of some Americans to have health care insurance. The district court held it

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

(Doc. 150 at 42 (emphasis in original)).

The district court noted in his clarification order that "[e]ven the district courts that have upheld the individual mandate seem to agree that 'activity' is indeed required before Congress can exercise its authority under the Commerce Clause. They have simply determined that an individual's decision not to buy health insurance qualifies as activity." (Doc. 167 at 3 n.1 (noting that the district court in *Mead v. Holder, supra*, "concluded that '[m]aking a choice is an

affirmative action, whether one decides to do something or not do something,’ and, therefore, Congress can regulate ‘mental activity’ under the commerce power.”) (citation omitted))

In conclusion, acknowledging that an en banc hearing is warranted in only the most compelling of cases, Plaintiffs submit this case is the exception, not the rule. The typical process, by which a panel renders a decision followed by en banc rehearing, would not meet the dual goals of expeditious and thorough appellate review under the urgent circumstances presented. Plaintiffs recognize the decision to grant en banc hearing is an entirely discretionary one, but urge that this case presents the proper circumstances for the exercise of this degree of review.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant this motion, establish an expedited briefing schedule, and set this case for oral argument during the Court’s en banc sitting the week of June 6, 2011. If en banc review is available only at a later date, it is not requested; instead, panel review and resolution at the earliest practicable date is requested.

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I hereby certify that on this 10th day of March, 2011, I filed the foregoing Response with the Court by federal express, overnight delivery and served copies on the following counsel by first class regular mail and email at the addresses provided below:

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