Nos. 11-1057 and 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,

v.

RAY ELBERT PARKER, et al.,
Movants.

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

BRIEF AMICUS CURIAE OF MATTHEW SISSEL, PACIFIC LEGAL FOUNDATION, AND AMERICANS FOR FREE CHOICE IN MEDICINE IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT AND IN SUPPORT OF AFFIRMANCE

ROBERT LUTHER III
Knicely & Associates, P.C.
487 McLaws Circle, Suite 2
Williamsburg, Virginia 23185
Telephone: (757) 253-0026
Facsimile: (757) 253-5825

TIMOTHY SANDEFUR
Counsel of Record
LUKE WAKE
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae Matthew Sissel,
Pacific Legal Foundation, and Americans for Free Choice in Medicine

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Matthew Sissel, Pacific Legal Foundation (a nonprofit corporation organized under the laws of California), and Americans for Free Choice in Medicine, hereby state that they have no parent companies, trusts, subsidiaries, and/or affiliates that have issued shares or debt securities to the public.

Pursuant to Fourth Circuit Local Rule 26.1, Amici Curiae Matthew Sissel, Pacific Legal Foundation (a nonprofit corporation organized under the laws of California), and Americans for Free Choice in Medicine, hereby state that they have no parent companies and issue no stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to amici participation.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. STATES HAVE A CONSTITUTIONALLY RECOGNIZED SOVEREIGN INTEREST IN ARTICULATING AND DEFENDING THE RIGHTS OF THEIR CITIZENS 4

A. Federalism Exists to Protect the Rights of Citizens and the Tenth Amendment Implicitly Incorporates States' Sovereign Interest in Defending Citizens' Rights 6

B. A State's Sovereign Interest in Protecting Individual Rights Is Distinct From the Individual's Interest in Those Rights and Is Not a Political Question 16

C. States Are Uniquely Positioned to Litigate Tenth Amendment Violations, and Courts Should Interpret Standing Flexibly to Allow Them to Do So 20

D. Allowing States to Sue on These Grounds Is a Viable Alternative to "Nullification" 23

II. *FRANCHISE TAX BD.* DOES NOT BAR THIS CASE 26

CONCLUSION 30

Page

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a) 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 527 U.S. 706 (1999) 4, 7

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982) 5, 9

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 6

Baker v. Carr, 369 U.S. 186 (1962) 18-19, 21

Bush v. Orleans Parish Sch. Bd.,
188 F. Supp. 916 (E.D. La. 1960),
aff'd 365 U.S. 569 (1961) 23

*Franchise Tax Bd. of Cal. v. Constr. Laborers
Vacation Trust for S. Cal.*, 463 U.S. 1 (1983) 3, 26-29

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 7

Gordon v. United States, 117 U.S. (2 Wall.) 697 (1865) 26

Gregory v. Ashcroft, 501 U.S. 452 (1991) 6, 22

Gully v. First Nat'l Bank in Meridian,
299 U.S. 109 (1936) 28

Hans v. Louisiana, 134 U.S. 1 (1890) 7

*Maryland People's Counsel v. Fed. Energy Regulatory
Comm'n*, 760 F.2d 318 (D.C. Cir. 1985) 13

Massachusetts v. EPA, 549 U.S. 497 (2007) 15

Page

Massachusetts v. Mellon, 262 U.S. 447 (1923) 3, 12-20

Missouri v. Holland, 252 U.S. 416 (1920) 2, 8-9, 17

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) . . . . passim

New Jersey v. Sargent, 269 U.S. 328 (1926) 17-18, 20

New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) 8

New York v. United States of America,
942 F.2d 114 (2d Cir. 1991) 29

New York v. United States, 505 U.S. 144 (1992) 6, 8-9, 11, 15

Oregon v. Legal Servs. Corp.,
552 F.3d 965 (9th Cir. 2009) 16, 20-21

Oregon v. Mitchell, 400 U.S. 112 (1970) 8-9, 11-12, 15

Phillips v. Wash. Legal Found., 524 U.S. 156 (1998) 16

S. Blasting Servs., Inc. v. Wilkes Co., 288 F.3d 584 (4th Cir. 2002) 3

Saenz v. Roe, 526 U.S. 489 (1999) 16

Sissel v. U.S. Dep't of Health & Human Servs.,
No. 1:10-cv-01263-RJL (D.D.C. filed July 26, 2010) 1

Skelly Oil Co. v. Phillips Petroleum Co.,
339 U.S. 667 (1950) 20, 27-28

The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) 5

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 11-12, 23

South Dakota v. Dole, 483 U.S. 203 (1987) . . . . passim

Page

Taylor v. Anderson, 234 U.S. 74 (1914) 27

Tenn. Elec. Power Co. v. TVA, 306 U.S. 118 (1939) 20

Tennessee v. Union & Planters' Bank,
152 U.S. 454 (1894) 27

Texas v. Interstate Commerce Comm'n,
258 U.S. 158 (1922) 12, 14, 20

United States of America v. Bond,
581 F.3d 128 (3d Cir. 2009),
cert. granted, 131 S. Ct. 455 (2010) 3, 20, 29

United States v. Lopez, 514 U.S. 549 (1995) 7

United States v. Peters, 9 U.S. (5 Cranch.) 115 (1809) 23

Wyoming ex rel. Crank v. United States,
539 F.3d 1236 (10th Cir. 2008) 5, 9

United States Constitution

U.S. Const. amend. X . . . . passim

U.S. Const. amend. XI 7

U.S. Const. amend. XXI 12, 21

Virginia Constitution

Va. Const. art. I, §§ 2-3 8

Miscellaneous

Amar, Akhil Reed, *Of Sovereignty and Federalism*,
96 Yale L.J. 1425 (1987) 22, 24

Page

Amar, Akhil Reed, *The Bill of Rights* (1998) 22

American Legislative Exchange Council,
Freedom of Choice in Health Care Act, *available at*
http://www.alec.org/AM/Template.cfm?Section=
FOCA&Template=/CM/HTMLDisplay.cfm&
ContentID=15323 (last visited Mar. 29, 2011) 10

Blackstone, William, 1 *Commentaries* 8

Brutus VI, *The Dangers of Unlimited Taxation:*
"GIVE! GIVE!", N.Y. J., Dec. 27, 1787, *in*
1 *The Debate on the Constitution*
(Bernard Bailyn ed., 1993) 6

Currie, David P., *The Constitution in the Supreme*
Court: The First Hundred Years 1789-1888 (1985) 13

Currie, David P., *The Constitution in the Supreme Court:*
The Second Century 1888-1986 (1990) 14, 20

The Federalist (Jacob E. Cooke ed., 1961) 4-7, 25

Locke, John, *Second Treatise of Civil Government*,
in John Locke, *Two Treatises of Government*
(Peter Laslett ed., rev. ed. 1963) (1690) 12

Madison, James, *Letter to Edward Everett* (Aug. 28, 1830),
in 9 *The Writings of James Madison: 1819-1836*
(Gaillard Hunt ed., 1910) 24

Madison, James, *Letter to Joseph C. Cabell* (Sept. 7, 1829),
in 9 *The Writings of James Madison: 1819-1836*
(Gaillard Hunt ed., 1910) 24

Page

Madison, James, *Notes on Nullification*, *in 9 The Writings of James Madison: 1819-1836* (Gaillard Hunt ed., 1910) 24

McCoy, Drew R., *The Last of the Fathers: James Madison and the Republican Legacy* (1989) 24

1 Warren, Charles, *The Supreme Court in United States History* (1922) 10

Woods, Thomas E., Jr., *Nullification: How to Resist Federal Tyranny in the 21st Century* (2010) 25

Woolhandler, Ann & Collins, Michael G., *State Standing*, 81 Va. L. Rev. 387 (1995) 21

IDENTITY AND INTEREST OF AMICI CURIAE

This brief is filed with the consent of both parties. Matthew Sissel is a citizen of Iowa who is the plaintiff in *Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10-cv-01263-RJL (D.D.C. filed July 26, 2010), a lawsuit pending in the United States District Court for the District of Columbia, which challenges the constitutionality of the Patient Protection and Affordable Care Act (PPACA). Mr. Sissel's home state is one of several currently considering a Health Care Freedom Act similar to the Virginia Health Care Freedom Act at issue in this case.[1] Pacific Legal Foundation (PLF) was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation defending private property rights, economic liberty, and limited government. PLF attorneys represent Matthew Sissel in his challenge to the PPACA. Americans for Free Choice in Medicine (AFCM) is a national nonprofit, nonpartisan, educational organization based in Newport Beach, California, which was founded in 1993 to promote the philosophy of individual rights, personal responsibility, and free-market economics in the health care industry. AFCM members include patients, Medicare recipients, physicians, nurses, health care professionals, insurance industry professionals,

---

[1] That bill, HF 111 (formerly HF 2), passed the state's House of Representatives on February 2, and is currently pending before a State Senate committee. *See* http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=hf&key=0130C&GA=84 (last visited Mar. 25, 2011).

pharmacists, and others. PLF and AFCM appeared as amici curiae in the district court in this case, and believe their legal and public policy expertise will assist this Court in its consideration of this case.

SUMMARY OF ARGUMENT

Amici file this brief to respond specifically to the arguments regarding standing advanced in the briefs of Amici Federal Jurisdiction Professors (Professors) and Professor Kevin C. Walsh. The Article III and statutory standing arguments presented in these briefs are erroneous and the Court should reject them.

The Constitution reserves to the states a broad and indefinite residual sovereignty, which includes such powers as taxation, regulation of hunting or of alcohol consumption, and the power to run their own elections. It also reserves to states the power to articulate and defend rights that the Constitution does not specifically delegate to federal protection. U.S. Const. amend. X. Just Maryland had standing to challenge an allegedly *ultra vires* federal action that conflicted with the state's reserved power of taxation in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and Missouri could challenge a federal act that intruded on its retained authority to regulate hunting in *Missouri v. Holland*, 252 U.S. 416 (1920), and South Dakota could challenge federal actions that intruded on its constitutionally reserved power to regulate alcohol consumption in *South Dakota v. Dole*, 483 U.S. 203 (1987),

so Virginia has standing to challenge the federal government's interference with its sovereign power to articulate and defend individual rights.

Although *Massachusetts v. Mellon*, 262 U.S. 447 (1923), barred states from vindicating non-specific grievances against the federal government, the Court refused to adopt a blanket prohibition on state lawsuits challenging federal overreaching. *Mellon*'s declaration that the federal government is *parens patriae* with regard to American citizens, *id.* at 486, is only true when the federal government is acting within its enumerated powers; outside those boundaries, the federal government has no authority, and it is states, not the federal government, that have primary responsibility for protecting individual rights. *S. Blasting Servs., Inc. v. Wilkes Co.*, 288 F.3d 584, 590 (4th Cir. 2002). To hold otherwise would damage the constitutional structure, and deprive states—which are well suited for the task—of the opportunity to defend vital Tenth Amendment interests—interests which individuals may lack standing to press. *See United States v. Bond*, 581 F.3d 128, 136-38 (3d Cir. 2009), *cert. granted*, 131 S. Ct. 455 (2010). Neither *Mellon* nor any other case supports the proposition that states have no sovereign interest "in protecting [their] citizens from allegedly invalid federal laws." Professors Br. at 21. Adopting such a rule would be unwarranted and would encourage unconstitutional state resistance.

Finally, *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983), does not bar statutory jurisdiction where, as here, the

resolution of a federal question is clearly at the heart of the case and plainly appears on the face of the complaint.

ARGUMENT

I

STATES HAVE A CONSTITUTIONALLY RECOGNIZED SOVEREIGN INTEREST IN ARTICULATING AND DEFENDING THE RIGHTS OF THEIR CITIZENS

The constitutional system of divided sovereignty makes the federal government the supreme representative of the American people with regard to those specific subjects delegated to the federal government. The state governments exercise a similar sovereignty over all matters not delegated to the federal government by the Constitution. *Alden v. Maine*, 527 U.S. 706, 714 (1999) (states "'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" (quoting *The Federalist* No. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961))); *see also The Federalist* No. 32, at 200 (Alexander Hamilton) ("State Governments . . . clearly retain all the rights of sovereignty which they before had and which were not by [the Constitution] *exclusively* delegated to the United States.").

Among a sovereign's primary powers are the articulation and protection of citizens' rights through the enactment and enforcement of legislation. The Constitution leaves that responsibility to states, except in those specified instances where such rights are given exclusive protection. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 77 (1873) ("[B]eyond the very few express limitations which the Federal Constitution imposed upon the States . . . the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government."). Thus while states lack power to act in a *parens patriae* capacity against the federal government *when the federal government is exercising an enumerated power*, states do have a distinct sovereign interest in protecting "residuary and inviolable sovereignty." *The Federalist* No. 39, at 256 (James Madison). That interest is judicially cognizable. *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) ("States have a legally protected sovereign interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction. . . . Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong." (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982))).

A. Federalism Exists to Protect the Rights of Citizens and the Tenth Amendment Implicitly Incorporates States' Sovereign Interest in Defending Citizens' Rights

The federalist system, as the Supreme Court has often reiterated, does not protect state autonomy just for its own sake, but to ensure greater protection for individual freedom. *New York v. United States*, 505 U.S. 144, 181-82 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The "power surrendered by the people" is divided "between two distinct governments," federal and state, so that "[t]he different governments will control each other." *The Federalist* No. 51, at 351 (James Madison).

The authors of *The Federalist* repeatedly explained that state governments would serve as a barrier against overreaching federal authority. Seeking to allay Anti-federalist fears that federal power would "introduce itself into every corner of the city, and country . . . light upon the head of every person in the United States . . . [and say to them] GIVE! GIVE!" Brutus VI (1787), *in* 1 *The Debate on the Constitution* 617 (Bernard Bailyn ed., 1993), Madison and his colleagues argued that most power would be left at the state level, and that states would counteract any tendency to aggrandize power in the distant federal government. *See*, *e.g.*, *The Federalist* No. 17, at 107-08 (Alexander Hamilton), No. 32, at 200 (Alexander Hamilton), No. 45, at 311-13 (James Madison). Indeed, if the federal government

were to "extend its power beyond the due limits," states would have plentiful "means of opposition," including the people's "refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; [and] *the embarrassments created by legislative devices*." *The Federalist* No. 46, at 319 (James Madison) (emphasis added). These legislative devices, would enable the "State Governments" to "easily defeat[]" any "schemes of usurpation" that federal authorities might undertake. *Id.* at 322.

The Constitution limits federal authority *primarily* through the enumeration of powers. *United States v. Lopez*, 514 U.S. 549, 552 (1995). The Tenth Amendment reiterates the device of enumerated powers by emphasizing that if a power is not conferred to the federal government by the Constitution's text, that power remains with the states. Just as the Eleventh Amendment has been interpreted as implicitly incorporating into the Constitution the states' preexisting sovereign immunity, *Hans v. Louisiana*, 134 U.S. 1 (1890), so the Tenth Amendment recognizes and incorporates into the Constitution the states' preexisting sovereign powers. *Alden*, 527 U.S. at 715 ("[States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."). Although this sovereignty is generally protected by the political process, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985), courts since at least

McCulloch have also allowed states to defend their constitutionally recognized sovereign authority by filing lawsuits challenging federal legislation.

The states' residual sovereign authority includes the power to regulate for the protection of public health, safety, and welfare. Each state enjoys in this regard "the same undeniable and unlimited jurisdiction . . . as any foreign nation." *New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837). That jurisdiction includes "not only the right, but the bounden and solemn duty . . . to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive" to those ends, within constitutional boundaries. *Id.* Thus each state has the residual sovereign authority to, among other things, lay and collect taxes, *McCulloch*, 17 U.S. (4 Wheat.) at 435, regulate alcohol consumption, *Dole*, 483 U.S. at 205, regulate hunting within its borders, *Holland*, 252 U.S. at 431, regulate the disposal of toxic waste, *New York*, 505 U.S. at 157, operate its elections, *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (opn. of Black, J.), and, as in this case, to "guard the rights of each individual citizen," 1 William Blackstone, *Commentaries* *48, by articulating, protecting, and giving legal force to those rights.[2]

---

[2] The Virginia Constitution mandates that the state act, within its Tenth Amendment power, to protect individual rights. *See* Va. Const. art. I, §§ 2-3 ("[M]agistrates are (continued...)

Where states enjoy a constitutionally recognized sovereign authority—whether it be taxation, the regulation of alcohol consumption, or the articulation and enforcement of individual rights—they have a concrete sovereign interest with which the federal government may not interfere except pursuant to an enumerated power. Unconstitutional restrictions on this sovereignty are concrete and particularized injuries to the states, which is all that Article III demands. *Wyoming*, 539 F.3d at 1242. It was on this basis that states were found to have standing to challenge federal laws that interfered with their constitutionally recognized residual sovereignty in *McCulloch*, *Dole*, *New York*, *Mitchell*, *Holland*, and other cases. Indeed, the states' sovereign authority to operate their own legal systems has virtually always been considered a sufficient interest to allow states to sue the federal government. *See Alfred L. Snapp & Son*, 458 U.S. at 601 (States have judicially cognizable interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal.").

In *McCulloch*, Maryland passed a statute taxing the national bank probably only as a basis for challenging its constitutionality—for what Amici in this case call

---

[2] (...continued)
[the people's] trustees and servants. . . . [G]overnment is . . . instituted for the common benefit, protection, and security of the people.").

"no sovereign or quasi-sovereign interest *other* than to provoke a conflict with federal law." Professors Br. at 25; *see* 17 U.S. (4 Wheat.) at 329 (argument of Mr. Webster) ("This is . . . an attempt to expel the bank from the State.").[3] The plaintiff sued both on his own behalf and as a representative of the state, *see id.* at 317 (identifying the defendant in error as "a sovereign state"), to challenge the constitutionality of the bank as exceeding Congress' powers and intruding on the states' retained sovereign authority. The Court never doubted that Maryland had Article III standing; instead, it decided the case on the merits. Since then, no commentator ever appears to have doubted that Maryland had standing.

There is little difference between Maryland's enactment of a tax law to challenge the constitutionality of what it considered an *ultra vires* federal act and the Virginia statute that here guarantees citizens the freedom from compulsory purchases. The power to tax and the power to articulate and defend specific individual rights are both inherent powers of sovereignty, and the only rights which the state is without power to identify and enforce are those which are conferred to exclusive federal

---

[3] Indeed, several states passed taxes or laws prohibiting the bank's operations for this purpose, 1 Charles Warren, *The Supreme Court in United States History* 505-06 (1922), not unlike the Health Care Freedom Acts enacted in several states in recent years. Health Care Freedom Acts have been enacted in Arizona, Florida, Georgia, Idaho, Lousiana, Missouri, Nevada, Oklahoma, Tennessee, and Utah. *See* American Legislative Exchange Council, *Freedom of Choice in Health Care Act*, *available at* http://www.alec.org/AM/Template.cfm?Section=FOCA&Template=/CM/HTMLDisplay.cfm&ContentID=15323 (last visited Mar. 29, 2011).

protection. In other words, while Amici Professors are correct that states have no justiciable interest in protecting citizens from *valid* federal laws, which are the supreme law of the land, the Constitution does reserve to the states a judicially cognizable interest in protecting citizens against *invalid* federal laws.

In *Mitchell*, 400 U.S. at 124, and *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966), the Supreme Court found that states had standing to challenge the constitutionality of the Voting Rights Act because the Constitution "preserve[s] to the States the power . . . to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise." *Mitchell*, 400 U.S. at 124 (opn. of Black, J.). In *Dole*, South Dakota had standing to seek declaratory relief as to the constitutionality of a federal law that the state alleged intruded on "the 'core powers' reserved to the States under § 2 of the [Twenty-First] Amendment." 483 U.S. at 205. In *New York*, the state could challenge the constitutionality of a federal law that intruded on its sovereign power to regulate nuclear waste. *New York*, 505 U.S. at 157. These cases stand for the proposition that states have standing to sue the federal government to defend those sovereign powers that the Constitution recognizes as their own. There is no principled distinction between these constitutionally recognized sovereign interests and the constitutionally recognized sovereign interest in articulating and defending individual

rights—between powers retained by the Twenty-First Amendment and powers retained by the Tenth.

Sovereignty includes an interest not only in articulating but in acting to enforce the rights of the citizen. *See* John Locke, *Second Treatise of Civil Government*, § 159, *in* John Locke, *Two Treatises of Government* 421 (Peter Laslett ed., rev. ed. 1963) (1690) ("[T]he Executor of the Laws having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society."); *id.* § 143, *in id.* at 409-10 ("The *Legislative* Power is that which has a right *to direct* how *the Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it."). The Tenth Amendment entrusts this sovereign function primarily to states; it is thus no less a constitutionally protected interest than were the sovereign interests which entitled states to sue in cases like *Katzenbach*, *Mitchell*, *Dole*, and other cases.

Nothing in *Mellon*, 262 U.S. 447, or *Texas v. Interstate Commerce Comm'n*, 258 U.S. 158 (1922), bars states from filing suit to defend their use of constitutionally recognized residual sovereignty. In *Mellon*, the Court rejected a *parens patriae* suit brought by a state challenging the constitutionality of a federal statute, because "in respect of their relations with the Federal Government," it is the federal government, and not states, which represent Americans as *parens patriae*. *Id.* at 486. But the Court emphasized that it was *not* creating a rule barring states from challenging the

constitutionality of federal laws. *See id.* at 485 ("We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress.").

Moreover, Massachusetts had not exercised its sovereign power to articulate or enforce a particular right that was being violated by the challenged federal statute. Instead, Massachusetts sought determination only of an abstract political question:[4] "[W]e are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government." *Id.* at 484-85. *See also id.* at 488 (Courts can only review the constitutionality of federal laws when a state alleges "some direct injury suffered or threatened,

---

[4] Indeed, *Mellon* is better understood as a political question decision than a true standing decision. As Professor Currie noted, *Mellon* perpetuated "confusion between political questions and standing" by "denying a state standing" while simultaneously "declar[ing] that the 'question, *as it is thus presented*, is political and not judicial in character.'" David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* at 304 n.121 (1985) (quoting *Mellon*, 262 U.S. at 483 (emphasis Currie's)). Under *Mellon*, states certainly "ha[ve] no standing to assert merely political interests," *id.* at 304, but neither does any other party. Even reading *Mellon* as a true standing case, however, it adopts a prudential standing rule intended to "protecting the powers of the federal government vis-a-vis the states." *Maryland People's Counsel v. Fed. Energy Regulatory Comm'n*, 760 F.2d 318, 321 (D.C. Cir. 1985). But the only powers the federal government has *vis-a-vis* the states are *enumerated* powers. Where a federal statute exceeds those enumerated powers, there is no constitutional warrant for denying judicial remedy for the state's actual injury.

presenting a justiciable issue," and "not merely" when the state "suffers in some indefinite way.").

The Court dismissed *Texas* for the same reason. It did not hold that states always lack standing to challenge the constitutionality of federal laws; instead, the Court dismissed the case because the poorly drafted complaint was primarily devoted to "an abstract question of legislative power" instead of "a case or controversy." 258 U.S. at 162. Courts may adjudicate such questions "only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute." *Id.*

Mellon and *Texas* thus differ from a case like this, in which the state has actually exercised its sovereign authority to articulate and to enforce a particular individual right. *See also* David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888-1986* at 185 (1990) ("[S]ince the state's alleged right to sue [in *Mellon*] was based upon representation of its citizens, it could sue only to enforce their rights, and no one had identified any citizen whose rights the federal law infringed."). Virginia's Health Care Freedom Act does not merely declare some generalized grievance, or seek judicial resolution of an abstract political question. Rather, that Act concretizes a specific citizen right as a matter of state law, as a step in the actual enforcement of that right; it is a specific exercise of Virginia's constitutionally retained sovereign power.

This approach is buttressed by *Massachusetts v. EPA*, 549 U.S. 497 (2007), where the Court emphasized the difference between a judicially cognizable sovereign interest and the sort of non-specific grievance that the *Mellon* Court found insufficient:

> The Chief Justice claims that we "overloo[k] the fact that our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest . . . against the Federal Government." Not so. *Mellon* itself disavowed any such broad reading when it noted that the Court had been "called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, [and] not *quasi sovereign rights actually invaded or threatened"*. . . . Massachusetts does not here dispute that the Clean Air Act applies to its citizens; it rather seeks to assert its rights under the Act.

Id. at 520 (citations omitted; emphasis added).

The "rights under the Act" were sufficient to confer standing in that case because those rights were recognized by federal statute, *id.* at 517 ("the right to challenge agency action unlawfully withheld"), and the interest at issue was a sovereign interest, *id.* at 519 ("Massachusetts' well-founded desire to preserve its sovereign territory."). In the same way, Virginia's right to articulate and protect individual rights that are not conferred to federal authority is recognized by the Constitution, U.S. Const. amend. X, and the interest at issue is a well-founded desire to preserve its sovereign authority over rights that are left to the states for protection. That is a constitutionally founded sovereign interest no less than were the interests that sufficed in *McCulloch*, *Mitchell*, *Dole*, *New York*, and other cases. And because

Virginia has actually exercised that power by enacting a statute that articulates and concretizes an individual right, this case differs from the general political grievance at issue in *Mellon*. The Virginia Health Care Freedom Act—or, more precisely, Virginia's authority to enact and enforce such a law—is a constitutionally recognized sovereign power. At the same time, that act makes the individual right at issue specific enough to be the subject of adjudication, rather than an abstract political question.

B. A State's Sovereign Interest in Protecting Individual Rights Is Distinct From the Individual's Interest in Those Rights and Is Not a Political Question

To understand Virginia's sovereign interest clearly, one must distinguish it from a third-party claim in which a plaintiff seeks to defend the rights of another. Virginia cannot merely represent an individual citizens' private interests. *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 974 (9th Cir. 2009) ("Oregon does not have standing to bring suit on behalf of . . . private parties."). But it does have sovereign authority to define the contours and mechanics of its citizens' rights or entitlements, within the boundaries of the federal Constitution. States have a sovereign interest in creating, for example, a property recordation system, or defining the state's property law, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998), or managing transfer-payment entitlements. *Saenz v. Roe*, 526 U.S. 489, 492 (1999). These interests are

distinct from a citizen's private interest in the particular property or entitlement involved.

As noted above, the Supreme Court in *McCulloch* never denied that Maryland had sovereign authority to tax activities within its boundaries, or that it could seek to vindicate that authority by challenging the constitutionality of a federal law that interfered with its statute. Likewise, in *Holland*, the Court found that the state had standing to challenge the constitutionality of a treaty regulating birds, because under that treaty, the federal government would "invade the sovereign right of the State and contravene its . . . statutes." 252 U.S. at 431. The Court did reject the state's argument that it had *proprietary* standing, because it owned the birds in fee. *See id.* at 434 ("To put the claim of the State upon title is to lean upon a slender reed."). But it did not question the state's standing to assert sovereign regulatory interests and on that basis to challenge the treaty's constitutionality. Instead, it proceeded to the merits. *Id.* at 434-35.

In *New Jersey v. Sargent*, 269 U.S. 328 (1926), by contrast, the Court found that New Jersey lacked standing to challenge a federal water regulation that would interfere with the state's sovereign authority over its waterways. But like *Mellon*, *Sargent* rejected standing because of the abstract nature of the question presented, not because of any absence of cognizable sovereign interests. Indeed, *Sargent* acknowledged that the state had such interests, but rejected standing because the state

was not actually "engaged or about to engage in any work or operations which the [federal] Act purports to prohibit or restrict." *Id.* at 338. New Jersey was not employing its sovereign power: "There is no showing that it has determined on or is about to proceed with any definite project . . . [or is] now taking or about to take any definite action respecting waters bordering on or within the State." *Id.* at 339. Although New Jersey argued that the federal law "pass[ed] beyond the field of congressional power and invad[ed] that reserved to the State," the Court lacked power to adjudicate the validity of the law "*until [the state's sovereign interests] are given or are about to be given some practical application and effect.*" *Id.* (emphasis added).

Here, by contrast, Virginia *has* acted pursuant to its sovereign interest. It has not merely declared its disagreement with the federal law or stated an individual right in precatory terms; rather, it has clearly defined an individual right and devoted its administrative resources to defending that right. Unlike in *Sargent*, the state is employing its constitutionally retained sovereignty in a specific way. Virginia is therefore seeking to adjudicate a specific, cognizable injury instead of an abstract political dispute.

Indeed, *Baker v. Carr*, 369 U.S. 186 (1962), cited both *Sargent* and *Mellon* as standing *not* for the proposition that states are barred from suing to defend their sovereign interests in protecting citizens from unconstitutional federal laws, but as

examples of the judiciary's unwillingness to adjudicate "'abstract questions of political power.'" *Id.* at 286 (quoting *Mellon*, 262 U.S. at 485). As *Baker* explained, federal courts rejected standing in such cases because the parties did not

> claim infringement of *an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government*—a complaint that the political institutions are awry. What renders cases of this kind non-justiciable is *not necessarily the nature of the parties* to them . . . nor is it the nature of the legal question involved, for the same type of question has been adjudicated when presented in other forms of controversy. The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy.

Id. at 287 (emphasis added).

The *Baker* Court summed up "the gist of the question of standing" as whether the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of [the] issues upon which the court so largely depends for illumination." *Id.* at 204. That standard is easily satisfied here. Virginia has exercised its sovereignty in a specific way, articulating a clearly defined individual right of its citizens, and putting state resources into the actual enforcement of that right. The federal government is depriving Virginia of that sovereign authority under a statute that goes beyond the Constitution's enumeration of powers. The issues are sufficiently sharpened and the parties sufficiently adverse to permit adjudication. This case has none of the abstract generality that led to the

Court's dismissal of *Mellon*, *Texas*, and *Sargent*. Given that the Constitution was written with the express intention that states serve a role in protecting both individual rights and their own autonomy against federal intrusion, there is no logical reason to deny Virginia standing to litigate this case.

C. States Are Uniquely Positioned to Litigate Tenth Amendment Violations, and Courts Should Interpret Standing Flexibly to Allow Them to Do So

In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950), the Supreme Court warned that questions of standing should not be the basis for indulging in "formalism or sterile technicality." In short, Article III standing requirements should be read in context. As Professor Currie observed, restricting standing too severely would render constitutional protections and prohibitions ineffectual, and while "this argument cannot justify judicial action in the absence of the case or controversy the Constitution requires . . . it may help in determining just what a case or controversy is." Currie, *Second Century*, *supra*, at 185.

States have a unique interest in Tenth Amendment questions for three reasons. First, individual citizens may lack standing to raise Tenth Amendment challenges. *See Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 144 (1939). The Supreme Court will decide that question this term. *See Bond*, 581 F.3d at 136-38, *cert. granted*, 131 S. Ct. 455. But if it is true that "*[o]nly states* have standing to pursue claims alleging violations of the Tenth Amendment by the federal government," *Oregon*,

552 F.3d at 972 (emphasis added), then they should have some viable means of doing so. The Supreme Court has already found that states may challenge the constitutionality of federal laws that intrude on constitutionally retained sovereign authority. If states have standing to defend sovereign powers retained by, say, the Twenty-First Amendment, there is no reason to deny them power to challenge statutes that intrude on other sovereign functions reserved by the Tenth Amendment.

Second, states have strong incentives to enforce the Tenth Amendment and to ensure a fair adjudication of federalism issues. If the "gist of the question of standing" is whether a party has sufficient interest at stake to "assure that concrete adverseness which sharpens the presentation of [the] issues," *Baker*, 369 U.S. at 204, then there is no reason to deny states standing to present Tenth Amendment issues crucial to them. Since at least the days of *McCulloch*, states have used their legislative power to challenge allegedly unconstitutional statutes and sharpen controversies into viable lawsuits. *See* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 420 (1995) (States often "adopt[ed] and enforce[d] laws that conflicted with federal laws to test indirectly whether the federal government exceeded its powers.").

Finally, the Tenth Amendment was written to help prevent the federal government from assuming powers not delegated to it; as part of what Professor Amar has called states' "special role and responsibility in protecting their constituents

from federal lawlessness." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1517 (1987). As the Supreme Court wrote in *Gregory*, 501 U.S. at 458, the founders balanced power between states and the federal government "to prevent the accumulation of excessive power" and "reduce the risk of tyranny and abuse from either front."

Given that states have a special interest in enforcing the Tenth Amendment, and adequate incentives to see that the Amendment is enforced, and the fact that state sovereignty was designed into the constitutional system to help keep the federal government within its limits "[i]n part by mutual jealousy and monitoring," Akhil Reed Amar, *The Bill of Rights* 123 (1998), there is no reason to resist allowing Virginia to seek redress for the concrete and particular injury that PPACA inflicts on its residual sovereign authority.

On the contrary, to deny states this power would risk upsetting the federal constitutional balance. The Amici argue that "[t]he state's interest in enforcing its legal code must necessarily give way to federal law *whenever a conflict arises*," Professors Br. at 22 (emphasis added), even if those federal statutes are unconstitutional. This extreme proposition is not be supported by precedent. If adopted, such a rule would hamper Virginia's ability to vindicate its constitutionally guaranteed residual sovereignty, would tend to insulate unconstitutional federal statutes from challenge, and would damage the states' role as restraints on federal

overreaching. Under that approach, the state of Maryland could not have challenged the constitutionality of the national bank in *McCulloch*, South Dakota could not have challenged the constitutionality of the statute in *Dole*, and South Carolina would have been barred from challenging the Voting Rights Act in *Katzenbach*. Suffice to say Article III imposes no such rule. States' authority to enforce their legal codes must give way to federal law only where those federal laws are within Congress' enumerated powers. Where a federal law inflicts a concrete and particularized injury on a state—by conflicting with an actual statute that articulates and protects a right which the Constitution leaves to the states—the state has standing to defend its sovereign interest in court.

D. Allowing States to Sue on These Grounds Is a Viable Alternative to "Nullification"

Amici are right to bemoan the recent resurgence of "nullification" rhetoric. Professors Br. at 30-31. There can be no dispute that "nullification" is unconstitutional, and that no state has power to absolve citizens of the obligation to obey federal statutes. *See*, *e.g.*, *United States v. Peters*, 9 U.S. (5 Cranch.) 115, 136 (1809); *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 923-27 (E.D. La. 1960), *aff'd* 365 U.S. 569 (1961) (per curiam). But Virginia's Health Care Freedom Act is not an attempt to "nullify" federal law. On the contrary, it represents a constitutionally legitimate *alternative* to nullification, because Virginia is merely

seeking a determination of a constitutional question within the federal judicial system. As Professor Amar has warned, it is important that while "discarding the extremism of nullification" we do not also "throw[] away a rich antebellum tradition emphasizing state protection of constitutional norms against the federal government." Amar, *Sovereignty*, *supra*, at 1517.

James Madison, who is often credited along with Thomas Jefferson with devising the "nullification" doctrine, denied that attribution while thoroughly explaining why states lack authority simply to void federal statutes. *See* Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 119-70 (1989); *see further* James Madison, *Notes on Nullification*, *in* 9 *The Writings of James Madison: 1819-1836* at 573-607 (Gaillard Hunt ed., 1910); James Madison, *Letter to Edward Everett* (Aug. 28, 1830), *in id.* at 383-403. He acknowledged that federal courts were the appropriate fora for resolving disputes between states and the federal government as to the proper scope of federal authority. *Id.* at 397; *see also* James Madison, *Letter to Joseph C. Cabell* (Sept. 7, 1829), *in id.* at 351 ("[T]here is & must be an Arbiter or Umpire in the constitutional authority provided for deciding questions concerning the boundaries of right & power. The particular provision, in the Constitution of the U.S. is in the authority of the Supreme Court."). But if it is proper for states to seek federal judicial resolution of the "boundaries of right and power" between their own sovereign authority and that of the federal government,

then there is no reason to deny states the opportunity to seek such determinations by enacting statutes that articulate and protect rights that the state believes are violated by an unconstitutional federal law. For a state to seek a judicial remedy within the federal system is an appropriate recognition of the state's relationship to the federal government: accepting the federal Supreme Court as the highest constitutional authority for interpreting federal laws, while protecting their own constitutionally recognized sovereign powers.

Moreover, denying states the ability to seek judicial determinations of these questions is likely to encourage further attempts at "nullification." The theory of "nullification" rests on the presumption that federal courts will not fairly adjudicate disputes between states and the federal government. *See*, *e.g.*, Thomas E. Woods, Jr., *Nullification: How to Resist Federal Tyranny in the 21st Century* 6 (2010). If states are denied the ability to seek federal judicial resolution of questions of this sort, they are more likely to attempt "nullification" or other unconstitutional alternatives. Indeed, as Madison observed in *The Federalist* No. 39, at 256, federal courts must adjudicate "controversies relating to the boundary between" the states and the federal government "impartially . . . according to the rules of the Constitution. . . . Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact."

Chief Justice Taney reiterated this point in *Gordon v. United States*, 117 U.S. (2 Wall.) 697, 700-01 (1865). The Constitution gave the federal judiciary its "unusual power[s]" because under the Constitution, "two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action." Thus there is "an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers."

Denying states standing to obtain a fair judicial review of the constitutionality of a federal statute that interferes with what the state contends falls within its constitutionally recognized residual sovereignty will only increase conflict and encourage states to resort to unconstitutional alternatives.

II

FRANCHISE TAX BD. DOES NOT BAR THIS CASE

Amicus Professor Walsh contends that, Article III concerns aside, the Court lacks statutory subject matter jurisdiction under *Franchise Tax*, 463 U.S. at 21-22. But this argument is ultimately unconvincing.

First, *Franchise Tax* was an application of the "well-pleaded complaint rule," *id.* at 10 n.9, which held that federal jurisdiction cannot be predicated on the mere possibility that a defendant might raise a federal question in defense. The case

essentially reiterated the rule that federal question jurisdiction exists only where the plaintiff's complaint presents a federal question "'unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.'" *Id.* at 10 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). Federal courts cannot take jurisdiction over cases based on the mere "'suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States.'" *Skelly Oil*, 339 U.S. at 672 (quoting *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 464 (1894)). In *Franchise Tax*, California sought the enforcement of a lien which the defendant believed was preempted by ERISA. This anticipated defense was the sole basis for federal jurisdiction. The question was not "'really' one of federal law," 463 U.S. at 13, because state law established the rules "without reference to federal law, under which a tax levy may be enforced," and federal law was relevant "only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law." *Id.*

This case, by contrast, lacks any such hypothetical or contingent factors. It is really one of federal law; the only question is whether Congress has constitutional authority to deprive the state of the residual sovereignty which entitles it to enact laws like the Health Care Freedom Act. This case requires no resolution of state law issues, and federal law is not solely relevant as a defense. As the *Franchise Tax*

Court recognized, "even though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law." *Id.* at 13. In other words, when the plaintiff's "right to relief necessarily depends on resolution of a substantial question of federal law," *id.* at 28, federal courts have jurisdiction. That is obviously the case here.

Second, *Franchise Tax* did not adopt a formalistic, blanket denial of state standing to seek judicial determinations of the constitutionality of federal laws. Indeed, the Court emphasized the importance of reading federal declaratory judgment jurisdiction with an eye to "practicality and necessity" and a " 'common-sense accommodation of judgment to kaleidoscopic situations.' " 463 U.S. at 20 (quoting *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 117 (1936)). *See also Skelly Oil*, 339 U.S. at 673 (counseling against "formalism or sterile technicality").

Here, practical considerations counsel in favor of jurisdiction. One major reason for the *Franchise Tax* decision was that the state could expect its arguments to be raised by private parties in their own lawsuits. 463 U.S. at 21 ("States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation."). But that is not the case here, given that states may lack standing to

raise Tenth Amendment arguments. *Bond*, 581 F.3d at 136-38. Thus, Virginia *would be* significantly prejudiced by the inability to seek declaratory judgment.

Finally, *Franchise Tax* did not bar federal jurisdiction in other cases seeking declaratory judgment as to the validity of federal laws that allegedly exceeded constitutional authority and intruded on residual state power. *Dole*, for example, was a declaratory relief action challenging a federal statute that the state believed intruded on its constitutionally recognized authority to regulate alcohol. 483 U.S. at 205. *New York v. United States of America* was also a suit for declaratory relief challenging a federal statute that interfered with the state's authority to make and enforce its own statutes. *See* 942 F.2d 114, 115 (2d Cir. 1991).

In short, *Franchise Tax* and the well-pled complaint rule in general are not formalistic prohibitions against state standing in challenging the constitutionality of federal statutes. Instead, they require only that the resolution of a federal question be plainly required by the complaint. That is obviously the case here.

CONCLUSION

The state of Virginia has standing to pursue this case.

DATED: March 31, 2011.

Respectfully submitted,

ROBERT LUTHER III
Knicely & Associates, P.C.

TIMOTHY SANDEFUR
LUKE WAKE
Pacific Legal Foundation

By s/ Timothy Sandefur
TIMOTHY SANDEFUR

Counsel for Amici Curiae Matt Sissel,
Pacific Legal Foundation, and
Americans for Free Choice in Medicine

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 11-1057 & 11-1058 Caption: *Commonwealth of Virginia v. Sebelius*

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]

- ☑ this brief contains 6,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
- ☐ this brief uses a monospaced typeface and contains __________ [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]

- ☑ this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-point Times New Roman; *or*
- ☐ this brief has been prepared in a monospaced typeface using __________ [*state name and version of word processing program*] with __________ [*state number of characters per inch and name of type style*].

DATED: March 31, 2011.

s/ Timothy Sandefur
TIMOTHY SANDEFUR

Counsel for Amici Curiae Matt Sissel,
Pacific Legal Foundation, and
Americans for Free Choice in Medicine

CERTIFICATE OF SERVICE

I certify that on March 31, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Timothy Sandefur
TIMOTHY SANDEFUR