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Florida v. HHS - Amicus Brief South Carolina Chamber of Commerce

South Carolina Chamber of Commerce

Nos. 11-11021 & 11-11067

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
No. 10-cv-91 (Vinson, J.)

BRIEF FOR *AMICUS CURIAE* SOUTH CAROLINA CHAMBER OF COMMERCE SUPPORTING PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE

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IN THE
U.S. COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

State of Florida, et al.,

v.

U.S. Department of Health & Human Services, et al.

Nos. 11-11021 & 11-11067

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 26.1-1, the undersigned certifies that the South Carolina Chamber of Commerce is a non-profit membership organization and is not a publicly traded corporation, issues no stock, and has no parent corporation.

In addition to the persons and entities listed in the Brief for Appellant and the additional persons and entities listed in the Brief for Private Plaintiffs-Appellees National Federation of Independent Business, Kaj Ahlburg, and Mary Brown ("Brief for Private Plaintiffs-Appellees"), undersigned counsel certifies that the following persons and entities may have an interest in the outcome of this action, and that to the best of his knowledge, the lists of persons and entities in the Brief for Appellant and Brief for Private Plaintiffs-Appellees, taken together, are otherwise complete:

a. South Carolina Chamber of Commerce (Amicus Curiae)

b. Thomas M. Christina (Counsel for Amicus Curiae South Carolina Chamber of Commerce)

c. Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Counsel for Amicus Curiae South Carolina Chamber of Commerce)

/s/Thomas M. Christina

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STATEMENT OF THE ISSUES PRESENTED

1. Whether Congress had authority to adopt the provisions of the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. 11-148 (Mar. 23, 2010), as amended by Title I of the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. 111-152 (Mar. 30, 2010) ("the Act"), alleged by Plaintiffs to be unconstitutional.

2. Whether the District Court erred by entering a declaratory judgment in favor of the Plaintiffs-Appellees that the Act is invalid.

STATEMENT OF INTEREST OF THE *AMICUS*[1]

Amicus Curiae the South Carolina Chamber of Commerce ("*Amicus*") is a membership organization that provides legislators and executive officials with information relevant to state legislative measures and regulatory initiatives affecting the interests of South Carolina's business community. If allowed to stand, provisions of the Act relating to American Health Benefit Exchanges ("Exchanges"), including but not limited to Section 1501, will narrow the scope of the *Amicus's* public advocacy within South Carolina because they will

[1] Pursuant to FRAP 29(c)(5), *Amicus* certifies that no counsel for any party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *Amicus*, its members, and its counsel have made such a monetary contribution. The parties have consented to the filing of this brief.

diminish the State's lawmaking authority and commandeer its elected officials to adopt, administer, and finance an Exchange.

STATEMENT

Section 1311(b) of the Act provides that "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange . . ." Until a State obeys this command, the Secretary of Health and Human Services ("HHS") has discretionary authority under Section 1321(b) to create an Exchange for that State at any time. Until HHS certifies that an Exchange established by a State under Section 1311 is fully operational, the State is subject to special maintenance of effort requirements under Section 1902(gg) of the Social Security Act (42 U.S.C. 1396a), as added by Act § 2001(b)(2).

Section 5000a of the Internal Revenue Code of 1986, as amended ("the Code"), as added by Section 1501 of the Act, generally requires federal taxpayers to be covered under "minimum essential coverage." Code § 36B, as added by Act § 1401, creates a tax credit to help low-income taxpayers obtain Exchange-available coverage that satisfies this mandate.[2] However, if HHS establishes an Exchange for a State, the maximum tax credit available to its citizens is zero. Code § 36B(b)(2)(A)-(B).

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[2] *See* Act §§ 1311(c) and 1321(a); *and see, also,* Code § 5000a(f)(1)(B)-(C) and (f)(2) (defining minimum essential coverage), *and cf.* Act § 1304(a)(1) and (3) (defining large and small group health market so that Exchange-available plans satisfy the definition)

SUMMARY OF THE ARGUMENT

Congress lacked authority to adopt the provisions of the Act alleged by Plaintiffs to be unconstitutional.

No provision of the Act would have been adopted by Congress without each of the others because the House of Representatives approved both PPACA and HCERA under rules prohibiting amendments and the Act lacks a severability clause. All the Plaintiffs, including the Plaintiff States, were entitled to the relief granted by the District Court.

The States had standing to seek a declaration that various provisions of the Act related to the Exchanges, including Section 1501, violated Constitutional principles governing federal-state relations. *First,* by requiring elected State officials to adopt, administer, and enforce a federal regulatory program, these provisions violate the anti-commandeering rule recognized by the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898, 933 (1997). *Second,* these provisions so completely interfere with the electorate's ability to distinguish the responsibility of state officials from federal officials for the operation of the Exchanges that they violate a principle of accountability to the electorate which *Amicus* submits is a Constitutional postulate under *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

Third, these provisions infringe on an attribute of each State's residual sovereignty by offering tax credits to citizens of States that establish Exchanges under Section 1311 and threatening to withhold the credits from otherwise qualified-taxpayers in States for which HHS establishes an Exchange under Section 1321(c). The United States has long recognized a specific "non-interference principle," according to which one sovereign may not interfere with a second by directly offering consideration to the second sovereign's officials to take or refrain from taking a governmental act. In the case of a republic, this principle extends to promises to pay particular voters or threats to withhold payments from them depending upon how their government exercises its authority. The States retain this attribute of their pre-Constitutional sovereignty because their continued existence as republics is essential to the Constitution of the federal government and guaranteed by it.

ARGUMENT[3]

I. The Parliamentary Tactics Employed to Secure the Act's Adoption Prevented Enacting Any of Its Provisions Without Each of the Others; Consequently, Plaintiffs Were Entitled to the Relief Granted.

[3] *Amicus* will not address the constitutionality of the Act's individual mandate provisions beyond stating that they do not regulate commerce or any activity affecting commerce, *see* Code § 5000a(a) (using the passive voice to define the required status), and they cannot be an exercise of a power to tax because the payment required in the event of not being covered as mandated is a penalty and the penalties are not apportioned among the States, *see id.*, 5000a(a) and (b)(1) *and see, also*, U.S. Const., Art. I, Sec. 8, cl. 1.

A. The Brief for Appellants states that the District Court failed to adhere to a doctrine of judicial restraint most recently enunciated by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 130 S.Ct. 3138, 3161 (2010), according to which the remaining provisions of an Act of Congress should be sustained if they are fully operative without a constitutionally defective provision, unless it is "evident" that the legislature would not have enacted them independently of the defective provision. *Id.*, 55, *citing and quoting Free Enterprise Fund, supra.* This statement is unfounded because it *is* evident that no provision of the Act would have been adopted without each of the others.

The House of Representatives adopted a rule requiring itself to consider PPACA only on an "all-or-nothing" basis, without amendments. *See* H.Res. 1203, 111th Cong., 2d Sess. (Mar. 21, 2010), ¶¶ 2-3, relating to H.R. 3590, as amended by the Senate Amendments to H.R. 3590. The House adopted a rule requiring itself to consider HCERA on an all-or-nothing basis, without amendments. H.Res. 1225, 111th Cong., 2d Sess. (Mar. 25, 2010), relating to H.R. 4872, as amended by Senate Amendments to H.R. 4872. Thus, no provision of the Act would have been adopted without each of the others because none of them *could* be adopted without each of the others.

B. The Brief for Appellants insinuates that the declaration of the Act's invalidity should not inure to the benefit of "parties that failed to

establish standing," apparently meaning the States. *Id.* at 60. While *Amicus* does not agree with the legal premise underlying this insinuation (much less Appellants' assumption regarding the nature of the States' interest in the constitutionality of Section 1501), even if both were correct, Appellants' criticism of the scope of the judgment would be wrong. The provisions of the Act relating to the creation, operation, and promotion of the Exchanges, including but not limited to Section 1501, invade one or more of the concrete interests of the States discussed in Sections II and III below, each of which belongs to a State as such and is legally cognizable. Moreover, since the Act has no severance clause, establishing the unconstitutionality of any of these provisions necessarily would redress the injuries described in Sections II and III below. *See* Section I.A above. Accordingly, Appellants' intimation that the States lacked standing to seek the relief granted is incorrect. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

II. The Act Unconstitutionally Commandeers State Legislatures and Executive Authorities and Renders Accountability to the Electorate Impossible.

A. The Constitution forbids Congress to use a State as a puppet through which to regulate the State's citizens in accordance with federally-determined standards or to commandeer a State legislature or executive officer to enforce federal law. *New York v. United States*, 505 U.S. 144 (1992); *Printz v.*

United States, 521 U.S. 898, 933 (1997); *and cf. Alden v. Maine*, 527 U.S. 706, 713 (1999) (Congress may not require the courts of a state to hear claims against the state arising under a federal statute the enactment of which was otherwise within its enumerated powers). The Act violates the anti-commandeering rule established in these cases in several ways.

B. Section 1311(b) commands that "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange" having characteristics prescribed by or under the Act. The State's Exchange must be "a governmental agency or nonprofit entity that is established by a State." Act § 1311(b)(1)(C) and (d)(1). However, only HHS "will issue regulations setting standards . . . with respect to the establishment and operation of Exchanges . . ." *See* Act § 1321(a)(1)(A). "An Exchange may not establish rules that conflict with or prevent the application of regulations promulgated by the Secretary [of HHS] under this subtitle." Act § 1311(k).

Thus, an Exchange will be a branch or instrumentality of the State in name only. Sections 1321(b)(1)-(2) insure this result by mandating, as the first step necessary to obey Section 1311(b)'s command, that a State "adopt and have in effect" the standards established by the Section 1321(a) regulations or a state statute or regulation implementing those standards. *See* Act § 1321(b)(1)-(2). By its literal terms, then, Section 1311(b) presses State officials into taking actions in their official capacities, including adopting, enacting, or promulgating

the substance of federal regulations, and creating what is nominally an instrumentality of the State in adherence with the substance of those federal regulations.

Commandeering under the Act does not end there. Once established, Exchanges will be required to execute federal law and regulations on an ongoing basis. In their primary function as "markets," the operations of the Exchanges will be entirely dictated by federal law, for they must make available "qualified health plans" (as defined by federal regulations) to "qualified individuals and qualified employers" (as defined by federal regulations), Act § 1311(b)(1)(C) and (d)(2)(A), and they may not make available to anyone "any health plan that is not a qualified health plan," Act § 1311(b)(1)(C) and (d)(2)(B)(i).

Moreover, to comply with the command of Section 1311(b), a State also must commit either to using its own taxing authority to support the Exchange financially after 2014 or to delegating its taxing authority to its Exchange. This necessity arises because of the statutory requirement that the State "shall insure that such Exchange is self-sustaining beginning on January 1, 2015, including allowing the Exchange to charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support its operations." Act § 1311(b)(1)(C) and (d)(5)(A).

C. The Act also displaces whatever legislative, regulatory, or other priorities each State may have. The Act gives HHS *carte blanche* to determine, at any time and on an after-the-fact basis, whether the State complied with Section 1311(b)'s command fast enough and to visit consequences on the State based on its determination. This facet of the Act's intrusion into the operation of a State's government is contained in Section 1321(c) of the Act, which allows HHS to establish an Exchange for a State at essentially any time and without advance notice, even if the State already is in the process of complying with Section 1311(b)'s command.

As noted above, to comply with Section 1311(b), a State must adopt, enact, or promulgate the substance of the Section 1321(a) regulations issued by HHS. Act § 1321(b). When a State takes this first step toward establishing an Exchange, the Act dubs it an "electing State." Act § 1321(b) and (c)(1)(A). Before the State takes this initial step, it is not referred to in the Act as an "electing State." *Id.*

Section 1321(c)(1) allows HHS to establish an Exchange at any time for any State that is not an "electing State," with no provision for advance notice. Section 1321(c)(2) allows HHS to establish an Exchange for an "electing State" that HHS believes will not have its Exchange operational by January 1, 2014, or that has not taken other steps toward implementation of the Act. The establishment of an Exchange under Section 1321(c)(2) can occur at any time

through and including January 1, 2013, and there is no provision for advance notice of either the criteria by which federal Exchange creation under Section 1321(c) is triggered or when the establishment of the Exchange by HHS will occur.

As a result, as long as a State remains "non-electing," it is in jeopardy of federal intervention at any time, without prior notice. The awareness of this risk plus the pressure caused by Sections 1401, 1501, and 2001 essentially stampede state officials into becoming an "electing State." However, becoming an "electing State" is simply leaping from the frying pan, because once a State becomes an "electing State," it yields control to HHS of its legislative, regulatory and law-enforcement agendas by committing itself to implementation of the Act's provisions on a schedule to be determined (and revealed) by HHS after the fact. *See* Act §§ 1321(c)(2).

D. The District Court found that the Act gives each State the choice between establishing an Exchange and having an Exchange created for the State by HHS. Mem. Op., *supra*, at 47, citing *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).[4] (Docket #77). That finding is debatable on a number of bases, beginning with the literal language of Section 1311(b), including in particular the explicitly imperative mood of the

[4] Amicus submits that the pressure applied to the States by Sections 1401, 1501, and 2001 to become proxy federal regulators is a sufficient basis on which to distinguish *Hodel*.

word "shall" in that Section. To be sure, Sections 1321(b)-(c) refer to a State by the title "electing State" once it begins to comply with Section 1311(b), but this self-serving euphemism is purely a term of art under the Act. The phrase reflects a politically-convenient fiction, not an inconsistency between Sections 1311(b) and 1321(b)-(c). Indeed, any impression of a conflict between those Sections is easily dispelled. Sections 1311(b) and 1321 can be harmonized effortlessly by reading the latter as specifying the exclusive mode by which a State must obey the direct order of the former.

Having HHS establish an Exchange within the State under Section 1321(c)(1) is therefore best viewed not as an alternative but (along with the tax credit provisions of Section 1401 and the exposure to special sanctions under 42 U.S.C. § 1396a(gg), as added by Act § 2001(b)(2)) as an additional sanction for disobedience. Unless Appellants explicitly rule out any interpretation of the Act except one under which a State can opt out of Section 1311(b)'s command without consequences to itself or its citizens, this appeal should be decided based on a literal interpretation of Section 1311(b) as a command. *Cf. Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 891-93 (2010) (rejecting respondent's suggestion that the case be resolved based on an interpretation of a statutory opinion respondent did not state it endorsed). On that interpretation, violation of the anti-commandeering rule and standing to seek relief are clear.

Moreover, the States' standing does not depend on the inaccuracy of the "choice" hypothesis reflected in the District Court's order. Impermissible federal commandeering can be accomplished by means that fall short of literally dragooning State officials or impressing them involuntarily into federal service. It can occur even when the national government restricts the choices offered to State officials to comply with a federal command. *Cf., Coyle v. Smith*, 221 U.S. 559 (1911) (Congress may not require a State to locate its capital in one specified city). Given the pervasively federal nature of every aspect of an Exchange's creation and operation, the market for health coverage in a State will be transformed in precisely the same way by an Exchange established under Section 1321(c) as by an Exchange established under Section 1311(b).

E. The anti-commandeering rule does not stem from an antiquarian concern with a late eighteenth century nicety of federalism. It furthers the people's interest in preserving the accountability of their elected officials—a principle that has garnered increased attention given the parliamentary techniques accompanying passage of the Act.

The anti-commandeering norm protects accountability by preventing a source of confusion over whether the State or the federal government is responsible for a given program.

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it

> may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

New York v. United States, supra, 505 U.S. at 168-69. The prohibition on commandeering state officers to enforce federal laws also is grounded in part on the necessity that the enforcement of federal law be in the hands of a unitary Executive branch, to preserve the accountability of the President. *Printz, supra,* 521 U.S. at 922-23.

Amicus submits that the accountability principle is itself a Constitutional norm applicable even outside the context commandeering. The Court has invoked the principle in a broad range of Constitutional contexts other than federal-state relations. *See, e.g.*, *Citizens United, supra,* 130 S.Ct. at 898 (striking down federal restrictions on electorally-related speech on First Amendment grounds and noting that "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *See, also, Free Enterprise Fund, supra,* 130 S.Ct. at 3155 (explaining the link between inferring the President's removal power from the Appointments Clause and the accountability principle).

The principle of accountability is of Constitutional dimension because the accountability of state legislators to the electorate is both presupposed and guaranteed by the Constitution's text. *See, e.g.,* U.S. Const., Article I, Sec. 2. cl.

1 (presupposing the continued existence of state legislatures composed at least in part of legislators elected by the people); the Guarantee Clause, U.S. Const., Art. IV, Sec. 4;[5] *and cf. McPherson v. Blacher,* 146 U.S. 1, 35 (1892) (State legislatures have plenary power to determine how members of the electoral college will be appointed). A state cannot be republican in form unless its officers and institutions rule with the consent of the people of that state as expressed by the electorate. *See Ex parte Yarbrough,* 110 U.S. 651, 666 (1884) ("In a republican government, like ours, … political power is reposed in representatives of the entire body of the people…."). This is why the Constitution "contemplates that a State's government will represent and remain accountable *to its own citizens*." *Printz, supra,* at 920 (emphasis added; citations omitted).

Accountability in the form of popular elections also is essential to the Constitutional plan, because elections are the only means by which the citizens of the States can exercise any control over their representatives in Congress. *See Cook v. Gralike*, 531 U.S. 510, 520 (2001) (instructions to representatives had no binding force *de jure*, but only "'de facto binding force' because it might have

[5] In a groundbreaking article discussing the anti-commandeering rule, Professor Deborah Merritt established a link between the Guarantee Clause as a limitation on Congressional power and the accountability principle. D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L.Rev. 1, 41 (1988) ("Merritt") ("A republican government . . . is responsible to its voters rather than to any outside agency.").

been 'political suicide' not to follow them.") (footnote and citation omitted). Accountability at the federal level is a principle of Constitutional dimension, as well, because it is essential to the exercise of the people's authority as an electorate. *See, e.g., Free Enterprise Fund, supra,* 130 S.Ct. at 3155, *citing and quoting* Federalist No. 70 ("Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'").

Even when the federal government does not literally dragoon the States to apply and administer a program of federally-established norms, there is a threat to popular sovereignty from legislation that blends federal and state authority in a way that confuses citizens about who is responsible for adopting and enforcing the law.

> Directives that the states consider, adopt, or enforce federal programs . . . permit federal officials to escape responsibility for their own initiatives. . . If a necessary program threatens to generate controversy, Congress can avoid the voters' ire by forcing state legislatures to adopt the measure. The citizens of each state, assuming that their local officials are responsible for the unwanted enactment, will retaliate against those officials.
>
> Such confusion over the lines of political responsibility is unacceptable in a republican government; in order to fulfill the ideal of popular control, the citizens must know which officials are responsible for unpopular legislation.

Merritt, *supra*, 88 Colum. L.Rev. at 61 - 62 (citations omitted).[6] *Cf. Printz, supra,* at 920 (citations omitted); *and cf. Free Enterprise Fund, supra*, at 3155 ("The diffusion of power carries with it a diffusion of accountability.").

On these bases, *Amicus* suggests that the principle of accountability is a Constitutional postulate and therefore generally enforceable by the judiciary, even in circumstances that might not fit conventional models of commandeering. *Cf. Principality of Monaco v. Mississippi*, *supra*, 292 U.S. at 322 ("Behind the words of the constitutional provisions are postulates which limit and control.").

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[6] Professor Merritt's general prediction already has come true with respect to the Act. State officials are being blamed on an explicitly partisan basis for the failure of the Act's provisions to enhance the attractiveness of State high risk pools. *See* G. Warner, *Not enough people dive into high-risk pools,* http://marketplace.publicradio.org/display/web/2011/04/25/pm-not-enough-people-dive-into-high-risk-pools/ (April 25, 2011).

"[**REPORTER GREGORY WARNER:**] Experts aren't exactly sure why [only 10,000 to 11,000 people have enrolled in state high risk pools under Act § 1101 when the federal government had predicted 400,000 would enroll]. . . The high-risk pools enrolling the fastest are almost all in blue states . . . Cecil Bykerk[] runs high risk pools in Montana.

"BYKERK: In Montana, the commissioner who's a Democrat went around the state, got a lot of free press!

"[**WARNER:**] She got the high-risk pool enrolled 50 percent. But Bykerk also runs the high risk pool in Iowa, where . . . enrollment's stuck at 14 percent.

"BYKERK: If your governor is making claims that this law is unconstitutional and it's gonna go away, you might be leery of buying."

That principle should be enforced in this case because the Act is an all-out assault on the principle of accountability. To illustrate by example, the Act forces an Exchange to decide in the first instance whether an individual is entitled to a religious exemption from the individual mandate. Act § 1311(d)(4)(H) and Code § 5000A(d)(2)(A)(i)-(ii), as added by Act § 1501(b). The State governmental unit or State-established not-for-profit entity constituting the Exchange must apply pre-existing provisions of the Code to decide this sensitive and highly personal matter. *Id.* However, its decision is subject merely to an unspecified form of review—and not by the Treasury Department, but by HHS. Act §§ 1311(d)(4)(H) and 1411(f)(1)(A). Given the intertwined responsibilities of federal, State, and potentially even private parties, unsuccessful applicants for religious exemptions might be unable to determine who is ultimately responsible for their disappointment, even after the most patient cross-referencing and study of the law. Act § 1411((e)(4)(B)(iv).[7]

The inevitable result of the interwoven scheme established by the Act is that citizens will be unable to trace to its actual source any grievance they may have with the substance or the administration of the Act. By erecting barriers

[7] The disappointed applicant's task may be rendered more difficult because the Act permits further delegation of the authority to decide an application for a religious exemption from the individual mandate under the Act. *See,* Act § 1311(f)(3)(A) (providing for an Exchange to enter into "an agreement with an eligible entity to carry out 1 or more of the responsibilities of the Exchange").

of these kinds, the Act effectively makes accountability impossible because it makes the information on which accountability rests effectively unattainable. *Cf. Citizens United, supra*, 130 S.Ct. at 898 ("The right of citizens to inquire, to hear, to speak, and *to use information to reach consensus* is a precondition to enlightened self-government and a necessary means to protect it.") (emphasis added).

III. The Act Infringes on a Constitutionally-Protected Attribute of the States' Residual Sovereignty by Explicitly Promising Individual Tax Credits Directly to Members of a State's Electorate If and Only If the State Establishes an Exchange under Section 1311.

Assuming *arguendo* that Sections 1311(b) and 1321(b) merely give each State a choice of becoming a federal regulator or having a federal regulator thrust upon it, the States nonetheless would have standing to seek a declaration of the invalidity of the Act as a whole based on Code § 36B, as added by Section 1401 of the Act. That Section establishes a tax credit for low-income taxpayers to help them defray part of any cost to themselves of complying with the duty to be covered by health insurance. However, the formula for computing the tax credit effectively makes a taxpayer ineligible for the credit unless he has coverage purchased through an Exchange established by his State under Section 1311.

By promising payments directly to citizens of "electing States" and threatening to deny payments to otherwise qualified taxpayers in other States,

the Act infringes on an attribute of the State's residual sovereignty under the Constitution. This attribute of State sovereignty, which prohibits another sovereign from offering a direct monetary inducement to individual state citizens in their political capacity, has been recognized by the federal government since the end of the Colonial period down to the present era. Infringement on that residual attribute of the States' sovereignty is prohibited by the Constitution whether or not it amounts to commandeering.

A. Under Code § 36B, "applicable taxpayers" are eligible for individual income tax credits to assist in meeting their obligations under Section 1501's individual mandate. Code § 36B defines "applicable taxpayer" to mean a taxpayer who has obtained the coverage required under Section 1501 and whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent of an amount equal to the poverty line for a family of the size involved. Code § 36B(a) and (c)(1)(A).

The amount of the tax credit under Section 36B is "an amount equal to the premium assistance credit amount of the taxpayer for the taxable year." Code § 36B(a). A taxpayer's premium assistance credit amount for each month is the lesser of:

> (A) the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent . . . of the taxpayer and *which were enrolled in through an*

> *Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act,* or
>
> (B) the excess (if any) of—
>
> (i) the adjusted monthly premium for such month for the applicable second lowest cost silver plan with respect to the taxpayer, over
>
> (ii) an amount equal to 1/12 of the product of the applicable percentage for the taxpayer's household income for the taxable year.

Code § 36B(b)(2)(A)-(B) (emphasis added).

The amount calculated under Section 36B(b)(2)(A) is zero unless the taxpayer actually is covered under a qualified health plan purchased on an Exchange established by a State under Section 1311 ("a Section 1311 Exchange"). Since zero is always lower than the amount calculated under Section 36B(b)(2)(B), the Section 1401 tax credit is zero for a taxpayer who is not actually enrolled in coverage from a Section 1311 Exchange. Exchanges serve geographic territories that follow state boundaries. *Cf.* Act § 1333(a) (relating to interstate compacts necessary for qualified health plans to be offered in more than one state). Under the "choice" hypothesis, an Exchange established by HHS under Section 1321(c) is an *alternative* to a Section 1311 Exchange, and therefore is not "an Exchange established by a State under Section 1311 of the Patient Protection and Affordable Care Act" within the meaning of that phrase in Code § 36B(b)(2)(A). By its literal terms, then,

Section 1401 of the Act offers direct monetary rewards to citizens of States that establish Exchanges pursuant to Section 1311 and threatens to withhold those direct monetary rewards from otherwise-qualified citizens of States do not not establish Exchanges under Section 1311.

Thus, under the "choice" hypothesis, Section 1401 reaches past a State's elected officials to generate political support for the establishment of an Exchange (which, as discussed above, entails the State's adoption of federally-dictated standards as state law; the State's undertaking perpetual financial responsibility for a scheme of federal regulation; and the other governmental acts described in Section II above). In this regard, Sections 1311(b), 1321(b), and Code § 36B represent a dangerous and unprecedented development in federal-state relations, falling well outside any program of "cooperative federalism" ever sanctioned by the Supreme Court. The Court has held that, within certain limits, the federal government may condition grants—less delicately called "bribes" by one scholar—to the States that require them to adopt and enforce federally-mandated policies. *See, South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the 1984 amendments to the Surface Transportation Assistance Act, which provided for funds to be withheld from States that did not enact a "national drinking age"), *and cf.*, R. Rotunda, The New States' Rights, The New Federalism, The New Commerce Clause, And The Proposed New Abdication, 25 Okla. City U. L. Rev. 869, 903 (2000)

("Congress can use its spending power to 'bribe' the states . . ."). However, there is no precedent for providing "conditional grants" to individual citizens in their personal capacities in consideration of a State's exercise of its governmental authority in one way rather than another. To the contrary, such a practice violates what the United States always has recognized as an inherent attribute of sovereignty, and one the States did not relinquish under the Constitution.

B. It was already well-established before the Revolutionary War that, as an attribute of its sovereignty, a nation-state is by right immune from another sovereign's attempt to interfere in its internal governmental affairs by directly appealing to the private monetary interests of its officials, agents, or constituents. "It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper and that no one of them has the least right to interfere in the government of another." De Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS (French original, 1758; English translation by Charges G. Fenwick published by Carnegie Institution, Washington, D.C., 1916), Book II, Ch. iv, §54, p. 131, *and see, also, id.*, Book IV, Ch. vii, § 93, p. 377 (bribery of court official by ambassador, thereby corrupting the fidelity of a sovereign's servant, is a wrong against the sovereign).

Amicus does not suggest that the United States was required to recognize this non-interference principle as an inherent attribute of sovereignty, but the historical record leaves no room for doubt that it did. The principle is acknowledged by federal jurists and its acceptance is attested to by the legislative, prosecutorial, and diplomatic practice of the United States over the entire course of its history.

The United States has asserted and sought to protect its immunity from prohibited interference by foreign sovereigns since the beginning of the Republic. *See, e.g.*, U.S. Const., Art. I, Sec. 9, cl. 8 ("no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, *from any King, Prince or foreign State*") (emphasis added); *and see, also*, Articles of Confederation, Art. VI, Sec. 1 (to the same effect). [8]

The principle of non-interference was put into practice at the very beginning of the Federal era, in the case of Edmond-Charles Genêt, the first French minister plenipotentiary to the United States. Genêt's actual mission

[8] *Amicus* submits that the Guarantee Clause is an additional instance in which the United States has recognized the non-interference principle. *See* Section I.E above, and esp. n.5. A state government cannot "represent and remain accountable to its own citizens," as contemplated by, *inter alia,* the Guarantee Clause, *see Printz, supra,* at 920, if members of the electorate are influenced in their capacity as State voters by federal "grants." *Cf. Gregory v. Ashcroft,* 501 U.S. 452, 463 (1991) (State citizens' right to determine qualifications for State office guaranteed by Guarantee Clause).

was to outfit privateers to sail from U.S. ports on British and Spanish shipping, which Genêt asserted was a French treaty right. *See* Thomas Jefferson's Notes on a Conversation with Edmond Genet (July 10, 1793), reprinted in *The Papers of George Washington, Digital Edition* (Crackle, ed. 2008). Secretary of State Jefferson and other representatives of the President made clear to Genêt that the President had determined that his Neutrality Proclamation was consistent with the treaties with France, and that under the federal Constitution, the President was the highest authority in these matters, and from his decision there was no appeal. *Id.* Genêt responded to Alexander Dallas, one of his visitors, "that he would appeal from the President to the people." *Id.* (footnote omitted). *See, also,* Alexander Dallas, *General Advertizer* (Philadelphia, Dec. 10, 1793). Genêt then "openly aligned himself with the Republican opposition in Philadelphia, participating in numerous Republican civic feasts in that city, patronizing the Democratic Society of Pennsylvania, assuming the presidency of the French Society of the Friends of Liberty, and agitating for an early session of Congress to reconsider [President Washington's] neutrality policy." E. Sheridan, *The Recall of Edmond Charles Genet: A Study in Transatlantic Politics and Diplomacy*, 18 Diplomatic History 463, 470 (1994). By August, the United States asked for Genêt's recall. Cabinet Opinion, 23 Aug. 1793; Notes on Cabinet Meetings, I-23 Aug. 1793 DLC:GW).

The Genêt affair is not unique. In 1889, the State Department requested the recall of the British Minister to the United States, Lord Sackville, because he acceded to a request from a former British subject for advice about voting in the upcoming Presidential election. *See* Letter of Charles F. Murchison to Lord Sackville, September 4, 1888, *reprinted in* U.S. Dept. of State, Papers relating to the foreign relations of the United States (December 3, 1889), vol. II., 1667-68 ("FRP 1889").

> [Lord Sackville] undertook to advise a citizen of the United States how to exercise the franchise of suffrage in an election . . . for the Presidency and Vice-Presidency of the United States . . . The question is thus presented, whether it is compatible with the dignity, security, and independent sovereignty of the United States to permit the representative of a foreign Government . . . to interfere in its domestic affairs by advising persons formerly his countrymen as to their political course as citizens of the United States.

Report from Secretary of State Thomas Bayard to the President (Oct. 29, 1888), reprinted in FRP 1889, *supra*, at 1670-71. Lord Sackville was informed of his status as *persona non grata* and returned to England. Letter from Bayard to Lord Sackville (Oct. 30, 1888), reprinted in FRP 1889, *supra*, at 1672-73.

The United States also demanded that its own diplomatic personnel respect the principle that one sovereign may not deal directly with individual citizens of another to influence them as political actors. "The plain duty of the diplomatic agents of the United States is scrupulously to abstain from interfering in the domestic politics of the countries where they reside." Sec. of

State Buchannan to Mr. Shields, Aug. 7, 1848, MS Inst. Venez. I. 73, *reprinted in* J. Moore, A DIGEST OF INTERNATIONAL LAW (GPO, 1906), Vol. IV, p 572, § 649.

The concept underlying a sovereign's right of non-interference was recognized again in the federal indictments arising out of the 1914 elections in Rhode Island, and by the Attorney General's defense of those indictments in *United States v. Gradwell*, 243 U.S. 476 (1917). Defendants in *Gradwell* and a companion case had been indicted for violating Section 37 of the federal criminal code, making it a crime to defraud the United States. The indictment alleged that the defendants violated Section 37 by "corrupting and debauching, by bribery of voters, the general election [of November 3, 1914], at which a Representative in Congress was voted for." *Id.*, at 478. On a writ of error sustaining demurrers to the indictments, the Brief for the United States argued that the United States has a right to honest, free, and fair elections and that a scheme to defeat that right is a scheme to defraud the United States. *Id.*

The United States also recognized the non-interference principle in legislation protecting the States. *See, e.g.,* 18 USC § 593 (making it unlawful, *inter alia*, for a military officer of the United States to keep federal troops at state polling places), *and cf.* Act of Feb. 25, 1865, ch. 52, section 1, 13 Stat. 437 (same prohibition except as necessary to repel enemies of the United States). At the same time, the Supreme Court recognized that "the United States . . .

has no power to regulate local political activities as such of state officials." *Oklahoma v. Civil Service Com'n.*, 330 U.S. 127, 143 (1947)

On the prosecutorial front, prior to *McNally v. United States*, 483 U.S. 350 (1987), the Department of Justice frequently indicted elected state officials for conspiring to deprive state citizens of a right to official's faithful services. *See, e.g., United States v. Mandel* , 591 F.2d 1347, 1353 (4th Cir. 1979) and cases cited at 1361-62. *See, also,* Brief for the United States, *McNally v. United States*, 483 U.S. 350 (1986), 22-23 & n.18 (arguing that "political rights" are among the intangible rights protected from wire and mail fraud under 18 USC § 1341).

Justice Kennedy's concurring opinion in *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995), not only relied on the non-interference principle, but also explained its mutuality under our federal system. "It was the genius of [the Framer's] idea that our citizens would have two political capacities, one state and one federal, *each protected from incursion by the other*. . ."

C. Because the United States recognizes the non-interference principle as an inherent attribute of sovereignty, it must be admitted that before ratification of the Constitution, each of the original States enjoyed the immunity derived from that principle.[9] The adoption of the Constitution did

[9] Prior to the ratification of the Constitution, each of the original thirteen States was a completely independent sovereign and a "republic" in the Framers' sense of that word. *See, e.g.*, The unanimous Declaration of the thirteen united States of America (declaring "that these united colonies are, and of right ought to be

not extinguish the States' status as sovereigns or republics. To the contrary, "[t]he Constitution specifically recognizes the States as sovereign entities." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.15 (1996). Nothing in the Constitution remotely suggests that this attribute of the States' original sovereignty is abrogated. To the contrary, the retention by the States of a residual and inviolable sovereignty "is reflected throughout the Constitution's text." *Printz, supra*, 521 U.S. at 918-19 (citations omitted).

D. The attributes of the States' residual sovereignty trump the exercise of Congressional power. *Alden v. Maine*, *supra*, 527 U.S. at 713 (Congress may not require the courts of a state to hear claims against the state arising under a federal statute otherwise within its enumerated powers because "the States' immunity from suit is a fundamental aspect of [their] sovereignty."). A State's immunity from outside inference includes immunity from federal interference. *Cf. Taylor v. Beckham*, 178 U.S. 548, 571, 580 (1900) (State's electoral process should be "free from external interference" and treating "interference of the general government," *i.e.*, from the national government, as a type of "external interference").

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free and independent states."); *and* Treaty of Paris (Sept. 3, 1783). *See, also*, U.S. Const., Art. 4, Sec. 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government") *and* Federalist No. XLIII (Guaranty Clause "supposes a pre-existing government of the form which is to be guaranteed"), *reprinted in The Federalist Papers* (I. Kramnick, ed., 1987), at 283.

Thus, if the "choice" hypothesis were correct, the States have an absolute right to the immediate abatement of the offers of money or threats of financial retaliation against a segment of their electorates made by the enactment of Act § 1401. The States therefore have standing to seek a declaration that the Act is void, thereby putting a stop to its malign and corrupting political influence.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this brief contains 6,952 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Garamond 14-point font.

/s/Thomas M. Christina

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2011, I directed Brief Amicus Curiae of South Carolina Chamber of Commerce in Support of Plaintiff-Appellees/Cross-Appellants and Affirmance to be filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit, 56 Forsyth St. N.W., Atlanta, Georgia 30303.

I further certify that on May 10, 2011, I served the Brief Amicus Curiae of South Carolina Chamber of Commerce in Support of Plaintiffs-Appellees/Cross-Appellants and Affirmance by placing copies in the U.S. Mail, first class postage attached, and by sending the foregoing brief electronically to:

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