1-1-2011

Seven-Sky v. Holder - Amicus Brief of Caesar Rodney Institute

Caesar Rodney Institute

[ORAL ARGUMENT NOT YET SCHEDULED]

Case No. 11-5047

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUSAN SEVEN-SKY, *ET AL.*,
Plaintiffs-Appellants

v.

ERIC H. HOLDER, JR., *ET AL.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF CAESAR RODNEY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for *Amicus Curiae* Caesar Rodney Institute makes the following certificates pursuant to D.C. Circuit Rule 28(a):

(A) Parties, Amici, and Intervenors:

Undersigned counsel certifies that to the best of his knowledge, the list of persons and entities that have or may have an interest in the outcome of this case is adequately set forth in the Briefs for Appellants, subsequently filed Notices of Intent to File An *Amicus Curiae* Brief, and subsequently filed *Amicus Curiae* Briefs except for the following additions:

***Amicus Curiae*:**

Caesar Rodney Institute

Counsel for Amicus Curiae

Lally, Grant M.

* Misir, Deborah N.

* Morris, William, G.

* Not admitted to the bar of this Court

The following list includes all parties who appeared in the District Court and who appear in this Court:

Plaintiffs-Appellants	Defendants-Appellants
Margaret Peggy Lee Mead (no longer a party to this appeal)	Eric H. Holder, Jr., Attorney General of the United States, in his official capacity
Charles Edward Lee	United States Department of Health and Human Services
Susan Seven-Sky	Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity
Kenneth Ruffo	
Gina Rodriguez	United States Department of the Treasury
	Timothy F. Geithner, Secretary of the United States Department of the Treasury, in his official capacity

No amici or intervenor appeared in the District Court proceedings. To the best of *Amici's* knowledge, the following *Amici* have filed or intend to file *Amicus Curiae* briefs in support of Plaintiffs-Appellants:

- Association of American Physicians & Surgeons, Inc.
- Cato Institute joined by Mountain State Legal Foundation, Pacific Legal Foundation, Competitive Enterprise Institute, Goldwater Institute, Revere America, Idaho Freedom Foundation, and Professor Randy E. Barnett

- Chamber of Commerce of the United States
- Mr. Gary Lawson joined by Mr. Robert Natelson, Mr. Guy Seidman and the Independence Institute
- Judicial Watch, Inc.
- Mountain State Legal Foundation
- Mr. Patrick Gillen
- The State of Texas joined by the States of Florida, Alabama, Indiana, Kansas, Maine, Michigan, Nebraska, North Dakota, Ohio, Pennsylvania, South Dakota, Washington, and Wisconsin
- Mr. Steven J. Willis

(B) Rulings Under Review:

Plaintiffs-Appellants are appealing from the final decision and supporting memorandum opinion of District Judger Gladys Kessler, entered on February 22, 2011, granting Defendants-Appellees' motion to dismiss the amended complaint. The memorandum opinion appears on Westlaw with the following citation: Mead v. Holder, 2011 WL 611139 (D.D.C. Feb. 22, 2011).

(C) Related Cases:

This case was never previously before this Court, or any other court, other than the District Court from which this case has been appealed. *Amicus Curiae* are not aware of any cases pending in this Court that involves the same parties or substantially the same issues or any such cases previously before this Court. *Amicus Curiae* provides the following list of cases, of which it is aware, that involve substantially the same or similar issue(s) as this appeal and that are currently pending before other federal courts.

Court Name	**Case Name**	**Docket Number**
U.S. District Court for the District of Columbia	Association of American Physicians & Surgeons v. Sebelius	1:10-cv-499-RJL
U.S. Court of Appeals for the Fourth Circuit	Virginia v. Sebelius	11-1057 & 11-1058
U.S. Court of Appeals for the Sixth Circuit	U.S. Citizens Association v. Obama	11-3327
U.S. Court of Appeals for the Eighth Circuit	Kinder v. Department of Treasury	11-1973
U.S. Court of Appeals for the Eleventh Circuit	Florida v. U.S. Department of Health and Human Services	11-11021 & 11-11067
U.S. District Court for the Eastern District of Oklahoma	Oklahoma v. Sebelius	6:11-cv-30-RAW

Court Name	**Case Name**	**Docket Number**
U.S. District Court for the Middle District of Pennsylvania	Goudy-Bachman v. U.S. Department of Health and Human Services	1:10-cv-763-CCC

Dated: May 23, 2011

Respectfully submitted,

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CAESAR RODNEY INSTITUTE'S
CIRCUIT RULE 26.1 DISCLOSURES

Pursuant to Fed. R. App. P. 26.1, and Circuit Rules 26.1, undersigned counsel certifies that Caesar Rodney Institute ("CRI") is not a publicly held corporation and that no corporation or other publicly held entity owns more than 10% of its stock. Caesar Rodney Institute has issued no stock, and has no parent corporations, master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to Caesar Rodney Institute's participation herein. The Internal Revenue Service has determined that Caesar Rodney Institute is organized and operated exclusively for research or educational purposes pursuant to Section 501(c)(3) or (4) of the Internal Revenue Code and are exempt from taxes.

Dated: May 23, 2011

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CERTIFICATE OF EXPLANATION FOR SEPARATE BRIEF

This brief addresses essential issues which have not addressed by Appellees, and to the best of counsel's knowledge, will not be addressed by any *amici*:

The first issue is whether the PPACA contains an adequate jurisdictional limit that would limit the statute's reach to individuals participating in interstate commerce, as required by United States v. Lopez, 514 U.S. 549, 562-63, 115 S.Ct. 1624 (1995). The second issue is whether the Congressional findings underpinning the PPACA rely on a method of reasoning to invoke the Commerce Clause that the Supreme Court has already rejected as untenable under the Constitution's structure of federalism and enumerated powers.

Dated: May 23, 2011

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CRI: Caesar Rodney Institute

PPACA: Patient Protection and Affordable Care Act, 111 Pub. L. No. 148, 124 Stat. 119, 111th Cong., 2d Sess., March 23, 2010

SUMMARY OF THE ARGUMENT

This case is about the limits of Federal Government power under the Commerce Clause and Taxation Clause. Without meaningful limits, the Federal Government's power descends the slippery slope to unlimited police power, which is reserved to the States under the U.S. Constitution.

This *amicus* focuses on two issues. First, the Patient Protection and Affordable Care Act ("PPACA") fails the Supreme Court's test under United States v. Lopez, 514 U.S. 549, 562-63, 115 S.Ct. 1624 (1995), because the Act does not contain an express jurisdictional element which would limit its reach to individuals participating in the interstate health services market. See id. Second, the formal Congressional findings in the PPACA do not provide support for Congress' attempt to regulate all individuals in the United States on the premise that they might one day need health care services. See id.

The PPACA is unconstitutional, and the decision of the District Court should be reversed

ARGUMENT

I. Introduction

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 42 U.S.C. §18001 et. seq. (2010) (collectively, the "Act" or "PPACA") provides that, "…an individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual…is covered under minimum essential coverage for such month." See PPACA §1501(b), 26 U.S.C. §5000A(a). An individual who does not comply, and is not otherwise exempt from the requirement, must pay a monetary penalty to the Federal Government. See id. Accordingly under the Act, individuals, including those who would prefer to negotiate directly with their doctors or other providers for the cost of medical services, or those who would rather not receive medical care for reasons other than religious convictions, are compelled to purchase health insurance products.

In the District Court, Plaintiffs-Appellants challenged the individual mandate of Section 1501(b) of the Act on the grounds that it exceeds Congress' enumerated power under the Commerce Clause of the U.S. Constitution. In addition, Plaintiffs- Appellants challenged the individual mandate under the Religious Freedom Restoration Act ("RFRA.") Mead, et al., v. Holder, et al., 2011

WL 611139 (D.D.C.). The District Court held that the Act was constitutional and did not infringe upon RFRA. This brief does not repeat the arguments raised below by the Parties and other *amici*, but rather focuses on two Commerce Clause issues that have not been fully briefed. The first issue is whether the PPACA contains an adequate jurisdictional limit that would limit the statute's reach to individuals participating in interstate commerce, as required by United States v. Lopez, 514 U.S. 549, 562-63, 115 S.Ct. 1624 (1995). The second issue is whether the Congressional findings underpinning the PPACA rely on a method of reasoning to invoke the Commerce Clause that the Supreme Court has already rejected as untenable under the Constitution's structure of federalism and enumerated powers. See U.S. v. Morrison, 529, U.S. 598, 615-20, 120 S.Ct. 1740, 1752-55 (2000).

II. The PPACA does not Contain an Express Jurisdictional Element, Limiting Regulation to Individuals Participating in Interstate Commerce.

Health insurance coverage is a financial product; a risk management device that hedges against the need for potential future medical care. Before passage of PPACA, individuals who were not eligible to purchase group health insurance products through their employer group or other group, or were not eligible for

public health insurance programs such as Medicare or Medicaid, made a personal cost-benefit decision whether to purchase individual health insurance products or to pay a medical provider directly for medical care. In particular, young people often choose to forego the purchase of health insurance in favor of paying off student loans, or saving for their first home simply because they tend to be healthier than older members of the population. The Act's individual mandate now requires U.S. citizens and legal residents to purchase a health insurance product if they do not otherwise have health insurance or fall into an exception. PPACA §1501, 26 U.S.C. §5000A(a). American Indians, illegal aliens, incarcerated individuals, and persons with financial hardship, or religious objections, or a gap in health insurance for less than three months, or incomes below a certain level are exempt from the requirement to purchase health insurance. Id.

The breadth of the PPACA is unprecedented, it reaches virtually every American. In upholding the constitutionality of the individual mandate, the District Court held that Congress may regulate the class of individuals who forgo health insurance because it is a type of activity that substantially affects interstate commerce.[1] Mead, 2011 WL 611139 at *19-22. The Court found there were two

[1] It is well established that under its Commerce Clause powers, Congress may regulate three types of activities. Namely, "the use of the channels of interstate commerce….the instrumentalities of interstate commerce or persons or things in interstate commerce...[and] activities that substantially affect interstate commerce." See generally, Lopez 514 U.S. 549; see also Rancho Viejo, LLC v. Norton, 323

categories of individuals in this class, individuals who will either pay for future medical services out of pocket, or those who will refuse medical services altogether. See id. The Court held that Congress has the power to regulate these persons because they have either conceded that they will participate in the health care market in the future and may not be able to afford their treatment, or they, "may well find their way into the health care market when they face the reality of illness or injury." See Id. at *20.

In enacting the PPACA, Congress found, as the general cause for the legislation, that, " [t]he individual responsibility requirement provided for in this section,… is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)." PPACA § 1501(a)(1), 42 U.S.C. § 18091(a)(1); see also, Mead, 2011 WL 611139 at *14. Apart from the fact that this finding represents extreme, Orwellian circular reasoning – the regulatory means (the individual mandate) offered up as itself the rationale for regulation under the Commerce Clause – it is the only justification given in the Act for the invocation of the Commerce Clause. There is no jurisdictional element tied to the individual mandate.

F.3d 1062, 1068 (D.C. Cir. 2003). The case at bar concerns the "substantially affects" class of activities regulated under the Commerce power.

The Supreme Court has held that federal regulation promulgated under the Commerce Clause must contain an explicit jurisdictional element which concretely ties the activity to be regulated to interstate commerce. Lopez, 514 U.S. at 561-62. The PPACA does not contain a jurisdictional element which limits its reach to health insurance that has an explicit connection with interstate commerce. See id. at 562.

In Lopez, the Supreme Court determined that the Gun-Free School Zones Act, which made it a federal offense to possess a firearm near a school zone exceeded Congress' commerce clause because the statute did not contain an express jurisdictional element which, "ensure through case-by-case inquiry that the firearm possession in question affects interstate commerce." Lopez, 514 U.S. at 561-62. Similarly in Morrison, the Court, relying upon Lopez, struck down the Violence Against Women Act because it failed to contain a jurisdictional element tying the statute's federal civil remedy for acts of violence motivated by gender to interstate commerce. See U.S. v. Morrison, 529, U.S. 598, 611-12, 120 S.Ct. 1740, 1750-51 (2000).

What is a jurisdictional element? In Lopez, the Court indicated that the statute at issue in U.S. v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971) -- the Omnibus Crime Control and Safe Streets Act -- contained an express jurisdictional element because it concretely tied firearm possession to interstate commerce. Lopez, 514

U.S. at 562 (citing Bass, 404 U.S. at 337). In Bass, the Court affirmed the reversal of a conviction because the Government had failed to demonstrate that the particular allegation involved possession of the weapon in commerce or affecting commerce. Id. Writing for the Court, Justice Marshall explained that in traditionally sensitive areas such as that involving the balance of power between the federal government and the States, Congress must make a clear statement that it has faced and intends to bring that particularly sensitive area into issue. Bass, 404 U.S. at 349-50. In the case of Bass, the Court chose a narrower reading of the statute to limit the reach to the federal government under the commerce clause into an area traditionally reserved to the States because Congress had not made a clear statement. Id.

In the case at bar, the District Court did not analyze whether or not the PPACA contains a jurisdictional element. The Act simply does not. The PPACA provides that an individual must maintain minimum health insurance coverage every month, or pay a penalty. See supra p.2; PPACA §1501(b), 26 U.S.C. §5000A(a). Congress did not tie the activity (or even lack of activity) of obtaining health insurance to interstate commerce in the statutory provision requiring individual purchase of health insurance. As was the case in Bass, Lopez and Morrison, PPACA impinges upon what has traditionally been an area of competency reserved to the States. See Medtronic Inc. v. Lohr, 518 U.S. 470, 475

(1996) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756, 105 S.Ct. 2380, 2398 (1985)); see also Hill v. Colorado, 530 U.S. 715, 120 S.Ct. 2480 (2000) ("[i]t is a traditional exercise of the States "police powers to protect the health and safety of their citizens.") (internal citations omitted). Congress' failure to incorporate a jurisdictional element

Without a jurisdictional limit, the Act effectively obliterates the distinction between what is national and what is local, and undermines the balance of power between the federal and State governments that is essential to federalism. The Act is thus unconstitutional.

III. The Congressional findings underpinning the PPACA rely on a method of reasoning to invoke the Commerce Clause that the Supreme Court has already rejected as untenable.

The District Court determined that Congress may regulate individuals who forego health insurance because they are "inevitable participants" in the health care services market even if they do not currently plan to utilize health care. Mead, 2011 WL 611139 at *18-22. In addition, the Distict Court noted that the

Emergency Medical Treatment and Active Labor Act of 1986, 42 U.S.C. § 1395dd requires hospitals to provide basic medical care to any patient who arrives regardless of ability to pay, thereby creating the cost shifting problem that the Act purportedly attempts to address by requiring all individuals in the United States to purchase health insurance. The District Court's opinion, and indeed the underlying premise of PPACA conflates access to health insurance with access to health care. In fact, there is a distinction between the health insurance market and the health care market. An individual does not need to possess health insurance in order to purchase health care. She may elect to pay the medical provider directly, or to forego medical treatment altogether for personal and spiritual reasons. The Commerce Clause cannot be evoked to reach every attenuated effect upon interstate commerce created by an individual's personal decision on how to treat and care for her body. Because it is an enumerated power there must be a limit to its scope.

Congress' primary justification for the Act was that the individual mandate requiring purchase of health insurance is commercial in nature, and thus affects interstate commerce. Congress then went on to find certain effects on the national economy and interstate commerce, most of which focus on the effect on the health insurance market, or conflate health care with health insurance, e.g.:

> **(A)** The requirement regulates activity that is commercial and economic in nature: economic and financial

> decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.
>
> **(B)** Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019. Private health insurance spending is projected to be $854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.
>
> **(C)** The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.
>
> **(D)** The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

PPACA § 1501(a)(2), 42 U.S.C. § 18091(a)(2). Of the 10 secondary effects on the national economy and interstate commerce described in the Congressional

findings, all 10 concern health insurance, and 4 arguably concern both health insurance and health care. None concerns health care alone. Finally, Congress stated in its findings, that in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), the Supreme Court in ruled that insurance is interstate commerce subject to Federal regulation. Read together, the Congressional findings of the Act indicate that Congress intended to regulate the health insurance market, and made findings related to health care only in the context of the health insurance market. See Chan v. Korean Air Lines, 490 U.S. 122 (1989) (Words omitted may be as significant as words expressly set forth.)

As Justice Marshall instructed in Bass, in areas of traditionally sensitive areas such as that involving the balance of power between the federal government and the States, Congress must make a clear statement that it has faced and intends to bring that particularly sensitive area into issue. Bass, 404 U.S. at 349-50. Congress chose not to state that it may regulate the health care market. Because PPACA is concerned with the health insurance market, its jurisdiction should be tailored to interstate activities within that market. For example, given the congressional findings in the Act, it may be appropriate for the PPACA to regulate the purchase of, or content of health insurance products. It is entirely inappropriate, however, for the Act to apply to all individuals in the United States, whether or not they are participating in the health insurance market based upon

inferences piled one upon the other, until the activity regulated is so removed from interstate commerce that the Constitution's enumeration of powers to the Federal Government becomes meaningless. See Lopez 514 U.S. at 567.

Finally, health care and welfare is traditionally the domain of the States. See Brecht v. Abrahamson, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). PPACA would foreclose the States from experimenting and exercising their own judgment in an area in which they have greater competency. Lopez, 514 U.S at 581-83 (Kennedy, J., O'Connor, J., concurring) Indeed, the States have already experimented or are trying different approaches to the problem of increasing access to health care while holding costs down. In the spring of 2006, the Commonwealth of Massachusetts passed legislation, requiring all non-exempt individuals to purchase some form of health insurance coverage. See An Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Acts c. 58. This year, Vermont is considering a single payer system. See VT LEG House Bill No. 202 (2011). Congress' infringement upon the area of health care in the guise of regulating the health insurance market fundamentally upsets the careful balance between federal and State power in the Constitution and should be struck down.

The Act should be struck down as unconstitutional because it is over-broad, has no jurisdictional limit demonstrating a nexus with the Commerce Clause[2], reaches activity that it is too attenuated from actual interstate commerce, and does not substantially affect interstate commerce. See e.g. Morrison, 529 U.S. at 613; Lopez, 514 U.S at 561-62.

[2] Congress could of course cure the jurisdictional limitation defect by amending the Act to cover individuals who seek health care in interstate commerce, as it ultimately did in the statute at issue in Lopez, see 18 U.S.C. §922(q)(2)(A). However as discussed supra, the current Congressional findings should also be amended to reflect the new purview of the law.

IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND CERTIFICATES PURSUANT TO FED. R. APP. P. 29

The Caesar Rodney Institute (CRI) is a Delaware-based non-for-profit research and educational organization that focuses on promoting individual liberty, property rights, rule of law, and transparent and limited government for all Delawareans. Delaware has for many years been a leading domicile for U.S. corporations (over fifty percent (50%) of all publicly traded companies in the U.S. and 63% of the Fortune 500) because of the singular competence and proficiency of its courts in business law. As Delawareans, CRI and its members have great interest in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 42 U.S.C. §18001 et. seq. (2010) ("PPACA") because it requires all U.S. citizens and legal residents to purchase or otherwise obtain qualifying health insurance, imposes significant new requirements on corporate employers, and establishes new rules in the private insurance market. In particular, CRI is concerned that the PPACA extended Congressional power under the Commerce Clause without any jurisdictional limit. CRI's expertise on issues of rule of law, transparency and the free market in the U.S. corporate context make it uniquely situated to contribute to this litigation as *amicus curiae*.

Pursuant to Federal Rule of Appellate Procedure, Rule 29(a), a*micus curiae* certifies that all parties have consented to the filing of this brief. In addition, pursuant to Federal Rule of Appellate Procedure, Rule 29(c)(5), *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and that none of the parties or their counsel, nor any other person or entity other than *amicus*, their members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, the District Court ruling should be reversed as the Patient Protection and Affordable Care Act is an unconstitutional exercise of Congressional power.

Dated: May 23, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND LENGTH

I certify that the foregoing *amicus curiae* brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). In reliance on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2010, the brief contains 3,481 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), which is no more than one-half the maximum length of 14,000 words authorized by Fed. R. App. P. 29(d), 32(a)(7)(B)(i).

The foregoing *amicus curiae* brief also 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). The brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As counsel for *amicus curiae*, I hereby certify that on May 23, 2011, I electronically filed the foregoing Amicus Brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system. The ECF system will automatically generate and send by e-mail a Notice of Docket Activity ("NDA") to all registered attorneys participating in the case, which notice constitutes service on those registered attorneys.

I hereby further certify that I will cause the requisite number of true and accurate hard copies of the foregoing to be delivered to the United States Court of Appeals for the District of Columbia Circuit, parties to the action, and other *amici* via U.S. Mail on May 24, 2011.

Dated: May 23, 2011

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