RECORD NO. 11-1057

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,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
IN HER OFFICIAL CAPACITY,

Defendant-Appellant.

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

BRIEF OF *AMICI CURIAE* PROFESSORS OF FEDERAL JURISDICTION IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction who teach and write about the justiciability doctrines informed by Article III's case-or-controversy requirement, especially the law governing standing to sue. *Amici* hold a diverse range of views concerning the appropriate contours of the Supreme Court's standing jurisprudence. Moreover, *amici* take no position here on the merits of the constitutional challenge to the "individual mandate" created by section 1501 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242–49 (2010). Instead, *amici* come together in this case to offer our views on two points with respect to which we have common cause: *First*, the Commonwealth of Virginia does not have standing to pursue the instant suit. *Second*, the district court's reasoning to the contrary, *see Virginia ex rel. Cuccinelli* v. *Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010),

1. Pursuant to Fed. R. App. P. 29(a), the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

cannot be reconciled with extant jurisprudence, and would likely wreak substantial havoc on standing doctrine — if not on the appropriate role of the federal courts more generally.

SUMMARY OF ARGUMENT

It is a settled proposition that states do not have standing to sue the federal government as *parens patriae* of their citizens. *See, e.g.*, *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). This rule results from the logical and legal reality that, where federal rights are concerned, "it is the United States, and not the state, which represents [citizens] as *parens patriae*." *Massachusetts* v. *Mellon*, 262 U.S. 447, 486 (1923); *see also Hodges* v. *Abraham*, 300 F.3d 432, 444 (4th Cir. 2002).

The *Mellon* rule is not just an infrequently revisited footnote to the Court's modern standing jurisprudence; rather, its *ratio decidendi* reflects a specific variation on a familiar (and fundamental) constitutional theme, *i.e.*, that the Constitution's structural guarantees exist to protect individuals, and not the sovereignty of the states as such. *See, e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 575–77 (1995) (Kennedy, J., concurring). To that end, and as a long line of post-*Mellon*

cases reinforce, states suffer no freestanding injury simply because Congress has allegedly exceeded its Article I powers.

Even as the Supreme Court has identified additional circumstances in which states might have a "quasi-sovereign" interest in suing private entities or other states on behalf of their citizens, it has never recognized a "quasi-sovereign" interest sufficient to justify suits challenging the constitutional scope of federal regulation. Instead, it has repeatedly reaffirmed the "critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert *its* rights under federal law (which it has standing to do)." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007) (quoting *Georgia* v. *Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)) (emphasis added).

Nor is there anything to the argument that these settled precedents can be distinguished because of the conflict between the individual mandate and the Virginia Health Care Freedom Act, VA. CODE ANN. § 38.2-3430.1:1 (2010). To be sure, the Supreme Court has recognized a state's *sovereign* (not "quasi-sovereign") interest in "the exercise of sovereign power over individuals and entities within the

relevant jurisdiction," which "involves the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). But this interest goes only to a state's power to ensure that its (valid) laws are followed by those who are bound to comply. Manufacturing a conflict with federal law cannot of itself create an interest sufficient to support standing, since the state law creating the conflict will have no bearing whatsoever on the constitutional validity of the federal regulation.

Because the district court rested Virginia's standing on the mere existence of a conflict between federal and state law, and identified no freestanding injury to any other quasi-sovereign or proprietary interest, its holding allows for no principled distinction between this suit and any other in which a state would use preemption as the basis for standing, even where the state's objection sounded purely in the applicability of a federal statute rather than its constitutionality.

Instead, such a holding would provide an all-too-effective end-run around *Mellon*, since it would reduce the Supreme Court's bar on *parens patriae* suits against the federal government to cases in which there is no state law with which the challenged federal action could be in

tension. In addition, to the extent that *Mellon* reflects deeper principles about Article III standing, including the bar on generalized grievances and the requirement that the plaintiff suffer a concrete, particularized injury, a rule that allows states to sue the federal government whenever there is a conflict between state and federal law would risk vitiating those requirements altogether in any instance in which a conflict is alleged to exist. Finally, and perhaps counterintuitively, allowing states to sue in virtually any instance of conflict with federal law would both interfere with the ability of individuals to vindicate their rights and short-circuit the principal means through which majorities have traditionally exercised control over the scope of federal power — at the ballot box.

To affirm the district court's conclusion that the Act suffices to confer standing upon Virginia would reward a state's effort to nullify federal law, incentivize future such endeavors by any state that believes itself to be similarly aggrieved, and thereby involve the federal courts in an enterprise that Article III's case-or-controversy requirement was specifically intended (and has long been interpreted) to keep them out of. As Professor Bickel warned, "It would make a mockery . . . of the

constitutional requirement of case or controversy . . . to countenance automatic litigation — and automatic it would surely become — by states situated no differently" than Virginia is here. Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89–90.

ARGUMENT

I. THE RULE THAT STATES LACK STANDING TO SUE THE FEDERAL GOVERNMENT AS *PARENS PATRIAE* REFLECTS FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL LAW

Just as members of Congress are not the appropriate parties to enforce the separation of powers, *see, e.g.*, *Raines* v. *Byrd*, 521 U.S. 811 (1997), so too the states are not the appropriate party to challenge the constitutional scope of federal regulation, *see, e.g.*, *Mellon*, 262 U.S. 447. This is so "not because the interests asserted are unreal or inadequately particular to the state, but because by hypothesis they should not, in such circumstances, suffice to invoke judicial action." Bickel, *supra*, at 88. Indeed,

> There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. But it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts . . . .

Raines, 521 U.S. at 828 (citations omitted). Such a "more restricted" role "lies in the protection [judicial review] has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." *United States* v. *Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Critically, "[i]t is *this* role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." *Id*.

This conception of the role of the federal courts in turn depends upon litigation in which parties sue to protect their concrete, particularized interests. *See, e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727, 739–40 (1972) ("[I]f any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so."); *see also United States* v. *Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not

sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.").

a. It is Settled Precedent that States May Not Sue the Federal Government to Vindicate the Rights of Their Citizens

One manifestation of these background principles is the venerable rule that states may not sue the federal government merely to vindicate the individual rights of their citizens. *See, e.g.*, *Pennsylvania,* 426 U.S. at 665 ("It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens . . . ."). As Justice Sutherland explained for a unanimous Court in *Mellon*,

> It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

262 U.S. at 485–86 (citation omitted); *see Texas* v. *ICC*, 258 U.S. 158, 162 (1922) (holding that Texas's claim that Congress exceeded its enumerated powers "does not present a case or controversy within the range of the judicial power as defined by the Constitution"); *see also Florida* v. *Mellon*, 273 U.S. 12 (1927); *New Jersey* v. *Sargent*, 269 U.S. 328 (1926).

Thus, *Massachusetts* v. *Mellon* rejected Massachusetts' standing to challenge the constitutionality of the Sheppard-Towner (or Maternity) Act of 1921, which provided matching federal funds for private programs designed "to reduce maternal and infant mortality," 262 U.S. at 478–79, on the ground that the Act interfered with state regulation in violation of the Tenth Amendment. *See id*. at 479. Similarly, in *Texas* v. *ICC*, Texas sought to challenge the constitutionality of key provisions of the Transportation Act of 1920, on the ground that they exceeded Congress's powers to regulate interstate commerce, *see* 258 U.S. at 160. Again, the Court rejected the state's standing to proceed absent a showing of a more concrete and direct injury to Texas's sovereign interests. *See id*. at 162.

Comparable claims were made — and dismissed — in *Florida* v. *Mellon* and *New Jersey* v. *Sargent*. In the former case, Florida sought to enjoin the Secretary of the Treasury from collecting certain taxes imposed by section 301 of the Revenue Act of 1926, on the ground that the taxes exceeded Congress's powers under Article I, Section 8. The Court rejected Florida's standing, citing *Massachusetts* v. *Mellon* for the proposition that "there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any direct injury as the result of the enforcement of the act in question." 273 U.S. at 18. And *Sargent*, like *Texas* v. *ICC* before it, held that challenges to the scope of federal regulation under the Commerce Clause were not properly brought by states absent some showing that some unique *state* interest was implicated. *See* 269 U.S. at 337–39.

The origins of the rule for which these cases stand can easily be found in nineteenth-century doctrine, in which "states could not (in federal court) ordinarily litigate against the federal government or other states conflicting claims to regulate, nor could they seek to enforce their own legislation or to vindicate their extrastatutory interests in protecting their citizenry." Ann Woolhandler & Michael G. Collins,

State Standing, 81 VA. L. REV. 387, 393 (1995). And although *Massachusetts* v. *Mellon* itself arose in the context of the Supreme Court's original jurisdiction, in which special considerations might enter into play, *see Snapp*, 458 U.S. at 603 n.12; *see also id*. at 610–12 (Brennan, J., concurring), it is now well-settled that its constraints apply just as much to suits — such as this one — initially filed in the lower federal courts. *See* Woolhandler & Collins, *supra*, at 490–91; *see also Snapp*, 458 U.S. at 610 n.16; *Hodges*, 300 F.3d at 444.

b. Fundamental Constitutional Principles Mandate that the Federal Government Acts as *Parens Patriae* Where Federal Law is Implicated

As the Court emphasized in *Massachusetts* v. *Mellon*, the impetus behind the bar on state standing in these circumstances is the practical and legal reality that it is the federal government, and not the states, which acts as *parens patriae* where federal rights are concerned. *See, e.g.*, *Mellon*, 262 U.S. at 485–86; *accord*. *Georgia*, 324 U.S. at 446.[2]

Moreover, as Professors Woolhandler and Collins have explained,

2. Thus, there is no analogous bar on suits by the federal government to enforce federal law against the states, their officers, or private parties.

> The Court's acceptance of an individual's ability to raise structural constitutional issues in contests with governments may be due at least in part to the nonrecognition of a sovereign's right to litigate such questions. This preference for having individuals rather than government police even structural guaranties expresses that individuals are the intended beneficiaries of those guaranties.

Woolhandler & Collins, *supra*, at 440 (footnote omitted). So understood, *Massachusetts* v. *Mellon* is not just an infrequently revisited footnote to the Court's modern standing jurisprudence; rather, its *ratio decidendi* reflects a specific variation on a familiar (and fundamental) constitutional theme:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

New York v. *United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted); *see also Lopez*, 514 U.S. at 575–77 (Kennedy, J., concurring).

a. *Mellon* Confirms that States Do Not Suffer a Freestanding Injury Whenever Congress Exceeds its Article I Powers

Inasmuch as *Mellon* and its successors reflect the principle that individuals are the intended beneficiaries of the Constitution's structural guarantees, they also stand for the related but distinct proposition that states do not suffer a freestanding legally cognizable injury whenever Congress exceeds its Article I powers.[3] In *Mellon* itself, "the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute." 262 U.S. at 483; *see id*. ("[I]t is plain

3. Thus, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), the Supreme Court upheld South Carolina's standing to contest whether Congress had the power under the Fifteenth Amendment to impose "preclearance" requirements on particular jurisdictions for future changes to local and state election laws, but rejected its ability to challenge the Voting Rights Act on due process and bill of attainder grounds. As the Court explained, South Carolina could raise the Fifteenth Amendment claim entirely because the Fifteenth Amendment (unlike the other constitutional provisions invoked by South Carolina) directly and uniquely governed the federal government's relationship with the states *as such*. *See id*. at 324; *see also* Woolhandler & Collins, *supra*, at 492 ("Presumably the state sought to litigate its own liberty interest in setting voter qualifications, as provided by specific provisions of the Constitution that expressly contemplate state power to set such qualifications."); *accord*. *Oregon* v. *Mitchell*, 400 U.S. 112, 119–25 (1970) (Black, J.) (explaining why the Constitution creates a concrete interest on the part of the states in the allocation of control over election procedures). And even on those hyper-narrow terms, *South Carolina* has still met with rather harsh criticism. *See, e.g.*, Bickel, *supra*, at 88–90.

that that question . . . is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power."). Nor did it matter to the Court that Massachusetts alleged that "the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights." *Id*. at 482. So too, in *Texas* v. *ICC*, *Florida* v. *Mellon*, *New Jersey* v. *Sargent*, and a host of other, similar cases. In short, "For purposes of litigation with the United States (through the officers charged with execution of federal laws), a state should have no recognizable interest in ensuring the fidelity of Congress to constitutional restraints." Bickel, *supra*, at 88.[4]

Although it would be some decades after *Massachusetts* v. *Mellon* before the Court articulated the modern guideposts for Article III

4. States may well have an interest — and suffer a particularized and concrete injury — when Congress improperly *compels* them to legislate, as was true in *New York* v. *United States*, 505 U.S. 144 (striking down a federal law on Tenth Amendment commandeering grounds in a suit brought by a state plaintiff). But those cases only prove the point, for the injury there is suffered *directly* by the state, and is not a generalized injury to the state's citizens that the state seeks to litigate on their behalf. Whether a criminal *defendant* may rely upon the Tenth Amendment, *see, e.g.*, *United States* v. *Bond*, 581 F.3d 128 (3d Cir. 2009), *cert. granted*, 131 S. Ct. 455 (2010) (No. 09-1227), it is settled the private plaintiffs may not. *See, e.g.*, *Tenn. Elec. Power Co.* v. *Tenn. Valley Auth.*, 306 U.S. 118, 143–44 (1939).

standing, Justice Sutherland's analysis on this point might best be understood as going to the existence *vel non* of a sufficiently particularized injury in fact to satisfy the case-or-controversy requirement. Put another way, "[t]he Court's refusal to allow states to litigate their Governing Interests also reinforced the constitutional requirement, grounded in the separation of powers, that federal courts hear only cases and controversies." Woolhandler & Collins, *supra*, at 440; *see also Barnes* v. *Kline*, 759 F.2d 21, 48 (D.C. Cir. 1984) (Bork, J., dissenting) ("The Supreme Court's decisions about suits over "generalized grievances" are closely related to *Massachusetts* v. *Mellon* . . . .").[5]

c. Even as the Supreme Court's Approach to State Standing Has Liberalized in Suits Against Private Parties and Other States, the *Mellon* Rule Has Remained Sacrosanct

5. Thus, even when then-Judge Scalia suggested in *Maryland People's Counsel* v. *FERC*, 760 F.2d 318 (D.C. Cir. 1985), that Congress in some circumstances should be able to confer *parens patriae* standing upon the states in suits against the federal government, his self-described "narrow" opinion emphasized the extent to which the separation of powers both (1) barred such suits *without* federal legislation; and (2) might in some instances bar such legislation, as well. *See id*. at 321–22. Needless to say, no federal statute authorizes Virginia's suit in this case.

Finally, although the Court has since recognized broader circumstances in which states *can* act as *parens patriae* of their citizens in suits against private entities or other states, *see, e.g.*, *Georgia*, 324 U.S. at 447, it has consistently reaffirmed the bar on *parens patriae* suits against the federal government, *see, e.g.*, *id*. at 446. Nowhere is this distinction more apparent than the Supreme Court's 1982 decision in *Snapp*, which recognized Puerto Rico's standing to sue Virginia apple growers on a claim that the defendants had violated federal law by refusing to honor a preference for U.S. workers over temporary foreign workers. *See* 458 U.S. 592. Treating Puerto Rico as a "state," *see id*. at 608 n.15, the 8-0 Court concluded that it had standing to proceed, even as it expressly distinguished suits against the federal government, *see id*. at 610 n.16 ("Here, . . . the Commonwealth is seeking to secure the federally created interests of its residents against private defendants.").

A similar distinction was central to the Supreme Court's decision in *Massachusetts* v. *EPA*. Although the Court there recognized a state's standing to challenge federal administrative action (or, more precisely, the lack thereof), Justice Stevens's opinion emphasized the "critical difference between allowing a State 'to protect her citizens from the

operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert *its* rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17 (quoting *Georgia*, 324 U.S. at 447) (emphasis added); *see also id*. ("Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act.").[6] Indeed, the linchpin of the Court's standing analysis was that rising sea levels would directly injure Massachusetts' *proprietary* interests as a coastal property owner. *See id*. at 522–23; *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 265 (6th ed. 2009).

In short, even as the Supreme Court has greatly increased the ability of states to sue both other states and private parties to vindicate "quasi-sovereign interests," and even as it has allowed suits against the federal government to vindicate states' statutory interests created by Congress, it has held fast to the *Mellon* rule as a categorical bar on pure *parens patriae* suits against the federal government. States simply do

6. The Court's analysis may also have reflected the view that Congress had specifically *authorized* Massachusetts' suit. *See Massachusetts*, 549 U.S. at 514 n.16.

not have a sovereign interest sufficient to confer standing anytime the federal government is alleged to have exceeded its constitutional power.

II. STATE LAW CANNOT CREATE STANDING MERELY BY PURPORTING TO EXEMPT STATE CITIZENS FROM FEDERAL LAW

Conceding the continuing force of the *Mellon* bar, Virginia contends — and the district court held — that it nevertheless has a sufficient interest to support standing because of the conflict between the individual mandate and Virginia's Health Care Freedom Act. The argument, in short, is that Virginia is not proceeding as *parens patriae*, but is rather seeking to vindicate its unique interest in enforcing the (otherwise preempted) state law. *See, e.g.*, Petition for a Writ of Certiorari Before Judgment at 7, *Virginia ex rel. Cuccinelli* v. *Sebelius*, No. 10-1014 (U.S. filed Feb. 8, 2011). As cases identifying *valid* sovereign and quasi-sovereign interests show, however, the distinction on which this argument rests is without a difference.

a. Quasi-Sovereign Interests Only Include Protecting the Health and Well-Being of Citizens and Preventing Discriminatory Treatment Within the Federal System

As noted above, the Supreme Court since *Massachusetts* v. *Mellon* has to some degree relaxed the constraints on the ability of states to sue in some circumstances. Further to that end, the Court has articulated

criteria pursuant to which states might have a "quasi-sovereign" interest sufficient to satisfy both Article III and prudential standing considerations, at least in suits against private parties or other states. *See, e.g.*, *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) ("In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.").

Tellingly, though, in none of these cases did the Supreme Court *ever* suggest that a state could use such a "quasi-sovereign" interest to sue the federal government; quite to the contrary. *See, e.g.*, *Snapp*, 458 U.S. at 610 n.16. Nor has any case suggested that a state could create such a "quasi-sovereign" interest merely by exempting its citizens from compliance with applicable federal law, and for good reason. Absent circumstances such as those identified in cases like *Georgia* v. *Pennsylvania Railroad* and *Snapp*, "the State is only a nominal party without a real interest of its own," *id*. at 600, and allowing standing would be tantamount to allowing the exact kind of suit that *Mellon* forbids. *See id*. at 602 ("A quasi-sovereign interest must be sufficiently

concrete to create an actual controversy between the State and the defendant.").

Thus, even against *non-federal* defendants, the Court in *Snapp* identified only two sets of circumstances in which states may in fact have a "quasi-sovereign" interest sufficient to confer standing: "First, a State has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id*. at 607.

b. A State Does Not Have an Independent Interest in Seeking to Protect Its Citizens from the Operation of Federal Law

Nothing in *Snapp*, or in any other Supreme Court decision before or since, suggests that states have a similar interest in protecting their citizens *from* federal law, especially in suits against federal defendants. After all, states cannot have an interest in protecting their citizens from the operation of *valid* federal laws, since those laws are "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2; *see also Mondou* v. *N.Y., New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912)

("When Congress . . . adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of [a state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.").

It necessarily follows that, even if a quasi-sovereign interest *could* support standing in a suit against the federal government, a state cannot claim a quasi-sovereign interest in protecting its citizens from allegedly invalid federal laws. *See, e.g.*, *Georgia* v. *Pa. R.R. Co.*, 324 U.S. at 446–47 (explaining that quasi-sovereign interests do *not* extend to suits "where a State sought to protect her citizens from the operation of federal statutes"). A contrary conclusion would be patently irreconcilable with *Mellon*, *Texas* v. *ICC*, and the litany of additional cases in which the Supreme Court rejected the argument that states may sue the federal government on claims that the latter exceeded its constitutional authority in its regulation of individuals.

c. States Cannot Create a Quasi-Sovereign Interest by Purporting to Exempt State Citizens from Federal Law

Nor is the above analysis altered by the suggestion that a state might have a quasi-sovereign interest in defending the applicability of

state law as against an allegedly invalid federal law. To be sure, *Snapp* reiterated the state's *sovereign* (not "quasi-sovereign") interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code, both civil and criminal." 458 U.S. at 601. But that (by then well-established) interest goes only to a state's power to ensure that its laws are followed by those who are bound to comply. *See, e.g.*, Woolhandler & Collins, *supra*, at 422–23. The state's interest in enforcing its legal code must necessarily give way to federal law whenever a conflict arises, all the more so because the existence of a conflict in no way bears upon the underlying constitutionality of the federal law.

To that end, no part of the Court's analysis in *Snapp* or any other case can fairly be read to suggest that a state could create a quasi-sovereign interest simply by creating a conflict. "A state cannot by creating an agency for the purpose of making life better in the state obtain a legal interest in every transaction to which an entity within the state is a party." *Ill. Dep't of Transp.* v. *Hinson*, 122 F.3d 370, 373 (7th Cir. 1997) (Posner, C.J.).

It is therefore bootstrapping to conclude that "'Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy [*Snapp*].'" *Sebelius*, 702 F. Supp. 2d at 607 (quoting *Wyoming ex rel. Crank* v. *United States*, 539 F.3d 1236, 1242 (10th Cir. 2008)). It is not the *fact* of preemption that might inflict a sufficiently concrete injury upon the state to confer standing, but the unique nature of the state interest with which the federal law arguably interferes.[7] Absent some more specific quasi-sovereign, proprietary, or private interest arising out of the application of federal law, states may not sue the federal government simply to protect their citizens from allegedly unconstitutional laws.

7. This conclusion may help to explain the Supreme Court's observation in *Franchise Tax Board* that "[t]here are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law. 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." *Franchise Tax Bd. of Cal.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983); *see also* Kevin C. Walsh, *The Ghost That Slew the Mandate*, 64 STAN. L. REV. (forthcoming 2011) (arguing that *Franchise Tax Board* precludes federal jurisdiction where, as here, states seek a declaratory judgment that state law is not preempted because the conflicting federal law is unconstitutional).

III. THE DISTRICT COURT'S HOLDING THAT VIRGINIA HAS STANDING WOULD HAVE GRAVE IMPLICATIONS FOR JUSTICIABILITY DOCTRINE

a. The District Court Rested Virginia's Standing Solely on the Conflict Between State and Federal Law

As noted above, the district court concluded that Virginia has standing because of the conflict between the individual mandate and Virginia's Health Care Freedom Act, VA. CODE ANN. § 38.2-3430.1:1, which provides that:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding.

What should be clear from the text of the statute is that it is not a criminal provision of the Virginia code, nor is it a law that reflects Virginia's quasi-sovereign interest in either "the health and well-being — both physical and economic — of its residents in general" or "in not being discriminatorily denied its rightful status within the federal system." *Snapp*, 458 U.S. at 607. The law creates no penalties, nor does it impose any obligations on (or barriers to conduct *by*) private citizens,

who remain free "to privately contract for health insurance for family members or former family members." Instead, the law exempts Virginia citizens from a requirement that, practically, could *only* be imposed by the federal government. Put simply, the statute serves no sovereign or quasi-sovereign interest *other* than to provoke a conflict with federal law.

Nevertheless, the district court concluded that the existence of a conflict between the individual mandate and the Virginia Health Care Freedom Act is sufficient to confer standing upon Virginia. *See Sebelius*, 702 F. Supp. 2d at 606–07. Invoking the Tenth Circuit's "principled and logical reasoning" in *Wyoming*, *see id.* at 607, the court concluded that Virginia, through its Attorney General, satisfies the standing requirements of Article III.

As the above analysis suggests, however, the mere fact of preemption is not — and cannot be — sufficient to create a sovereign or quasi-sovereign interest supporting Virginia's standing to challenge the constitutionality of federal regulation. And although the district court heavily relied upon it, the Tenth Circuit's decision in *Wyoming* is not to the contrary. As was true in *Massachusetts* v. *EPA*, Wyoming's suit was

specifically authorized by the APA. *See* 539 F.3d at 1242–44. The question presented to the Tenth Circuit was only whether the Bureau of Alcohol, Tobacco, and Firearms had acted arbitrarily and capriciously in interpreting a federal statute; like Massachusetts before it, Wyoming was asserting its statutory rights under federal law.[8]

In that regard, it is telling that the district court in this case provided no additional analysis of, or explanation for, how the individual mandate affects Virginia's sovereign interests as distinct from the interests of her citizens; its standing analysis rises and falls on the simple but incorrect conclusion that a claim of preemption will always suffice to confer upon the state an interest sufficient to challenge the constitutionality of the conflicting federal law.

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8. To similar effect, the two circuit decisions on which the *Wyoming* court relied in holding that preemption is sufficient to confer standing *also* involved situations where states were suing federal agencies for failing to comply with federal statutes. *See Alaska* v. *U.S. Dep't of Transp.*, 868 F.2d 441, 444 (D.C. Cir. 1989) ("Congress has expressly contemplated that States may be heard to complain of injury inflicted by the Orders."); *Ohio ex rel. Celebrezze* v. *U.S. Dep't of Transp.*, 766 F.2d 228, 233 (6th Cir. 1985) ("The threatened injury to a State's enforcement of its safety laws is within the zone of interests of the Administrative Procedure Act and the Hazardous Materials Transportation Act.").

b. Such Reasoning Would "Make a Mockery" of the Case-or-Controversy Requirement

Because the district court rested Virginia's standing on the mere existence of a conflict between federal and state law, and identified no freestanding injury to any other quasi-sovereign or proprietary interest, its holding allows for no principled distinction between this suit and any other in which a state would use preemption as the basis for standing to bring a constitutional challenge to federal law. Nor is there any logical distinction between such a suit and one in which the state's objection sounded purely in the *applicability* of a federal statute — not that the conflicting federal statute was unconstitutional, but merely that it did not actually preempt state law. Such overbroad and cursory analysis, if allowed to stand, would create three distinct problems for contemporary standing doctrine.

First, allowing states to challenge the constitutionality of federal laws by creating a statutory conflict with state law would provide an all-too-effective end-run around *Mellon*, since it would reduce the Supreme Court's bar on *parens patriae* suits against the federal

government to cases in which there is no positive state law with which the challenged federal action is in tension.[9]

Second, to the extent that *Mellon* reflects deeper principles about Article III standing, including the bar on generalized grievances and the requirement that the plaintiff suffer a concrete, particularized injury, a rule that allows states to sue the federal government whenever there is a conflict between state and federal law would risk vitiating those requirements altogether in any instance in which a conflict is alleged to exist. Indeed, if a putative conflict between state and federal law itself sufficed to satisfy the injury-in-fact prong of standing analysis, *see Sebelius*, 702 F. Supp. 2d at 607, there would be no way of ensuring that the challenged federal law actually injured an individual party; the existence of standing would be governed simply by the abstract — and quite possibly hypothetical — conflict between state and federal law. *See, e.g.*, Bickel, *supra*, at 90 ("Time and again, precisely like a council of revision, the Court would be pronouncing the

9. Even this distinction might prove illusory; federal law in most relevant cases will displace at least *some* state law, such as state tort law in the case of federal law governing the manufacture of medical devices. *See, e.g.*, *Wyeth* v. *Levine*, 129 S. Ct. 1187 (2009).

abstraction that some law generally like the one before it would or would not generally be constitutional in the generality of its applications.").

In addition to prematurely (and perhaps unnecessarily) involving the courts in a political dispute, such a result would also fly in the face of the Court's repeated admonition that "we must carefully inquire as to whether [plaintiffs] have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820.

Third, and perhaps counterintuitively, "expansive state standing has a serious potential to undermine rather than complement individual standing in constitutional cases," Woolhandler & Collins, *supra*, at 396; *see also id*. at 504 ("[I]ncreased state standing could potentially undermine individual standing to litigate individual and structural constitutional guaranties."), both because it would prioritize claims by states over those of individuals and because of the likelihood that it would be "majority reinforcing," placing into tension "[t]he freedom of government" and "the freedom from government." *See id*. at 483. In other words, a doctrine that allows states to sue in virtually any

instance of conflict with federal law would short-circuit the principal means through which majorities have traditionally exercised control over the scope of federal power — at the ballot box — and come at the expense of those parties who historically have been left to the courts to vindicate their rights.

c. Preemption-Based Standing Would Also Incentive State Attempts to Impermissibly Nullify Federal Laws

Finally, it bears noting that Virginia's Health Care Freedom Act is hardly the first — or most aggressive — recent attempt by a state to manufacture a conflict with federal law. Idaho's Health Freedom Act goes even further, providing that

> The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment. The state of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of securing health care services free from the imposition of penalties, or the threat thereof, by the federal government of the United States of America relating thereto.

IDAHO CODE § 39-9003(1) (2010); *see also* THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY

122–23 (2010) (quoting the Idaho law and invoking it as a model for future state efforts to nullify allegedly unconstitutional federal laws).

In one sense, these efforts may reflect "the political reality that a smaller unit of government is more likely to have a population with preferences that depart from the majority's. It is, therefore, more likely to try an approach that could not command a national majority." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (book review). But that only further undermines the argument that such conflicts should create standing, for it would inevitably lead to multifarious efforts to challenge federal legislation from every direction, and by every constituency.[10] As Professor Bickel warned, "It would make a mockery . . . of the constitutional requirement of case or controversy . . . to countenance automatic litigation — and automatic it would surely become — by

10. In February 2011, for example, the Arizona Senate passed S.B. 1178 (the "Intrastate Commerce Act"), which provides that all services performed within Arizona, and all goods grown or made in the state for consumption within the state, "are not subject to the authority of Congress under its constitutional power to regulate commerce among the several states." The bill also imposes substantial fines for state or federal officers who attempt to enforce federal laws that are inconsistent with those proscriptions.

states situated no differently" than Virginia is here. Bickel, *supra*, at 89–90.

Virginia's Health Care Freedom Act does not expressly "nullify" federal law. But it was enacted to invite the same result, albeit via judicial invalidation rather than outright nullification. To allow standing based solely on the existence of such statutes is to take up such an invitation, and to involve the courts in an enterprise that Article III's case-or-controversy requirement was specifically intended (and has long been interpreted) to keep them out of.

* * *

Ultimately, whether or not the individual mandate is a constitutional exercise of Congress's Article I powers is an important question, but one that does not turn in any meaningful way on state laws purporting to exempt state citizens from its operation. If the individual mandate is constitutional, then these state laws will all fall under the Supremacy Clause. If the individual mandate is *not* constitutional, then *it* will fall regardless of whether it conflicts with any state laws. Even at its broadest, standing doctrine has never encompassed such an undifferentiated, unspecific, and ultimately

irrelevant injury to state law. To allow such a suit to proceed here would be to sanction a practice that the text, purpose, and history of the Constitution expressly forbid, and

> would be a fundamental denial of perhaps the most innovating principle of the Constitution: the principle that the federal government is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry, which is its own as well as theirs.

Bickel, *supra*, at 89.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the district court's decision be vacated and remanded with instructions to dismiss for lack of standing.

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) and Fed. Cir. Rule 32(b). The brief contains 6,983 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I hereby certify that on March 7, 2011, I filed and served the foregoing Brief of Amici Curiae Professors of Federal Jurisdiction in Support of Appellant with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. I also hereby certify that I have caused eight (8) copies to be delivered to the Court by hand delivery, and have caused copies to be served upon the following counsel by first-class mail:

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