UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

STATE OF WEST VIRGINIA, Plaintiff, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	)))))))))))	Case No. 1:14-cv-01287-RBW

AMICUS CURIAE BRIEF OF
PACIFIC LEGAL FOUNDATION IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

LCvR 7.1

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

No. 1:14-cv-01287-RBW

State of West Virginia v. U.S. Department of Health and Human Services

Certificate required by LCvR 7.1 of the Local Rules of the United States District Court for the District of Columbia:

I, the undersigned, counsel of record for Amicus Curiae Pacific Legal Foundation, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Pacific Legal Foundation which have any outstanding securities in the hands of the public:

N/A

These representations are made in order that judges of this court may determine the need for recusal.

DATED: November 10, 2014.

Respectfully submitted,

/s/ Lars H. Liebeler

LARS H. LIEBELER, D.C. Bar No. 416666
E-Mail: LLiebeler@TL-Lawfirm.com
Thaler Liebeler LLP
International Square
1825 Eye Street NW
Suite 400
Washington, DC 20006
Telephone: (202) 587-4747
Facsimile: (202) 466-2693

TIMOTHY SANDEFUR, Cal. Bar No. 224436
E-Mail: tsandefur@pacificlegal.org
ANASTASIA P. BODEN, Cal. Bar No. 281911

E-Mail: apb@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae
Pacific Legal Foundation

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IDENTITY AND INTEREST OF AMICUS CURIAE

A full summary of Pacific Legal Foundation's (PLF) identity and interest in the case is set out in the accompanying motion to file a brief as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE CASE

This case challenges the Executive Branch's authority to ignore binding federal statutes and regulations defining what health insurance policies may legally be offered for sale, and to foist all political accountability for the enforcement of those federal laws on the states.

The ACA mandates the types of health coverage insurers may sell. For example, insurers may only vary policy premiums based on a limited number of characteristics, must accept applicants regardless of preexisting conditions, may not charge consumers more for insurance if those consumers are already ill, and they must offer plans with certain "essential" benefits. 42 U.S.C. §§ 300gg-300gg-6, 300gg-8. As a consequence, many insurance policies with which consumers were formerly satisfied are now illegal as a matter of federal law.

If a state declines to enforce these restrictions, the Act provides that the federal government "shall" do so. 42 U.S.C § 300gg-22. But the so-called "administrative fix" changes this statutory scheme by declaring that if a state does not enforce the statute, the statute will simply go unenforced. This fundamentally alters the state's choices from those provided by the ACA.[1]

Significantly, the federal government has not declined to enforce these laws on the grounds that they are unconstitutional; rather, it is refusing to enforce them because they have proven politically unpopular. A state would have to expend significant resources to enforce the federal law. But non-enforcement also brings serious costs. While the federal government may enact legislation

[1] *Extended Transition to Affordable Care Act—Compliant Policies*, Centers for Medicare & Medicaid Services, *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf (last visited Nov. 5, 2014).

that gives states the option of enforcing a law, or leaving it to federal officials to enforce, and may even offer states financial inducements to enforce federal law, it cannot force states to choose between enforcing federal law or suffering consequences so punitive as to be coercive. Compelling states to make a Hobson's choice as the "administrative fix" has done, constitutes impermissible commandeering in violation of the Tenth Amendment. By unilaterally thrusting the decision between enforcement and non-enforcement upon the states, the Administration's actions radically alter the structure of the Patient Protection and Affordable Care Act (ACA) and harm West Virginia in its capacity as a state. The state has standing to challenge such a violation of the Tenth Amendment.

I

WEST VIRGINIA HAS STANDING TO CHALLENGE THE AFFORDABLE CARE ACT'S "VOLUNTARY" INSURANCE REGULATIONS AND "ADMINISTRATIVE FIX"

A. The Anti-Commandeering Doctrine Encompasses the Right of States to Be Free of Coercive Penalties for Failure to Enforce Federal Law

The executive branch's unilateral refusal to enforce those provisions of the ACA that define what insurance policies are deemed compliant forces states to choose between enforcing federal law, or suffering certain penalties. But just as the Tenth Amendment limits the federal government's ability to commandeer a state outright into enforcing federal law, *New York v. United States*, 505 U.S. 144, 175 (1992), so, too, that Amendment forbids the federal government from forcing a state to make decisions on policy matters that it would otherwise not make. Were this not the case, this loophole would swallow the anti-commandeering rule, and empower the federal government to coerce states under the guise of a "cooperative federalism" which is neither cooperative, nor respectful of federalism. Thus, West Virginia may challenge a purported "choice" under the Tenth

Amendment when the alternative to enforcing federal law is so coercive as to leave the state with no genuine choice.

The Founders, distrustful of consolidated power and seeking to disperse authority among multiple lawmaking bodies, drafted the Constitution to delegate limited power to the federal government and reserve the rest to the states—trusting that each body would jealously guard its own prerogatives and keep the other in check. *See The Federalist* No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) ("[A] double security arises on the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."). This division of power is enshrined in the Tenth Amendment.

Federalism is not an end in itself. The separation of power between federal and state sovereigns "enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). It allows "[d]iversity among states" and perpetuates "citizens' ability to vote with their feet," which are "federalism's chief attractions." Michael S. Greve, *Against Cooperative Federalism*, 70 Miss. L.J. 557, 558 (2000). It enables state and federal officials to efficiently allocate responsibility for joint programs in a predictable and rational manner. And it bolsters political accountability by ensuring that individuals know which officials to hold accountable for unpopular laws. *New York*, 505 U.S. at 168. Thus when the federal government violates the Tenth Amendment's dictates, courts permit both states and individuals to vindicate the distinct injury suffered by each. *See*, *e.g.*, *id.*; *Bond*, 131 S. Ct. at 2365.

While the Supreme Court has not articulated the outer boundaries of the Tenth Amendment, it has held that, at a minimum, when the federal government forces states to adopt, enforce, or adhere to federal law, it unconstitutionally usurps state sovereignty. Thus, for example, the federal government cannot outright command states to enforce federal regulations by requiring state officials to perform background checks on potential gun purchasers, *Printz v. United States*, 521 U.S. 898, 933 (1997), or require states to choose between providing for the disposal of radioactive waste or taking possession of the material itself. *New York*, 505 U.S. at 175-76.

These cases emphasize that federal commandeering harms political accountability. In *Printz*, the Court noted that where Congress

> force[s] state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for solutions with higher federal taxes. And even when States are not forced to absorb the costs . . . they are still put in the position of taking the blame for its burdensomeness and its defects.

521 U.S. at 930. Likewise in *New York*, the Court noted that "[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 505 U.S. at 169. Under this line of cases, the federal government can neither outright commandeer a state into enforcing federal law, nor force states to make a choice between two options, neither of which it could command outright.

As an alternative to such outright commandeering, the federal government has often offered states a choice between adhering to federal standards or standing aside while the federal government enforces them. These schemes are characterized as "cooperative federalism." *See* Greve, *supra*, at 558. Though these arrangements may have problems of their own, *see id.* at 559 (cooperative federalism "undermines political transparency and accountability," "heighten[s] civic disaffection and cynicism," "diminishes policy competition among the states," and "erodes self-government and liberty"), they are constitutional so long as they do not coerce state action.

But just as the federal government may not compel outright, it is also forbidden to make an "offer" which is so coercive as to essentially force the state into "choosing" to enforce federal law. In *New York*, the Court emphasized that its cases "have identified a variety of methods, *short of outright coercion*, by which Congress may urge a State to adopt a legislative program consistent with federal interests." 505 U.S. at 166 (emphasis added). The only "permissible method of encouraging a State to conform to federal policy choices" allows "the residents of the State [to] retain the ultimate decision as to whether or not the State will comply." *Id.* at 168. As a practical matter, states do not retain a choice when the federal government threatens to revoke funding which has become indispensable to the state's operations. Where a "choice" is not truly voluntary, that is not cooperative federalism; that is commandeering.

This is best exemplified in the Spending Clause cases. The Supreme Court has long held that while Congress can offer states financial inducements to behave in certain ways, there is a "point at which pressure turns into compulsion, and ceases to be inducement." *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). Thus in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2607 (2012), the Court held that the federal government could not condition the continued receipt of federal funds for Medicaid on the state's "voluntary" choice to expand Medicaid eligibility. The Court found such a choice to be coercive because the funds were used not only as an incentive, but as a penalty. Thus the state's choice was not truly voluntary. The federal government may not twist a state's arm in such a way as to effectively "*require* the States to govern according to [its] instructions." *Id.* at 2602 (citing *New York*, 505 U.S. at 162) (emphasis added).

Notably, though it analyzed the claim under the Spending Clause, the *NFIB* Court cited Tenth Amendment commandeering cases for this principle—because that Amendment protects the right of states to govern free of federal coercion. Said the Court, "'[T]he Constitution simply does not give Congress the authority to require the States to regulate.' That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Id.* at 2602 (citing *New York*, 505 U.S. at 178). Without this limitation, the Tenth Amendment's prohibition on commandeering would be meaningless.

In short, "[t]he power to confer or withhold unlimited benefits is the power to coerce or destroy." *United States v. Butler*, 297 U.S. 1, 71 (1936). The federal government cannot do through the inducement of benefits or threats what it cannot do outright. The Tenth Amendment protects states from coercive choices just as much as it protects them from commandeering.

B. West Virginia Is Injured by the Federal "Option" to Enforce Health Insurance Policy Regulations

Though states cannot sue as *parens patriae* to vindicate harms that belong only to their citizens, *see Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923), they can sue when they suffer a harm that is unique to the state itself—such as invasions of state sovereignty. *See New York*, 505 U.S. at 157.

States have repeatedly been held to have standing where the federal government passes a law that infringes the lawmaking power reserved to them by the Tenth Amendment. *See*, *e.g.*, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)) ("States have a legally protected sovereign interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction . . . . Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong."). In *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (opn. of Black, J.), the Supreme Court permitted the state to challenge the constitutionality of the Voting Rights Act because the Constitution "preserve[s] to the States the power . . . to establish and maintain their own separate and independent governments." *See also South Carolina v. Katzenbach*, 383 U.S. 301, 324-25 (1966) (state could challenge portions of Voting Rights Act alleged to infringe state sovereignty); *Missouri v. Holland*, 252 U.S. 416, 431 (1920) (state permitted to challenge a federal treaty that was alleged to unconstitutionally interfere with the powers reserved to the states by the Tenth Amendment); *New York*, 505 U.S. at 157. These cases stand for the proposition that states have standing to sue the federal government to defend their sovereign powers when the federal government usurps that power, by commandeering, or by measures that are tantamount to commandeering.

A state's "choice" under the "administrative fix" is tantamount to unconstitutional coercion in four ways. First, a state must enforce the federal regulations if it chooses to set up its own state-funded "exchange."[2] Because the ACA preempts state law to the extent that the law inhibits the application of Title I of the Act, *see* Section 1321(d), a state cannot establish its own exchange and permit illegal policies to be offered on it. Thus if a state "chooses" not to enforce the federal regulations, it forfeits the option of establishing a state-funded exchange.

Electing not to establish an exchange, in turn, forces states to give up certain benefits. Where states can fund their own exchanges, they can exercise some degree control over operational costs, how those costs are passed on to consumers, and the design of the exchange. States that elect to set up their own exchanges may also apply to the Secretary for waivers from some regulations. 42 U.S.C. § 18052. Significantly, some federal courts have ruled that if a state declines to set up a

[2] The Affordable Care Act provides for the creation and regulation of health insurance "exchanges," through which consumers can purchase health insurance policies. The Act permits states to establish state-funded exchanges, or, if they decline to do so, to default to the federal exchange (known as healthcare.gov). In addition to the limitations imposed by 42 U.S.C. § 300-gg, all exchanges, whether federal or state, must be approved by the Secretary of Health and Human Services, and must comply with a list of requirements laid out in 42 U.S.C. § 18041 and any rules promulgated by the Secretary.

state-funded exchange, it may lose out on federal subsidies available under the Act. *See Halbig v. Burwell*, 758 F.3d 390, 399 (D.C. Cir. 2014) (ACA did not authorize tax subsidies to federal exchange), *reh'g en banc granted, judgment vacated*, No. 14–5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014); *Oklahoma ex rel. Pruitt v. Burwell*, No. CIV-11-30-RAW, 2014 WL 4854543 (E.D. Okla. Sept. 30, 2014) (same). *Contra*, *King v. Burwell*, 759 F.3d 358, 373 (4th Cir. 2014) (upholding IRS rule that interprets Affordable Care Act as allowing subsidies to federal exchanges). And while establishing a state-funded exchange allows the state to submit to a "blueprint" for its own design of the exchange for federal approval,[3] the default to a federal exchange requires the state to accept the one-size-fits-all federal exchange system, which may not adequately suit state needs.

The "administrative fix" adds a second, potentially long-term injury. If a state chooses not to enforce the federal standards, that decision will subject its residents and health insurance carriers to uncertainty over the legality of policies issued in violation of those standards. Though a state may permit carriers to offer non-conforming insurance policies, those policies are nevertheless illegal under federal law. The law prohibiting them has not been repealed; the President has merely chosen not to enforce the law, a decision that can be reversed whenever political expediency demands.[4]

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[3] *Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges*, Centers for Medicare & Medicaid Services, *available at* http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/hie-blueprint-states.html (last visited Nov. 5, 2014).

[4] This is akin to the current legal status of medical marijuana in the United States. Though medical marijuana sales are legal under some state laws, those sales remain illegal under Federal law. And though the Executive has promised not to enforce those Federal laws, *see* David Johnston and Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, NEW YORK TIMES, March 18, 2009, *available at* http://www.nytimes.com/2009/03/19/us/19April holder.html?_r=0 (last visited Nov. 5, 2014), it has often changed its mind. *See Obama Explains Increasing Medical Marijuana Crackdowns, Raids in 'Rolling Stone' Interview*, HUFFINGTON POST, April 25, 2014, *available at*

(continued...)

Thus insurers and consumers who buy and sell non-conforming policies are left in a legal grey zone. Any disputes that arise under non-conforming policies will require state courts to determine the effect or ultimate legality of those policies. The President's temporary suspension of enforcement of the ACA's criteria for compliant insurance policies does not eliminate the injury suffered by the state—if anything, it compounds it, by allowing insurance transactions to proceed which violate the ACA.

In *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972), the Court rejected the argument that a delay in enforcement rendered a challenge to a state environmental law nonjusticiable. The plaintiff's claims depended "on the present effectiveness in fact of the obligation under the Michigan statute to install sewage storage devices." *Id.* at 507. The Court determined that "if appellants are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy," even though the state had not yet chosen to prosecute. *Id.* Because "compliance [was] coerced by the threat of enforcement," the case could proceed. *Id.* at 508. Likewise, here, the fact that the President chose to ignore the sale of insurance policies that are illegal under the ACA does not make those policies compliant, or absolve future courts of the obligation to determine whether those policies are legal, enforceable contracts.[5]

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[4] (...continued)
http://www.huffingtonpost.com/2012/04/25/obama-marijuana-raids-rolling-stone_n_1451744.html (last visited Nov. 5, 2014).

[5] This is not an idle concern. State courts are routinely required to address complicated legal and constitutional matters in the context of determining the validity of insurance claims. *See*, *e.g.*, *Thomas v. Metro. Life Ins. Co.*, 131 A.2d 600 (Pa. 1957) (state court in insurance case required to determine whether Korean conflict was a "war"); *Langlas v. Iowa Life Ins. Co.*, 63 N.W.2d 885, 887-88 (Iowa 1954) (same).

The "administrative fix" is not simply a matter of the federal government declining to enforce the statute. In a paradoxical, but significant sense, the Executive Branch is 'enforcing' the statute by putting states to this unforeseen choice. In *ACRA Turf Club, LLC v. Zanzuccki*, No. 12-2775 (JAP), 2012 WL 2864402, at *5 (D.N.J. July 11, 2012), the District Court, relying on *MacMullan*, observed that the plaintiff had standing to sue even though the government said it was withholding enforcement of the regulation at issue. It was not "entirely accurate" to say that the agency was not enforcing the regulation, the court held, because it was "requiring Plaintiffs to petition" for exemption. *Id.* Likewise, by shifting responsibility for enforcement or non-enforcement on the states, the Executive Branch is enforcing the ACA, in the sense that states are still required to act, and to make a decision they would not otherwise have made.

Third, by removing the possibility of federal enforcement, the Administration has shifted political accountability for the changes wrought by the insurance regulations onto the state. *See* Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 13. Whereas under the ACA, states could implement the new laws without fear of voter reprisal, because the Federal government accepted the role of enforcer, now the responsibility of enforcement has been thrust upon the states. The unilateral determination by the Executive Branch to compel states to decide whether to enforce federal law or to allow violations of that law to continue within their borders was not the result of any decision by Congress or agreement between the states and the federal government, but is solely its attempt to avoid the consequence of public opinion. Evasions of political accountability are one of the chief harms of state commandeering. *See New York*, 505 U.S. at 168-89; *Printz*, 521 U.S. at 920.

The framers of the Constitution were deeply concerned with promotion of political accountability and responsibility.[6] Ensuring that those who make decisions are ultimately accountable to the public is one of the primary means of ensuring democratic control over policy. As Professor D. Bruce La Pierre observes, the federal government can evade this responsibility if it can shift the burdens of its policies to the states: "Congress' freedom to act in ways not approved by the electorate is enhanced because some of the 'costs' of its political decisions are eliminated. Those who otherwise would be burdened, at least indirectly, by the costs of enforcing national policies are, in effect, excluded from the political process." *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577, 645 (1985). This frustrates the political checks and balances established by the Constitution, and undermines the legitimacy of federal policy, "because the electorate might well prefer a different decision if it had to bear the full burdens of its representatives' decisions." *Id.* But a policy such as the "administrative fix," which shunts the responsibility for decision-making onto the states who did not make, and could not make, those decisions, allows those responsible to escape political accountability.

Finally, the state is harmed by the "administrative fix" by having the legal regime to which its representatives agreed altered unilaterally so that the nature of the state's obligations under the law are fundamentally changed. Under the ACA as written by Congress, the state enjoyed the choice of enforcing the Act's restrictions on insurance policies, or devoting its resources elsewhere, while

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[6] In fact, the *Oxford English Dictionary* credits *The Federalist* as the earliest appearance of the word "responsibility." *See* Michael I. Meyerson, *Liberty's Blueprint: How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made Democracy Safe for the World*, 283 n. 218 (2009).

the federal government enforced those restrictions. The "administrative fix" changed the law by confronting the state with a new choice: devoting its resources to enforcement of federal law, or having that law go unenforced within its boundaries. States that spend state tax dollars to enforce the federal law are deprived of the opportunity to devote those tax dollars to state priorities, and states that decline to enforce the statute must see the ACA—which is supposedly "the Supreme Law of the Land," U.S. Const. art. VI, § 2— rendered ineffective.

Unlike in *Arizona v. United States*, 132 S. Ct. 2492 (2012), this federal non-enforcement does *not* concern a subject over which the federal government has exclusive jurisdiction, meaning that states should be able to supplement any failed enforcement by the federal government. Indeed, "States, as a matter of tradition and express federal consent, have an important interest in maintaining precise and detailed regulatory schemes" regarding health insurance. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring). Yet as a matter of ordinary preemption law, the ACA bars states from plugging the hole of federal non-enforcement with its own laws relating to health insurance. A normal cooperative federalism scheme allows the state to choose between two options, and both result in federal law being enforced. But under the "administrative fix," the state must either devote its own resources to enforcing federal law or to stand by while federal law relating to this important interest goes unenforced—and meanwhile the state is unable to make or enforce its own alternative regarding insurance.

The "administrative fix" is thus analogous to the Medicaid spending provisions which the *NFIB* Court found unconstitutionally coercive. There, the ACA's Medicaid provisions appeared to allow the federal government to zero out *all* Medicaid spending for states that declined to expand their Medicaid programs. 132 S. Ct. at 2601-08. The Court found that this was "economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 2605. Because the withdrawal of all Medicaid funds threatened some 10 percent of states' budgets, states had no real power to decline. Although the federal government argued that states had always been warned that the Medicaid program was subject to alteration, this threat of withdrawal transformed the program fundamentally, and was not just an alteration: "The Medicaid expansion . . . accomplishes a shift in kind, not merely degree." *Id.*

In the same way, the "administrative fix" transforms the choice that states could make under 42 U.S.C. §§ 300gg-22 in kind, not degree. A state that does not enforce the statute has its power to regulate the insurance industry overridden by federal statutes that are then not enforced. In effect, the "administrative fix" works to veto state laws without implementing any meaningful substitute. Congress could not simply erase state laws relating to the purchase and sale of insurance policies within state boundaries, without substituting some effective regulation of interstate commerce. *See The Federalist* No. 33, at 200 (Alexander Hamilton) (Clinton Rossiter ed., 1961)

> Suppose . . . that upon the pretense of an interference with its revenues, [Congress] should undertake to abrogate a land tax imposed by . . . a State; would it not be . . . evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments?

Yet here, the effect of the "administrative fix" does just that: a state must enforce the ACA on its own, or have its internal regulations of the insurance industry preempted by an unenforced federal law—effectively creating a hole in regulation. This is coercive.

C. West Virginia Is Better Suited to Serve as a Plaintiff than Any Other Party

Not only is West Virginia injured by the "administrative fix," but as a state, it is uniquely situated to challenge the federal incursion of state sovereignty. First, as the Supreme Court held in

Bond, the harm suffered by states in commandeering cases is distinct from that suffered by individual citizens. Indeed, individuals will often not be able to bring on Tenth Amendment challenge, because they must have suffered a harm in addition to the violation of the Amendment itself. *Bond*, 131 S. Ct. at 2365 ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer an otherwise justiciable injury may object.").

Second, states retain unique incentives to enforce the Tenth Amendment's limitations on federal power. Indeed the entire purpose of Federalism is to pit states and the federal government directly against each other. *See The Federalist* No. 28, at 174 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress."); Greve, *supra*, at 574 ("The logic of the written Constitution is the opposite of intergovernmental cooperation—independent national authority, coupled with institutional competition, rivalry, and jealousy."). And any incursion of one into the other's sovereignty inherently reduces the other's power, thus "assur[ing] that concrete adverseness which sharpens the presentation of [the] issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). States thus have a singular interest in challenging Tenth Amendment violations.

West Virginia easily meets the federal standard for standing. It is injured because it must either enforce federal law, or forfeit federal subsidies; undertake undue political accountability; have its own laws on insurance preempted without any effective replacement effected; and subject its citizens to uncertainty over the legality of nonconforming insurance policies. Whatever path it chooses, it will be injured. Because it alleges that it is subject to a coercive alternative to outright commandeering, it has alleged a constitutional injury under the Tenth Amendment.

II

THE "ADMINISTRATIVE FIX" IS JUST THE LATEST IN THE STRING OF EXEMPTIONS TO OBAMACARE WHICH UNDERMINE POLITICAL ACCOUNTABILITY

Since the passage of the ACA, the Executive Branch has effectively nullified a number of the statute's requirements which turned out to be politically unpopular or bureaucratically unfeasible.[7] Such directives have not always been formal, of if they are, they are buried deep within other directives—making them difficult to find.[8] Because many changes to the Affordable Care Act were made by unilateral executive authority, or informal administrative action, they are difficult to track. According to some counts, the President alone has made at least 24 revisions to the law.[9]

The Administration initially adopted a one-year delay (later delayed further) for the requirement that employers report whether they complied with the mandate to provide health

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[7] *Changes and Delays to the Health Law*, N.Y. TIMES, Mar. 6, 2014, *available at* http://www.nytimes.com/interactive/2013/12/20/us/politics/changes-and-delays-to-health-law.html?_r=2& (last visited Nov. 5, 2014) (tracking 15 changes made to the Affordable Care Act by the Obama administration).

[8] *ObamaCare's Secret Mandate Exemption*, WALL ST. J., Mar. 12, 2014, *available at* http://online.wsj.com/articles/SB10001424052702304250204579433312607325596 (last visited Nov. 5, 2014).

[9] *See*, *e.g.*, Tyler Hartsfield & Grace-Marie Turner, *42 Changes to ObamaCare . . . So Far*, GALEN INST., July 18, 2014, *available at* http://www.galen.org/newsletters/changes-to-obamacare- so-far/ (last visited Nov. 5, 2014); Elizabeth MacDonald, *28 Delays, and Counting, to Health Reform*, FOX BUSINESS, Feb. 12, 2014, *available at* http://www.foxbusiness.com/economy-policy/2014/02/12/28-delays-and-counting-to-health-reform/ (last visited Nov. 5, 2014).

insurance to their employees.[10] Although the law requires employer compliance by 2014, the Administration announced it would not enforce the law for employers with 50-99 employees until 2016.[11] Similarly, companies with 100+ employees would have to offer coverage to 70 percent of their workforce starting in 2015. *Id.* The delay was made through final regulations issued through the Department of the Treasury, and was widely reported in the media due to the fact that the employer mandate was supposed to go into effect just before the 2014 midterm elections, making some surmise that the delay was adopted to forestall the political fallout that would inevitably follow its implementation.[12]

The Administration has also sought to postpone other harmful effects of its own law. First, it delayed the deadline for obtaining insurance coverage by just over a month, allowing those who had not yet complied to avoid tax penalties.[13] The Administration later extended the 2015 insurance enrollment period—pushing back the deadline to just after the midterm elections. Months later, it

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[10] Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-02-12/pdf/2014-03082.pdf (last visited Nov. 5, 2014).

[11] U.S. Department of Treasury, *Fact Sheet: Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015*, *available at* http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf (last visited Nov. 5, 2014).

[12] Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-size Employers until 2016*, WASH. POST, Feb. 10, 2014, *available at* http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html (last visited Nov. 5, 2014).

[13] Robert Pear, *White House to Tweak Tax-Penalty Deadline*, N.Y. TIMES, Oct. 23, 2014, *available at* http://www.nytimes.com/news/affordable-care-act/2013/10/23/white-house-to-tweak-tax-penalty-deadline/?ref=healthcarereform (last visited Nov. 5, 2014).

permitted those whose policies were cancelled to obtain catastrophic coverage in order to comply with the insurance coverage requirement—even though catastrophic coverage does not qualify under the law, as written. And it again effectively delayed the deadline to obtain coverage by rolling out final regulations[14] that drastically expanded the hardship exemption. Under the new, expanded exemption, individuals only needed to attest that their plan was cancelled or that they encountered some other hardship in obtaining health insurance in order to obtain a waiver from the mandate.[15] Of course, it also promised not to enforce its own laws pursuant to the "administrative fix" challenged here.

Other changes include:

- The Administration repeatedly delayed implementation of the federal exchanges from which small businesses could buy insurance policies and likewise delayed enforcement of the requirement that small businesses enroll.[16]

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[14] Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 53,646 (Aug. 30, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-08-30/pdf/2013-21157.pdf (last visited Nov. 5, 2014).

[15] *Extended Transition to Affordable Care Act—Compliant Policies*, Centers for Medicare & Medicaid Services, *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf (last visited Nov. 5, 2014).

[16] Robert Pear, *Small Firms' Offer of Plan Choices Under Health Law Delayed*, N.Y. TIMES, Apr. 1, 2013, *available at* http://www.nytimes.com/2013/04/02/us/politics/option-for-small-business-health-plan-delayed.html (last visited Nov. 5, 2014); Robert Pear, *Online Health Law Sign-Up is Delayed for Small Business*, N.Y. TIMES, Nov. 27, 2013, *available at* http://www.nytimes.com/2013/11/28/us/politics/years-delay-expected-in-major-element-of-health-law.html?emc=edit_na_20131127 (last visited Nov. 5, 2014).

- It permitted "self-attestation" of income, thus allowing people to determine their own eligibility for subsidies on exchanges.[17]
- It permitted Congress—with its more than 16,000 employees—to be treated as a "small business" so that members would be eligible for subsidies under the Small Business Health Options Program,[18] even though Congress does not qualify as a "small business" under the law as written.
- It exempts "self-insured plans" that do not use a third party administrator—plans that are notably used only by unions—from a reinsurance fee imposed on others.[19]
- It granted over 1,000 waivers that allow businesses to impose annual caps on the health insurance coverage they provide to their employees, in violation of the ACA's requirements.[20]

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[17] Sarah Kliff & Sandhya Somashekhar, *Health Insurance Marketplaces Will Not be Required to Verify Consumer Claims*, WASH. POST, July 5, 2013, *available at* http://www.washingtonpost.com/national/health-science/health-insurance-marketplaces-will-not-be-required-to-verify-consumer-claims/2013/07/05/d2a171f4-e5ab-11e2-aef3-339619eab080_story.html (last visited Nov. 5, 2014).

[18] J.D. Harrison, *Federal Judge: Congress Can Continue Using Obamacare's Small Business Exchange*, WASH. POST, July 22, 2014, *available at* http://www.washingtonpost.com/business/on-small-business/federal-judge-congress-can-continue-using-obamacares-small-business-exchange/2014/07/22/8f543c6e-11b6-11e4-8936-26932bcfd6ed_story.html (last visited Nov. 5, 2014) (noting that a lawsuit against this policy was dismissed based on standing).

[19] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,773 (Mar. 11, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-03-11/pdf/2014-05052.pdf (last visited Nov. 5, 2014).

[20] *Annual Limits Policy: Protecting Consumers, Maintaining Options, and Building a Bridge to 2014*, Centers for Medicare and Medicaid Services, *available at* http://www.cms.gov/CCIIO/Resources/Files/approved_applications_for_waiver.html (last visited Nov. 5, 2014).

- It cancelled scheduled cuts to Medicare Advantage two years in a row, despite the ACA's requirement that $200 billion be cut over a period of 10 years.[21]
- It granted retroactive subsidies to people who initially enrolled in an insurance policy outside of an exchange due to "technical issues" with the exchange website, but later purchased insurance off such an exchange—even though those subsidies are only authorized for policies bought off of an exchange.[22]

In sum, the Administration has changed or abandoned altogether portions of the ACA that it has found inconvenient. While the Executive always has some degree of enforcement discretion, and Congress is always free to amend laws through the normal lawmaking process, both must do so in a way that satisfies statutory procedural requirements and the Constitution.

CONCLUSION

The Defendants' Motion to Dismiss should be denied.

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Respectfully submitted,

/s/ Lars H. Liebeler

LARS H. LIEBELER, D.C. Bar No. 416666
E-Mail: LLiebeler@TL-Lawfirm.com
Thaler Liebeler LLP
International Square

[21] Jason Millman, *Obama Administration Reverses Proposed Cut to Medicare Plans*, WASH. POST, Apr. 7, 2014, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/07/obama-administration-reverses-proposed-cut-to-medicare-plans/ (last visited Nov. 5, 2014).

[22] *Obamacare Rule Eased for States with Website Troubles*, CBS NEWS, Feb. 28, 2014, *available at* http://www.cbsnews.com/news/obamacare-rule-eased-for-states-with-website-troubles/ (last visited Nov. 5, 2014).

1825 Eye Street NW
Suite 400
Washington, DC 20006
Telephone: (202) 587-4747
Facsimile: (202) 466-2693

TIMOTHY SANDEFUR, Cal. Bar No. 224436
E-Mail: tsandefur@pacificlegal.org
ANASTASIA P. BODEN, Cal. Bar No. 281911
E-Mail: apb@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2014, I electronically filed the foregoing AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lars H. Liebeler
LARS H. LIEBELER