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PUBLISHED

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.

AMERICA'S HEALTH INSURANCE PLANS; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amici Curiae,

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; THE ARC OF THE UNITED STATES; BREAST CANCER ACTION; FAMILIES USA; FRIENDS OF CANCER RESEARCH; MARCH OF DIMES FOUNDATION; MENTAL HEALTH AMERICA; NATIONAL BREAST CANCER COALITION; NATIONAL ORGANIZATION FOR RARE DISORDERS;

No. 11-1057

NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL SENIOR CITIZENS LAW CENTER; NATIONAL WOMEN'S HEALTH NETWORK; THE OVARIAN CANCER NATIONAL ALLIANCE; AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED; AMERICAN MEDICAL STUDENT ASSOCIATION; CENTER FOR AMERICAN PROGRESS, d/b/a Doctors for America; NATIONAL HISPANIC MEDICAL ASSOCIATION; NATIONAL PHYSICIANS ALLIANCE; CONSTITUTIONAL LAW PROFESSORS; YOUNG INVINCIBLES; KEVIN C. WALSH; AMERICAN CANCER SOCIETY; AMERICAN CANCER SOCIETY CANCER ACTION NETWORK; AMERICAN DIABETES ASSOCIATION; AMERICAN HEART ASSOCIATION; DR. DAVID CUTLER, Deputy, Otto Eckstein Professor of Applied Economics, Harvard University; DR. HENRY AARON, Senior Fellow, Economic Studies, Bruce and Virginia MacLaury Chair, The Brookings Institution; DR. GEORGE AKERLOF, Koshland Professor of Economics, University of California-Berkeley; DR. STUART ALTMAN, Sol C. Chaikin Professor of National Health Policy, Brandeis University;

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AMERICAN COLLEGE OF NURSE -
MIDWIVES; AMERICAN
FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES; AMERICAN
MEDICAL WOMEN'S ASSOCIATION;
THE ASIAN AMERICAN JUSTICE
CENTER; ASIAN & PACIFIC ISLANDER
AMERICAN HEALTH FORUM; THE
ASIAN PACIFIC AMERICAN LEGAL
CENTER; THE BLACK WOMENS
HEALTH IMPERATIVE; THE COALITION
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CHILDBIRTH CONNECTION; THE
CONNECTICUT WOMEN'S
EDUCATION AND LEGAL FUND; THE
FEMINIST MAJORITY FOUNDATION;
IBIS REPRODUCTIVE HEALTH;
INSTITUTE OF SCIENCE AND HUMAN
VALUES; MARYLAND WOMEN'S
COALITION FOR HEALTH CARE
REFORM; MENTAL HEALTH AMERICA;
NATIONAL ASIAN PACIFIC AMERICAN
WOMEN'S FORUM; NATIONAL
ASSOCIATION OF SOCIAL WORKERS;
NATIONAL COALITION FOR LGBT
HEALTH; NATIONAL COUNCIL OF
JEWISH WOMEN; NATIONAL
COUNCIL OF WOMEN'S
ORGANIZATIONS;

NATIONAL LATINA INSTITUTE FOR
REPRODUCTIVE HEALTH; THE
NATIONAL RESEARCH CENTER FOR
WOMEN & FAMILIES; OLDER
WOMEN'S LEAGUE; PHYSICIANS FOR
REPRODUCTIVE CHOICE AND HEALTH;
RAISING WOMEN'S VOICES; SARGENT
SHRIVER NATIONAL CENTER ON
POVERTY LAW; SOUTHWEST
WOMEN'S LAW CENTER; WIDER
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WOMENS LAW PROJECT; VIRGINIA
ORGANIZING; AMERICAN HOSPITAL
ASSOCIATION; ASSOCIATION OF
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CATHOLIC HEALTH
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FEDERATION OF AMERICAN
HOSPITALS; NATIONAL
ASSOCIATION OF CHILDREN'S
HOSPITALS; NATIONAL
ASSOCIATION OF PUBLIC
HOSPITALS AND HEALTH SYSTEMS;
CONSTITUTIONAL ACCOUNTABILITY
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University of Pennsylvania Law
School; REBECCA L. BROWN,
Newton Professor of Constitutional
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California Gould School of Law;

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STATE OF OREGON; STATE OF VERMONT; CHRISTINE GREGOIRE, Governor of Washington; SERVICE EMPLOYEES INTERNATIONAL UNION; CHANGE TO WIN,

Amici Supporting Appellant,

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KELLY, United States
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POLICY ANALYSIS CENTER; FAMILY RESEARCH COUNCIL; WILLIAM BARR, Former United States Attorney General; EDWIN MEESE, III, Former United States Attorney General; DICK THORNBURGH, Former United States Attorney General; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; AMERICAN CIVIL RIGHTS UNION; PHYSICIAN HOSPITALS OF AMERICA; TOUSSAINT TYSON,

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No. 11-1058

NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL SENIOR CITIZENS LAW CENTER; NATIONAL WOMEN'S HEALTH NETWORK; THE OVARIAN CANCER NATIONAL ALLIANCE; AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED; AMERICAN MEDICAL STUDENT ASSOCIATION; CENTER FOR AMERICAN PROGRESS, d/b/a Doctors for America; NATIONAL HISPANIC MEDICAL ASSOCIATION; NATIONAL PHYSICIANS ALLIANCE; CONSTITUTIONAL LAW PROFESSORS; YOUNG INVINCIBLES; KEVIN C. WALSH; AMERICAN CANCER SOCIETY; AMERICAN CANCER SOCIETY CANCER ACTION NETWORK; AMERICAN DIABETES ASSOCIATION; AMERICAN HEART ASSOCIATION; DR. DAVID CUTLER, Deputy, Otto Eckstein Professor of Applied Economics, Harvard University; DR. HENRY AARON, Senior Fellow, Economic Studies, Bruce and Virginia MacLaury Chair, The Brookings Institution; DR. GEORGE AKERLOF, Koshland Professor of Economics, University of California-Berkeley;

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NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; THE NATIONAL RESEARCH CENTER FOR WOMEN & FAMILIES; OLDER WOMEN'S LEAGUE; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; RAISING WOMEN'S VOICES; SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW; SOUTHWEST WOMEN'S LAW CENTER; WIDER OPPORTUNITIES FOR WOMEN; THE WOMENS LAW CENTER OF MARYLAND, INCORPORATED; WOMENS LAW PROJECT; VIRGINIA ORGANIZING; AMERICAN HOSPITAL ASSOCIATION; ASSOCIATION OF AMERICAN MEDICAL COLLEGES; CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES; FEDERATION OF AMERICAN HOSPITALS; NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS; NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS; CONSTITUTIONAL ACCOUNTABILITY CENTER; MATTHEW H. ADLER, Leon Meltzer Professor of Law, University of Pennsylvania Law School; REBECCA L. BROWN, Newton Professor of Constitutional Law, University of Southern California Gould School of Law;

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Law School; JUDITH RESNIK, Arthur
Liman Professor of Law, Yale
Law School; THEODORE W. RUGAR,
Professor of Law, University of
Pennsylvania Law School; ROBERT
A. SCHAPIRO, Professor of Law,
Emory University School of Law;
DAVID L. SHAPIRO, William Nelson
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Harvard Law School; SUZANNA
SHERRY, Herman O. Loewenstein
Professor of Law, Vanderbilt
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School of Law; PETER J. SMITH,
Professor of Law, George
Washington University Law
School; ADAM WINKLER, Professor
of Law, UCLA School of Law;
STATE OF CALIFORNIA; STATE OF
CONNECTICUT; STATE OF DELAWARE;
STATE OF HAWAII; STATE OF IOWA;
STATE OF MARYLAND; STATE OF
NEW YORK;

STATE OF OREGON; STATE OF VERMONT; CHRISTINE GREGOIRE, Governor of Washington; SERVICE EMPLOYEES INTERNATIONAL UNION; CHANGE TO WIN,

Amici Supporting Appellee,

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SURGEONS, INCORPORATED; JANIS
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MD; GUENTER L. SPANKNEBEL, MD;
GRAHAM L. SPRUIELL, MD;
WASHINGTON LEGAL FOUNDATION;
CONSTITUTIONAL LAW SCHOLARS;
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ENTERPRISE INSTITUTE; RANDY E.
BARNETT, Professor; JUSTICE AND
FREEDOM FUND; KURT ALLEN
ROHLFS; MOUNTAIN STATES LEGAL
FOUNDATION; LANDMARK LEGAL
FOUNDATION; BOB MARSHALL,
Virginia Delegate; GUN OWNERS OF
AMERICA, INCORPORATED; GUN
OWNERS FOUNDATION; AMERICAN
LIFE LEAGUE, INCORPORATED;
INSTITUTE ON THE CONSTITUTION;
THE LINCOLN INSTITUTE FOR
RESEARCH AND EDUCATION; PUBLIC
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CONSERVATIVE LEGAL DEFENSE AND
EDUCATION FUND; THE LIBERTY
COMMITTEE; DOWNSIZE DC
FOUNDATION; DOWNSIZEDC.ORG;

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Amici Supporting Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Henry E. Hudson, District Judge.
(3:10-cv-00188-HEH)

Argued: May 10, 2011

Decided: September 8, 2011

Before MOTZ, DAVIS, and WYNN, Circuit Judges.

Vacated and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Davis and Judge Wynn joined.

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OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

The Commonwealth of Virginia ("Virginia") brings this action against Kathleen Sebelius, the Secretary of the Department of Health and Human Services ("the Secretary"). Virginia challenges one provision of the Patient Protection and Affordable Care Act as an unconstitutional exercise of congressional power. Virginia maintains that the conflict between this provision and a newly-enacted Virginia statute provides it with standing to pursue this action. After finding that this asserted conflict did give Virginia standing to sue, the district court declared the challenged provision unconstitutional. For the reasons that follow, we hold that Virginia, the sole plaintiff here, lacks standing to bring this action. Accordingly, we vacate the judgment of the district court and remand with instructions to dismiss the case for lack of subject-matter jurisdiction.

I.

In March 2010 Congress enacted the Patient Protection and Affordable Care Act ("the Affordable Care Act" or "the Act"), which seeks to institute comprehensive changes in the health insurance industry. Pub. L. No. 111-148. The provision of the Act challenged here requires, with limited exceptions, that individual taxpayers who fail to "maintain" adequate health insurance coverage pay a "penalty." 26 U.S.C. § 5000A(a)-(b). We describe the Affordable Care Act and this "individual mandate" provision in *Liberty Univ. v. Geithner*, ___ F.3d ___

(4th Cir. 2011). We need not repeat that discussion here. Like the plaintiffs in *Liberty*, Virginia contends that Congress lacked constitutional authority to enact the individual mandate.

This case, however, differs from *Liberty* and every one of the many other cases challenging the Act in a critical respect: the sole provision challenged here—the individual mandate –- imposes no obligations on the sole plaintiff, Virginia. Notwithstanding this fact, Virginia maintains that it has standing to bring this action because the individual mandate allegedly conflicts with a newly-enacted state statute, the Virginia Health Care Freedom Act (VHCFA).

Virginia filed this action on March 23, 2010, the same day that the President signed the Affordable Care Act into law. The Governor of Virginia did not sign the VHFCA into law until the next day. The VHCFA declares, with exceptions not relevant here, that "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage." Va. Code Ann. § 38.2-3430.1:1. It contains no enforcement mechanism.

Because the individual mandate applies only to individual persons, not states, the Secretary moved to dismiss the suit for lack of subject-matter jurisdiction. The Secretary contended that Virginia had not and could not allege any cognizable injury and so was without standing to bring this action. Virginia insisted that it acquired standing from the asserted "collision" between its new statute, the VHCFA, and the individual mandate. Although the district court recognized that the VHCFA was only "declaratory [in] nature," it held that the VHCFA provided Virginia standing. The court then declared the individual mandate unconstitutional, awarding summary judgment to Virginia.

The Secretary appeals, maintaining that Virginia lacks standing to challenge the individual mandate and that, in any

event, the mandate withstands constitutional attack. We review *de novo* the district court's ruling as to standing. *See Benham v. City of Charlotte*, 635 F.3d 129, 134 (4th Cir. 2011). Because we hold that Virginia lacks standing,[1] we cannot reach the question of whether the Constitution authorizes Congress to enact the individual mandate. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

II.

Article III of the Constitution confers on federal courts the power to resolve only "cases" and "controversies." A federal court may not pronounce on "questions of law arising outside" of such "cases and controversies." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. ___ (2011) (slip op. at 5). To do so "would be inimical to the Constitution's democratic character" and would weaken "the public's confidence in an unelected but restrained Federal Judiciary." *Id.*

The standing doctrine prevents federal courts from transgressing this constitutional limit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Thus, to ensure that there exists the requisite "case" or "controversy," a plaintiff must satisfy the three requirements that combine to form the "irreducible constitutional minimum of standing." *Id.* at 560.

Specifically, a plaintiff must demonstrate that: (1) it has "suffered an injury in fact"; (2) there exists a "causal connection between the injury and the conduct complained of"; and

[1]In *Liberty*, we held that the Anti-Injunction Act (AIA) barred two taxpayers from bringing a pre-enforcement action challenging the individual mandate. ___ F.3d at ___. Virginia may well be exempt from the AIA bar. *See South Carolina v. Regan*, 465 U.S. 367, 378 (1984). We do not reach this question, however, because we must dismiss this case for lack of standing. *See Sinochem Intern. Co. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 431 (2007) (noting that "a federal court has leeway to choose among threshold" jurisdictional grounds for dismissing a case (internal quotation omitted)).

(3) a favorable judicial ruling will "likely" redress that injury. *Id.* (internal quotations omitted). The burden rests with the party invoking federal jurisdiction, here Virginia, to "establish[ ] these elements." *Id.* at 561. Only if Virginia meets the burden of establishing standing does the Constitution permit a federal court to address the merits of the arguments presented. *See Steel*, 523 U.S. at 101-02.

Standing here turns on whether Virginia has suffered the necessary "injury in fact." To satisfy that requirement, Virginia must demonstrate that the individual mandate in the Affordable Care Act "inva[des]" its "legally protected interest," in a manner that is both "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560 (internal quotations omitted).

We note at the outset that the individual mandate imposes none of the obligations on Virginia that, in other cases, have provided a state standing to challenge a federal statute. Thus, the individual mandate does not directly burden Virginia, *cf. Bowen v. Public Agencies*, 477 U.S. 41, 50 n.17 (1986), does not commandeer Virginia's enforcement officials, *cf. New York v. United States*, 505 U.S. 144 (1992), and does not threaten Virginia's sovereign territory, *cf. Massachusetts v. EPA*, 549 U.S. 497, 519 (2007). Virginia makes no claim to standing on these bases.

What Virginia maintains is that it has standing to challenge the individual mandate solely because of the asserted conflict between that federal statute and the VHCFA. A state possesses an interest in its "exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)). A federal statute that hinders a state's exercise of this sovereign power to "create and enforce a legal code" at least arguably inflicts an injury sufficient to provide a state standing to challenge the federal statute. *See Wyoming*

v. United States, 539 F.3d 1236, 1242 (10th Cir. 2008); *see also Diamond v. Charles*, 476 U.S. 54, 62 (1986) (noting in *dicta* that "a State has standing to *defend* the constitutionality of its statute" (emphasis added)). Virginia argues that the individual mandate, in assertedly conflicting with the VHCFA, has caused Virginia this sort of sovereign injury.

The Secretary contends that Virginia's claim is not of the sort recognized in *Wyoming*. Rather, according to the Secretary, Virginia actually seeks to litigate as parens patriae by asserting the rights of its citizens. As the Secretary points out, such a claim would run afoul of the prohibition against states suing the United States on behalf of their citizens. *See Snapp*, 458 U.S. at 610 n.16; *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). This prohibition rests on the recognition that a state possesses no legitimate interest in protecting its citizens from the government of the United States. *See Mellon*, 262 U.S. at 485-86. With respect to the federal government's relationship to individual citizens, "it is the United States, and not the state, which represents [citizens] as parens patriae." *Id.* at 486. When a state brings a suit seeking to protect individuals from a federal statute, it usurps this sovereign prerogative of the federal government and threatens the "general supremacy of federal law." *Pennsylvania v. Kleppe*, 533 F.2d 668, 677 (D.C. Cir. 1976). A state has no interest in the rights of its individual citizens sufficient to justify such an invasion of federal sovereignty. *See id.* at 677-78 (noting that the "federalism interest" in "avoidance of state inference with the exercise of federal powers" will "predominate and bar" any parens patriae lawsuit against the United States).

Accordingly, the question presented here is whether the purported conflict between the individual mandate and the VHCFA actually inflicts a sovereign injury on Virginia. If it does, then Virginia may well possess standing to challenge the individual mandate. But if the VHCFA serves merely as a smokescreen for Virginia's attempted vindication of its *citizens*' interests, then settled precedent bars this action.

III.

Faithful application of the above principles mandates a single answer to this question: the VHFCA does not confer on Virginia a sovereign interest in challenging the individual mandate. Virginia lacks standing to challenge the individual mandate because the mandate threatens no interest in the "enforceability" of the VHCFA. *Maine v. Taylor*, 477 U.S. 131, 137 (1986).

Contrary to Virginia's arguments, the mere existence of a state law like the VHCFA does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts. Rather, only when a federal law interferes with a state's exercise of its sovereign "power to create *and enforce* a legal code" does it inflict on the state the requisite injury-in-fact. *Snapp*, 458 U.S. at 601 (emphasis added); *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983) (holding that "federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law").

Thus, in each case relied on by Virginia, in which a state was found to possess sovereign standing, the state statute at issue regulated behavior or provided for the administration of a state program. *See Taylor*, 477 U.S. at 132-33 (regulating importation of baitfish); *Diamond*, 476 U.S. at 59-60 (regulating abortion); *Wyoming*, 539 F.3d at 1239-40 (establishing "procedure to expunge convictions of domestic violence misdemeanors" for purposes of "restoring any firearm rights"); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 409 (5th Cir. 1999) (establishing telecommunications aid programs for schools and libraries); *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 442-43 (D.C. Cir. 1989) (regulating airline price advertising); *Ohio v. U.S. Dep't of Transp.*, 766 F.2d 228, 230 (6th Cir. 1985) (regulating shipment of hazardous nuclear materials). The state statutes in each of these cases reflect the "exercise of [a state's] sovereign power over

individuals and entities within the relevant jurisdiction." *Snapp*, 458 U.S. at 601.

By contrast, the VHCFA regulates nothing and provides for the administration of no state program. Instead, it simply purports to immunize Virginia citizens from federal law. In doing so, the VHCFA reflects no exercise of "sovereign power," for Virginia lacks the sovereign authority to nullify federal law. *See Mayo v. United States*, 319 U.S. 441, 445 (1943) (stating the "corollary" of the Supremacy Clause that "the activities of the Federal Government are free from regulation by any state"); *Johnson v. Maryland*, 254 U.S. 51, 55-56 (1920) (noting the "entire absence of power on the part of the States to touch . . . the instrumentalities of the United States").

Moreover, the individual mandate does not affect Virginia's ability to enforce the VHCFA. Rather, the Constitution itself withholds from Virginia the power to enforce the VHCFA against the federal government. *See Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (stating that "federal officers who are discharging their duties in a state . . . are not subject to the jurisdiction of the state"). Given this fact, the VHCFA merely declares, without legal effect, that the federal government cannot apply insurance mandates to Virginia's citizens. This non-binding declaration does not create any genuine conflict with the individual mandate, and thus creates no sovereign interest capable of producing injury-in-fact.

Nor do we find at all persuasive Virginia's contention that the use of the passive voice in the VHCFA—i.e., a declaration that no Virginia resident "shall be required" to maintain insurance –- provides a regulation of private employers and localities that conflicts with the individual mandate. This is so because the *individual* mandate regulates only *individuals*; it does not in any way regulate private employers or localities. *See* 26 U.S.C. § 5000A(a). Thus, Virginia has suffered no

injury to its sovereign interest in regulating employers and localities.[2]

In sum, Virginia does not possess a concrete interest in the "continued enforceability" of the VHCFA, *Taylor*, 477 U.S. at 137, because it has not identified any plausible, much less imminent, enforcement of the VHCFA that might conflict with the individual mandate. Rather, the only apparent function of the VHCFA is to declare Virginia's opposition to a federal insurance mandate. And, in fact, the timing of the VHCFA, along with the statements accompanying its passage, make clear that Virginia officials enacted the statute for precisely this declaratory purpose. *See* Va. Governor's Message (Mar. 24, 2010) (Governor stating at VHCFA signing ceremony that "access to quality health care . . . should not be accomplished through an unprecedented federal mandate"); *id.* (Lieutenant Governor also remarking that the VHCFA "sent a strong message that we want no part of this national fiasco"). While this declaration surely announces the genuine opposition of a majority of Virginia's leadership to the individual mandate, it fails to create any sovereign interest in the judicial invalidation of that mandate. *See Diamond*, 476 U.S. at 62 ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.").

Given that the VHCFA does nothing more than announce

[2]Moreover, even if the individual mandate did some day in the future interfere with the asserted application of the VHCFA to localities and private employers, it would not *now* provide Virginia standing. Only injury that is "actual or imminent, not conjectural or hypothetical" can support Article III standing. *Lujan*, 504 U.S. at 560 (internal quotation omitted). Any future conflict between the individual mandate and the purported regulation of localities or private employers contained in the VHCFA is at best conjectural. Virginia has identified no actual non-federal insurance requirement that runs afoul of the VHCFA, nor has it offered evidence that any private employer or locality is contemplating the imposition of such a requirement.

an unenforceable policy goal of protecting Virginia's residents from federal insurance requirements, Virginia's "real interest" is not in the VHCFA itself, but rather in achieving this underlying goal. *Snapp*, 458 U.S. at 600; *see id*. at 602 (noting that "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement"). But a state may not litigate in federal court to protect its residents "from the operation of [a] federal statute[]," *Georgia v. Pa. R. Co.*, 324 U.S. 439, 447 (1945), nor can it escape this bar merely by codifying its objection to the federal statute in question. *See New Jersey v. Sargent*, 269 U.S. 328, 334 (1926) (dismissing an action whose "real purpose" was "to obtain a judicial declaration that . . . Congress exceeded its own authority").

The presence of the VHCFA neither lessens the threat to federalism posed by this sort of lawsuit nor provides Virginia any countervailing interest in asserting the rights of its citizens. *Cf. Kleppe*, 533 F.2d at 677. After all, the action of a state legislature cannot render an improper state parens patriae lawsuit less invasive of federal sovereignty. *See Mellon*, 262 U.S. at 485-86 (emphasizing that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government"). Nor does a state acquire some special stake in the relationship between its citizens and the federal government merely by memorializing its litigation position in a statute. *See Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997). To the contrary, the VHCFA, because it is not even hypothetically enforceable against the federal government, raises only "abstract questions of political power, of sovereignty, of government." *Mellon*, 262 U.S. at 485. The Constitution does not permit a federal court to answer such questions. *See id.* (noting that courts are "without authority to pass abstract opinions upon the constitutionality of acts of Congress").

To permit a state to litigate whenever it enacts a statute declaring its opposition to federal law, as Virginia has in the VHCFA, would convert the federal judiciary into a "forum" for the vindication of a state's "generalized grievances about the conduct of government." *Flast v. Cohen*, 392 U.S. 88, 106 (1968). Under Virginia's standing theory, a state could acquire standing to challenge *any* federal law merely by enacting a statute—even an utterly unenforceable one—purporting to prohibit the application of the federal law. For example, Virginia could enact a statute declaring that "no Virginia resident shall be required to pay Social Security taxes" and proceed to file a lawsuit challenging the Social Security Act.[3] Or Virginia could enact a statute codifying its constitutional objection to the CIA's financial reporting practices and proceed to litigate the sort of "generalized grievance[]" about federal administration that the Supreme Court has long held to be "committed to the . . . political process." *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (internal quotation omitted).

Thus, if we were to adopt Virginia's standing theory, each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court. *See, e.g.*, *id.*; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). We cannot accept a theory of standing that so contravenes settled jurisdictional constraints.

[3]At oral argument, Virginia appeared unconcerned about the prospect of such lawsuits, merely repeating the truism set forth in its brief that "litigants frequently have standing to lose on the merits." Appellee's Br. at 17. This argument fails. The Supreme Court has clearly disavowed such "hypothetical jurisdiction," emphasizing that jurisdictional requirements are mandatory in *all* cases. *Steel*, 523 U.S. at 101. The Court has explained that in cases involving baseless substantive claims, it is all the more important that we respect the "constitutional limits set upon courts in our system of separated powers." *Id.* at 110.

IV.

In concluding that Virginia lacks standing to challenge the individual mandate, we recognize that the question of that provision's constitutionality involves issues of unusual legal, economic, and political significance. The Constitution, however, requires that courts resolve disputes "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Virginia can provide no such "concrete factual context" here, because it challenges a statutory provision that applies not to states, but exclusively to individuals.

Given this fact, Virginia lacks the "personal stake" in this case essential to "assure that concrete adverseness which sharpens the presentation of issues." *Massachusetts v. EPA*, 549 U.S. at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Thus, Virginia's litigation approach might well diverge from that of an individual to whom the challenged mandate actually does apply. *See United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam) (explaining that the "actual antagonistic assertion of rights" serves as a "safeguard essential to the integrity of the judicial process" (internal quotation omitted)); *Hinson*, 122 F.3d at 373 (noting that rules of standing aim to prevent state "bureaucrats" and "publicity seekers" from "wresting control of litigation from the people directly affected").

Moreover, the lack of factual context here impedes analysis of the underlying constitutional disputes. *See Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't of Labor*, 995 F.2d 510, 513 (4th Cir. 1993) (explaining that the "concrete adverseness" required by standing rules "helps reduce the risk of an erroneous or poorly thought-out decision" (internal quotation omitted)). For example, both parties prem-

ise their Commerce Clause arguments on their competing characterizations of what the individual mandate regulates. *Compare* Appellee's Br. at 23 (arguing that § 5000A regulates the "passive status of being uninsured") *with* Appellant's Br. at 45-48 (arguing that § 5000A regulates the financing of consumers' inevitable participation in the health care market). A number of factors might affect the validity of these characterizations, including a taxpayer's current possession of health insurance, current or planned future consumption of health care, or other related voluntary action. *See Thomas More Law Center v. Obama*, ___ F.3d ___ (6th Cir. 2011) (No. 10-2388, slip op. at 52-53) (opinion of Sutton, J.). The case at hand lacks the concrete factual context critical to a proper analysis of these issues.

In sum, the significance of the questions at issue here only heightens the importance of waiting for an appropriate case to reach the merits. This is not such a case.

V.

For the foregoing reasons, we vacate the judgment of the district court and remand to that court, with instructions to dismiss the case for lack of subject-matter jurisdiction.

VACATED AND REMANDED