NOS. 11-11021 & 11-11067

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, et al.,

Plaintiffs-Appellees / Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants / Cross-Appellees.

On Appeal From the United States District Court for the Northern District of Florida

BRIEF OF THE TEXAS PUBLIC POLICY FOUNDATION AS *AMICUS CURIAE* ON BEHALF OF PLAINTIFFS- APPELLEES / CROSS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The parties' amended certificates of interested persons appear to be complete with the following addition: Texas Public Policy Foundation, by and through Mario Loyola. Texas Public Policy Foundation is a non-profit corporation organized under the laws of Texas and has no capital stock or other ownership.

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The Patient Protection and Affordable Care Act ("ACA") contains Medicaid expansion provisions that will dramatically increase the fiscal burdens on States while drastically limiting their regulatory autonomy in respect of the provision of healthcare. These burdens will fall disproportionately on Texas, where General Revenue Medicaid spending is projected to increase under the ACA by 48.7 percent in the first ten years, more than in any other State. Jagadeesh Gokhale, *The New Health Care Law's Effect on State Medicaid Spending*, Cato Institute, April 6, 2011, at 6, *available at* http://www.cato.org/store/reports/new-health-care-laws-effect-state-medicaid-spending-study-five-most-populous-states.

The mission of the Texas Public Policy Foundation is to defend liberty, personal responsibility, free enterprise, and limited government in Texas and in the nation as a whole. Because these goals will be particularly undermined by the Medicaid expansion provisions of the ACA, the Texas Public Policy Foundation has an interest in this Court's determination of the validity of those provisions under the United States Constitution.

The parties have consented to the filing of this brief. No counsel to any party authored the brief in any part, nor were any monies received from any party, or any counsel to any party, or any other person, for the specific preparation or submission of this brief.

ARGUMENT

The district court's grant of summary judgment to the federal government on the Medicaid count of this case represents a potentially historic development in the jurisprudence of the Spending Clause. By ruling, in effect, that the emperor of "coercion doctrine" has no clothes, Judge Vinson has confronted this Court with a difficult choice: to decide whether there is in fact *some* point at which "pressure turns into compulsion", as the Supreme Court presupposed in *South Dakota v. Dole*, 482 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)) or whether conditional federal grants are in reality an "instrument for the total subversion of the governmental powers reserved to the individual states", as the Supreme Court warned in *U.S. v. Butler*, 291 U.S. 1, 75 (1936).

The Texas Public Policy Foundation respectfully asks this Court to consider the Medicaid expansion provisions of the ACA in the light of the potential that conditional federal grants have for eroding the whole federal structure of our Constitution. If Judge Vinson was correct to rule that the practice of conditioning federal grants to the States is not limited by any doctrine of coercion, then the federal spending power can be used in effect to commandeer State governments. But the Spending Clause cases fundamentally presuppose *some* limit that can keep "the financial inducement offered by Congress [from becoming] so coercive as to pass the point at which pressure turns into compulsion," *Dole*, 482 U.S. at 211

(quoting *Steward Machine*, 301 U.S. at 590), to affirm the ruling below on the Medicaid count would be to hold that *Dole*, and many Supreme Court cases before it, were wrongly decided.

Dole requires an inquiry into whether the States' acceptance of a conditional federal grant is voluntary not just in theory, but also "in fact." 483 U.S. at 211. This Court should reverse the summary judgment below on the Medicaid count because there is at least an issue of material fact as to whether compliance with the Medicaid expansion provisions of the ACA is "not merely in theory but in fact" a voluntary prerogative of the States. A trial on the factual merits of the Plaintiff-Appellees / Cross-Appellants's Medicaid expansion claims will quickly reveal that "in fact" the States have no choice but to comply with those provisions, because the sums of money involved, compared with the conditions imposed, become such an overriding factor in the deliberations of State legislators as to blot out any other consideration. Promising ideas for innovative and sustainable healthcare policies have had to be put off, indefinitely. In State legislatures across the country, from one end of the political spectrum to the other, the people's elected representatives are resigned to the inevitability of accepting the new Medicaid "conditions." Because compliance is "in fact" the only realistic option, the Medicaid expansion provisions of the ACA clearly "pass the point at which pressure turns into

compulsion". If so, they constitute a commandeering of State agencies by the federal government, and are flatly unconstitutional.

I. Conditional Federal Grants Pose Grave Dangers to State Regulatory Autonomy and to the Federal Structure of the Constitution.

The government does not dispute that commanding the States to implement and bear part of the expense of implementing a federal program such as Medicaid would fall outside any of its enumerated powers under the Constitution. Yet the federal government can in fact at some point compel compliance by taxing residents of the several States, and returning the money to them only on condition that their State governments cede to the federal government "the governmental powers reserved to the individual states." It is not disputed that Congress may exercise its taxing and spending powers "for the general Welfare of the United States"; nor that this power goes beyond the other enumerated powers of the federal government. But "the Constitution simply does not give Congress the authority to require the States to regulate." *New York v. U.S.*, 505 U.S. 144, 178 (1992).

Because "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion," *Stewart Machine Co. v. Davis*, 301 U.S. at 590, the Supreme Court has long recognized that conditional federal grants can be coercive. *S.D. v. Dole*,

482 U.S. at 211. The Medicaid expansion provisions of the ACA are not merely coercive; they are perhaps the most exemplary exposition ever devised of the coercive potential of conditional federal grants.

A. Conditional Federal Grants Can Be Coercive

In *U.S. v. Butler*, the Supreme Court noted that "if, in lieu of compulsory regulation of subjects within the States' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states." 297 U.S. at 74, n. 21. The Supreme Court had long recognized that, through the device of conditional federal grants, "constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender which though, in form voluntary, *in fact* lacks none of the elements of compulsion." Id. at 72 (quoting *Frost Tracking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926)).

The dangers that conditional federal grants pose to state regulatory autonomy, and to the whole federal structure of our constitution, go beyond the potential for de facto commandeering of State governments where States governments feel they have little choice "in fact" but to comply.

There is also an obvious inequity in punishing non-compliant States by shifting federal tax revenue from them to compliant States. The taxing power is the anvil against which the hammer of coercive federal funding strikes its most anti-democratic blow. It allows a majority of the States' representatives in Congress to tax everyone, and then condition the return of those funds on compliance with that coalition's policy preferences on the full range of issues that the Tenth Amendment to the Constitution leaves to the prerogative of the States.

The Supreme Court has recognized the "intuitive difference" between the "denial of a gift" and a "sanction." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expenses Bd.*, 527 U.S. 666, 687 (1999). In *College Savings Bank*, the Court observed that the difference between a gift denied and a sanction imposed could disappear if the gift to be denied was large enough. But in the context of conditional federal funds, a compelling argument can be made that because the funds in question come from the residents of the several States to begin with, they should not be considered gifts. The threat of losing vast sums of money to other States is categorically in the nature of a sanction. And even assuming that the conditional grant may be considered a gift, the Court in *College Savings Bank* made clear that threatening to withhold it could still cross the point of coercion.

The residents of Texas may want nothing to do with the state policy preferences of California or New York. Yet through the mechanism of conditional federal funding, to the extent that voluntariness gives way to compulsion "in fact," the preferences of the residents of these other States are substituted for the preferences of the residents of Texas in the determination of Texas state policy.

This scheme is not just anti-democratic in principle, weakening citizen choice and the citizens' ability to influence the institutions of self-government. It also has great potential to reduce the practical accountability on which the institutions of self-government so vitally attend. The residents of Texas can vote their own legislators and representatives in Congress out of office. But they cannot vote the legislators and representatives of other States out of office. And yet, as the prominence of conditional federal funds in State budgets grows apace, the legislators and representative of other States will have increasing influence over Texas policies within areas that are quintessentially matters of State regulatory autonomy, and as to which the maintenance of State prerogative is vital to any pretense of State sovereignty.

Conditional federal funds also tend to reduce social welfare. This is not merely because national uniformity in areas that ought to be matters of State regulatory autonomy kills the "laboratories of democracy" interstate competition

that is vital to producing best policy solutions in matters of State concern. To the extent that a minority of States pursue policies that confer a competitive advantage in attracting residents and businesses from other States, the conditions attached to federal programs advanced by a majority of States in the interests of uniformity create a scheme in which the minority States must choose between losing the competitive advantage gained by their policies, on the one hand, and giving up enormous sums of money, as a proxy for the *gains* obtained through such competitive advantage, on the other. *See*, e.g., Lynn Baker, *Conditional Federal Spending and States' Rights*, 574 Annals 104, 109, American Academy of Political and Social Science (March 2001). This will often be at best an unpleasant choice, and at worst Hobson's choice.

B. The Medicaid Expansion Provisions Constitute an Exemplary Case of Coercion

The three major federal entitlement programs, Medicaid, Medicare, and Social Security, are on an unsustainable path to insolvency. Taken together, they are projected to absorb up all currently projected federal revenue by 2062, exceeding 20 percent of GDP with no end in sight. Cong. Budget Office, *The Long-Term Budget Outlook*, 4 (June 2010). Not content to expand such programs further still, the federal government is now inducing States to forsake their efforts

at devising sustainable healthcare programs, and join the federal government in its reckless abandon.

The federal grant in Medicaid constitutes 40 percent of all federal funds paid to States. U.S. Census Bureau, *Federal Aid to States for Fiscal Year 2009*, August 2010. It is the largest single conditional federal grant program of all time, paying out hundreds of billions to State governments yearly. Id. The scale of the program makes it nearly impossible to imagine that any State could reasonably forego such a large amount of its citizen's taxes paid to the federal government for any reason.

The problems presented by any conditional federal grant program are particularly acute where the federal government makes more onerous the conditions attaching to an existing program in which the States are already heavily invested. Even assuming that the Medicaid program itself is not categorically coercive (an assumption that seems far less valid given the failure of any meaningful limit on the conditional spending power in the years since *Dole*), surely changing the original conditions on which States relied to their detriment in establishing federally-compliant Medicaid programs presents a different calculus: The case for arms length contract principles upon which the State voluntariness requirement rests is far weaker when the conditions are made more onerous in mid-stream.

In *U.S. v. Butler*, 297 U.S. 1 (1936), the Supreme Court examined the Agricultural Adjustment Act of 1933, which imposed a federal tax on farmers who could then draw benefits if they complied with the Act's dictates, then thought to lie outside the federal commerce power. "The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. […] This is coercion by economic pressure. The asserted power of choice is illusory." 279 U.S. at 71.

If ever there was a federal conditional grant program as to which the States' power of choice is illusory, Medicaid is it, and the Medicaid expansion provisions of the ACA are its most coercive element.

II. The Coercion Doctrine is the Only Way to Protect State Regulatory Autonomy and the Federal Structure of our Constitution from Excessive Uses of Conditional Federal Grants.

Federal courts have articulated or alluded to a variety of limits to the spending power, in order to diminish the long-recognized danger that the spending power poses to State sovereignty and to the federal structure of our Constitution. A meaningful doctrine of coercion is the only limit that offers any realistic hope of keeping that power in check. None of the other limits commonly cited have proven effective in protecting State sovereignty from the expansion of conditional federal grants.

A. None of the Four General Restrictions on the Spending Power Articulated in *South Dakota v. Dole* Offer Any Protection for State Regulatory Autonomy.

In attempting to trace the limits on the federal conditional spending power, the Supreme Court in *Dole* observed, "The spending power is of course not limited, but is instead subject to several general restrictions articulated in our cases." 483 U.S. at 207, (citations omitted). The Court listed four: (1) the exercise of the spending power must be in pursuit of "the general welfare"; (2) the conditions must be unambiguously stated; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions cannot require the States to do something that is otherwise unconstitutional. 483 U.S. at 207-08. Each of these limits either by its own terms offers no logical protection for State sovereignty, or has been applied by federal courts in a way that offers no such protection.

In applying the "general welfare" prong, federal courts must "defer substantially" to the judgment of Congress, Id., and the Court has even speculated that the standard isn't judicially enforceable at all. Id. at 207 n.2. The requirement that conditions be unambiguously stated is an issue of statutory drafting and tells us nothing about the nature or scope of the condition, or whether the conditional federal grant constitutes coercion. The requirement that the condition bear a

reasonable relation to the federal interest in a national project or program has the promise implied in Justice Sandra Day O'Connor's dissent in *Dole*, namely that of drawing a distinction between conditions on how the federal grant is to be spent (which O'Connor thought permissible), and conditions based on State adoption of a regulatory scheme not specifically related to how the grant is to be spent, (which O'Connor thought impermissible). 483 U.S. at 216. But the Court's holding in *Dole* forecloses that promise as a useful distinction, because the drinking-age requirement at issue in *Dole* was not a condition on how the federal highway funds were to be spent, but rather a loosely related regulation. And in any case, as the Court implicitly recognized in *Dole*, the conditions attaching to federal conditional funds may "cross the point at which pressure turns into compulsion" even if the conditions are focused purely on how the funds are to be spent. Finally, the bar against requiring States to do anything that is otherwise unconstitutional is logically of no help, because we are questioning a federal grant program conditioned on the States' adoption of policies that would otherwise be constitutional exercises of State regulatory autonomy.

B. No Other Alternative Sources of Protection Have Been Effective.

Some commentators have suggested that that the political process itself provides sufficient protection of State sovereignty from undue exertions of federal

power, because the several States' representatives control Congress and hypothetically "have broadly acquiesced in sanctioning the challenged Act of Congress." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 Colombia L. Rev. 543, 559 (1954). The point has been convincingly answered: "While the state-based apportionment of representation within the federal government may well ensure that 'states interests as such' are protected against federal oppression, *federal oppression* is not the problem. The problem, rather, lies in the ability of *some* states to harness the federal lawmaking power to oppress *other* states. Not only can the state-based allocation of congressional representation not protect against this use of the federal lawmaking power, it facilitates it." Baker, 574 Annals at 107-08. This is because the states that favor the policy objectives of the federal grant are likely already quite willing to adopt those policy objectives independently of the federal grant; their support for the federal program is therefore a vote in favor of imposing burdens on *other* states. Id. The point carries still greater force when one considers that the U.S. Senate heavily dilutes the voting power of residents of large States in favor of residents of smaller States, creating the inherent risk that tax revenues uniformly exacted will be distributed preferentially to the smaller States.

The same calculus applies with greater force to constitutional amendments, the other means by which the political process can theoretically protect States from federal oppression. If the States which support a federal grant program can muster a congressional majority, they can surely muster the numbers needed to block a constitutional amendment.

III. If the ACA's Medicaid Expansion Provisions Do Not Run Afoul of an Existing Doctrine of Coercion, It Must Follow that *Dole* Was Wrongly Decided and that Conditional Federal Grants Are Categorically Unconstitutional.

The Supreme Court's holding in *Dole* was premised on the fact that States wanting to ignore the federal drinking-age preference stood to lose "a relatively small percentage of certain federal highway funds." 483 U.S. at 211. "When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact." Id. This mere "temptation" (id., quoting *Stewart Machine Co. v. Davis*, 301 U.S. at 589) in the form of "relatively mild encouragement" was not enough to rise to the level of coercion. Id. Regulatory authority over the State's drinking age "remains the prerogative of the States not merely in theory but in fact." Id. at 211-12.

The Court cast aside evidence of the near-universal compliance with the federally "induced" drinking age as irrelevant. The key issue for the Court was clearly the proportion of highways funds at issue, and implicitly the overall size of the grant.

If from the *Dole* Court's discussion of coercion one were to devise a hypothetical conditional federal grant program to make sure that *some* such program would qualify as coercive, one might hypothesize an enormous federal grant program, far-reaching conditions, the threatened loss of all funding for non-compliance, and, for good measure, an onerous change in the conditions of the already consented-to and established program, that would both increase the expense of the program to the States and further reduce their regulatory autonomy. In other words, one would hypothesize something like Medicaid and the Medicaid expansion provisions of the ACA. Though an issue of material fact arguably exists as to whether State consent remains a prerogative of the States "in theory and in fact," it is virtually impossible to imagine what conditional federal grant program could possibly qualify as coercive if the one in the case at bar does not.

One conceptual problem for the Court is that, if the Medicaid expansion provisions of the ACA do not constitute coercion under *Dole*, then the judgment below must ultimately be vindicated: The spending power is not in fact limited by

any coercion doctrine, or by any other protection for State sovereignty. But that would be the same as to hold that *Dole* itself was wrongly decided. This is because the discussion of coercion in *Dole* was no mere dictum. The Spending Clause cases of the Supreme Court have all recognized the danger of inducement rising to the level of compulsion, and vitally presupposed that the danger could be guarded against because Courts would be able to distinguish between encouragement and compulsion.

The government here has not advanced the argument that the federal spending power is unlimited, nor can it. Though the Commerce Clause portion of *U.S. v. Butler* is no longer valid law, *Wickard v. Filburn*, 317 U.S. 111 (1942), there is presumably no argument with the *Butler* Court's famous observation on the inherent conflict between a too-expansive reading of the Spending Clause, and the federal structure of the Constitution:

> Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States (which has aptly been termed " an indestructible Union, composed of indestructible States") might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers so as to reserve to the states and the people sovereign power, to be wielded by the

> states and their citizens and not to be invaded by the United States, they nevertheless, by a single clause, gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument, when seen in its true character and in the light of its inevitable results, must be rejected.

297 U.S. at 77.

If conditional federal grants have no limit in a doctrine of coercion, then the exercise of the power to make them has no limit, save such as may be self-imposed by the federal government. But that is precisely the unlimited spending power rejected by the Framers, and by virtually every major Spending Clause case of the Supreme Court since.

If there is no way to keep conditional federal grants from turning into compulsion, then it follows that the practice must be categorically unconstitutional. This is why the Court in *Dole* presupposed the existence of a coercion doctrine, and this is why *Dole* is probably not viable as precedent without the existence of a coercion doctrine.

"When Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. […] Accountability is thus 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."

New York v. U.S., 504 U.S. at 168-69. In *New York*, the Court held that the take title provisions of a law for regulating the disposal of low-level radioactive waste crossed the line distinguishing encouragement from coercion, by giving States a choice between two noxious alternatives, neither of which Congress could impose as a free standing requirement. Reasoned the Court, "A choice between two unconstitutionally coercive regulatory techniques is no choice at all." Id. at 176.

It is not contested that Congress could not, as a free standing requirement, command the States to implement Medicaid programs. If it is admitted that the penalty of opting-out of Medicaid, namely the transfer of huge sums of federal tax revenue from the opting-out State to other parts of the country, is a permissible exercise of the spending power, that does not make it a politically feasible choice for the States. As a matter of fact, the sums involved *can* be so large as to leave State legislators with no realistic option for opting-out: In the case of Medicaid, the costs of opting-out are far too vast to be remotely politically possible. Just raising the taxes necessary to cover the lost revenue – which would be to tax the citizens of the opting-out state twice for the same benefit – would be politically impossible. And so it is that even those State legislators most committed to limiting the expansion of the federal government, and preserving the prerogatives of the States, allow their ability to remain "responsive to the local electorate's preferences," and

their ability to "remain accountable to the people" for State programs, evaporate along with a good measure of State regulatory autonomy – and sovereignty. When the residents of a State are as a matter of fact deprived of the ultimate decision as to whether or not the State will comply with the conditional federal grant program, encouragement has crossed the line into coercion.

To hold that there is no doctrine of coercion, or to hold that the ACA's Medicaid expansion provisions to not constitute coercion (which for all practical purposes would be the same thing), would be to hold that the residents of a State may indeed be deprived of the ultimate decision as to whether or not to comply with a conditional federal grant program, and that nothing in the Constitution protects them or the sovereignty of their State from the federal spending power. This would undermine an essential foundation of all the Supreme Court's Spending Clause cases, namely that in our federal system, the federal government's powers are limited, and cannot be used to destroy the sovereignty of the States.

IV. The Proper Standard of Coercion Is Whether States Retain The Voluntary Prerogative In Fact To Comply or Not Comply With the Conditions Attached to Federal Grants.

Judge Vinson was arguably correct to note that the federal courts have declined to articulate and develop a doctrine of coercion along the lines

presupposed in *Dole*. But *Dole* contains important clues as to what the doctrine might consist of.

First is the Court's observation that States' freedom to accept or reject the conditions remained a State prerogative "not merely in theory but in fact." This has to be read together with preceding quotation from *Steward Machine Co.*, in which the Court observed, "But to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes in possible." 301 U.S. at 589-90. Temptation, then, is not the same as coercion; when the States can "theoretically" opt out of a federal program, doing so remains their prerogative "in theory." But the Court also noted that the States must be able to retain their prerogatives "in fact." In other words, under the given program, States must retain a meaningful choice "in fact."

Under any fair reading of *Dole*, what matters is the scale of the funding to be forfeited on non-compliance with federal conditions. The Court used terms of scale to describe the permissible program before it: "pressure" rather than "compulsion"; a "relatively small percentage" of federal funds as opposed to a large percentage; "temptation" rather than "coercion"; and "relatively mild encouragement" rather

than an overwhelming inducement to comply with federal preferences. 482 U.S. at 211.

The key question seems to be this: Does the federal program really allow States a practicable freedom of choice between compliance and non-compliance, or does the inducement rise to the level at which it becomes the overwhelming consideration, blotting out other considerations, and making any alternative impossible as a matter of political fact? If, given the circumstances of any particular State or group of States, the financial inducement offered by Congress is so coercive as to pass the point at which pressure turns into compulsion, the program cannot pass constitutional muster. There is at the very least an issue of material fact as to whether any given federal program crosses that point. But if *any* conditional federal grant program would run afoul of the prohibition on coercion, the ACA's Medicaid expansion provisions do. This Court would be entirely justified in reaching the conclusion that there is no issue of material fact, and that summary judgment should have been granted for the plaintiffs below on the Medicaid count.

CONCLUSION

For the foregoing reasons, this Court should reverse the summary judgment below on the Medicaid count, and hold that the ACA's Medicaid expansion provisions constitute coercion of the States in violation of the United States Constitution.

Respectfully submitted,

/s/

Mario Loyola
Counsel for Amicus Curiae

May 11, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance) contains 4,888 words as determined by the word-counting feature of Microsoft Word 2000 in 14-point Times New Roman.

Signed: /s/_____
Mario Loyola
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May 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2011, I filed the foregoing Brief for Amicus Curiae by causing paper copies to be delivered to the Court by U.S. Mail. I also certify that, by agreement with corresponding counsel, I caused the brief to be served by electronic mail upon the following counsel:

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