IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

STATE OF FLORIDA, by and through BILL McCOLLUM, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 3:10-cv-00091-RV/EMT
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS'
"STATEMENT OF MATERIAL FACTS IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT"

Pursuant to Local Rule 56.1, defendants hereby respond to plaintiffs' statement of material facts in support of plaintiffs' motion for summary judgment." Defendants use below the same paragraph numbering as plaintiffs' statement.

1. This paragraph does not contain "facts" other than facts showing that the Patient Protection and Affordable Care Act ("ACA") was duly enacted into law.

2. This paragraph contains statements about the law, rather than facts.

3. This paragraph contains plaintiffs' characterization of section 1501 of the ACA, rather than facts. The text of section 1501, *q.v.*, is not in dispute.

4. This paragraph contains legal argument rather than facts. The legal argument is that Congress relied solely on its commerce power, and in particular that it did not rely on its power to tax and spend for the general welfare. The Court's ruling on the motion to dismiss

accepted that legal argument, so it is the *law* of the case for purposes of this motion. (Defendants' not having revisited the issue in their motion for summary judgment is, of course, without prejudice to their right to argue that legal point in any appellate proceedings.) The proposition that Congress relied solely on the commerce power, however, is not an assertion of *fact*, let alone an undisputed assertion of fact. "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Thus, that Congress did not make unnecessary *recitals* of reliance on its power to tax and spend does not imply that ACA § 1501 is not supported by the power of Congress to tax and spend for the general welfare.

5. This paragraph, again, sets forth legal argument, rather than facts. Congress has, in any event, previously required Americans to purchase goods and services, including the required purchase of firearms and ammunition by all free males (Second Militia Act of 1792, ch.38, § 1, 1 Stat. 264, 265), and the required purchase of insurance in a wide variety of contexts.

6. This paragraphs contains a discussion of one dictionary meaning of "activity" rather than any facts.

7. This paragraph does not set forth any facts, but instead refers to laws enacted in several plaintiff states that purport to nullify portions of section 1501 of the ACA.

8. This paragraph does not set forth any facts, but instead consists of legal argument and characterizations of various provisions of the ACA.

9. It is not disputed that plaintiffs Brown and Ahlburg do not now have what would, in 2014, be qualifying health care coverage. However, the only evidence submitted with respect to their future intentions, is, at best, ambiguous on their future intents. Neither the declaration of Brown nor that of Ahlburg clearly states either 1) that the declarant will desire not to purchase

qualifying insurance even if it turns out that the purchase would be financially advantageous; or 2) that the declarant currently predicts that he or she will not desire to buy insurance because he or she is making an empirical prediction that the purchase will not be financially advantageous. To whatever extent plaintiffs are making an empirical claim, it is not one supported by record evidence. The declarations are silent about almost every fact that might be relevant (plaintiffs' current health status, for example). The declarations do disclose plaintiffs' ages (Brown is 55, Ahlburg 51, Brown Decl. ¶ 1; Ahlburg Decl. ¶ 1), but the age of the declarants tends to cut against any such empirical claim because of the ACA's limitation on age banding starting in 2014.

10. The first sentence is undisputed. The second sentence, alleging that NFIB members "must arrange their affairs to comply with the Individual Mandate, which will require the diversion of resources that otherwise could be used for their businesses," is conclusory. The declarations of NFIB members indicate that they will "investigate" the possible impact of the ACA, Brown Decl. ¶ 11, but it is not now possible, in advance of knowledge of either the premiums or coverage that will be available to plaintiffs in 2014, to come to any conclusion on that point. To the extent that the declarations state or suggest that NFIB members have pre-determined what they will conclude when they evaluate their options in 2013, those conclusions are not supported or supportable by specific facts.

11. Defendants do not deny the factual assertion that NFIB is educating its members about the ACA. However, insofar as plaintiff NFIB makes a legal assertion that the expenditure of resources for that educational purpose is sufficient to confer standing, defendants dispute that legal assertion as a matter of law. *See, e.g.*, *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1433-34 (D.C. Cir. 1995); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62

(D.C. Cir. 2005).

12. Not material; partially disputed. Whether a state has a budget deficit at a particular moment is not material to whether a conditional spending program is a permissible exercise of Congress's authority under the Spending Clause. Defendants do not dispute that, when the ACA was enacted, many states had budget deficits.

Defendants dispute that the ACA fiscally harms states; to the contrary, on balance, it helps their budgets. See Defs.' MSJ 40-41 & n.12; CEA, *The Impact of Health Insurance Reform on State and Local Governments*, at 7-8 (Sept. 15, 2009) (Ex. 33) [hereinafter *The Impact on States*]; John Holahan & Stan Dorn, Urban Institute, *What Is the Impact of the [ACA] on the States?*, at 2 (June 2010) (Ex. 35) ("[S]tate and local governments would save approximately $70-80 billion over the 2014-2019 period by shifting [currently state-funded coverage] into federally matched Medicaid, clearly exceeding the new cost to the states of the Medicaid expansion."); J. Angeles, *Center on Budget and Policy Priorities, Some Recent Reports Overstate the Effect on State Budgets of the Medicaid Expansions in the Health Reform Law*, at 10 (Oct. 21, 2010) (Ex. 36) [hereinafter *Recent Reports Overstate the Effect on State Budgets*] ("[S]tates' savings from no longer having to finance as much of the cost of providing uncompensated care to the uninsured may fully offset the small increase in Medicaid costs resulting from the Medicaid expansion."); Kaiser Family Foundation, *Health Reform Issues: Key Issues About State Financing and Medicaid*, at 3 (May 2010) (Ex. 37) (increases in federal Medicaid funding will generate economic activity at the state level, including jobs and state tax revenues); Bowen Garrett et al., Urban Institute, *The Cost of Failure to Enact Health Reform: Implications for States*, at 13 tbl.2B (Sept. 30, 2009) (Ex. 38) (absent reform, state Medicaid/CHIP spending estimated to increase 60.7 percent by 2019 even under best-case

scenario).

Defendants also dispute the assertion that states lack the means to close any budget gaps by, for example, reducing expenditures or raising revenue. Through the political process, each state is "free to change its method of generating public income whenever [its] people wish to do so." *Nevada v. Skinner*, 884 F.2d 445, 448 n.5 (9th Cir. 1989). *See also* Fed'n of Tax Adm'rs, *2009 State Tax Collection by Source* (Defs.' Ex. 42) (six plaintiff states — Alaska, Florida, Nevada, South Dakota, Texas, and Washington — impose no personal income tax; three impose no corporate income tax; and one imposes no sales tax); Fed'n of Tax Adm'rs, *2009 State Tax Revenue* (Defs,' Ex. 43) (of the 10 states with the lowest per capita tax burden, 7 are plaintiffs here: Alabama, Arizona, Colorado, Florida, Georgia, South Carolina, South Dakota, and Texas).

13. Not material; partially disputed. Whether a conditional spending program would increase net outlays for state governments is not material to whether it is a permissible exercise of Congress's authority under the Spending Clause. Defendants do not dispute that the CBO projects that, over 2010 to 2019, the ACA will reduce the federal deficit by $143 billion. Defendants dispute that the ACA fiscally harms states. *See supra* ¶ 12.

14. Not material; disputed. Whether the ACA as a whole, or any of its provisions, decreases the federal government's net outlays for Medi*care* — a program that is not even at issue in this lawsuit — is not material to whether the ACA's amendments to Medic*aid* are a permissible exercise of Congress's authority under the Spending Clause. Defendants dispute that the federal government's savings are projected to come mainly from reductions in Medicare providers' compensation. In fact, the CBO's projections about the ACA's net effect on the federal budget are the sum of a broad mix of new expenditures, reduced outlays, and revenue-generating provisions. CBO Letter to Speaker Pelosi tbls. 2, 5.

For this statement, plaintiffs rely on a Wall Street Journal op-ed asserting that, according to the CMS chief actuary, "Medicare payment rates for doctors and hospitals serving seniors will be cut by 30% over the next three years." Peter Ferrara & Larry Hunter, *How ObamaCare Guts Medicare*, The Wall Street Journal, Sept. 9, 2010. But those cuts are required not by the ACA, but by *prior law* — specifically, the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) (tying physician payment rates to a "sustainable growth rate" formula) — so they were appropriately excluded from the CBO's cost projections. *See* Paul N. Van de Water, Center on Budget and Policy Priorities, *The Sustainable Growth Rate Formula and Health Reform*, at 1 (Apr. 21, 2010); Bds. of Trustees of Fed. Hosp. Ins. & Fed. Supp. Med. Ins. Trust Funds, *2010 Annual Report*, at 281 (Aug. 5, 2010).

15. Not material; not facts but legal argument; partially disputed. Whether a conditional spending program would increase net outlays for state governments is not material to whether it is a permissible exercise of Congress's authority under the Spending Clause. Moreover, this paragraph contains not facts, but legal argument regarding the effects of the ACA's minimum coverage and Medicaid provisions. Defendants dispute that the ACA fiscally harms states. *See supra* ¶ 12. Defendants do not dispute the assertion (though it is not fact but legal argument) that, beginning in 2014, covered expenses for Medicaid enrollees who were already eligible for Medicaid before the ACA will be reimbursed at regular FMAPs.

16. This paragraph sets forth legal argument rather than fact, much less undisputed fact. The paragraph cites only to a law review article, and even that article makes only the modest claim that whether something like the minimum coverage requirement is appropriate "is likely to be judged differently by people with diverging ideologies and political allegiances." That article in turn cites to another article that proposes a different untested possibility for

covering pre-existing conditions that does not claim that it is the only method that could be used.

17. Not material; not facts but legal argument; refers to nonexistent or dismissed claims. No response is required to the assertion that the ACA requires states to "provide expanded benefits to all employees who participate in a State group plan" because it refers to the ACA's general insurance industry reforms (e.g., the bar on preexisting condition exclusions), which plaintiffs do not challenge. Likewise, no response is required to the assertion that the ACA requires states to "offer enrollment in a state group insurance plan to all [state employees] who work 30 or more hours a week," because it refers to a claim that has been dismissed. Slip op. at 42-47. These assertions are not material to any live claim.

18. Not material; not facts but legal argument; refers to nonexistent or dismissed claims. *See supra* ¶ 17; slip op. at 42-47.

19. Not material; not facts but legal argument; refers to nonexistent or dismissed claims. *See supra* ¶ 17; slip op. at 42-47.

20. Undisputed.

21. Not material; not facts but legal argument; disputed. This paragraph consists of legal argument regarding conditions on the receipt of federal Medicaid funds under the ACA, none of which is material. In any event, each is disputed. Even if the Medicaid Act's original purpose to assist states with the cost of medical assistance for "needy persons," *Harris v. McRae*, 448 U.S. 297, 308 (1980), were material — and it is not, as it is Congress's intent in the ACA that matters, *see id.* at 309 & n.12 — the ACA is consistent with that purpose. *See* 42 U.S.C. § 1396d(a) (providing for assistance to those "whose income and resources are insufficient" to meet the costs of medical care); 75 Fed. Reg. 45628, 45629 (Aug. 3, 2010) (those with incomes between 100 and 133 percent of the federal poverty level make just $10,830 to $14,404 per

year); Kaiser Family Foundation, *Survey of People Who Purchase Their Own Insurance* 4 (June 2010), *available at* http://www.kff.org/kaiserpolls/upload/8077-R.pdf (last visited Nov. 22, 2010) (average annual cost of health insurance (premiums and out-of-pocket costs) in the individual market is $4,530).

Moreover, the ACA's expansion of Medicaid was foreseeable. *See* 42 U.S.C. § 1396a note; *Bowen v. POSSE*, 477 U.S. 41, 53 (1986) (states enter Medicaid subject to, and on notice of, Congress's authority to amend the program); John Klemm, Ph.D., *Medicaid Spending: A Brief History*, 22 Health Care Fin. Rev. 105, 106 (Fall 2000) (Ex. 31) (between 1966 and 2000, Medicaid enrollment expanded from 4 million to 33 million).

The ACA's maintenance-of-effort provisions do not eliminate state discretion to control Medicaid costs. Vernon K. Smith et al., Kaiser Comm'n on Medicaid & the Uninsured, *Hoping for Economic Recovery, Preparing for Health Reform* 32 (Sept. 2010), *available at* http://www.kff.org/medicaid/upload/8105.pdf (last visited Nov. 21, 2010) (39 states restricted provider rates in FY 2010, and 37 states plan to in FY 2011; 20 states restricted benefits in FY 2010, and 14 plan to in FY 2011).

Even if the states had standing to challenge ACA § 2304, which they assert makes them "not only responsible (with their federal partner) for reimbursing health care costs, but responsibility (without their federal partner) to provide health care services," plaintiffs concede that the provision is "unclear in its import and effect," Pls.' MSJ at 42 n.42, and "cannot be assessed until regulations are promulgated" by CMS, *id.* Ex. 16 at 2 ¶ 4, 4 ¶ 6 (Nevada); *see also id.* Ex. 18 ¶ 12 (South Dakota) (change "may . . . alter South Dakota's Medicaid program" but CMS "has provided no guidance on whether or how").

22. Not material; not facts but legal argument; disputed. Whether a conditional

spending program would impose new costs or responsibilities on state governments is not material to whether it is a permissible exercise of Congress's authority under the Spending Clause. Defendants dispute that the ACA fiscally harms states. *See supra* ¶ 12.

Plaintiffs' reference to 138 percent (rather than 133 percent) of the poverty level appears to incorporate Congress's adjustments to the use of income "disregards" in determining Medicaid eligibility. Medicaid eligibility for most groups is determined partly by income level. Historically, states have used a variety of income disregards to exclude certain amounts when evaluating an applicant's eligibility for medical assistance. These disregards vary widely from state to state, and have the effect of raising the eligibility ceiling for such programs, sometimes significantly. In the ACA, to achieve greater consistency, Congress eliminated states' use of such disregards to make income-based eligibility determinations for Medicaid, with certain exceptions (for example, for the elderly or disabled), ACA § 2002(a) (adding 42 U.S.C. § 1396a(e)(14)(B), (D)), and instead adopted a standard 5 percent disregard to be applied in determining an applicant's modified adjusted gross income, *id.* (adding 42 U.S.C. § 1396a(e)(14)(A), (I)). These changes take effect in 2014. *Id.* § 2002(c). *See also, e.g.*, Donna Cohen Ross et al., Kaiser Comm'n on Medicaid & the Uninsured, *Determining Income Eligibility in Children's Health Coverage Programs: How States Use Disregards in Children's Medicaid and SCHIP* (May 2008), *available at* http://www.kff.org/medicaid/upload/7776.pdf (last visited Nov. 22, 2010).

23. This paragraph does not set forth any facts, but instead consists of legal argument and characterizations of various provisions of the ACA.

24. Not material; not facts but legal argument; refers to nonexistent or dismissed claims. Whether a conditional spending program imposes immediate costs or responsibilities on

state governments is not material to whether it is a permissible exercise of Congress's authority under the Spending Clause. Moreover, this paragraph generally does not set forth facts, but instead consists of legal argument and characterizations of various provisions of the ACA. Nevertheless, defendants do not dispute that *some* plaintiff states "are devoting funds and resources now to prepare and implement changes" for continued participation in Medicaid or to establish exchanges. Defendants also do not dispute the assertion that the ACA's maintenance-of-effort provisions are currently in effect. No response is required to the assertion that "the States as employers must imminently expand benefits offered within their employer group insurance plans" because it refers to a claim that has been dismissed. Slip op. at 42-47.

25. This paragraph does not set forth any facts, but instead consists of legal argument. Even if the states had standing to challenge ACA § 2304, which they assert makes them "not only responsible (with their federal partner) for reimbursing health care costs, but responsibility (without their federal partner) to provide health care services," plaintiffs concede that the provision is "unclear in its import and effect," Pls.' MSJ at 42 n.42, and "cannot be assessed until regulations are promulgated" by CMS, *id.* Ex. 16 at 2 ¶ 4, 4 ¶ 6 (Nevada); *see also id.* Ex. 18 ¶ 12 (South Dakota) (change "may . . . alter South Dakota's Medicaid program" but CMS "has provided no guidance on whether or how").

26. Not material; disputed. Whether a conditional spending program would impose new costs or responsibilities on state governments is not material to whether it is a permissible exercise of Congress's authority under the Spending Clause. In any event, this paragraph is disputed. CMS's most recent guidance explains that the federal government will only recapture rebates above prior-law levels; thus, states that were receiving additional rebates before the ACA will keep them. *See* CMS Letter to State Medicaid Directors at 1-3 (Sept. 28, 2010), *available at*

http://www.cms.gov/smdl/downloads/SMD10019.pdf (last visited Nov. 23, 2010); *Recent Reports Overstate the Effect on State Budgets*, at 9 (inset). Defendants dispute that the ACA fiscally harms states. *See supra* ¶ 12.

27. Not material; disputed. Whether a conditional spending program would impose new costs or responsibilities on state governments is not material to whether it is a permissible exercise of Congress's authority under the Spending Clause. In any event, this paragraph is disputed. The ACA sets the minimum payment for Medicaid primary care physician services "furnished in 2013 and 2014" by a physician with a primary specialty designation of family medicine, general internal medicine, or pediatric medicine at the Medi*care* rate and provides for 100 percent FMAP during those years. HCERA § 1202. States therefore do not contribute to the 2013 and 2014 increased payment rates. The ACA imposes no such requirement beyond 2014, and plaintiffs improperly assume that they will continue to pay these increased rates at regular FMAPs in later years. As Nevada concedes, the ACA imposes no such requirements. *Id.* Ex. 16 ¶ 3 ("The State will need to decide whether it will continue paying physicians at that level or to lower the rates after 2014."); *see also Reports Overstate the Effect on State Budgets*, at 6 (inset). Defendants dispute that the ACA fiscally harms states. *See supra* ¶ 12.

28. This paragraph generally does not set forth facts, but instead consists of legal argument. Nevertheless, defendants do not dispute that one of the proposed findings in the Bipartisan Commission on Medicaid Act of 2005, H.R. 985, 109th Cong. § 2(13) (2005) — which Congress never acted upon — was that "Medicaid is the single largest Federal grant-in-aid program to the States, accounting for over 40 percent of all Federal grants to States." Defendants also do not dispute that in FY 2009 (not FY 2010), federal spending for Medicaid was about $251 billion, CBO, *The Long-Term Budget Outlook*, at 30 (Aug. 2010), or roughly 7

percent of total federal outlays; and that in FY 2008, state spending on Medicaid, as a proportion of total state expenditures, averaged 20.7 percent (although a majority of that state spending was funded by federal dollars). And although defendants do not dispute that the majority of federal revenues come from individual income taxes and social security or social insurance taxes, and that most payors of those taxes *reside* in the states, they note that those taxes are collected from *federal* taxpayers.

29. This paragraph generally does not set forth facts, but instead consists of legal argument. Defendants do not dispute that Florida collected about $32 billion in tax revenues in 2009, but note that the projected *federal* share of Medicaid spending — that is, the revenue that Florida could potentially lose if it withdrew from Medicaid — is not "more than half" of this amount. Defendants dispute the assertion that states lack the means to close any budget gaps by, for example, reducing expenditures or raising revenue. *See supra* ¶ 12. Defendants note that Florida is one of the handful of states that impose no personal income tax, Fed'n of Tax Adm'rs, *2009 State Tax Collection by Source* (Defs.' Ex. 42), and its per capita tax burden is among the lowest in the nation, Fed'n of Tax Adm'rs, *2009 State Tax Revenue* (Defs,' Ex. 43).

30. This paragraph does not set forth any facts, but instead consists of legal argument.

31. This paragraph generally does not set forth facts, but instead consists of legal argument. Defendants dispute the assertion that states lack the means to close any budget gaps by, for example, reducing expenditures or raising revenue. *See supra* ¶ 12. Defendants also dispute the assertion that states are unable to fund state-run programs for the medically needy outside of Medicaid. Many states already fund such programs. *See, e.g.*, CEA, *The Impact on States*, at 34-35, 85 (describing Pennsylvania's adultBasic program and the Healthy Indiana Plan). Indeed, Arizona provided medical care to its low income citizens outside of Medicaid

until 1982, when it first joined the program. *See Phoenix Mem'l Hosp. v. Sebelius*, 622 F.3d 1219, 1226 (9th Cir. 2010).

32. This paragraph does not set forth any facts, but instead consists of legal argument.

33. This paragraph does not set forth any facts, but instead consists of legal argument.

34. This paragraph generally does not set forth facts, but instead consists of legal argument. Defendants do not dispute that Medicaid pays for medical services for many needy persons. However, defendants dispute the assertion that states are unable to fund state-run programs for the medically needy outside of Medicaid, *see supra* ¶ 31, as well as the assertion that a state's withdrawal from Medicaid would necessarily be abrupt or harmful to current enrollees, given the options available to the state and the discretion afforded to the Secretary. *See, e.g.*, 42 U.S.C. § 1396b(a); 42 C.F.R. § 430.12; 42 U.S.C. § 1315(a); *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 291-94 (4th Cir. 2002).

35. This paragraph does not set forth any facts, but instead consists of legal argument.

Dated: November 23, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2010, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Plaintiffs' counsel of record.

/s/ *Eric B. Beckenhauer*
ERIC B. BECKENHAUER