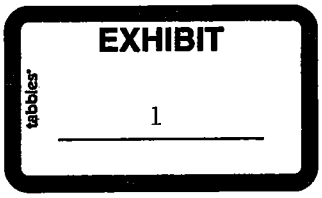
The Honorable Roger Vinson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

STATE OF FLORIDA, by and through BILL McCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	Case No. 3:10-cv-91

GOVERNOR'S AMICUS MEMORANDUM IN SUPPORT OF CONTINUING IMPLEMENTATION OF AFFORDABLE CARE ACT IN THE STATE OF WASHINGTON



The Plaintiffs have asked the Court to "specify that Defendants are enjoined from enforcing the [Affordable Care Act] ACA against the Plaintiff States, NFIB and its members, and the Individual Plaintiffs." Plaintiffs' Memorandum In Opposition To Defendants' Motion To Clarify, note 1, pages 2- 3 (emphasis added). They argue that because the Plaintiffs requested and obtained a Declaratory Judgment that "held the mandate to be non-severable" from other provisions in the ACA, the result is "[t]he preexisting status quo should be in effect." *Id.* at pages 8 and 9. The Plaintiffs characterize as "wishful thinking" the position of the Defendants that the Court's declaratory judgment does not relieve any obligation or deny any rights under the ACA while appellate review is pending, and assert that the declaratory judgment is binding on the parties before the Court. *Id.* at page 3. In light of these arguments, the Governor of the State of Washington respectfully sets forth the basis for her position that the Washington Attorney General does not represent the Governor or other state officials and his joinder in the lawsuit and these positions on the injunctive effect of the declaratory judgment should not constrain the benefits Washington state government and state citizens are currently receiving under the ACA.

I. Factual Background.

Under the ACA Washington has applied for and received a Medicaid waiver under which it now receives federal assistance for health care coverage programs previously supported solely by state funds.[1] Under the ACA, 897,000 seniors in Washington who have Medicare coverage can no longer be required to pay a co-pay to receive important preventive health services or pay extra if they want to stay healthy by

[1] http://hrsa.dshs.wa.gov/MedicaidHealthCareReform/Waiver/WaiverApprovalResponse.pdf

getting an annual check-up. Nearly 54,000 Medicare beneficiaries have received a one-time, tax-free $250 rebate to help pay for prescription drugs in the "donut hole" coverage gap in 2010.[2] Medicare beneficiaries who fall into the "donut hole" in 2011 will be eligible for 50 percent discounts on covered brand name prescription drugs.[3] Under the ACA, the Early Retiree Reinsurance Program provides financial assistance to employers and unions to help them maintain coverage for early retirees age 55 and older who are not yet eligible for Medicare.[4] To date, over 70 organizations in Washington, including state and local government, businesses and unions are receiving assistance under this program. Under the ACA the Department of Health and Human Services has awarded at least $82.9 million in new grant funding in Washington that will support: 150 projects that show significant potential to produce new and cost-saving therapies; demonstration projects to address health professions workforce needs; Tribal, Maternal, Infant and Early Childhood Home Visiting Programs; Medicare improvements for patients and providers; building epidemiology, laboratory, and health information systems capacity; additional HIV Prevention and Public Health Fund activities; expansion of Primary Care Residency Program and physician's assistant training; capital development in health centers; and increased resources for pregnancy assistance programs.[5]

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[2] http://www.healthcare.gov/news/factsheets/donut_hole_checks_by_state.html
[3] *Id.*
[4] http://www.healthcare.gov/law/provisions/retirement/states/wa.html
[5] http://www.healthcare.gov/center/states/wa.html

II. The Governor Is Concerned About The Inequities That Could Result If A De Facto Injunction Were to Disrupt The Programs And Budgets That It Is Her Constitutional Obligation to Administer.

The Governor has deep concerns about the vagueness of the relief being sought by the plaintiffs and the potentially grossly unfair and disruptive effects of this court's granting of the relief sought. Indeed, the request for a "de facto injunction" raises many troubling questions; including among them:

- Would the Medicaid waiver described above that was already obtained by the State of Washington which affects thousands of the state's neediest citizens and implicates millions in State funds be affected or even rescinded?
- Would the thousands of insurance policies now covering young adults up to the age of twenty-seven in Washington be voided or otherwise impaired, while young adults in California or other states whose attorneys-general did not join in the lawsuit retain their benefits?
- Would the thousands of Washington citizens with pre-existing conditions have their insurance stripped from them while citizens in states where the attorneys-general did not join in this litigation remain insured?
- Would Washington retain its eligibility for over eighty million dollars in grants already secured by the Governor or her administration under the ACA or would those funds be lost while other States retain their ability to receive such aid?

The potential for any of these outcomes is extremely disruptive to the administration of State government, which is the province of the Governor, not the Attorney General. For this reason, it would be particularly inappropriate for the Court to

provide such relief when the Governor of Washington is not being represented by the Attorney General of the State here and, in fact, welcomes further implementation of the Act in her State.

III. The Washington Attorney General's Joinder In This Lawsuit Should Not Keep Other State Officials From Implementing And Receiving The Benefits Of The Affordable Care Act.

The Governor of the State of Washington, as well as other officials of the State, do not wish to forego the benefits afforded under the ACA, and would be severely harmed by an order forbidding the federal government from ongoing implementation of the provisions from which they benefit. Any further order of this Court should recognize the distinction between the Attorney General of Washington and the Governor and other officials of the State of Washington who support and choose to move forward with implementation of the ACA.

As previously set forth in the "Motion of Governors of Washington, Colorado, Michigan, And Pennsylvania for Leave to File Amicus Brief and Memorandum in Support Thereof" (Document 59, filed 6/23/10), the Attorney General does not represent the Governor of the State of Washington or other executive offices or agencies. Any injunctive relief would not properly encompass officials and agencies of the State of Washington who voluntarily support the implementation of the Affordable Care Act. The fact that the Attorney General of Washington has chosen to assert positions adverse to other state departments and officials should not operate as a de facto injunction that deprives those departments and officials and the people they serve of the substantial benefits currently being received under the law.

IV. The Washington Attorney General's Joinder In The Lawsuit Should Not Constrain The Benefits Washington Citizens Are Currently Receiving Under The Affordable Care Act.

The Attorney General of Washington does not represent and bind the citizens of the state in a *parens patriae* capacity in this lawsuit. *See Massachusetts v. Mellon,* 262 U.S. 447, 479, 43 S. Ct. 597, 67 L.Ed. 1078 (1923). Further, a state *parens patriae* action would be based on "a quasi-sovereign interest in the health and well-being-both physical and economic-of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L.Ed.2d 995 (1982). It would be incongruous for any injunctive impact to extend to the citizens of the State of Washington on a theory of *parens patriae* when the Attorney General has told the citizens of the state that he believes the unchallenged provisions of the ACA that are beneficial for their physical and economic health and well-being can and should take effect in the near term. The Attorney General's official website prior to the issuance of the declaratory judgment told the citizens:

> [C]hallenging the two unconstitutional provisions will not "overturn" or "repeal" the new health care reform legislation. In fact, this lawsuit does not challenge most provisions in this 2,400-page bill, including several of the provisions of the federal health care legislation scheduled to take effect this year, such as among other things:
>
> - Allowing children access to health insurance regardless of pre-existing conditions;
> - Providing seniors a rebate to fill the so-called "donut hole" in Medicare drug coverage, which severely limits prescription medication coverage expenditures over $2,700;
> - Banning lifetime caps on the amount of insurance an individual can have;
> - Prohibiting insurance companies from denying coverage to existing policy-holders when they get sick; and
> - Allowing young adults to continue to be covered by their parents' health insurance until they reach age 27.

Washington State Office of the Attorney General Website, Health Care Lawsuit and FAQ as visited on January 31, 2011 (MHTML web page archive) attached as Exhibit A.

After issuance of the declaratory judgment, the Attorney General's official website stated that "Attorney General McKenna stands by his belief that the two provisions the states are challenging may be ruled unconstitutional without overturning the entire health care reform act." The explanation for joining in pleadings to the contrary is that "[a]s in most multistate litigation, the majority of the 26 states in this lawsuit dictated the final arguments that have been advanced in the case, including the argument that individual mandate is not severable from the rest of the bill--meaning that if a judge finds that piece of the bill unconstitutional, the entire new law must be overturned." http://atg.wa.gov/2010healthcarelawsuit.aspx (visited February 28, 2011).

Within the State of Washington there is agreement that implementation of provisions of the ACA other than those provisions specifically challenged will inure to the benefit of Washington's citizens. The declaratory judgment issued by this Court should not operate to the prejudice of Washington citizens who currently are receiving the benefits and protections of the (ACA).

V. Considerations Of "Practicality And Wise Judicial Administration" Weigh In Favor Of Refraining From Imposing Any De Facto Injunction.

Depriving any state or its citizens of the benefits of the ACA provisions currently in effect is not necessary to remedy the claimed constitutional injuries or to serve the principles of severability. The minimum insurance coverage provision that this Court has declared unconstitutional and nonseverable does not take effect until 2014. The ongoing implementation of other provisions with earlier effective dates cannot be said to cause

any immediate or ongoing constitutional injury. These particular circumstances allow for appellate review to be final before any injunctive effect of a declaratory judgment.

This course is appropriate given the realities of the multiplicity of suits on overlapping issues. As this Court is aware, the constitutional and severability questions have been answered in different ways by different federal district courts. These varying and conflicting declaratory judgments sharpen the legal issues for appellate resolution. However, granting each of these declaratory judgments injunctive effect would only create confusion and disruption. For example, are the employees of the State of Michigan entitled to implementation of the provisions requiring group insurance to allow parents to extend coverage to adult children up to age 26? Is this question controlled by the declaratory judgment of the federal district court in Michigan, *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010), or the order of this Court where the Attorney General of Michigan is a plaintiff?

In other contexts, the Declaratory Judgment Act has been described as conferring on federal courts substantial discretion in deciding whether to declare the rights of litigants based on "considerations of practicality and wise judicial administration." *Wilton v. Seven Falls Co.,* 515 U.S. 277, 286, 115 S.Ct. 2137, 2143, 132 L.Ed.2d 214 (1995). Certainly a district court can and should apply these same considerations in deciding the attendant power of injunctive relief. In the unusual circumstances of these cases, the Governor of Washington respectfully urges the exercise of this discretion to refrain from imposing a de facto injunction.

CERTIFICATE OF LOCAL RULE 7.1(B) CONFERENCE

Counsel for the Governor of the State of Washington conferred with Plaintiffs' counsel but the parties were unable to reach an agreement as to the relief sought in this Motion.

CERTIFICATE OF SERVICE

I hereby certify, that on this 28th day of February, 2011, a copy of the foregoing was served on counsel of record for all parties through the Court's Notice of Electronic Filing system.

DATED: February 28, 2011

/s/ Guy M. Burns

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Health Care Lawsuit Background and FAQ

Documents:

* Patient Protection and Affordable Care Act
* Summary (Federation of Medical Boards)
* Copy of the original lawsuit
* Copy of the amended lawsuit
* Scheduling order
* DOJ's motion to dismiss
* Response to Motion to Dismiss
* Judge Vinson's Oct. 14, 2010 order on the Motion to Dismiss
* States' Motion for Summary Judgment
* DOJ's Motion for Summary Judgment

News

* McKenna joins lawsuit to protect Washington citizens against new health care mandates (3-22-2010)
* Attorneys General File Amended Complaint in Health Care Reform Lawsuit (5-14-2010)
* McKenna responds to motion to dismiss the health care reform act lawsuit (6-17-2010)
* McKenna responds to governors' motion opposing health care mandate lawsuit (6-23-2010)
* Health care reform: Too important to build on an unconstitutional foundation (7-6-2010)
* Florida judge leaning toward moving forward on health care lawsuit (9-14-2010)
* Florida Judge allows challenge to the individual mandate, Medicaid expansion to move forward (10-14-2010)
* Attorney General Rob McKenna's statement on Virginia health care decision (12-13-2010)
* Florida judge hears multistate health care challenge (12-16-2010)
* Six new states seek to join multi-state health care reform challenge (1-18-2011)

EXHIBIT
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* States' Response to DOJ's Motion
* Judge sides with states in federal health care challenge (1-31-2011)
* States' Motion to Amend Complaint
* States' 2nd Amended Complaint
* Judge Vinson's ruling - 1-31-2011

* Updated 1/31/2011

Background: In December 2009, Attorney General McKenna joined several state attorneys general in expressing concerns over provisions in the Senate health care bill that appeared to violate our federal Constitution. At that point, the states were primarily concerned about the special arrangement in the Senate's health care proposal which permanently exempted Nebraska from paying its share of the additional Medicaid costs mandated by the bill. However, the states also indicated they had other legal or constitutional concerns with certain provisions of the proposed legislation.

On Tuesday, March 23, 2010, after further legal analysis and deliberation—and after notifying Governor Gregoire of his decision on March 22—McKenna joined fellow AGs in a multi-state, bi-partisan lawsuit challenging those specific provisions as an expansion of federal authority beyond that the states believe is allowed under the U.S. Constitution. Florida AG Bill McCollum filed this suit in U.S. District Court for the Northern District of Florida.

To date 20 states have joined the suit including: Florida, Alabama, Alaska, Arizona, Colorado, Georgia Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah and Washington. Virginia has filed its own suit. The National Federation of Independent Business and several individuals joined the suit in May. The states' filed a motion on Jan. 18, 2011, requesting to amend their complaint and add six more states to the suit: Iowa, Ohio, Kansas, Wyoming, Wisconsin and Maine. If the judge allows this motion, 26 states will have joined the multistate. Virginia has filed its own suit and Oklahoma has indicated it will do the same.

On October 14, 2010, Judge Roger Vinson of the U.S. District Court for the Northern District of Florida rejected motions by the U.S. Department of Justice to dismiss the case. In his ruling, Judge Vinson said, "[T]here have been at least six attempts by the federal government to introduce some kind of universal healthcare insurance coverage. At no point – until now – did it mandate that everyone buy insurance... While the novel and unprecedented nature of the individual mandate does not automatically render it unconstitutional, there is perhaps a presumption that it is."

Recently Governor Chris Gregoire and Democratic legislators joined separate amicus briefs voicing their opposition to this lawsuit. Attorney General McKenna supported the right of both parties to file amicus briefs in this case because he believes it's important for the courts to hear a thorough analysis of the Constitutional issues at hand.

On Dec. 13, US District Court Judge Henry Hudson for the Eastern District of Virginia ruled the individual mandate unconstitutional, stating Congress's attempt to force Americans to purchase private insurance "exceeds the constitutional boundaries of congressional power." While this case is separate from the multi-state case to which Washington is a party, this ruling validates the important constitutional questions that 21 total states have raised.

On Dec. 16, 2010, Judge Vinson heard arguments on the merits of multistate case and indicated he would rule as soon as possible.

Q: What is this lawsuit about?

A: As this state's independently elected attorney general, McKenna takes his duty to defend Washington's constitutional rights very seriously. Health care reform is much too important to build on an unconstitutional foundation.

The two main provisions of our lawsuit deal with:
1) The unprecedented and unconstitutional requirement that individuals must purchase private insurance or face a fine; and
2) The massive expansion of the Medicaid program which will unconstitutionally require states to spend billions more on this program at a time when state budgets are already in crisis.

The filing states believe both of these mandates represent expansions of federal authority that violate the 10th Amendment, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The states are also concerned the individual mandate violates the Commerce Clause because never before has Congress required all Americans to purchase a specific product in the private marketplace.

Q: What is this lawsuit not about?

A: Attorney General McKenna believes challenging the two unconstitutional provisions will not "overturn" or "repeal" the new health care reform legislation. In fact, this lawsuit does not challenge most provisions in this 2,400-page bill, including several of the provisions of the federal health care legislation scheduled to take effect this year, such as among other things:

- Allowing children access to health insurance regardless of pre-existing conditions;
- Providing seniors a rebate to fill the so-called "donut hole" in Medicare drug coverage, which severely limits prescription medication coverage expenditures over $2,700;
- Banning lifetime caps on the amount of insurance an individual can have;
- Prohibiting insurance companies from denying coverage to existing policy -holders when they get sick; and
- Allowing young adults to continue to be covered by their parents' health insurance until they reach age 27.

While many provisions of the federal health care bill meet constitutional muster, the states who have joined this suit feel strongly that the federal government exceeded its constitutional authority in certain provisions of the health care bill, and that the individual rights of the citizens they represent deserve to be given the respect that the Constitution requires. As in most multistate litigation, the majority of the 20 states in this lawsuit dictated the final arguments that will be advanced in the case.

While Attorney General McKenna stands by his belief that the two provisions the states are challenging may be ruled unconstitutional without overturning the entire health care reform act, it's more important to him that the courts consider the vital constitutional concerns raised by the individual mandate and the massive expansion of Medicaid that will cost states billions at a time when budgets are stretched tight.

Q: What will it cost the state of Washington to join this lawsuit?

A: State attorneys general typically use multi-state lawsuits to address important national issues or when more than one state has an interest in a legal matter. As a party to this multi-state suit, Washington is one of 20 states participating to date. As the lead state, the Florida Attorney General is committed to handling representation in the most cost-efficient manner possible. Florida is currently negotiating a cost-sharing agreement with the bulk of the states to cover the costs of resources and personnel to pursue the case. The constitutional scholar Florida retained usually charges $950 per hour, however, he has been engaged by the states at the rate of $250 per hour. The contract is also capped at $50,000 in fees and is not based on contingency fees. Despite this, Washington is not participating in the cost-sharing agreement so costs to Washington taxpayers will be even lower.

Q: What is the role of the Washington Attorney General in this state?

A: The Attorney General is a separately elected, independent state official. The Attorney General derives his powers from our state constitution, which says

that "the attorney general shall be the legal adviser of state officers, and shall perform such other duties as may be prescribed by law." Our state Supreme Court interprets these duties broadly, ruling that as legal adviser, his role is something more than a passive observer of state government. Finally, the role of the Attorney General is one of many "checks and balances" in our democratic form of government.

Q. Did the Attorney General consult with Gov. Gregoire before joining this lawsuit?

A. Attorney General McKenna joined a conference call with fellow attorneys general on Sunday, March 21, to discuss concerns about the constitutionality of provisions of the health care bill as passed by Congress. McKenna expressed interest in joining the suit but requested time to review the brief. McKenna received the brief the following morning. His chief deputy sent a copy of the brief to the Governor's office to review at roughly 10 a.m. and had discussions with staff in the Governor's office at that time. Attorney General McKenna called Gov. Gregoire around noon on Monday, March 22. He issued a media advisory 1 p.m. and notified Florida late on Monday afternoon he would join their suit. The suit was not filed until Tuesday, March 23, after President Obama signed the bill into law.

Q: How does the health care bill mandate to buy insurance differ from requirements that people purchase auto insurance?

A. There are two major differences. First, auto insurance is mandated by the states, not the federal government. The federal government does not have the power under the U.S. Constitution to mandate individual health insurance purchases. Under the 10th Amendment, an undelegated power is reserved to the states and to the people.

Second, auto insurance is a regulatory requirement imposed by states on the privilege of driving. You can choose not to drive, and therefore not have to buy insurance. The health insurance requirement is a mandate on every American.

Q: How does the health care bill mandate to buy insurance differ from Medicare or Social Security?

A. The insurance mandate isn't a tax. Medicare and Social Security are taxes that we pay to the government. In return, we receive services from the government.

It's unprecedented for the federal government to force you to buy a product from the private market, to decide which product qualifies and to penalize you if you don't buy that product. The government is neither collecting the money you would pay for insurance nor providing the insurance.

If you don't buy insurance, you would pay a fine. Even though the penalty would be collected by the Internal Revenue Service when you file a tax return, it's still a fine for violating a law – not a tax.

Q: Did Washington join this lawsuit for political reasons?

A: No. This case raises constitutional questions about specific parts of the federal health care reform bill. It could just as easily be suggested that those in favor of the legislation are willing to ignore serious legal questions for their own political reasons. One important role of the Attorney General is to ask a court to intervene when there are issues impacting the state's legal interests and the interests of its people. Given our concerns about sections of this bill, we conclude that it would be in the state's best interest to resolve these legal questions now, so that we may repair our health care system in a way that does not conflict with the United States Constitution.

Q. Many Constitutional scholars, including all of those at a recent UW forum, contend this suit has no merit. How do you respond?

A. There has been robust debate on this issue across the country. Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at Georgetown Law Center, is one of many law professors who agree with the states.

He and others point to two recent cases where Constitutional law professors predicted the court would uphold laws banning handguns within 1,000 feet of a school (U.S. v. Lopez) and permitting women to sue rapists in federal court (U.S. v. Morrison) — yet the U.S. Supreme Court struck these laws down because they exceeded Congress' power under the Commerce Clause.

In a New York Times interview, Barnett says, "The individual mandate goes far beyond these previous acts. Congress has never before mandated that a citizen enter into an economic transaction with a private company, so there can be no judicial precedent for such a law. Telling someone how they must do something is one thing; commanding that they must do something is entirely different."

On October 14, 2010, Judge Roger Vinson of the U.S. District Court for the Northern District of Florida rejected motions by the U.S. Department of Justice to dismiss the case. In his ruling, Judge Vinson said, "[T]here have been at least six attempts by the federal government to introduce some kind of universal healthcare insurance coverage. At no point – until now – did it mandate that everyone buy insurance... While the novel and unprecedented nature of the individual mandate does not automatically render it unconstitutional, there is perhaps a presumption that it is."

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