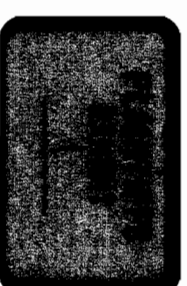


***Florida et al v. United States Department of Health and Human
Services et al., No. 3:10-cv-RV-EMT (N.D. Fla.).***

**Plaintiffs' Presentation for Hearing on Defendants' Motion
To Dismiss First Amended Complaint**

**Before the Hon. Roger C. Vinson, U.S. District Judge
Tuesday, September 14, 2010, 9:00 A.M.**



Standing and Justiciability: General Pleading Rules

- Plaintiffs' burden is to allege sufficient facts to support standing.
- Plaintiffs' factual allegations are to be taken as true.
- Defendants confuse facial challenge to jurisdiction on motion to dismiss with factual challenge at later states of litigation.

Individual Plaintiffs Have Standing

- Elements: (1) Injury in fact; (2) causal relationship between injury and challenged statute; (3) redressability of harm by Court. Only injury-in-fact requirement is at issue here.
- Amended Complaint alleges (see ¶¶ 27, 28, 62, 64) that Mary Brown and Kaj Ahlburg:
 - *Do not have and have not had insurance;*
 - *Do not want insurance and intend not to buy it in 2014;*
 - *Will be subject to Individual Mandate and its penalty;*
 - *Object to the Individual Mandate .*
- Defendants speculate circumstances might change – contrary to facts.
- Key is probability of harm at fixed point in future – not that it be “soon.”
- Baldwin v. Sebelius – inadequate standing allegations; dismissal without prejudice.

Plaintiff NFIB Has Standing

- Requirements for Associational Standing: (1) Members would have standing; (2) protected interests germane to association's purpose; (3) individual members' participation in lawsuit is not needed. Only the "germaneness" requirement is disputed here.
- Amended Complaint alleges (see ¶¶ 26, 62, 63) that NFIB:
 - *Is leading association for small businesses, including individuals;*
 - *Protects members' rights to own, operate, and earn success in business;*
 - *Informs members of how laws and regulations affect them;*
 - *Has individual members who object to the Individual Mandate's diversion of resources away from their businesses.*
- Connection between business and healthcare insurance is well established.
- NFIB's burden to educate members about Individual Mandate's effects.

Plaintiff States: Five Bases For Standing To Challenge The Individual Mandate

- “Piggyback” Standing;
- Injury-in-fact from the Individual Mandate;
- Injury-in-fact from other features of the PPACA not severable from the Individual Mandate;
- Injury to sovereign power to create and enforce a legal code;
- Quasi-sovereign standing as *parens patriae* to assert and protect state citizens’ rights.

STANDING BASIS NO. 1:

- Plaintiff States may “piggyback” on individual Plaintiffs’ and NFIB’s standing to challenge the Individual Mandate.
- Only one Plaintiff must have standing for Court to hear Claim
 - other Plaintiffs need not establish standing.
- Standing of either individual Plaintiff or NFIB is sufficient for States’ challenge to the Individual Mandate.

STANDING BASIS NO. 2:

- The Individual Mandate causes injury-in-fact to Plaintiff States:
 - PPACA greatly expands Medicaid eligibility;
 - Individual Mandate will increase Medicaid enrollment at great cost to states (see Amended Complaint at ¶ 72);
 - Florida must incur costs to implement the PPACA, including its changes to Medicaid (see Amended Complaint ¶¶ 49, 56-57);
 - Virginia v. Sebelius: noting that Virginia must “revamp its health care program . . . particularly with respect to Medicaid” (Slip Op. at 16).
- Dropping Medicaid Unrealistic (see Amended Complaint ¶¶ 65-68):
 - Millions of needy persons deserted;
 - Billions of dollars in federal funding would be lost.
- PPACA assumes states will stay in Medicaid:
 - Cost-shifting goal devastated if Medicaid plans terminated;
 - No legal mechanism to withdraw or transition to another program.

STANDING BASIS NO. 3:

- Plaintiff States Are Impacted By Other PPACA Provisions That Cannot Be Severed From The Individual Mandate:
 - Plaintiff States have standing to challenge other provisions of PPACA (Medicaid expansion, insurance regulation, and employee coverage – Amended Complaint Counts Four through Six);
 - PPACA itself acknowledges that the Individual Mandate is essential to the Act as a whole – PPACA rises or falls with the Individual Mandate.
- Severability test turns on functional interdependence of parts of statute:
 - Individual Mandate requires persons to have qualifying coverage: other challenged provisions provide “doors” by which persons may fulfill the mandate;;
 - PPACA has no severability clause;
 - Courts should hesitate before severing parts of PPACA.
- Unreasonable to infer that Congress would have passed PPACA without the Individual Mandate.

STANDING BASIS NO. 4:

- Plaintiff States have sovereign power to enact laws to protect citizens from coercion in the healthcare arena.
- States' police powers include the power to protect their citizens' health.
- States have power, as sovereigns, "to create and enforce a legal code."
- Virginia v. Sebelius: Virginia has standing as a sovereign to challenge the Individual Mandate in light of state law prohibiting health care coercion.
- Four Plaintiff States have enacted comparable legislation, and most other Plaintiff States have proposed comparable constitutional amendments or statutes.

STANDING BASIS NO. 5:

- States have quasi-sovereign standing as *parens patriae* to protect State citizens' rights.
- Every citizen has two political capacities, as a citizen of the United States, and as a citizen of a State. This reflects dual sovereignty.
- Plaintiff States are asserting a quasi-sovereign interest on behalf of State citizens.
- States may sue as *parens patriae* to protect State citizens from unconstitutional acts of Congress.
- If ever there were a case for States to exercise quasi-sovereign power, this is it.

Plaintiffs' Challenge To The Individual Mandate Is Ripe.

- Delay before the Individual Mandate takes full effect is irrelevant, because date is certain and effects are inevitable.
- States already are having to plan and budget for the effects of the Individual Mandate.
- The Individual Mandate is facially unconstitutional – no record development is needed.
- Plaintiffs' claims are not hypothetical, remote, or abstract.
- **Virginia v. Sebelius**: claim that the Individual Mandate is unconstitutional held to be ripe.

Anti-Injunction and Declaratory Judgment Acts Do Not Bar This Action.

- Anti-Injunction Act is inapplicable because Plaintiffs challenge the Individual Mandate itself, regardless of the penalty.
- Anti-Injunction Act is inapplicable because the penalty is not a tax:
 - PPACA's stated goal is universal coverage;
 - If everyone obeys the Individual Mandate, it will yield no revenue;
 - The Individual Mandate penalty is enacted to enforce a regulation; it is not a tax with incidental regulatory effects;
 - The legal distinction between a penalty and a tax remains valid.
- Anti-Injunction Act is inapplicable because no alternative remedy is available for Plaintiff States:
 - South Carolina v. Regan controls;
 - Virginia v. Sebelius: held that the Anti-Injunction and Declaratory Judgment Acts were inapplicable under the *Regan* exception.
- Anti-Injunction Act is inapplicable because States are not “persons.”

The Individual Mandate Fails Because The Federal Government Is One Of Limited Powers.

- This case involves two fundamental limits on federal power: dual sovereignty and the doctrine that Congress has only limited and enumerated powers. Only the States possess general police power.
- The Patient Protection and Affordable Care Act (“PPACA”) violates these limits on federal power by exceeding the limits of Congress’ enumerated powers and improperly invading the sovereignty of the States.
- If the Commerce Clause allows Congress to force Americans to obtain a particular health insurance coverage, there is no principled limit to what is essentially federal “police power.”

The Commerce Clause Does Not Reach Inactivity

- Congress' power to "regulate" Commerce is not a power to compel commerce.
- The Supreme Court has consistently interpreted the Commerce Power as relating only to "economic activity." Never before has Congress attempted to use the Commerce Power to regulate inactivity.
- Thus, while some activities do not fit within the constitutional meaning of "Commerce," there are no types of Commerce that do not involve "activity."
- In rare instances where the federal government imposes duties on inactive persons (e.g., military draft, census), it does so under express powers, not commerce.
- Where States impose duties on inactive persons (e.g., vaccinations) they do so pursuant to police powers which are not limited to "economic activity."

Defendants Cannot Fit The PPACA's "Individual Mandate" On Inactive Persons Within The Limits Of The Commerce Power

- The PPACA's Lynchpin is an "Individual Mandate" that forces all Americans to obtain health insurance coverage whether they wish to do so or not.
- Because Congress has never before tried to use the Commerce Clause to compel inactive Americans to purchase a good or service, Defendants struggle to characterize the lack of insurance as economic "activity."
- Defendants' shifting explanations of "activity" reflect the incoherence of trying to recast inactivity as activity. Defendants have suggested that Congress may regulate as "activity": decisions not to buy health insurance, the future purchase of health services, or the practice of "self insurance."
- If these theories give rise to "activity," then there is no principled limit on the scope of the Commerce Power.

Defendants Cannot Save The Individual Mandate On Inactive Persons By Invoking The Necessary And Proper Clause (1)

- The Necessary and Proper Clause is a modest grant of power that allows Congress to take measures necessary to implement enumerated powers.
- The Clause is not a blank check. As Chief Justice Marshall explained in McCullough v. Maryland: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” The Individual Mandate violates all of these limitations.
- The Mandate is the kind of attempt to bypass the “letter and spirit” of the Constitution against which Chief Justice Marshall warned in McCullough.

Defendants Cannot Save The Individual Mandate On Inactive Persons By Invoking The Necessary And Proper Clause (2)

- The Mandate utterly fails under the Supreme Court's recent analysis in United States v. Comstock. It is not: (1) a means to implement the legitimate exercise of an enumerated power; (2) a "modest" addition to a longstanding federal statutory scheme; (3) a reasonable means of fulfilling some other federal obligation; (4) closely related to the legitimate exercise of an enumerated power; or (5) respectful of the constitutional rights and interests of the states.
- Rather, the mandate assumes a police power that is offensive to the Constitution. As the Supreme Court noted in Printz v. United States, "when a law . . . for carrying into execution the Commerce Clause violates the principle of state sovereignty . . . it is not a law . . . proper for carrying into execution the Commerce Clause."

Defendants Cannot Save The Mandate On Inactive Persons

By Invoking The Taxing Power

- Congress explicitly relied on the Commerce Clause as authority to pass the Individual Mandate. Both the President and Congress were at pains to insist that the Individual Mandate was not a tax.
- The Individual Mandate's penalty lacks the attributes of a tax. Even if taxes may have a regulatory motive, a tax is "an enforced contribution to provide for the support of the government," while a penalty is an exaction imposed to punish noncompliance with other requirements.
- If the Individual Mandate were a tax, however, it would be an unconstitutional Direct Tax, because it is not apportioned.

Count Four States A Valid Claim For Coercion and Commandeering With Respect To The States' Participation In Medicaid.

- PPACA undoes the Medicaid Partnership between the States and the federal government:
 - Sets Medicaid eligibility well above the poverty line;
 - Makes states responsible for providing care;
 - Added costs are unaffordable: at least \$20 billion, much higher later;
 - PPACA removes Plaintiff States' control over their budgetary processes and legislative agendas.
- The PPACA gives States a Hobson's choice: accede to federal government commands and run budgets off cliff, or attempt to drop Medicaid.
- Here, the financial inducement offered by Congress is so coercive as to pass the point at which pressure turns into compulsion.
- Plaintiffs are not asserting that Medicaid must be "frozen in place."
- South Dakota v. Dole's four restrictions on the federal government's spending power are violated here.

Count Five States A Valid Claim For Coercion and Commandeering Of State Governments In The Service Of Federal Insurance Policy.

- PPACA § 1341 commandeers Plaintiff States to administer and enforce federal reinsurance program – no “discretion” except to set up more than one reinsurance entity.
- PPACA § 1003 requires States to participate in developing insurance program review process.
- PPACA § 1413(c) directs States to establish secure electronic interface allowing exchange of data, compatible with federal system.
- State establishment of Insurance Exchanges is not really voluntary:
 - PPACA § 2001(b) makes State-established Exchange a condition of a State being relieved of onerous Medicaid “maintenance of effort” requirements.
 - PPACA § 1313(a)(4) makes States guarantors of Exchanges regardless of whether State established the exchange, by threatening to withhold federal funds from other programs.

Count Six States A Valid Claim For Interference With States' Sovereignty As Employers And In Their Performance Of Governmental Functions.

- PPACA requires States, for the first time, to give fringe benefits to officers and employees – or pay taxes and penalties to the federal government. See PPACA §§ 1511, 1513, 9001.
- The State as a sovereign is entitled to order the processes of its own governance and to structure its own internal government.
- PPACA imposes costly requirements on States as large employers – no option to avoid.
- Florida must give way to the PPACA's commands or face a penalty of over \$240 million annually.
- Congress may not force States to choose between unconstitutional alternatives.
- Directing States to incur the cost of adding thousands or employees to a plan, or else to pay huge penalties, lessens States' options and ability to carry out sovereign obligations.

Employer Mandates Discriminate Against States And Violate

The Intergovernmental-Tax-Immunity Doctrine.

- The Federal Government may not tax the States as States or burden instruments of State government.
- States are immune from discriminatory taxation and from federal interference with their essential functions.
- PPACA penalizes States more harshly than other large employers:
 - States bear the costs for Exchanges;
 - Congress exempted itself;
 - States lack the flexibility to raise prices to pass on added costs of Act;
 - Private employers are not required to employ personnel or expend resources essential for sovereign government.
- PPACA violates the Intergovernmental-Tax-Immunity Doctrine's function of protecting each sovereign's governmental operations from undue interference by the other.