IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA,	)	
EX REL. KENNETH T. CUCCINELLI, II,	)	
in his official capacity as	)	
Attorney General of Virginia,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**Civil Action No. 3:10cv188**
KATHLEEN SEBELIUS,	)	
Secretary of the Department	)	
of Health and Human Services,	)	
in her official capacity,	)	
	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Secretary begins her memorandum, (Doc. 96 at 11), imagining that there is binding authority in her favor and invoking *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989). But binding Supreme Court authority holds that the means chosen by Congress to regulate how Americans "pay for . . . health care services," (*Id*.), are unconstitutional because they are tantamount to a federal police power. As this Court has already noted, "[n]ever before has the Commerce Clause and associated Necessary and Proper Clause been extended this far." (Doc. 84 at 25).

Virginia, does not ask "this Court [to] overturn the Supreme Court's current decisions recognizing Congressional authority to regulate activities with substantial effects on interstate commerce." (Doc. 96 at 11) (citing *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)). Virginia cited *Raich* in its Complaint (Doc. 1 at 5, Par. 19) and has relied upon it throughout these proceedings to mark the affirmative outer limits of the Commerce Clause: regulation of economic activity which is not yet intrastate commerce because there has been no sale, but which nonetheless in the aggregate substantially affects the supply of a commodity in interstate commerce. *Raich* is simply *Wickard* with this difference: Raich conceded the facial constitutionality of the statute she was attacking. This was fatal because *Wickard* does not permit those engaged in economic activity affecting the common stock of a commodity to raise an atomized, as applied Commerce Clause defense. Nothing in *Raich* lends support to the claimed power to command one citizen to purchase goods or services from another. Nor does Virginia ask this Court to "upend the Supreme Court's present-day holdings that Congress may adopt measures necessary to ensure the effectiveness of a larger regulation of interstate commerce." (Doc. 96 at 12) (citing *Raich*, 545 U.S. at 18). What Virginia does argue is that the means chosen here – the mandate and

penalty – are not necessary and proper under the Necessary and Proper Clause because they do not simply execute the commerce power. Instead, if allowed, they would alter the nature of that power.

While it is true that Virginia "does not dispute that the ACA's insurance industry reforms – requiring insurers to accept all Americans, including those with pre-existing medical conditions, for coverage and barring discrimination in premiums based on health status – are well within the Congress's commerce power," (Doc. 96 at 12), it has demonstrated that the means chosen are unconstitutional because they are without principled limits and are tantamount to an exercise of a federal police power. In arguing that the Supreme Court's most recent pronouncement on the Necessary and Proper Clause employed a "deeply historical" inquiry, Virginia does not "invent" a rule of its own. *Id*. The five part test is an "invention" of the Supreme Court, not Virginia.

The notion that *United States v. Sanchez*, 340 U.S. 42, 44-45 (1950), overruled the *Child Labor Tax Case* and creates unbounded regulatory power is easily refuted. First, the most recent authority on which *Sanchez* relied is *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937), which recognizes the continued validity of the *Child Labor Tax Case* by distinguishing it. Second, the penalty here is not a tax, and a regulatory penalty must be supported by an enumerated power other than the taxing power. (Doc. 84 at 27). Third, the *Child Labor Tax Case* has been cited with approval by the Supreme Court as recently as 1994. *Dep't. of Rev. of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994). Finally, the Secretary's position continues to ignore the outer limits of federal power established in *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) ("'We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.'") (citation omitted). In

over one hundred pages of briefing the Secretary has never so much as acknowledged this controlling principle, much less joined issue with it.

Finally, the Secretary's argument on facial versus as applied challenges makes a distinction without a difference. All claims that Congress has exceeded its enumerated powers are inescapably facial. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting); Rosenkrantz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1236, 1276, 1279 (2010). *See also*, *United States v. Lopez*, 514 U.S. 549 (1995) (no distinction drawn between facial and as applied challenges); *Morrison*, 529 U.S. 598 (same). In any event, the analysis this Court has to undertake would not change under either label. Finally, the Secretary's premise, that Congress undertook through the mandate to regulate commercial actors as opposed to the passively uninsured, is false.

II. THE EXERCISE OF A CLAIMED POWER THAT IS TANTAMOUNT TO A NATIONAL POLICE POWER CANNOT BE SAVED SIMPLY BECAUSE IT IS INTEGRAL TO A LARGER REGULATORY SCHEME.

The Secretary continues to insist that if the unprecedented exercise of an unenumerated power (commanding a citizen to purchase goods or services from another) is important to making Congress's scheme work, it must be constitutional. Nowhere does she deal with the problem that the Supreme Court has never gone beyond permitting the regulation of **economic activities** that substantially affect interstate commerce. Nowhere does she even engage with Virginia on the controlling principle in this case: the Supreme Court *always* has rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power. Nowhere does she deal with the problem that, when a law for carrying into execution the Commerce Clause violates principles of state sovereignty, it is not a law proper for carrying into execution the Commerce Clause but is instead "'merely [an] ac[t] of unsurpation' which 'deserves to be treated as such.'" *Printz v. United States*, 521 U.S. 898,

923-24 (1997) (citation omitted). Nowhere does she address the fact that the command in PPACA is an attempt to exercise a police power.

With her discussion of *United States v. Comstock*, 130 S. Ct. 1949 (2010) (Doc. 96 at 20-23), the Secretary loses her footing altogether, accusing the Commonwealth of "invent[ing]" the *Comstock* five part test. (*Id*. at 20). It is true that Justice Breyer, writing for the majority, calls the five part test, the "five considerations" which "[t]aken together" support the holding. *Comstock*, 130 S. Ct. at 1956. But Justice Thomas calls it a "five-factor test," so it is hardly an invention of the Commonwealth. *Id*. at 1974.

The Secretary responds to the five part test first by characterizing the traditional dislike of compelled transactions, such as forced loans under the Stuarts, as irrelevant "policy preferences." It is actually history, an integral part of constitutional adjudication. Appealing to history herself, the Secretary repeats the strange assertion that eminent domain is a compelled transaction rather than a taking. She joins to this a litany of examples of regulation of persons already voluntarily engaged in interstate commerce, mischaracterizing them as compelled transactions. Turning to the second and third factors, she calls the lack of any history of federal involvement in compelled transactions "irrelevant" even though the second and third factors are defined in terms of historical involvement. 130 S. Ct. at 1958, 1961. The fourth factor focuses on accommodation of state interests. The Secretary states that Virginia's interest is accommodated by provisions that permit states some flexibility in providing comprehensive coverage. But Virginia has used its police power to establish a right not to buy insurance, and this clear exercise of the police power is being invaded by the contrary claims of the federal government. The fifth factor considers whether the links between the enumerated power and the chosen means are attenuated. Regulating inactivity to compensate for the federal government's execution of its power to

regulate the insurance industry could hardly be more attenuated from the Commerce Clause as it has heretofore been understood. Furthermore, and decisively, the five factors involve "fit" between the Necessary and Proper Clause and the enumerated power. That fit is simply irrelevant if the exercise is not *proper* because it violates principles of federalism. *Printz*, 521 U.S. at 923-24.

III. THE STATUS OF BEING UNINSURED IS NOT AN ACTIVITY SUBSTANTIALLY AFFECTING INTERSTATE COMMERCE.

Beginning with familiar Supreme Court language permitting Congress to "regulate **activities** that substantially affect interstate commerce," (Doc. 96 at 24) (emphasis added), the Secretary continues her trope of calling the status of being uninsured "activity." (*Id*. at 24-29). No one not engaged in special pleading would ever use the word that way. The fact that "no one can guarantee that he will not participate" in the health care market does not render the antecedent condition of being uninsured "activity." (*Id*. at 25). Nor does it matter that the uninsured include those who have or will receive health care services, those who have had or will obtain insurance, or those who have or will contract for medical services without being able to pay for them, as long as what Congress chose to regulate is inactivity.

The Secretary's discussion of boycotts is wrong both in its premises and conclusions. (*Id*. at 27). It is true that royal colonial governments did not regard non-importation agreements as unlawful. It is also true that modern law permits the regulation of some boycotts. But not as inactivity. Unlawful boycotts are unlawful because of the combination of the actors—an activity. *Black's Law Dictionary*, 6th ed., at 187 (defining boycott as "[c]oncerted refusal to do business"), 266 (defining combination as "[t]he union or association of two or more persons for the attainment of some common end.") Of course, none of Congress's findings attribute the status of being uninsured to boycotts.

The Secretary's professed confusion concerning the boundaries between economic activity and passivity are easily answered. (*Id*. at 28). The difference is between economic activity which can be regulated and a police power command to purchase goods or services from another citizen.

The Secretary's remaining examples of the supposed regulation of inactivity are inapt. As the Commonwealth has previously demonstrated, (Doc. 95 at 31), Superfund liability only attaches to an actor in interstate commerce. While the statement that "[t]he subjects of the numerous insurance-purchase requirements in the United States Code could not exempt themselves from those requirements by calling themselves 'passive,'" is true, (Doc. 96 at 28), it is not true for the reason the Secretary imagines. The reason they could not successfully call themselves passive is because they are not. They are all engaged in voluntary commerce or other activities giving rise to jurisdiction to regulate.

IV. THE SECRETARY'S FACIAL/AS APPLIED ANALYSIS IS CONFUSED AND WRONG.

The Secretary's facial/as applied argument (Doc. 96 at 28-29) fails for the several reasons discussed above. Supra at 3. It also misses the point in two significant ways. First, with respect to the Commonwealth's sovereign injury, there is no other application than the one before the Court. Second, the claim that "the statute covers individuals who are engaged in economic activity," (Doc. 96 at 29), does not matter. The fact that Congress could have regulated activities does not rehabilitate the mandate and penalty, which are unconstitutional because they are a forbidden exercise of a police power. As such, they are unconstitutional in every application despite the possibility that Congress could have required actual actors to do something in connection with an activity.

V. THE MANDATE AND PENALTY CANNOT BE SUSTAINED UNDER THE TAXING POWER.

The Secretary's taxing power argument is now familiar through repetition. But it is also clear that, as with her Commerce Clause argument, it is dependent on idiosyncratic definitions of words, on the refusal to join issue with cases or lines of authority that do not support her positions, and on anti-historical claims that the federal government has, and has always had, a federal police power rooted in the taxing power.

Verbal sleight of hand is on display in the second sentence of the taxing power portion of the Secretary's memorandum where she renames what Congress called a "penalty" a "tax penalty." (Doc. 96 at 29). Because her formulation is not tethered to, but contradicts, the statute, the Secretary takes the only route available to her—she argues that the text is irrelevant and that "'the labels used do not determine the extent of the taxing power.'" (*Id*. at 30) (quoting, *Simmons v. United States*, 308 F.2d 160, 166 n.21 (4th Cir. 1962)). However, the Secretary's resort to *Simmons* fails for several reasons.

The question in *Simmons* was whether a $25,000 prize for catching a fish had been validly taxed. No one disputed that the exaction in question was a tax, so the quoted language has been violently wrested from its context. Unlike *Simmons*, the threshold tax question in this case is whether there is any reason to even address the taxing power and associated cases. Contrary to the Secretary's reading of *Simmons*, the Supreme Court has refused to permit litigants to denominate as a tax that which Congress has denominated an exercise of commerce power. *Bd. of Trs. of the Univ. of Ill. v. United States*, 289 U.S. 48, 58 (1933).

Even if the Secretary could overcome the fact that Congress chose to explicitly impose a penalty and could also overcome the Supreme Court's decision in *Board of Trustees,* her argument would still fail. Her interpretation of *Simmons*, that "[t]he substance of the provision[]

controls over any labels[,]" (Doc. 96 at 30), leads inexorably to the conclusion that the PPACA penalty, as a matter of substance, is intrinsically a penalty and not a tax.

The United States Supreme Court has long recognized that "taxes" and "penalties" are separate and distinct, stating that "'[a] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.'" *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)). As the *La Franca* court held, the word "tax" and the word "penalty"

> are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled . . . .

La Franca, 282 U.S at 572. To prevail, the Secretary's taxing power argument requires that this Court ignore Congress's express decision to denominate the PPACA penalty a "penalty" and to "alter the essential nature" of the penalty by ignoring its function so that it can be called a tax. Given that the penalty functions as a penalty and not a tax, the Secretary's argument, that "the substance of the provision . . . controls," defeats her own position.

The Secretary tries to avoid the Supreme Court's consistent view, that, substantively, a penalty is an imposition for failing to obey a command of government, by resorting to idiosyncratic definitions. She stakes out the position that unlawful acts are limited to criminal violations, so that penalties for violating non-criminal statutes are not penalties at all. (Doc. 96 at 32-33). This is simply not the law.

The idea that it is only unlawful to violate criminal statutes as opposed to civil statutes is incorrect as a simple matter of definition. *Black's Law Dictionary*, 6th Edition, defines "unlawful" as:

> That which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law. Term is equivalent to without excuse or justification. **While necessarily not implying the element of criminality, it is broad enough to include it.**

Black's at 1536 (internal citation and quotation omitted) (emphasis added). Clearly, "unlawful" comprehends the violation of any law, whether civil or criminal.

This plain-meaning, common-sense definition finds firm support in precedents of the Supreme Court. For instance, in *Kurth Ranch*, 511 U.S. at 784, a case cited by the Secretary (Doc. 96 at 32), the Court explicitly recognizes "civil penalties" as being distinct from "taxes", noting that "tax statutes serve a purpose quite different from civil penalties . . . ." Accordingly, the Secretary's suggested formulation is rejected in one of the very cases she cites.

Despite having argued that it is substance and not form that should determine whether the PPACA penalty is a tax, the Secretary then advances a purely formal argument, asserting that the penalty must be a tax because it "is codified in the Internal Revenue Code in a subtitle labeled 'Miscellaneous Excise Taxes.'" (Doc. 96 at 31). This formalistic argument is not available to the Secretary, not simply because it contradicts her prior argument that substance trumps form, but because it is foreclosed by both statutory and Supreme Court authority. A provision of the Internal Revenue Code, 26 U.S.C. § 7806(b), provides that "[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision of this title . . . ." Furthermore, the United States Supreme Court, in finding that an exaction that Congress had denominated a "tax", located in a

section of the Internal Revenue Code titled "Miscellaneous Excise Taxes", was actually a penalty and not a tax, stated that "[n]o inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code." *CF&I Fabricators*, 518 U.S. at 223.

Even assuming that the penalty is a tax, it must pass muster under an enumerated power other than the taxing power so long as it is being used for regulation. *Child Labor Tax Case*, 259 U.S. 20 (1922). *See also United States v. Butler*, 297 U.S. 1, 68 (1936); *Linder v. United States*, 268 U.S. 5, 17-18 (1925). The Secretary suggests that the Court may decline to follow these cases, but this Court must refuse the invitation because, as one of the Secertary's *amici* notes, "these decisions have not been explicitly overruled . . . ." (Doc. 70 at 18). And the prerogative of overruling controlling Supreme Court authority belongs to that Court alone. *Rodriguez de Quijas*, 490 U.S. at 484.

In any event, the Secretary's argument that the *Child Labor Tax Case*, *Butler*, and *Linder* have fallen into desuetude rests on dicta contained in a footnote in *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741, n. 12 (1974). The Secretary's resort to dicta buried in a footnote simply serves to underscore the weakness of her position. The footnote in question never mentions the *Child Labor Tax Case* (which is mentioned in the body of the case prior to the footnote) nor does it mention *Butler* or *Linder*, making it impossible to maintain that the footnote overruled those cases. *Id*. Second, the footnote, when read in its entirety, reveals itself as pure dicta:

> In support of its argument that this case does not involve a "tax" within the meaning of § 7421 (a), petitioner cites such cases as *Hill v. Wallace*, 259 U.S. 44 (1922) (tax on unregulated sales of commodities futures), and *Lipke v. Lederer*, 259 U.S. 557 (1922) (tax on unlawful sales of liquor). It is true that the Court in those cases drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. *E.g., Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). **Even if such distinctions have merit, it would not assist petitioner, since its challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which clearly are intended to raise revenue.**

Id. (emphasis added). Finally, a review of the case cited in the footnote, *Sonzinsky*, reveals that it did not overrule the *Child Labor Tax Case* but instead treated it as binding precedent that had to be distinguished. Specifically, the *Sonzinsky* court wrote:

> The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. See *Child Labor Tax Case*, 259 U.S. 20, 35; *Hill v. Wallace*, 259 U.S. 44; *Carter v. Carter Coal Co.*, 298 U.S. 238.

Sonzinsky, 300 U.S. at 513. Simply put, the Supreme Court has never overruled the basic thrust of the *Child Labor Tax Case*: that a "purported tax" that is actually a penalty to force compliance with a regulatory scheme must be tied to an enumerated power other than the taxing power.

That these cases are still good law binding on this court should come as no surprise to the Secretary. The *Child Labor Tax Case* was cited with approval by the Supreme Court in 1994, with the Court writing:

> Yet we have also recognized that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.*, at 46 (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)).

Kurth Ranch, 511 U.S. at 779. Given that the Supreme Court as recently as 1994 cited the *Child Labor Tax Case* for the very proposition for which the Commonwealth offers it, it cannot be demonstrated that it is no longer good law. Not only did the Secretary cite *Kurth Ranch* herself (Doc. 96 at 32), she has also repeatedly cited *Butler* as valid authority, making her desuetude argument even odder. *See, e.g.*, (Doc. 22 at 47); (Doc. 77 at 25); and (Doc. 91 at 53). Finally, these cases are perfectly consistent with the overarching principle found in *Morrison*, that the Court has **"*always* . . . rejected readings of . . . the scope of federal power that would permit**

Congress to exercise a police power." *Morrison*, 529 U.S at 618-19 (bolded emphasis added) (internal quotation and citation omitted).

Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), and *Knowlton v. Moore*, 178 U.S. 41 (1900), do not aid the Secretary's case, but rather, underscore why it fails. It is true that *Steward Machine* upheld the Social Security tax, but it did so because it was a valid excise on a voluntary activity/transaction-- the employment relationship. *Steward Machine*, 301 U.S. at 580-581. Nothing in the opinion suggests that Congress has the power to impose an employment excise tax on workers who are not working or on businesses that do not currently exist. Similarly, while in *Knowlton* the Court upheld the estate tax as an excise tax or duty, it was upheld not as a tax on a person or even a person's death, but rather, as a tax on a commercial event-- the transfer of property. *Knowlton*, 178 U.S. at 78 (estate taxes "concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax [could be] levied . . . .").

The Secretary's taxing power argument ultimately fails because it is not bounded by any principled limits, and therefore, arrogates to the federal government a national police power denied to it by the Constitution. As the Secretary has summarized her position, anything that "imposes involuntary pecuniary burdens for a public purpose . . . is an exercise of the taxing power. . . ," and therefore, is constitutional. (Doc. 91 at 56). This radical position has already been rejected by the Supreme Court in *Morrison* as quoted above.

VI. THE SECRETARY OF THE TREASURY IS NOT AN INDISPENSABLE PARTY WHOSE ABSENCE PRECLUDES THE COURT FROM ENTERING JUDGMENT FOR THE COMMONWEALTH.

The Secretary's insistence that she is entitled to judgment because the Secretary of the Treasury is not a defendant serves to underscore her misapprehension of Rule 19 Fed. R. Civ. P.

and the relevant case law. A proper understanding of the law demonstrates that Secretary Geithner is neither indispensable nor necessary and that his absence is no impediment to judgment being entered for the Commonwealth.

First, the Secretary has waived any such objection. If Secretary Geithner were a necessary party under Rule 19(a), her failure to raise the issue when she filed her motion to dismiss waived the point. As then Judge, now Justice, Kennedy wrote in *Citibank v. Oxford Properties & Finance Ltd.*, 688 F.2d 1259, 1263 n.4 (9th Cir. 1982), "[i]n Federal procedure, failure to join necessary parties is waived if objection is not made in defendant's first responsive pleading." The Secretary relegates her response to the waiver argument to a footnote. (Doc. 96 at 38, n. 11). In that footnote, she argues that *Citibank* does not state the "law in this circuit" and that it is contrary to Rule 12 Fed. R. Civ. P. She is incorrect on both counts. First, *Delta Fin. Corp. v. Paul D. Comandaras & Assocs.*, 973 F.2d 301, 306 n.5 (4th Cir. 1992), recognized waiver as a possible disposition but found no waiver– as no party raised waiver as an issue. Furthermore, the Fourth Circuit held that the remedy was not dismissal with prejudice, but rather, "remand . . . so that the district court may develop the record and determine in the first instance whether Cranch indeed must be joined. See Fed. R. Civ. P. 19(a)." *Id*. at 306.

The Secretary's reliance on Rule 12(h) is similarly misplaced. Rule 12(h) allows a defendant to raise the issue of an indispensable party under Rule 19(b) at any time, up to and including trial. However, whatever the merits of the argument that Secretary Geithner might be a necessary party under Rule 19(a), he is clearly not a Rule 19(b) party.

To be such a party under Rule 19(b), Secretary Geithner would have to be beyond the reach of this Court's process or his presence in the suit would have to deprive the Court of jurisdiction. *CSX Transp., Inc. v. Forst*, 777 F. Supp 435, 444 (E.D. Va. 1991) ("The absence of

a party from an action can result in dismissal of that action, however, only if such party is not subject to service of process, or if the party's joinder would destroy the court's jurisdiction. Fed. R. Civ. P. 19(b)."). Clearly, Secretary Geithner is subject to process from this Court and his presence would not destroy this Court's jurisdiction. Accordingly, Secretary Geithner cannot be a Rule 19(b) party.

Assuming that Secretary Geithner were a Rule 19(a) party, the remedy would not be to dismiss the case, but for the Court to add him as a party. Rule 19(a)(2) provides that if the Court were to determine that Secretary Geithner is a Rule 19(a) party, "the court **must** order that the person be made a party." (emphasis added). *See also Orff v. United States*, 545 U.S. 596, 602 (2005) ("Rule 19(a) requires a court to order joinder . . ." if it finds a party is a necessary party under Rule 19(a)); *Forst*, 777 F. Supp. at 444. Thus, if the Secretary were right about Secretary Geithner being necessary, she would still be wrong about the remedy.

The cases cited by the Secretary are not to the contrary. *Gardner v. Cartman*, 880 F.2d 797 (4th Cir. 1989), dealt with a finding that a federal official who was required **by statute** to be named in the claim was a necessary party and that the claim could no longer be brought against him because the statute of limitations had run. *Id.* at 798-99. Neither situation applies to Secretary Geithner in this case. In *McCowen v. Jamieson*, 724 F.2d 1421 (9th Cir. 1984), the Ninth Circuit, finding the Secretary of Agriculture to be a necessary party, reversed the judgment of the district court, but remanded "the case to the district court with directions to add the Secretary of Agriculture as a necessary party." *Id.* at 1424. Given that a case cited by the Secretary finds it is not too late to add a cabinet official after judgment is entered in the district court, she is wrong to suggest that this Court lacks the power to do so now. Accordingly, the Court should either find that the Secretary has waived the argument, find that Secretary

Geithener is not a necessary party under Rule 19(a), or it must add him as a party under Rule 19(a)(2).

VII. THIS COURT SHOULD ADHERE TO ITS PRIOR RULING ON THE SECRETARY'S JURISIDICTIONAL ARGUMENTS.

In her memorandum, the Secretary argues that she is entitled to judgment because the Court "lacks subject matter jurisdiction" over the suit. (Doc. 96 at 38). She then rehashes the same jurisdictional arguments (standing, ripeness and the Anti-Injunction Act) that she made in her motion to dismiss. (*Id*. at 38-39). The Secretary offers no new arguments to support her position and "recognizes that the Court has ruled to the contrary on these points . . . ." (*Id*. at 39). Accordingly, for the reasons stated by the Court in denying the Secretary's motion to dismiss, the Court has subject matter jurisdiction over the suit, and therefore, the Commonwealth is entitled to judgment on the Secretary's jurisdictional defenses.

VIII. THE UNCONSTITUTIONAL MANDATE AND PENALTY ARE NOT SEVERABLE FROM THE REMAINDER OF THE ACT, AND THEREFORE, PPACA FAILS IN ITS ENTIRETY.

In her memorandum, the Secretary makes a significant concession regarding severance. She concedes that, if the mandate and penalty are unconstitutional, other "provisions of the Act plainly cannot survive," (Doc. 96 at 41), specifically acknowledging that the "insurance industry reforms" contained in PPACA "cannot be severed from the" mandate and penalty, and therefore, must be stricken if the mandate and penalty are found to be unconstitutional. (*Id*. at 42).

However, the Secretary's concession is the beginning rather than the end of the severance analysis. A review of the remainder of the Secretary's argument on this issue reveals that she has misread Virginia's position and misapprehended the relevant law. The Secretary asserts that Virginia argues that "the ACA does not include a severability clause, and in the absence of such a clause it must be presumed that the entire Act falls if one provision does." (*Id*. at 41).

Although Virginia has noted the absence of a severability clause, the Secretary has misstated the associated argument.

The Secretary herself has recognized that PPACA does not contain a severability clause. (*Id*. at 15, Par. 5). From this undisputed fact, Virginia correctly notes that statutes "containing severability clauses are entitled to 'a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.' *Alaska Airlines*, 480 U.S. at 686. PPACA does not contain such a clause, and thus, the Secretary is not entitled to that presumption." (Doc. 89 at 33). However, Virginia has not argued that the lack of a severability clause is dispositive of the severance question.

Virginia has always maintained that severability issues must be resolved based on the test set forth in *Alaska Airlines v. Brock*, 480 U.S. 678 (1987). However, the Secretary's arguments demonstrate that she misreads the *Alaska Airlines* test. While the Court made clear in *Alaska Airlines* that "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently. . . [,]" *id*. at 684, such cases only represent a subset of provisions that may not be severed. *Alaska Airlines* firmly establishes that all provisions of an enactment must be stricken, even provisions that are unquestionably legitimate exercises of congressional power, if the entire enactment would not have passed without the unconstitutional provision. Specifically, citing a long line of cases, the Court wrote:

> "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam), quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Accord: *Regan v. Time, Inc.*, 468 U.S., at 653; *INS v. Chadha*, 462 U.S., at 931-932; *United States v. Jackson*, 390 U.S. 570, 585 (1968).

Id. The Court went on to note that, in determining severance questions, courts should be cognizant of the importance of the unconstitutional provisions to the overall "legislative bargain." *Id*. at 685.

In the case of PPACA, it is impossible to credibly maintain that the "legislative bargain" struck was not entirely dependent on the mandate and penalty. The tortured legislative process that was utilized to enact PPACA resulted in it passing the House by the margin of 219 to 212, a fact the Secretary concedes.[1] (Doc. 96 at 15, Par. 8). The legislative history reveals an awareness that no change could be made in the House because the margin necessary to invoke cloture in the Senate had been lost. Hence, it is as well known as such a thing can ever be known, that any change, let alone a major change like the elimination of the mandate and penalty, would have caused PPACA to fail.

Furthermore, the Secretary herself has described the mandate and penalty as the "linchpin" of PPACA's insurance reforms. (Doc. 22 at 14). In one of her filings in Florida, the Secretary noted that the insurance reforms and the people they would allegedly protect were "a core objective of the Act. . . ." as a whole. *Florida v. Sebelius* (N.D. Fla.), Case No.: 3:10-cv-91RV/EMT, *available on* PACER at Doc. 74 at 29. Clearly, anything that is a "core objective of" PPACA is essential to the "legislative bargain" that produced it.

Ironically, one of the examples selected by the Secretary for provisions that could be severed from PPACA, abstinence education, drives this point home. (Doc. 96 at 42-43). It is

[1] The Secretary misapprehends the significance of the narrow margin for passage. It is true that a valid bill that passes by a one-vote margin is still validly passed. However, when trying to determine what portions of a law can be severed from an unconstitutional section, the margin is significant in determining whether the remainder of the law would have passed without the constitutionally offensive provision. In this case, any change to PPACA that would have changed four "yeas" to "nays" would have defeated the entire bill.

simply not credible to maintain that the 219 Democrats, led by Speaker Pelosi, would have adopted the abstinence education provisions, or any other noninsurance provision of the bill, as a stand-alone measure. Thus, under *Alaska Airlines*, it is clear that a finding that the mandate and penalty are unconstitutional is fatal to the entirety of PPACA.

Even if the Secretary were correct in the assertion that the abstinence education provisions (and others like them) could be allowed to stand because they would have passed as stand-alone enactments separate from the "legislative bargain" that was PPACA, it is clear from the Secretary's concession regarding severance that all regulation of health care funding in PPACA must fall. Throughout this proceeding, the Secretary has argued that the mandate and penalty, like much of PPACA, sought to regulate how citizens "pay for . . . health care services." (Doc. 96 at 11). She made this point clear at the hearing on her motion to dismiss, arguing that

> Congress decided to comprehensively regulate **the way in which health care services were paid for . . . . And they did it to all aspects of the industry.** So for employers, there are requirements and tax incentives to broaden insurance. For the federal government and the state program, Medicaid is expanded to increase access for low income individuals.

July 1, 2010 Tr. at 24, ln. 5-12 (emphasis added). The secretary reiterates this position in her memorandum, linking insurance provisions that she concedes rise and fall with the mandate and penalty, (Doc. 96 at 41), with other provisions in PPACA that affect how health care services are paid for:

> the ACA regulates economic decisions regarding the way in which health care services are paid for. The Act regulates payment for those services through employer-sponsored health insurance; through governmental programs such as Medicaid; and through insurance sold to individuals or to small groups in the new exchanges. The Act also regulates the terms of health insurance policies, ending industry practices that have denied insurance to and inflicted burdens on many people, most notably the refusal to insure persons because of pre-existing medical conditions.

(*Id*. at 17). Thus, under the Secretary's own view of PPACA-- that it is an interlocking set of reforms designed to regulate the manner in which Americans pay for health care services-- any provisions that deal with paying for health care services **cannot** be severed from the unconstitutional mandate and penalty. Accordingly, any provisions dealing with regulation of the private insurance industry, regulation of employers regarding insurance, or changes to Medicare and Medicaid must also fall with the mandate and penalty. However, because it is so clear that the entire legislative bargain would have failed without the mandate and penalty, the Commonwealth prays that the Court declare that no provision of PPACA is severable from the whole.

IX. THE COMMONWEALTH IS ENTITLED TO AN INJUNCTION.

For the reasons stated previously, (Doc. 89 at 38-41), the Commonwealth has satisfied the standard for the issuance of an injunction to prevent the Secretary from further implementing PPACA. However, a concession made by the Secretary likely moots the issue. In her memorandum, the Secretary suggests that an injunction is unnecessary because "a declaratory judgment provides adequate relief as against an executive officer, as it will not be presumed that that officer will ignore the judgment of the Court . . . ." (Doc. 96 at 44-45). If it is truly the Secretary's position that the separation of powers dictates that she honor any declaration of unconstitutionality by ceasing her efforts to implement PPACA, no formal injunction is necessary. And, in any event, the Secretary's concession presumably would apply equally to all officials of the Executive Branch who would owe the same deference to such a declaration by the judiciary.

However, an injunction may still be proper if, as it appears, the Secretary seeks to limit her deference to this Court. Specifically, after stating that a declaration has the effect of an injunction because of the deference she owes the judiciary, she tries to limit the concession,

suggesting that she is only bound by the decision of this Court "after appellate review is exhausted." (*Id*. at 45). The cases cited by the Secretary certainly do not suggest that Executive Branch officials must defer to judgments of the federal courts only after all appeals are final, and the Commonwealth is aware of no body of law that holds that the declarations, orders, and judgments of this Court are only valid and binding "after appellate review is exhausted." If it is the Secretary's position that she will only honor this Court's decision after all appeals are final, the Commonwealth's need for an injunction is evident.

CONCLUSION

Wherefore, for all the reasons stated, the Commonwealth prays the Court to grant its motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2010, I electronically filed the foregoing REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to: Ian Gershengorn, ian.gershengorn@usdoj.gov, Joel McElvain, joel.mcelvain@usdoj.gov, Jonathan Holland Hambrick, jay.h.hambrick@usdoj.gov, Sheila M. Lieber, slieber@civ-usdoj.gov, and all counsel for Amici. A copy also has been served by first class, postage prepaid, U.S. Mail to Ray Elbert Parker, *Pro Se*, P. O. Box 320636, Alexandria, Virginia 22320.

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