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. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity, Defendant.	)	Civil Action No. 3:10-cv-00188-HEH

BRIEF OF AMICUS CURIAE PHYSICIAN HOSPITALS OF AMERICA IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF THE AMICUS

Physician Hospitals of America ("PHA") is a 26 U.S.C. § 501(c)(6) organization formed to educate members of the physician-owned hospital community about regulatory and legislative issues and to encourage PHA members to advocate for the rights of physician-owned hospitals. PHA has approximately 166 member hospitals in 34 different states, comprising both existing facilities and physician-owned hospitals in various stages of development. PHA member hospitals are typically enrolled as providers under Medicare and Medicaid programs, with up to 70% of their case mix stemming from Medicare and Medicaid patients. The physician owners of PHA member hospitals are also providers under the Medicare and Medicaid programs.

PHA is committed to the sanctity of private property as guaranteed by the Constitution, especially in relation to the rights of physicians to own and operate hospitals and to provide patients with expert, cost-effective, and efficient health care. In *Physician Hospitals of America, et al. v. Sebelius*, Case No. 6:10-cv-00277-MHS, filed June 3, 2010, in the U.S. District Court for the Eastern District of Texas, Tyler Division, PHA, along with a member hospital, is challenging the constitutionality of § 6001 of the Patient Protection and Affordable Care Act of 2010 ("PPACA"), which singles out for negative treatment physician-owned hospitals from among all those owned by persons of any other profession. Section 6001 retroactively prohibits planned, approved, and commenced service facility expansion at approximately 58 Medicare-certified hospitals solely because they are owned by physicians, and further prevents the development of an additional 84 physician-owned hospitals that would be otherwise eligible for Medicare certification.

PHA has an interest in protecting its members directly, and the public indirectly, from any unconstitutional healthcare legislation, and thus it has an interest in supporting the Commonwealth of Virginia in this action.

In the following memorandum, PHA addresses the merits of the Commonwealth's case and in particular the dubious constitutional bases asserted by the Secretary in an attempt to have the Court sustain § 1501 of the PPACA, which requires American citizens who are not already insured to purchase health insurance coverage. PHA urges the Court to grant summary judgment for the Commonwealth and to enjoin enforcement of the PPACA in its entirety.

MEMORANDUM OF LAW

I. The PPACA's Individual Mandate to Purchase Insurance Is An Unprecedented and Unconstitutional Extension of Federal Power Beyond Congress's Authority To Regulate Interstate Commerce

As noted by the Court, this action turns on the narrow question of "whether or not Congress has the power to regulate—and tax—a citizen's decision not to participate in interstate commerce." *Commonwealth of Virginia v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010). As the Court rightly observed, "no reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce." *Id*.

In her response to Virginia's motion for summary judgment, the Secretary sidesteps the central question, suggesting instead that this particular area of commerce, the market for health care services, is somehow *sui generis*. According to the Secretary, this market, as she defines it, is unique because an individual cannot decline to participate in it:

> No person can *guarantee* that he will divorce himself entirely from the market for health care services. The health care market is *distinctive* in this respect. Because the minimum coverage provision regulates the means of payment in a market in which *all are participants*, the Congressional power to enact it does not in any way imply a power to require individuals to participate in other markets or to take any other action.

(Def.'s Mem. Opp'n to Pl.'s. Mot. Summ. J. 1) (emphasis added).

The Secretary argues that since most Americans will eventually participate in the health care services market, they can justifiably be shanghaied into participating now. Yet there is nothing unique regarding the size or economic significance of the health care services market. It is much the same as the markets for other essential goods and services such as food, clothing, housing and transportation. Most Virginians will participate in these markets, to one degree or

another, throughout their lives.[1] Yet no one would suggest that Congress has unlimited authority under the Commerce Clause to mandate the individual purchase of particular food, clothing, housing or transportation products.

Moreover, to make her point, the Secretary engages in a rhetorical shell game, redefining and enlarging the scope of commerce implicated by the health insurance mandate. This suit however, involves only the relatively narrow market for health care insurance, not some broad, amorphous market for health care services. For many Virginians, participation in the latter simply does not require participation in the former, and indeed, the Secretary concedes that numerous Americans have elected not to purchase health insurance because they do not believe that, in their particular situations, the product is worth its cost. The Secretary tries to save the mandate by insisting that these same Americans must eventually purchase health care services of some kind. Based on this expected participation in a broader health care services market at a later time, the Secretary believes that all Virginians can be made to engage in a narrower health insurance market today.

Were the Secretary's rationale to succeed, there would no longer be any limit on Congress's use of the Commerce Clause to regulate private conduct. Rather, Congress would be empowered to regulate not only those engaged in interstate commerce, but also those who are *anticipated to participate* in commerce. If Congress can force anyone it deems a potential entrant into a market to actually enter and purchase goods and services—on pain of a monetary penalty—then there truly is no limit to Congress's power. The Tenth Amendment—and even federalism itself—has become a nullity.

[1] Of course the popular media frequently reports, anecdotally, on individuals who have lived to old age without ever requiring any health care services; and tragically many Virginians die accidental deaths at young ages without having required health care services.

Fortunately, the Supreme Court has repeatedly affirmed that there are actual limits on Congress's power under the Commerce Clause. "[E]ven under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000) (*quoting United States v. Lopez*, 514 U.S. 549, 557 (1995)).

While it is undoubtedly true that the Congress's Commerce power has grown far beyond the conception of the Framers, *see, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942), the Court has clearly prescribed its limits. As characterized in *Lopez*, Congress may regulate only the use of the channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). However, even if an exercise of the Commerce power might otherwise fall within this description, the Court has rejected any interpretation of the Commerce power which would transform it into a boundless police power. *See Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 617.

Here, the mandate does not fall within the permissible range of regulation under the Commerce Clause. A present-day decision to decline to purchase health insurance does not affect or embody the channels or instrumentalities of interstate commerce. Uninsured individuals are purposefully not participating in the health insurance market by choice. The issue of whether these same individuals may someday be in the market for other health care services is irrelevant to the Commerce Clause analysis. While Congress can regulate activities substantially affecting interstate commerce, no case has ever recognized the extension of Congressional authority to inactivity. If a citizen chooses to participate in the market for health insurance *in the future*, that participation may *then* be subject to regulation. But it remains a

citizen's prerogative to make that affirmative choice, not for Congress to make the choice for him.

The Secretary proposes that Congress's commerce power have no limit. Under her theory, Congress could subject individuals to its regulatory schemes on the pretext that they are potential participants in some amorphous market, subjecting them to whatever compulsions it can devise. As expressed by the Supreme Court in *Lopez*, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564.

II. The Mandate to Purchase Insurance is Not a Valid Exercise of the Taxing Power.

The Secretary has argued in the alternative that if the mandate to purchase insurance is not a valid exercise of the Congress's authority under the Commerce Clause, it is nonetheless a constitutionally permissible exercise of the taxing power. (Def.'s Mem. Opp'n to Pl.'s. Mot. Summ. J. 19, *et seq.*) This argument is similarly unavailing.

First, the health insurance mandate cannot be saved as an exercise of the taxing power because Congress did not intend to exercise that power when it enacted the mandate. The Supreme Court has held that Congress is entitled to deference from the courts with respect to which of its powers it purports to exercise. *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). Here, not only does the PPACA expressly define the mandate to be an exercise of the commerce power, but the legislative history conclusively demonstrates that Congress considered and rejected the use of the taxing power.

The tortured legislative process which resulted in the enactment of the PPACA was much documented in the media. The passage of the legislation favored by the House of Representatives was derailed by the election of Senator Scott Brown—resulting in the House's

passage of the Senate Bill. The unsuccessful House Bill, designated as H.R. 3962, contained language similar to § 1501 of the PPACA. It too included a mandate to purchase insurance. A key difference, however, is that H.R. 3962 explicitly claimed to exercise Congress's taxing power in order to compel individuals to purchase insurance:

> In the case of any individual who does not meet the requirements of subsection (d) at any time during the taxable year, there is hereby imposed a *tax* equal to 2.5 percent of the excess of— (1) the taxpayers modified adjusted gross income for the taxable year, over (2) the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

H.R. 3962, 111th Cong. (2009) (emphasis added). That language was excluded from the bill that passed the Senate.

The Secretary makes much in her brief about the democratic process, arguing that this Court should refrain from exercising its own authority under the Constitution out of deference for the elected branches. Here, however, the same deference to the legislative process would appear to cut off any assertion that the mandate is an exercise of the taxing power. The elected branch of government of which the Secretary is so considerate specifically contemplated exercising its taxing power to enforce the mandate, but rejected doing so. Instead, Congress attempted to exercise is power under the Commerce Clause—an attempt which, as described above, impermissibly overstepped the bounds of the power granted by that clause.

However, even if the Court allowed the Secretary to succeed in her counter-factual recharacterization of the mandate as an exercise of the taxing power, the mandate still fails. The Supreme Court held in *Bailey v. Drexel Furniture* (*Child Labor Tax Case*), 259 U.S. 20 (1922), that Congress cannot evade the bounds placed on its powers by the Tenth Amendment through the mere semantic manipulation of calling a penalty a tax. In the words of Chief Justice Taft: "To give such magic to the word 'tax' would be to break down all constitutional limitation of

the powers of Congress and completely wipe out the sovereignty of the States." *Id*. at 38. Further, "[w]here the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another." *Id*. Here, while Congress has a broad power to lay and collect taxes for the purpose of raising revenue, the plenary police power required to lawfully enact the mandate to purchase insurance rests with the states.

To be a valid tax, "the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power." *Id*. at 43. The mandate to purchase insurance fails this test. As the Commonwealth aptly points out, if the mandate works as intended, no revenue will in fact be collected. The supposed excise is exacted only upon a class of citizens who decline to follow a prescribed course of conduct. It is thus particularly ill suited for the collection of revenue and cannot be sustained under the taxing power.

The Secretary asserts in her brief that the *Child Labor Tax* case is no longer good law in light of *Bob Jones University v. Simon*, 416 U.S. 725 (1974). Although the Court in the *Child Labor Tax Case* had struck down a putative tax as an unconstitutional regulation, a similar claim failed in *Bob Jones* because, unlike in the *Child Labor Tax Case*, the plaintiffs there filed a prospective action to prevent enforcement of the tax, rather than a retrospective action for redress. *Id*. at 740-41. If in fact *Bob Jones* is to have any bearing on the holding of the *Child Labor Tax Case* at all, it is a favorable one, since the *Bob Jones* Court cites that case with approval. See 416 U.S. at 740-41. Nevertheless, the Secretary hangs her hat on a footnote in *Bob Jones* which speculates whether distinctions between revenue-raising and regulatory taxes have been abandoned. *Id*. at 741 n.12. In the footnote, the Court referred to *Sonzinsky v. United*

States, 300 U.S. 506, 513 (1937), and did not refer to the *Child Labor Tax Case* at all. The holding of *Sonzinsky*, of course, did not overrule the *Child Labor Tax Case*, but merely limited it by pointing out that "an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict the thing taxed." 300 U.S. at 513. In fact, *Sonzinsky* specifically preserved the holding of the *Child Labor Tax Case*:

> This 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 regulations. *See Child Labor Tax Case*, 259 U.S. 20.

300 U.S. at 513. Thus there is no credence to the Secretary's claim that the *Child Labor Tax Case* is no longer good law. Absent the rule of the *Child Labor Tax Case*, the taxing power would become a de facto police power.

The mandate to purchase insurance does not on its face even purport to be a tax. Even if it did, the fact that it is not designed to raise revenue but merely to regulate would be necessarily fatal to any attempt to sustain its validity under Congress's taxing power.

III. The Court Should Enjoin Enforcement of the PPACA in its Entirety.

As the Secretary correctly notes, the PPACA is a comprehensive statute that addresses a wide variety of issues. Many, if not most, of the Act's substantive effects, however, are in the realm of health insurance reform, of which the health insurance mandate is an essential element. The Secretary concedes that these reforms—such as guaranteed-issue and community-rating—cannot be severed from the minimum coverage provision. However, it is less clear what other sections contained in PPACA's hundreds of pages are truly independent of the minimum coverage requirement.

Astonishingly, the Secretary proposes that this Court should—at a later date—undertake a "serious severability analysis" of mammoth proportions by separately examining every provision of PPACA's 10 titles, which includes 59 subtitles and more than 450 sections. The proper role of the Court is not to make an individual determination about the desirability of every provision of PPACA in light of the excision of § 1501. The judicial branch is not charged with straining to "rewrite" a legislature's law in a futile attempt to salvage it. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). Such analysis and parsing of language is "quintessentially legislative" and effectively "substitute[s] the judicial for the legislative part of the government." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 330 (2006) (*quoting United States v. Reese*, 92 U.S. 214, 221 (1876)). Accordingly, the Court should declare the PPACA stricken in its entirety and enter an injunction against its enforcement.

CONCLUSION

For these reasons, the requirement of § 1501 of the PPACA that individual citizens purchase health insurance or be subject to a monetary penalty is unconstitutional. PHA therefore requests this Court to grant the Commonwealth's Motion for Summary Judgment and deny Secretary Sebelius's Motion for Summary Judgment.

Dated: October 4, 2010

Respectfully submitted,

/s/ Scott C. Oostdyk

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2010, I electronically filed the foregoing Brief Of Amicus Curiae Physician Hospitals of America in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant'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 Earle Duncan Getchell, Jr., Charles E. James, Jr., Stephen R. McCullough, Wesley Glenn Russell, Ian Gershengorn, Joel McElvain, Jonathan Holland Hambrick, Sheila M. Lieber, and all counsel for Amici. A copy has also been served via first class, postage prepaid, U.S. Mail to Ray Elbert Parker, Pro Se, P.O. Box 320636, Alexandria, Virginia 22320.

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