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. 3:10-cv-00188-HEH
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity,	)	
Defendant.	)	

DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

On October 7, 2010, the Hon. George Caram Steeh issued the attached opinion in *Thomas More Law Center, et al. v. Obama, et al.*, Case No. 2:10-cv-11156-GCS-RSW (E.D. Mich. Oct. 7, 2010), upholding the constitutionality of the Patient Protection and Affordable Care Act ("ACA"). Judge Steeh's opinion is additional authority in support of defendant's summary judgment motion.

The plaintiffs in *Thomas More*, like the plaintiff here, argued that Congress had exceeded its Article I powers in enacting the minimum coverage provision of the ACA. The district court rejected this claim, finding a rational basis for Congress's conclusion that the regulated activities, "'taken in the aggregate, substantially affect interstate commerce.'" (Slip op. at 12, quoting *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)). The court noted that the decision whether to purchase health insurance or to attempt to pay for health care out of pocket "is plainly economic," (slip op. at 16), and that these decisions in the aggregate affect interstate commerce, because other

participants in the health care market bear the cost when the uninsured receive care but cannot pay for it. (*Id.*) This cost-shifting had a "clear and direct" effect on other market participants, the court found, (*id.*), rendering this case unlike *United States v. Lopez*, 514 U.S. 549 (1995), in which Congress could only link its regulated activity to interstate commerce by "pil[ing] inference upon inference." (*Id.* at 14, 17.)

With regard to the plaintiffs' claims that they were categorically beyond the commerce power because they "choose not to engage in commerce," the court noted the Supreme Court's rejection of similar claims in *Raich*; *Wickard v. Filburn*, 317 U.S.. 111 (1942); and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)). (Slip. op. at 17.) Moreover, the court noted, the health care market was different from other markets in that the plaintiffs could not "opt out." (*Id.*.) No person, the court found, could "ensure that he or she will never participate in the health care market," and the relevant question was only whether the plaintiffs would fund that participation through insurance or through "an attempt to pay out of pocket with a backstop of uncompensated care funded by third parties." (*Id.* at 16.)

The court sustained Congress's Article I authority to enact the minimum coverage provision for the additional reason that it is "'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (*Id.* at 18, quoting *Raich*, 545 U.S. at 24-25 (internal quotation omitted)). It noted that Section 1201 of the Act bars insurers from refusing to cover persons with pre-existing medical conditions. Without the minimum coverage provision, the court found, these reforms would create an incentive for individuals to wait to buy insurance until they needed care, which in turn, would "aggravate current problems with cost-shifting and lead to even higher premiums," threatening to "driv[e] the insurance market into extinction." (*Id.* at 18.) The court

thus held that Congress had appropriately found the minimum coverage provision to be essential to the success of the Act's insurance industry reforms. (*Id.*) Because the court sustained the provision under the commerce power, it found it unnecessary to decide whether the provision was also valid under the General Welfare Clause. (*Id*. at 19.)[1]

DATED this 8th day of October, 2010.

Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN (admitted *pro hac vice*)
Deputy Assistant Attorney General

NEIL H. MacBRIDE
United States Attorney

By: /s/ Jonathan H. Hambrick
JONATHAN H. HAMBRICK, VSB # 37590
Assistant United States Attorney
Office of the United States Attorney
600 East Main Street, Suite 1800
Richmond, Virginia 23219
Telephone: (804) 819-5400
Fax: (804) 819-7417
Email: jay.h.hambrick@usdoj.gov

JENNIFER RICKETTS RIVERA, VSB # 29281
SHEILA M. LIEBER (admitted *pro hac vice*)
JOEL McELVAIN (admitted *pro hac vice*)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7332
Washington, D.C. 20001
Telephone: (202) 514-2988
Fax: (202) 616-8202
Email: Joel.McElvain@usdoj.gov

Attorneys for the Defendant

[1] The court also ruled that "plaintiffs' challenge to the constitutionality of the penalty as an improperly apportioned direct tax is without merit." (Slip op. at 20.)

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Earle Duncan Getchell, Jr.
Charles E. James, Jr.
Stephen R. McCullough
Wesley Glenn Russell, Jr.
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219

/s/ Jonathan H. Hambrick
JONATHAN H. HAMBRICK, VSB # 37590
Assistant United States Attorney
Office of the United States Attorney
600 East Main Street, Suite 1800
Richmond, Virginia 23219
Telephone: (804) 819-5400
Fax: (804) 819-7417
Email: jay.h.hambrick@usdoj.gov