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.	)	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

On October 14, 2010, the Hon. Roger Vinson issued the attached opinion in *Florida, et al., v. United States Department of Health and Human Services, et al.,* Case No. 3:10-cv-91-RV/EMT (N.D. Fla. Oct. 14, 2010). The opinion has particular salience in the instant case because the Florida suit, like this one, involves challenges to PPACA brought by sovereign States, and the Secretary, who is a defendant in both cases, raises virtually identical arguments.

Most significantly, Judge Vinson thoroughly considered and then rejected the Secretary's argument that the PPACA penalty is a tax, holding that "it is quite clear that Congress did not intend the individual mandate penalty to be a tax; it is a penalty. It must be analyzed on the basis of whether it is authorized under Congress' Commerce Clause power, not its taxing power." *Id.* at Slip Op., p. 57-58. In reaching this conclusion, Judge Vinson carefully considered and rejected all of the arguments made by the Secretary, often for the same reasons that the

Commonwealth has offered in this case. *Id*. at 7-30. In fact, Judge Vinson extensively quotes from arguments made by the Secretary in *Commonwealth v. Sebelius* (*Florida* at Slip Op., p. 26) to make the point that her argument is based on idiosyncratic definitions and tortured logic, going so far as to compare the Secretary's argument to one made by a character from Lewis Carroll's *Alice in Wonderland*. *Florida*, Slip Op., at 28, n. 9 (positing that the federal government's taxing argument is equivalent to Humpty Dumpty's assertion that "[w]hen I use a word . . . it means what I choose it to mean, neither more or less. . . ," regardless of how such words are commonly understood or defined.).

Judge Vinson's holding is that

> I conclude that the individual mandate penalty is not a "tax." It is (as the Act itself says) a penalty. The defendants may not rely on Congress's taxing authority under the General Welfare Clause to try and justify the penalty after-the-fact. If it is to be sustained, it must be sustained as a penalty imposed in aid of an enumerated power, to wit, the Commerce Clause power. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393, 60 S. Ct. 907, 84 L. Ed. 1263 (1940).

Id. at 29. This is exactly the position that the Commonwealth has advanced in the instant case. (Doc. 89 at 31) ("[U]nder *La Franca*, the penalty is not a tax but a naked penalty. As such it requires an enumerated power for its support. The penalty is not in aid of the taxing power because the mandate is not a tax. Because the Commerce Clause is the only other conceivable enumerated power available to support the penalty, the tax argument collapses back into the Commerce Clause inquiry.").

In addition to finally disposing of the taxing power argument, Judge Vinson also addressed the Commerce Clause and Necessary and Proper Clause arguments that have been raised by the Secretary. *Florida*, Slip Op., at 60-65. While Judge Vinson did not finally dispose of such arguments because he was only ruling on a motion to dismiss, he cast great doubt on

their efficacy. He rejected the Secretary's attempt to dismiss the case based on her Commerce Clause and Necessary and Proper Clause arguments, noting that "at this stage in the litigation, this is not even a close call." *Id*. at 61.

Furthermore, Judge Vinson rejected the Secretary's claim, which she has made in this case as well, that the mandate and penalty are not unprecedented. Judge Vinson specifically found that "[t]he power that the individual mandate seeks to harness is simply without prior precedent." *Id*. He would go on to distinguish cases cited by the Secretary, noting that

> in this case we are dealing with something very different. The individual mandate applies across the board. People have no choice and there is no way to avoid it. Those who fall under the individual mandate either comply with it, or they are penalized. It is not based on an activity that they make the choice to undertake. Rather, it is based solely on citizenship and on being alive.

Id. at 63.

In short, Judge Vinson's total rejection of the Secretary's taxing power argument and his other findings are wholly consistent with the positions advanced by the Commonwealth in this case. Thus, his opinion is persuasive authority that the Commonwealth is entitled to prevail on its motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2010, I electronically filed the foregoing PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY 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, on: Ray Elbert Parker, *Pro Se*, P. O. Box 320636, Alexandria, Virginia 22320 and W. Spencer Conerat, III, *Pro Se*, 13584 Feather Sound Circle, W., Apt. 2009, Clearwater, FL, 33762.

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