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

DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

On November 30, 2010, the Hon. Norman K. Moon issued the attached opinion in *Liberty University, et al. v. Geithner, et al.*, Case No. 6:10-cv-00015-nkm-mfu (W.D. Va. Nov. 30, 2010), granting the defendants' motion to dismiss and upholding the constitutionality of the Patient Protection and Affordable Care Act ("ACA"). Judge Moon's opinion is additional authority in support of defendant's summary judgment motion.

The plaintiffs in *Liberty University*, like the plaintiff here, argued (among other claims) that Congress had exceeded its Article I powers in enacting the minimum coverage provision of the ACA, 26 U.S.C. § 5000A. The court held that the provision was a valid exercise of the commerce power, and granted the defendants' motion to dismiss. The court noted that the burden fell on the plaintiffs "to make a 'plain showing that Congress has exceeded its constitutional bounds.'" (Slip op. at 21, quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000)). The court further noted that, to succeed in their facial challenge to Section 5000A, the

plaintiffs "must establish that 'no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications.'" (*Id.*, quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation omitted)).

The court held that the plaintiffs had failed to meet this burden. The court noted that although the "unique nature of the market for health care and the breadth of the Act present a novel set of *facts* for consideration," the application of *legal* precedents was not at all novel; rather, "the *well-settled principles* expounded in *Raich* and *Wickard* control the disposition of this claim." (Slip op. at 27 (emphasis added), citing *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942)). The court acknowledged that it was required to uphold the challenged provision if Congress had a rational basis to conclude that the total incidence of the regulated activities have a substantial effect on interstate commerce. (*Id.* at 22.) The court recognized that, because participation in the health care market is nearly universal, the choice of the means of payment for one's inevitable use of health care services is an economic decision:

> Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care. The "fundamental need for health care and the necessity of paying for such services received" creates the market in health care services, of which nearly everyone is a participant. Regardless of whether one relies on an insurance policy, one's savings, or the backstop of free or reduced-cost emergency room services, one has made a choice regarding the method of payment for the health care services one expects to receive.

(*Id.* at 27, quoting *Thomas More Law Ctr. v. Obama*, --- F. Supp. 2d ---, 2010 WL 3952805, at *9 (E.D. Mich. Oct. 7, 2010)). The court thus rejected the plaintiffs' attempt to characterize their health care financing decisions as "inactivity," and it held that Congress had rationally found that, in the aggregate, individual decisions as to how to finance health care expenditures have a substantial effect on interstate commerce:

> Far from "inactivity," by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance. As Congress found, the total incidence of these economic decisions has a substantial impact on the national market for health care by collectively shifting billions of dollars on to other market participants and driving up the prices of insurance policies.

(*Id.* at 27-28.)

The court noted that the Supreme Court had recognized limitations on Congress's power to regulate noneconomic activities, where the link between the target of the regulation and any effects on interstate commerce is "too attenuated." (Slip op. at 24-25, citing *United States v. Lopez*, 514 U.S. 549 (1995) and *Morrison*.) It held, however, that "decisions to pay for health care without insurance are economic activities," and thus that the minimum coverage provision's regulation of those activities does not exceed the limits on the Congressional commerce power described in *Lopez* and *Morrison*. (*Id.* at 27-28.)

The court sustained Section 5000A under the commerce power for a second reason. It held that Congress rationally concluded that "the failure to regulate the uninsured would undercut the Act's larger regulatory scheme for the interstate health care market." (Slip op. at 29, citing *Raich*, 545 U.S. at 18, and *Wickard*, 317 U.S. at 128-29). The court noted that the ACA instituted reforms of the interstate insurance market, including requirements for insurers to guarantee coverage for all applicants, including applicants with preexisting medical conditions. (*Id.*) The court held that Congress had a rational basis to conclude that Section 5000A is an essential part of this regulation of that interstate market:

> As Congress stated in its findings, the individual coverage provision is "essential" to this larger regulatory scheme because without it, individuals would postpone health insurance until they need substantial care, at which point the Act would obligate insurers to cover them at the same cost as everyone else. This would increase the cost of health insurance and decrease the number of insured individuals – precisely the harms that Congress sought to address with the Act's regulatory measures.

(*Id.*)

Because the court sustained Section 5000A under the commerce power, it found it unnecessary to decide whether the provision was also valid under the General Welfare Clause, or under the implementation authority of the Necessary and Proper Clause. (*Id*. at 21.)[1]

DATED this 3rd day of December, 2010.

Respectfully submitted,

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[1] The court held that the plaintiffs' suit was not barred under the Anti-Injunction Act, 26 U.S.C. § 7421, for reasons that the defendant believes to be erroneous. (Slip op. at 20-21.) The court reserved judgment, however, on whether Section 5000A was an exercise of the General Welfare Clause power. (*Id.* at 20 n.13.)

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 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:

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