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May 23, 2011

Mr. Leonard Green
Clerk, United States Court of Appeals
for the Sixth Circuit
540 Potter Stewart U.S. Courthouse Building
Cincinnati, Ohio 45202-3988

Re: *Thomas More Law Center v. Obama, No. 10-2388*

Dear Mr. Green:

Appellees respectfully submit this supplemental letter brief pursuant to this Court's order of May 12, 2011.

I. Standing/Ripeness

A. Background

Plaintiffs are four individuals and the Thomas More Law Center, a public interest law firm. They allege that the Affordable Care Act's minimum coverage provision is not a valid exercise of Congress's Article I powers.

Two of the individual plaintiffs submitted declarations to support their allegations of standing. Plaintiff Jann DeMars represented that she does "not have private health care insurance," that her "employer does not provide health care coverage for" her or her children, that she does not "want to be compelled by the federal government to purchase health care coverage," and that she is "presently making significant financial sacrifices to ensure that" she is "able to purchase health care coverage as required by the Act." R-18, Exhibit 1 ¶¶ 2, 3, 7 (Supplemental DeMars Decl.). DeMars stated, for example, that she has "cut back on discretionary

spending" and has had to "forego making home and car repairs" and "purchasing items for" her home. *Id*. ¶ 7. Plaintiff Steven Hyder represented that he does "not have private health care insurance," that he does not "want to be compelled by the federal government to purchase health care coverage," that he has "arranged [his] personal affairs such that it will be a hardship" to pay for health insurance or penalties, and that the Act "impacts [him] now because [he] will have to reorganize [his] affairs and essentially change the way [he] live[s] to meet the government's demands." R-7, Exhibit 5 ¶¶ 2, 5 (Hyder Decl.).

In the district court, the government argued that these allegations fail to establish standing. R-12 at 9-14; R-20 at 2-5. The district court rejected these arguments, however, concluding that the declarations establish Article III standing for DeMars and Hyder. The court recognized that the minimum coverage provision does not take effect until 2014, and that "the Act might not affect plaintiffs after 2014, if, for instance, changed health circumstances or other events lead plaintiffs voluntarily to satisfy the minimum coverage provision." R-28 at 5. The court held, however, that plaintiffs' "decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring standing." *Id*. at 7. The court found standing on the basis of this "present economic injury," *id*. at 5, reasoning that "the injury-in-fact in this case is the present financial pressure experienced by plaintiffs due to the requirements of" the minimum coverage provision. *Id*. at 8. The court acknowledged that a change in plaintiffs' circumstances could present an issue of mootness, but concluded that the possibility of such a change does not call plaintiffs' standing into question. R-28 at 8.[1]

The district court also held that the case is ripe for review. The court explained that, in considering whether an issue is ripe for review, courts are to "'evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id*. at 8 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The court found it "highly probable" that the individual

[1] Plaintiffs have not advised the Court of any material change in their personal circumstances since the filing of their declarations. *Cf. Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) (noting counsel's "continuing duty" to inform the Court of any development that "could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy").

plaintiffs would be required to obtain minimum coverage or pay a penalty, *id*. at 9 (quoting *Kardules v. City of Columbus*, 95 F.3d 1335, 1344-46 (6th Cir. 1996)), and concluded that plaintiffs' challenge "presents a purely legal issue which 'would not be clarified by further factual development.'" *Ibid*. (quoting *Abbott Labs*, 387 U.S. at 149). Accordingly, the court held that the case "is ripe for consideration." *Ibid*.

The district court's reasoning has been followed by district courts in other cases challenging the Affordable Care Act's minimum coverage provision. For example, in *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010), *appeal pending*, No. 10-2347 (4th Cir.), the district court held that certain individual plaintiffs had standing because they alleged they would have to undertake "significant financial planning in advance of the actual purchase of insurance in 2014" and "must incur the preparation costs in the near term." *Id*. at 624. Similarly, the district court in *State of Florida v. HHS*, __ F. Supp. 2d __, 2011 WL 285683 (N.D. Fla. 2011), *appeals pending*, Nos. 11-11021 & 11-11067 (11th Cir.), held that an individual plaintiff had standing because she must "make financial arrangements now to ensure compliance" in 2014. *Id*. at *8; *see also Mead v. Holder*, __ F. Supp. 2d. __ (D.D.C. Feb. 22, 2011), 2011 WL 611139, *5-*8, *appeal pending*, No. 11-5047 (D.C. Cir.) (finding standing based on allegations of present economic injury and substantial probability of future injury); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d. __ (M.D. Pa. Jan. 24, 2011), 2011 WL 223010, *5-*7 (finding standing based on allegations of present economic injury).

By contrast, district courts have held that other individual plaintiffs, who did not allege present economic injury, lack standing to challenge the minimum coverage provision. *See*, *e.g.*, *Liberty University*, 753 F. Supp. 2d at 621-22 && nn. 6-7; *New Jersey Physicians, Inc. v. Obama*, __ F. Supp. 2d __ (D. N.J. Dec. 8, 2010), 2010 WL 5060597, *appeal pending*, No. 10-4600 (3d Cir.); *Baldwin v. Sebelius*, No. 3:10-cv-1033 (S.D. Cal. Aug. 27, 2010), 2010 WL 3418436, *appeal pending*, No. 10-56374 (9th Cir.).

B. Article III requirements

Although we view the question as close and recognize that the Court must reach its own independent judgment on jurisdictional issues, the conclusion that plaintiff DeMars has established Article III standing to sue appears to be consistent with Supreme Court precedent, albeit for reasons somewhat different from those

articulated by the district court. A plaintiff's own decision to incur financial costs, like other self-imposed harms, will not, by itself, give rise to an Article III injury in fact.[2] But a plaintiff may establish standing based on injury expected to result from the implementation of a challenged direct regulation of her conduct, provided the injury is sufficiently imminent, and financial costs may be relevant to the imminence of the injury.

That understanding is consistent with Supreme Court's reasoning in *New York v. United States*, 505 U.S. 144 (1992). There, the State of New York challenged a provision of federal law that required the State, by January 1, 1996, either to provide for the disposal of low-level radioactive waste generated within its borders or else take title to the waste. The State filed suit against the United States in 1990, six years before the provision was to take effect, and the case was heard by the Supreme Court in 1992. The Supreme Court rejected the "suggestion that, because the take title provision will not take effect until January 1, 1996, petitioners' challenge thereto is unripe." *Id*. at 175. The Court noted that it "takes many years to develop a new disposal site," that "New York must take action now in order to avoid the take title provision's consequences," and that "no party suggests that the State's waste generators will have ceased producing waste by 1996." *Ibid*. The Court held that "[t]he issue is thus ripe for review." *Ibid*.

The analysis in *New York* was framed in terms of ripeness, but the doctrines of ripeness and standing "'unquestionably ... overlap.'" *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (*en banc*) (citation omitted). "Like standing, ripeness 'is drawn both from Article III limitations on judicial power and from prudential

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[2] *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("No [party] can be heard to complain about damage inflicted by its own hand."); *ACLU v. NSA*, 493 F.3d 644, 654-657, 662-663 (6th Cir. 2007) (opinion of Batchelder, J.) (plaintiffs' decisions to incur "costs" and "expense[s]" to avoid potential surveillance reflect actions "incidental to the alleged wrong" not Article III injuries establishing standing, even if those actions reflect views that "may be reasonable"); *id*. at 689-691 (opinion of Gibbons, J.) (such plaintiffs must show that they are actually "subject to the conduct" they challenge); *cf. United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378-1380 (D.C. Cir. 1984) (Scalia, J.) (plaintiff who is not subject to a "regulatory, proscriptive, or compulsory" exercise of government power cannot establish Article III injury from plaintiff's own decision to cease expressive conduct).

reasons for refusing to exercise jurisdiction.'" *Ibid*. (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)); *accord Connection Distributing Co. v. Holder*, 557 F.3d 321, 342 (6th Cir. 2009) (*en banc*). The premise of *New York* was that a case meets the requirements of Article III when a plaintiff must take action years in advance of the statute's effective date in order to comply with a regulatory requirement that will apply when the statute ultimately took effect. The Article III injury in fact in *New York* was therefore the regulatory requirement itself, and that injury was sufficiently "imminent" for Article III purposes because, under the circumstances, New York had shown that it needed to take steps reasonably necessary for it to comply with that impending requirement. To be sure, the circumstances here differ in important respects from those in *New York,* and the level of specificity required at this stage of the proceedings to satisfy plaintiffs' burden to establish jurisdiction is far from settled. Nonetheless, DeMars' representations about the actions she presently needs to take to comply with the Act appear adequate to establish standing to sue.

C. Prudential considerations

Although the DeMars allegations appear to satisfy requirements of Article III, we recognize that prudential considerations present an even closer issue. *See Connection Distributing*, 557 F.3d 32 at 342 (ripeness doctrine "'serves to avoid[] ... premature adjudication of legal questions'") (quoting *Warshak*, 532 F.3d at 525). In *New York*, "no party suggest[ed] that the State's waste generators will have ceased producing waste by 1996." 505 U.S. at 175. Here, by contrast, the district court acknowledged that a change in plaintiff's material circumstances could obviate the need to address her constitutional challenge. R-28, at 8. DeMars does "not object to health insurance in general," R-7, Exhibit 4, ¶ 4 (DeMars Decl.); she simply prefers to "pay for health care services as [she] need[s] them." *Id.* ¶ 3. That preference could change if, for example, her medical needs change or her employer offers health insurance. Her preference also could be influenced by the new federal tax credits and federal cost-sharing payments that will be available under the Act. *See* U.S. Br. 17.

Moreover, the DeMars declarations do not provide sufficient information to determine whether she would be subject to a tax penalty if she fails to maintain minimum coverage in 2014. The tax penalty will not apply to individuals whose household income is insufficient to require them to file a federal income tax return, whose premium payments would exceed 8% of their household income, or who

establish that obtaining minimum coverage would impose a hardship. 26 U.S.C.A. § 5000A(e).

This Court's order directs the parties to address "enforcement mechanisms ... available to the IRS" and "[w]hat role, if any" they "play in the injury and hardship requirements." Section 5000A provides that a taxpayer must include any liability for a penalty under Section 5000A with his tax return. 26 U.S.C. § 5000A(b)(2). Because "'[t]he Federal tax system is basically one of self-assessment,'" *United States v. Galletti*, 541 U.S. 114, 122 (2004) (quoting 26 C.F.R. § 601.103(a)), many taxpayers will voluntarily report and pay any liability they owe under Section 5000A. In the absence of voluntary payment, the penalty is "assessed and collected in the same manner" as other tax liabilities. 26 U.S.C. §§ 5000A(g)(1); 6671(a). The collection authority of the IRS includes the power to recover tax liabilities through offset. In particular, the IRS may credit any overpayment of tax "against any liability in respect of an internal revenue tax" that the taxpayer owes, 26 U.S.C. § 6402(a), including a liability for the Section 5000A penalty, as long as the collection period is open. The Attorney General also has general authority to file civil suits for unpaid tax liabilities. *See* 26 U.S.C. §§ 7401 *et seq.*; *id.* § 6502(a); *United States v. Chamberlin*, 219 U.S. 250, 261-262 (1911).[3] Thus, if DeMars does not have minimum coverage in 2014, and if she is subject to a tax penalty, her constitutional challenge could be raised in connection with actions taken by the government to collect the tax penalty.

Notwithstanding the availability of post-implementation review of claims such as plaintiffs', there are some prudential factors that counsel in favor of addressing constitutional challenges to the minimum coverage provision before the provision goes into effect in two-and-a-half years. The federal government has acknowledged in other litigation that the Affordable Care Act's guaranteed-issue and community-rating provisions due to take effect along with the minimum coverage provision in 2014 — *i.e.*, sections 2701, 2702, 2704 (regarding adults), and 2705(a) of the Public Health Service Act, as added by section 1201 of the Affordable Care Act — cannot be severed from the minimum coverage provision. *See*, *e.g.*,

[3] The minimum coverage provision bars criminal prosecution for a failure to pay the penalty and prohibits the IRS from filing a notice of lien with respect to a taxpayer's property, or from levying on that property, because of a failure to pay. 26 U.S.C. § 5000A(g)(2)(A), (B).

Response/Reply Brief for Appellants at 58, *Florida v. HHS*, Nos. 11-11021 & 11-11067 (11th Cir.) (filed May 18, 2011). Thus, constitutional challenges to the minimum coverage provision implicate millions of private transactions that would be difficult to unravel if deferring consideration of those challenges resulted in their not being decided until the provision has been implemented.[4]

II. Facial/As-applied.

Because the minimum coverage provision does not take effect for several years, plaintiffs challenge the provision on its face. *See* R-17 at 4 n.4.[5] Accordingly, plaintiffs bear the burden of showing that "no application of the statute could be constitutional." *Sabri v. United States*, 541 U.S. 600, 609 (2004). The Supreme Court has held that "[a] facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The district court in *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 773-74 (E.D. Va. 2010), questioned the "viability" of what it described as this "*Salerno* dictum." *Id*. at 774. There is no doubt, however, that *Salerno* remains the governing law. Indeed, "the Supreme Court has expressed increasing skepticism of facial challenges in recent years," *Warshak*, 532 F.3d at 529, including in the context of enumerated power claims, *see Sabri*, 541 U.S. at 608-610.

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[4] State plaintiffs also have sought to challenge the minimum coverage provision in the *Florida* suit and in *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *appeals pending*, Nos. 11-1057 & 11-1058 (4th Cir.). The minimum coverage provision, however, applies only to individuals, and Supreme Court precedent forecloses a suit by a state "to protect her citizens from the operation of federal statutes." *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007). The district courts in *Florida* and *Virginia* erred in holding that a state can circumvent that bar to *parens patriae* standing in a suit against the federal government by enacting a state law that purports to exempt the state's citizens from the operation of federal law. *See*, *e.g.*, Brief for Respondent in Opposition 19-22, *Virginia v. Sebelius*, No. 10-1014 (S. Ct.), 2011 WL 915095.

[5] This pleading was stricken on other grounds.

There is also no doubt that the *Salerno* standard applies in the context of a Commerce Clause challenge. In *United States v. Faasse*, 265 F.3d 475 (6th Cir. 2001) (*en banc*), for example, this Court reviewed a Commerce Clause challenge to a conviction under the Child Support Recovery Act. Noting that Faasse brought an as applied challenge to the statute, this Court confirmed that "[f]acial invalidation of a statute ... is reserved only for when there are no set of circumstances in which the statute's application would be constitutional." *Id*. at 487 & n.10. This Court rejected Faasse's contention that the statute was invalid "as applied" to his circumstances because he had "passively failed to engage in commerce," finding "no principled distinction between the parent who fails to send any child support through commerce and the parent who sends only a fraction of the amount owed." *Id*. at 487 & n.9.

Although plaintiffs here purport to challenge the minimum coverage provision on its face, even their own legal theory would not render the provision invalid in all of its applications. Plaintiffs argue that, as "volitionally uninsured legal residents of the United States," they "are not now engaged in any commercial or economic activity that affects in any way interstate commerce." Pl. Br. 30. Many persons, however, move in and out of the health insurance market and are thus "active" under plaintiffs' own narrow conception of market activity — *i.e.*, if activity in the insurance market is viewed in isolation, divorced from activity in the health care services market. *See* Response/Reply Br. 16-17, *Florida v. HHS*, Nos. 11-11021 & 11-11067 (citing studies). Other persons may have insurance that will not meet minimum standards in 2014, when certain additional consumer protections become effective. Even DeMars does not claim that she never had insurance or that she will not obtain insurance in the future. To the contrary, she admits that she does "not object to health insurance in general based on [her] religious beliefs and convictions," R-7, Exhibit 4, ¶ 4 (DeMars Decl.), and claims only that she is not "now" active in the insurance market. Pl. Br. 30.

Because the minimum coverage provision will apply to individuals who are "active" in commerce even under plaintiffs' narrow conception of the term, plaintiffs' own theory provides no basis on which to invalidate the minimum coverage provision on its face. Indeed, the difficult (if not impossible) line-drawing problems inherent in plaintiffs' argument make facial adjudication particularly inappropriate. In rejecting an argument that the Commerce Clause did not authorize Congress to "regulate" someone who claimed he "passively failed to engage in commerce," this Court noted that the proffered "distinction between 'active obstruction' and 'passive

failure'" in that case was "illusory." *Faasse*, 265 F.3d at 487. Any attempt to draw a non-illusory line around "inactivity" in the context of the minimum coverage provision would require consideration of different applications to different types of individuals, with varying histories with health insurance coverage, varying medical needs, and varying participation in the health care services market, to determine who was "active" in commerce. The need for such an exercise makes it all the more perilous for the Court to proceed on a facial basis and "'los[e] the lessons taught by the particular, to which common law method normally looks.'" *Warshak*, 532 F.3d at 533 (quoting *Sabri*, 541 U.S. at 609).

We do not, of course, concede that there would be any merit to an as-applied challenge to the minimum coverage provision. The provision does not regulate "inactivity"; it regulates the timing and means of payment for services in the health care services market. For all of the reasons set out in our brief, the constitutional challenges to the minimum coverage provision rest on a fundamental misunderstanding of the nature of the regulated economic activity, the role of insurance as the means of payment for services in the health care market, and the governing Supreme Court precedent. The minimum coverage provision validly regulates a class of persons whose economic conduct, in the aggregate, substantially affects interstate commerce. Thus, the provision is valid both facially and in all of its applications. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2011, I caused the foregoing letter brief to be filed and served through the Court's CM/ECF system. All counsel of record are registered CM/ECF users.

/s/ Alisa B. Klein
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