Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Clint Bolick (Ariz. Bar No. 021684)
Nicholas C. Dranias (Ariz. Bar No. 330033)
Christina Sandefur (Ariz. Bar No. 027983)
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000
CBolick@GoldwaterInstitute.org
NDranias@GoldwaterInstitute.org
CSandefur@GoldwaterInstitute.org
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NICK COONS, et al., Plaintiffs, vs. TIMOTHY GEITHNER, et al., Defendants.	)	No. 2:10-CV-1714-GMS **PLAINTIFFS' SUPPLEMENTAL BRIEF**

Introduction

On June 29, 2012, the United States Supreme Court ruled that although Congress has no power under the Commerce or Necessary and Proper clauses to compel individuals to buy insurance, the financial penalty that PPACA[1] imposes on individuals who do not buy insurance can be construed as an exercise of Congress's tax power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) ("*NFIB*"). Pursuant to this Court's August 31, 2012, order (Doc.

[1] All references herein to "PPACA" shall mean Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

84), Plaintiffs submit this supplemental brief addressing whether Counts IV, V, and VIII remain viable in light of *NFIB*. For the reasons set forth below, even construed as a tax, PPACA violates Plaintiff Nick Coons' constitutionally-protected rights to medical autonomy (Count IV), privacy (Count V), and health care freedom (Count VIII).

I. The tax penalty violates the Health Care Freedom Act

There is no question that PPACA conflicts with Arizona Constitution art. XXVII, § 2. The Health Care Freedom Act (HCFA) protects the right to "pay directly for lawful health care services" without being subject to "penalties or fines" for choosing to do so, Ariz. Const. art. XXVII, § 2(A)(2), and shields Arizonans from compulsory participation in a health care system, including inducement through "penalties or fines." §§ 2(A)(1), (D)(1). While PPACA's constitutionality under *federal* law may turn on whether it is construed as a mandate or tax, *NFIB*, 132 S. Ct. at 2608, it unequivocally violates the Arizona Constitution under either interpretation. This is because HCFA defines "penalties or fines" broadly, extending to:

> any civil or criminal penalty or fine, *tax*, salary, or wage withholding or surcharge or any named fee with a similar effect established by law or rule by a government established, created or controlled agency that is used to punish or discourage the exercise of rights protected under this section.

Ariz. Const. art. XXVII, § 2(D)(5) (emphasis added). Moreover, the Supreme Court explicitly recognized that the tax penalty "aims to induce the purchase of health insurance" and "seeks to shape decisions about whether to buy health insurance." *NFIB* at 2596. This goal is at odds with HCFA's explicit prohibition on inducing participation in a health care system or of discouraging direct payment for lawful health care services. §§ 2(A)(1), 2(A)(2), 2(D)(5).

Plaintiffs have shown that where, as here, the federal law regulates an area traditionally governed by states, the "high threshold [that] must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act," *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1985 (2011), is not met. (Doc. 51 at 51-6; Doc. 70 at 12-14.) Here, PPACA guarantees that:

> No individual, company, business, nonprofit entity, or health insurance issuer offering group or individual health insurance coverage shall be required to participate in any Federal health insurance program created under this Act . . . or in any Federal health insurance program expanded by this Act . . . and there shall be no penalty or fine imposed upon any such issuer for choosing not to participate in such programs.

42 U.S.C. § 18115. In view of this provision, Defendants cannot meet the "high threshold" required to prove that PPACA was meant to preempt the HCFA. *NFIB*'s construction of PPACA as a tax does not disturb Plaintiffs' HCFA claim, and accordingly, this Court should enforce the protections the Arizona Constitution affords Plaintiffs.

II. Congress's tax power is limited by the reserved powers of the states

The tax penalty is also unlawful because Congress cannot exercise its tax power in a manner that displaces constitutionally-reserved state sovereignty. The federal Constitution establishes a structure of government that divides sovereignty between the state and federal governments. *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citations omitted) ("States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere'"); *The Federalist* No. 45 at 289 (James Madison) (C. Rossiter, ed. 1999) ("The powers

delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the state governments are numerous and indefinite"). Even the broad enforcement powers bestowed upon Congress by the Fourteenth Amendment are curbed by the reserved powers of the states. *Oregon v. Mitchell*, 400 U.S. 112, 128-29 (1970) (invalidating law that enfranchised 18-year-olds in state and local elections where state law required voters to be 21). Limits on Congress's enumerated powers are "critical to ensuring that . . . legislation does not undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 132 S. Ct. at 2602. With narrow exceptions not applicable here, federal power that contravenes state sovereignty "is not within the enumerated powers of the National Government." *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011).

The sovereignty of the states accordingly constrains Congress's exercise of its tax power. *United States v. Butler*, 297 U.S. 1, 69 (1936) (citations omitted). "It would undoubtedly be an abuse of the [tax] power if so exercised as to impair the separate existence and independent self-government of the states." *Veazie Bank v. Fenno*, 75 U.S. 533, 541 (1869). Thus, "Congress is not empowered to tax for those purposes which are within the exclusive province of the states." *Butler*, 297 U.S. at 69 (citations omitted).

The Founders envisioned a system of federalism in which states, with their powers protected by the Tenth Amendment and other constitutional provisions, would counterbalance the federal government so as to protect individual freedoms against concentrated power. *See Bond*, 131 S. Ct. at 2364 ("Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. . . . Federalism secures the freedom

of the individual"). To that end, the Constitution reserves to the states the power to protect the individual liberties of their citizens within traditionally-reserved powers. Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights*, 26 Am. Crim. L. Rev. 1261, 1293 (1989). States may fulfill this function by adopting guarantees for individual liberties broader than the federal Constitution. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). This dual system of federalism enables states to "respond, through the enactment of positive law," to protect the rights of citizens "without having to rely solely upon the political processes that control a remote central power." *Bond*, 131 S. Ct. at 2364. Indeed, the Ninth and Tenth Amendments were meant to work in tandem to ensure federal power was circumscribed by state law guarantees of individual liberty enacted pursuant to the state's reserved powers. Wilmarth, 26 Am. Crim. L. Rev. at 1302 & n.209 (citing House debates of Aug. 18, 1789; letter from Hardin Burnley to James Madison dated Nov. 28, 1789; letter from James Madison to George Washington dated Dec. 5, 1789; 2 The Bill of Rights: A Documentary History 1118, 1190 (B. Schwartz ed. 1971); Caplan, *History and Meaning of the Ninth Amendment*, 69 VA. L. Rev. 223, 262-64 (1983)).

The people of Arizona did that by adopting HCFA, a positive protection of their rights in a field of law traditionally governed by states' police powers. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002) (the "field of health care" is "a subject of traditional state regulation"); *see also Gonzalez v. Oregon*, 546 U.S. 243, 271 (2006) (Controlled Substances Act could not be enforced to prevent physicians who prescribed drugs, in compliance with state law, from assisting suicide of the terminally ill); (Doc. 51 at 54-5; Doc. 70 at 13-14.) HCFA, when properly enforced, preserves "the promise of liberty" as secured by the Constitution's system of

divided sovereignty. *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991). Enforcing PPACA's tax penalty would supersede Arizona's authority to shield individual liberty from federal power, thwarting the very aim of American federalism.

III. The tax power cannot be exercised in a way that infringes on individual rights

Just as Congress's enumerated powers are circumscribed by state sovereignty, they are likewise constrained by the people's substantive rights. Thus, even construed as an exercise of Congress's tax power, PPACA violates Plaintiffs' rights to medical autonomy and privacy.

"When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is [a court's] delicate and difficult task to determine whether the resulting restriction on freedom can be tolerated." *United States v. Robel*, 389 U.S. 258, 264 (1967) (citations omitted) (striking down law banning member of communist organization from working in defense facility as inconsistent with freedom of association). Plaintiffs have established that Nick Coons has a fundamental right to medical autonomy. (Doc. 51 at 35-7.) PPACA places a substantial obstacle before Plaintiff Coons' ability to exercise that right. Even construed as a tax, PPACA "seeks to shape [individual] decisions about whether to buy health insurance." *NFIB*, 132 S. Ct. at 2596. The tax penalty forces Plaintiff Coons to divert some of his limited financial resources to obtaining a health care plan he does not desire or otherwise to save his income to pay the exaction. (Doc. 51 at 35.) Selecting either option reduces the health care treatments and doctor-patient relationships he can afford to choose, thereby unduly burdening his right to medical autonomy. *See Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.) (regulation may not "impose[] an undue burden on [the]

ability to make [a] decision . . . [at] the heart of the liberty protected by the Due Process Clause"). The *NFIB* Court itself acknowledged that "Congress's ability to use its taxing power to influence conduct is not without limits," and that "exactions obviously designed to regulate behavior" or that were so burdensome as to constitute a "penalty with the characteristics of regulation and punishment," would be unconstitutional. 132 S. Ct. at 2599-2600 (citations omitted). But such questions were not raised or addressed in that case.

Plaintiff Coons has a constitutionally-protected privacy right not to be compelled to disclose his personal medical records and other sensitive information. (Doc. 51 at 37-40.) Even construed as a tax, PPACA unduly burdens his ability to exercise that right by forcing him choose between entering into relationships that require him to relinquish such information, or paying a penalty. The Constitution prohibits "obstacles [that] . . . impact[] upon the . . . freedom to make a constitutionally protected decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977).

Conclusion

Counts IV, V, and VIII of Plaintiffs' Second Amended Complaint are still viable in light of the Supreme Court's interpretation of PPACA. Accordingly, Plaintiffs' Motion for Summary Judgment should be granted with respect to Count VIII, and they should be allowed to proceed with discovery on Counts IV and V.

DATED: September 13, 2012

Respectfully submitted,

/s/ Christina Sandefur
Clint Bolick (Ariz. Bar No. 021684)
Nicholas C. Dranias (Ariz. Bar No. 330033)
Christina Sandefur (Ariz. Bar No. 027983)
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Christina Sandefur, an attorney, hereby certify that on September 13, 2012, I electronically filed a Plaintiffs' Rule 12(d) Motion with the Clerk of the Court for the United States District Court, District of Arizona by using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the District Court's CM/ECF system.

/s/ Christina Sandefur