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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Nick Coons; et al., Plaintiffs, vs. Timothy Geithner; et al., Defendants	Case No.: CV-10-1714-PHX-GMS **DEFENDANTS' SUPPLEMENTAL BRIEF**

INTRODUCTION

Plaintiffs' substantive due process and "alternative non-preemption" claims should be dismissed. The supposed right not to purchase health insurance is not deeply rooted in this Nation's history and tradition. Nor does the minimum coverage provision violate Coons' right to medical privacy; other federal laws strictly limit the situations in which insurance companies may disclose confidential medical information, and in any event the due process clause does not prohibit reasonable disclosures of personal medical information to insurance companies. Plaintiffs' "alternative non-preemption" count is also meritless, as the Supreme Court in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), conclusively established the constitutionality of the minimum coverage provision. Although plaintiffs contend otherwise, it is well established that, in our federal system, a constitutional federal law trumps a conflicting state law, not vice versa.

ARGUMENT

I. The Minimum Coverage Provision Does Not Violate Due Process

The government has explained that Coons does not have a fundamental right under the Due Process Clause not to purchase health insurance. *See* Defs.' Mot. Dismiss at 41-43, ECF No. 42.[1] To qualify for due process protection, the asserted right must be "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were

[1] The government has already explained in its briefing that plaintiffs lack standing to assert their claims and that those claims are not ripe for review. Rather than repeat those arguments here, the government incorporates them by reference.

sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citation and internal quotation marks omitted). These include the "rights to marry," "to have children," "to direct the education and upbringing of one's children," "to marital privacy," "to use contraception," "to bodily integrity," "to abortion," and possibly "to refuse unwanted lifesaving medical treatment." *Id.* at 720 (citations omitted). The Court has cautioned against recognizing new fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (citation omitted).

The right to forgo health insurance that one can afford and, as a result, to shift one's health care costs to third parties, is not "deeply rooted in this Nation's history and tradition." *Id.* at 720-1. Avoiding insurance that one can afford is not a prerequisite to liberty. *Glucksberg*, 521 U.S. at 720. Because the right to forgo health insurance does not belong to the same category as the rights to marry, to have children, and the like, the minimum coverage provision is subject only to rational basis review. The minimum coverage provision plainly satisfies this "highly deferential" standard of review. *Flores by Galvez-Maldoaonado v. Meese*, 913 F.2d 1315, 1330 (9th Cir. 1990). As the government has explained, Congress rationally found that the minimum coverage provision is essential to creating effective health insurance markets "in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold," Pub. L. No. 111-148, §§ 1501(a)(2)(G), 10106(a), while also helping to reduce administrative costs and lower premiums, *id.* §§ 1501(a)(2)(G), (H), 10106(a).

Plaintiffs do not respond to these points. Instead, they argue that buying health insurance or paying the assessment "reduces the health care treatments and doctor-patient relationships [Coons] can afford to choose, thereby unduly burdening his right to medical autonomy." Pls.' Supp. Br. at 6, ECF No. 85, (relying on *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.)). Coons retains the right to see any doctor that he chooses, and he is not required to submit insurance claims if he chooses not to do so. Nor does the minimum coverage provision bar him from creating any patient-doctor relationships that he wants or implicate in any way the right to refuse medical treatment. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). As this Court has observed (Order at 4, ECF No. 84), the provision does not even require Coons to purchase health insurance directly; by paying the assessment Coons will have "fully complied with the law."[2] *NFIB*, 132 S. Ct. at 2597.

Nor does the minimum coverage provision violate any due process right to informational privacy. In plaintiffs' view, the minimum coverage provision violates due process by forcing Coons to disclose confidential medical information to an insurance company. As an initial matter, this claim is unripe. Plaintiffs' claim depends on their implausible speculation that *all* insurers will require them to disclose that information after the minimum coverage provision goes into effect. Indeed, the one court to have

[2] To the extent plaintiffs claim that the minimum coverage provision burdens Coons' right to medical autonomy by diverting his income away from the "health care treatments and doctor-patient relationships" he would like to choose, the case plaintiffs rely upon recognizes that "a law [which] has the incidental effect of making it more difficult or more expensive" to exercise a right "cannot be enough to invalidate it." *Casey*, 505 U.S. at 874 (plurality op.).

considered the issue has found that this type of claim was not ripe because"[t]o competently conduct either analysis, the Court must at least consider the particular demands of the challenged law, the nature of the information to be disclosed, the purpose for which the government seeks it, the protections afforded to the disclosed information, and any other circumstances particular to the dispute." *Walters v. Holder*, Civil Action No. 2:10-cv-76-KS-MTP, 2012 WL 3644816, at *5 (S.D. Miss. Aug. 23, 2012).

Even if this Court were to reach the merits, the minimum coverage provision in no way *requires* individuals to submit claims to their health plan. Indeed, as the Supreme Court explained, citizens are not required to obtain health coverage at all; rather, they "may lawfully choose to pay [the assessment] in lieu of buying health insurance." *NFIB*, 132 S. Ct. at 2597. Indeed, any plaintiff could choose to pay the monetary assessment rather than purchase health insurance. *See id.* at 2595-96. Plaintiffs' due process claims thus necessarily fail, given the "especially broad latitude" that Congress has in "creating classifications and distinctions in tax statutes." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (collecting cases); *see also R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 921 (9th Cir. 2004) ("The Supreme Court has repeatedly emphasized that deference not warranted in other regulatory areas is warranted when it comes to the tax system.")

Even if the minimum coverage provision did require the purchase of health insurance directly, plaintiffs' medical privacy claim would be meritless. The ACA *prohibits* the health insurance Exchanges from requiring any applicant to provide any information other than what is "strictly necessary to authenticate identity, determine

eligibility, and determine the amount of the [premium tax] credit or [cost-sharing] reduction" for which the applicant is eligible. *See* 42 U.S.C. § 18081(g)(1). In addition, given that insurers are prohibited from taking into account an individual's health status or medical condition when determining eligibility or enrollment, there is no reason to believe the Exchanges would be collecting such information. Moreover, another federal law, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), strictly limits the manner in which insurance companies may use or disclose individuals' medical information. *Id.* at §§ 1320d, *et seq.*; 45 C.F.R. § 164.502. Because plaintiffs' medical information is "shielded by statute from unwarranted disclosure," *NASA v. Nelson*, 131 S. Ct. 746, 762 (2011) (internal quotation and alteration omitted), plaintiffs have no due process claim.

Finally, putting aside the point that the minimum coverage provision does not compel any disclosures of information at all, the constitutional right to informational privacy does not bar "reasonable" disclosures of medical information to insurance companies if they are asked to pay claims. *Id.*, at 759. "[D]isclosures of private medical information to doctors, to hospital personnel, *to insurance companies*, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." *Whalen v. Roe*, 429 U.S. 589, 602 (1977) (emphasis added). *See also Seaton v. Mayberg*, 610 F.3d 530, 537 (9th Cir. 2010) (no privacy interest in medical information in "disclosures to . . . *insurance companies*") (emphasis added).

II. Arizona's Laws Do Not Preempt Federal Law

There is no conflict between Arizona's law and the Affordable Care Act if Article XVIII of the Arizona Constitution is interpreted to apply only to *state* laws and to *state* laws mandating health coverage. The Arizona Constitution purports to "preserve the freedom of Arizonans to provide for their health care." Ariz. Const. art. XXVII, § 2. It provides that "[a] law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system." *Id.* Nothing in section 2 prohibits *federal* laws passed by *federal* officials, and it is natural to assume that the State passed the Health Care Freedom Act against the background of the federal Constitution's Supremacy Clause. *See* U.S. Const. art. VI, cl.2. Thus the Arizona Constitution might prohibit a state law minimum coverage provision, but it cannot "prevent the application" of the provision that Congress passed. *See* 42 U.S.C. § 18041(d).

Moreover, as the Supreme Court concluded, a person subject to the minimum coverage provision "may lawfully choose to pay [the monetary assessment] in lieu of buying health insurance." *NFIB*, 2012 WL 2427810, at *26. In light of this interpretation, the minimum coverage provision does not conflict with the Arizona Constitution's prohibition of laws or rules that "compel, directly or indirectly, any person, employer or health care provider to participate in any health care system." Ariz. Const. art. XXVII, § 2. Plaintiffs attempt to avoid this conclusion by referring to section 2's prohibition of "penalties or fines" (Pls.' Supp. Br. at 2); that prohibition, however, applies to "penalties or fines *for accepting direct payment from a person or employer for*

lawful health care services." Ariz. Const. art. XXVII, § 2 (emphasis added). Nothing in the minimum coverage provision or the Affordable Care Act more generally imposes any penalties or fines for accepting direct payment for lawful health care services.

In any event, plaintiffs' admissions that the "PPACA conflicts with the Arizona Constitution art. XXVII, § 2" (Pls.' Supp. Br. at 2) and that the ACA "unequivocally violates the Arizona Constitution" (*id.*) independently resolve plaintiffs' non-preemption claim. Contrary to plaintiffs' view, a state law cannot preempt a constitutional federal law. *See* Pls' Mot. for Summ. J. 2, ECF No. 49 (arguing that the minimum coverage provision and the assessment, "even if constitutional, are preempted by the Arizona Constitution and the state's Health Care Freedom Act."). Rather, in our federal system "*state* laws are preempted when they conflict with *federal* law," not vice versa. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (emphasis added). Because the Supreme Court has determined that the minimum coverage provision is a valid exercise of Congress's tax power, it follows that any state law that "conflicts" (Pls.' Supp. Br. at 2) with federal law is preempted. For this reason, plaintiffs' lengthy discussion about how 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," is beside the point. *See id.* at 3-6.

CONCLUSION

For the foregoing reasons, this Court should enter a final judgment dismissing this case in its entirety.

DATED: September 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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