IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, by and through Attorney General Pam Bondi, et al.,

No. 11-

Plaintiffs-Appellees,

No. 3:10-cv-91-RV (N.D. Fla.)

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants.

Appellants' Motion for Expedition

The federal government respectfully asks this Court to consider on an expedited basis its appeal from the district court's order of January 31, 2011, which held unconstitutional the minimum coverage provision of the Patient Protection and Affordable Care Act ("Affordable Care Act") and declared the Act invalid in its entirety.

On March 3, 2011, the district court stayed its ruling pending appeal, contingent upon the federal government's filing of a notice of appeal within seven days and a request for expedited review. The federal government filed a notice of appeal earlier today (March 8, 2011) and now asks that the Court expedite

proceedings and establish the following briefing schedule, with oral argument to follow on an expedited basis as determined by the Court:

Defendants' Opening Brief: due 4/18/2011

Plaintiffs' Response Brief: due 5/18/2011

Defendants' Reply Brief: due 6/1/2011 (as qualified below)

The proposed deadline for the reply brief assumes that plaintiffs will not renew on appeal, through cross-appeal or otherwise, claims or arguments not accepted by the district court. If that assumption proves incorrect, defendants may need additional time for the reply brief. We have consulted with plaintiffs' counsel, who advised us today that plaintiffs are not in a position to support or oppose this motion.

1. The Affordable Care Act is a comprehensive reform of our national health care system that includes hundreds of provisions. Plaintiffs are twenty-six states, two private citizens, and the National Federation of Independent Business ("NFIB"). Their amended complaint included six causes of action that challenged the constitutionality of several provisions of the Affordable Care Act.

The district court held that Congress lacked authority under its commerce power or taxing power to require that non-exempted individuals maintain a minimum level of health insurance coverage or pay a tax penalty. 26 U.S.C.A. § 5000A. The court thus held this minimum coverage provision invalid, although it rejected

plaintiffs' substantive due process challenge to the provision. The minimum coverage provision, which applies only to non-exempted individuals, and not to states or employers, will not go into effect until 2014.

The district court did not accept any of plaintiffs' other constitutional claims or arguments. In addition to rejecting plaintiffs' substantive due process challenge to the minimum coverage provision, the court granted the federal government's motion to dismiss plaintiffs' challenge to the employer responsibility provision, 26 U.S.C.A. § 4980H, which in specified circumstances will impose a tax penalty on large employers that fail to make adequate coverage available to their full-time employees if at least one full-time employee receives a tax credit to assist with the purchase of coverage through a health insurance exchange established under the Act. The court also granted the federal government's motion to dismiss plaintiffs' claim that provisions of the Act establishing health insurance exchanges, 42 U.S.C.A. § 18031, impermissibly "coerce" state governments. And, in its summary judgment ruling, the court likewise rejected plaintiffs' claim that the provision of the Act that will expand eligibility for the Medicaid program in 2014, 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII), is impermissibly "coercive."

Notwithstanding the district court's rejection of all of plaintiffs' claims except for their Article I challenge to the minimum coverage provision, the court, on

January 31, 2011, issued a declaratory judgment stating that the Affordable Care Act is invalid in its entirety. The court acknowledged that, "[i]n a statute that is approximately 2,700 pages long and has several hundred sections — certain of which have only a remote and tangential connection to health care — it stands to reason that some (perhaps even most) of the remaining provisions can stand alone and function independently of the individual mandate." Op. 65. The court also recognized that, "because a ruling of unconstitutionality frustrates the intent of democratically-elected representatives of the people, the 'normal rule' — in the 'normal' case — will ordinarily require that as little of a statute be struck down as possible." *Id.* at 71-72. Nonetheless, based on "the unique facts of this case and the particular aspects of the Act," which present a "situation [not] likely to be repeated," id. at 74, the court held that the minimum coverage provision cannot be severed from any other provision of the Act and thus declared the entire Act invalid.

On March 3, 2011, on defendants' motion seeking clarification of the intended effect of the January 31, 2011 declaratory judgment, the court stated that it had intended the declaratory judgment to be treated as the practical equivalent of an injunction with respect to the parties to this case. The court recognized, however, that its ruling would be "extremely disruptive," Op. at 17, and, *sua sponte*, issued a stay

pending appeal, contingent upon defendants' filing of a notice of appeal within seven days of the clarification order and seeking expedited appellate review.

2. Consistent with that order, defendants filed a notice of appeal earlier today, and respectfully request that the Court adopt the expedited briefing schedule set forth above.

Expedition is warranted, and the briefing schedule proposed here is similar to that approved by the Fourth Circuit in Commonwealth of Virginia v. Sebelius, Nos. 11-1057 & 11-1058 (4th Cir.), which is the only other case in which a district court invalidated the minimum coverage provision. The Fourth Circuit will hear argument in the Virginia case in seriatim with Liberty Univ., Inc. v. Geithner, No. 10-2347 (4th Cir.), in which the district court upheld the minimum coverage provision. The Sixth Circuit, in *Thomas More Law Ctr. v. Obama*, No. 10-2388 (6th Cir.), also granted a request for an expedited oral argument date following the close of briefing. Like the district court in *Liberty University*, the district court in *Thomas* More upheld Congress's authority to enact the minimum coverage provision. The federal government also recently consented to an expedited briefing schedule similar to that proposed here in Mead v. Holder, No. 11-5047 (D.C. Cir.), in which the district court upheld the minimum coverage provision.

Expedition in this case is particularly warranted because of the district court's unprecedented severability ruling, which presents issues that the federal government has not previously addressed in appellate briefs and covers numerous provisions of the Act already in effect.

We believe that the requested schedule allows for adequate briefing of the significant questions raised by the court's adverse rulings. It is less clear that the schedule allows sufficient time for preparation of defendants' reply brief. The proposed deadline for the reply brief assumes that plaintiffs will not renew on appeal claims or arguments that were not accepted by the district court. If that assumption proves incorrect, defendants reserve the right to seek additional time for the reply.

Respectfully submitted,

NEAL KUMAR KATYAL Acting Solicitor General

TONY WEST Assistant Attorney General

THOMAS F. KIRWIN United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2011, I filed the foregoing motion with the Court by federal express, overnight delivery and served copies on the following counsel by first class regular mail and email:

David Boris Rivkin, Jr.
Lee Alfred Casey
Baker & Hostetler LLP
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
drivkin@bakerlaw.com
lcasey@bakerlaw.com

Carlos Ramos-Mrosovsky
Baker & Hostetler LLP
45 Rockefeller Plaza, 11th floor
New York, New York 10111
cramosmrosovsky@bakerlaw.com

Larry James Obhof, Jr. Baker & Hostetler LLP 1900 E. 9th Street, Suite 3200 Cleveland, Ohio 44114 lobhof@bakerlaw.com

Blaine H. Winship
Office of the Attorney General, Florida
The Capitol, Suite PL-01
400 South Monroe Street
Tallahassee, Florida 32399
blaine.winship@myfloridalegal.com

Katherine Jean Spohn Office of the Attorney General, Nebraska 2115 State Capitol Lincoln, Nebraska 68509 katie.spohn@nebraska.gov

William James Cobb III Office of the Attorney General, Texas 209 W. 14th Street Austin, Texas 78711 bill.cobb@oag.state.tx.us

/s/ Samantha L. Chaifetz
SAMANTHA L. CHAIFETZ
Counsel for Defendants-Appellants