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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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

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 PPACA¹ 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).

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

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8 There is no question that PPACA conflicts with Arizona Constitution art. XXVII, § 2.
9 The Health Care Freedom Act (HCFA) protects the right to “pay directly for lawful health care
10 services” without being subject to “penalties or fines” for choosing to do so, Ariz. Const. art.
11 XXVII, § 2(A)(2), and shields Arizonans from compulsory participation in a health care system,
12 including inducement through “penalties or fines.” §§ 2(A)(1), (D)(1). While PPACA's
13 constitutionality under *federal* law may turn on whether it is construed as a mandate or tax,
14 *NFIB*, 132 S. Ct. at 2608, it unequivocally violates the Arizona Constitution under either
15 interpretation. This is because HCFA defines “penalties or fines” broadly, extending to:
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18 any civil or criminal penalty or fine, *tax*, salary, or wage withholding or surcharge
19 or any named fee with a similar effect established by law or rule by a government
20 established, created or controlled agency that is used to punish or discourage the
21 exercise of rights protected under this section.

22 Ariz. Const. art. XXVII, § 2(D)(5) (emphasis added). Moreover, the Supreme Court explicitly
23 recognized that the tax penalty “aims to induce the purchase of health insurance” and “seeks to
24 shape decisions about whether to buy health insurance.” *NFIB* at 2596. This goal is at odds with
25 HCFA's explicit prohibition on inducing participation in a health care system or of discouraging
26 direct payment for lawful health care services. §§ 2(A)(1), 2(A)(2), 2(D)(5).
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1 Plaintiffs have shown that where, as here, the federal law regulates an area traditionally
2 governed by states, the “high threshold [that] must be met if a state law is to be pre-empted for
3 conflicting with the purposes of a federal Act,” *Chamber of Commerce of the United States v.*
4 *Whiting*, 131 S. Ct. 1968, 1985 (2011), is not met. (Doc. 51 at 51-6; Doc. 70 at 12-14.) Here,
5 PPACA guarantees that:
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8 No individual, company, business, nonprofit entity, or health insurance issuer
9 offering group or individual health insurance coverage shall be required to
10 participate in any Federal health insurance program created under this Act . . . or
11 in any Federal health insurance program expanded by this Act . . . and there shall
12 be no penalty or fine imposed upon any such issuer for choosing not to participate
13 in such programs.

14 42 U.S.C. § 18115. In view of this provision, Defendants cannot meet the “high threshold”
15 required to prove that PPACA was meant to preempt the HCFA. *NFIB*’s construction of PPACA
16 as a tax does not disturb Plaintiffs’ HCFA claim, and accordingly, this Court should enforce the
17 protections the Arizona Constitution affords Plaintiffs.

18 **II. Congress’s tax power is limited by the reserved powers of the states**

19 The tax penalty is also unlawful because Congress cannot exercise its tax power in a
20 manner that displaces constitutionally-reserved state sovereignty. The federal Constitution
21 establishes a structure of government that divides sovereignty between the state and federal
22 governments. *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citations omitted) (“States ‘form
23 distinct and independent portions of the supremacy, no more subject, within their respective
24 spheres, to the general authority than the general authority is subject to them, within its own
25 sphere’”); *The Federalist* No. 45 at 289 (James Madison) (C. Rossiter, ed. 1999) (“The powers
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1 delegated by the proposed Constitution to the federal government are few and defined. Those
2 which are to remain to the state governments are numerous and indefinite”). Even the broad
3 enforcement powers bestowed upon Congress by the Fourteenth Amendment are curbed by the
4 reserved powers of the states. *Oregon v. Mitchell*, 400 U.S. 112, 128-29 (1970) (invalidating law
5 that enfranchised 18-year-olds in state and local elections where state law required voters to be
6 21). Limits on Congress’s enumerated powers are “critical to ensuring that . . . legislation does
7 not undermine the status of the States as independent sovereigns in our federal system.” *NFIB*,
8 132 S. Ct. at 2602. With narrow exceptions not applicable here, federal power that contravenes
9 state sovereignty “is not within the enumerated powers of the National Government.” *Bond v.*
10 *United States*, 131 S. Ct. 2355, 2366 (2011).

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

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22 The Founders envisioned a system of federalism in which states, with their powers
23 protected by the Tenth Amendment and other constitutional provisions, would counterbalance
24 the federal government so as to protect individual freedoms against concentrated power. *See*
25 *Bond*, 131 S. Ct. at 2364 (“Federalism is more than an exercise in setting the boundary between
26 different institutions of government for their own integrity. . . . Federalism secures the freedom
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1 of the individual”). To that end, the Constitution reserves to the states the power to protect the
2 individual liberties of their citizens within traditionally-reserved powers. Arthur E. Wilmarth,
3 Jr., *The Original Purpose of the Bill of Rights*, 26 Am. Crim. L. Rev. 1261, 1293 (1989). States
4 may fulfill this function by adopting guarantees for individual liberties broader than the federal
5 Constitution. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). This dual system
6 of federalism enables states to “respond, through the enactment of positive law,” to protect the
7 rights of citizens “without having to rely solely upon the political processes that control a remote
8 central power.” *Bond*, 131 S. Ct. at 2364. Indeed, the Ninth and Tenth Amendments were meant
9 to work in tandem to ensure federal power was circumscribed by state law guarantees of
10 individual liberty enacted pursuant to the state’s reserved powers. Wilmarth, 26 Am. Crim. L.
11 Rev. at 1302 & n.209 (citing House debates of Aug. 18, 1789; letter from Hardin Burnley to
12 James Madison dated Nov. 28, 1789; letter from James Madison to George Washington dated
13 Dec. 5, 1789; 2 *The Bill of Rights: A Documentary History* 1118, 1190 (B. Schwartz ed. 1971);
14 Caplan, *History and Meaning of the Ninth Amendment*, 69 VA. L. Rev. 223, 262-64 (1983)).

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20 The people of Arizona did that by adopting HCFA, a positive protection of their rights in
21 a field of law traditionally governed by states’ police powers. *Rush Prudential HMO, Inc. v.*
22 *Moran*, 536 U.S. 355, 387 (2002) (the “field of health care” is “a subject of traditional state
23 regulation”); *see also Gonzalez v. Oregon*, 546 U.S. 243, 271 (2006) (Controlled Substances Act
24 could not be enforced to prevent physicians who prescribed drugs, in compliance with state law,
25 from assisting suicide of the terminally ill); (Doc. 51 at 54-5; Doc. 70 at 13-14.) HCFA, when
26 properly enforced, preserves “the promise of liberty” as secured by the Constitution’s system of
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1 divided sovereignty. *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991). Enforcing PPACA's
2 tax penalty would supersede Arizona's authority to shield individual liberty from federal power,
3 thwarting the very aim of American federalism.
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5 **III. The tax power cannot be exercised in a way that infringes on individual rights**

6 Just as Congress's enumerated powers are circumscribed by state sovereignty, they are
7 likewise constrained by the people's substantive rights. Thus, even construed as an exercise of
8 Congress's tax power, PPACA violates Plaintiffs' rights to medical autonomy and privacy.
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10 "When Congress' exercise of one of its enumerated powers clashes with those individual
11 liberties protected by the Bill of Rights, it is [a court's] delicate and difficult task to determine
12 whether the resulting restriction on freedom can be tolerated." *United States v. Robel*, 389 U.S.
13 258, 264 (1967) (citations omitted) (striking down law banning member of communist
14 organization from working in defense facility as inconsistent with freedom of association).
15 Plaintiffs have established that Nick Coons has a fundamental right to medical autonomy. (Doc.
16 51 at 35-7.) PPACA places a substantial obstacle before Plaintiff Coons' ability to exercise that
17 right. Even construed as a tax, PPACA "seeks to shape [individual] decisions about whether to
18 buy health insurance." *NFIB*, 132 S. Ct. at 2596. The tax penalty forces Plaintiff Coons to divert
19 some of his limited financial resources to obtaining a health care plan he does not desire or
20 otherwise to save his income to pay the exaction. (Doc. 51 at 35.) Selecting either option
21 reduces the health care treatments and doctor-patient relationships he can afford to choose,
22 thereby unduly burdening his right to medical autonomy. *See Planned Parenthood v. Casey*, 505
23 U.S. 833, 884 (1992) (plurality op.) (regulation may not "impose[] an undue burden on [the]
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1 ability to make [a] decision . . . [at] the heart of the liberty protected by the Due Process
2 Clause”). The *NFIB* Court itself acknowledged that “Congress’s ability to use its taxing power
3 to influence conduct is not without limits,” and that “exactions obviously designed to regulate
4 behavior” or that were so burdensome as to constitute a “penalty with the characteristics of
5 regulation and punishment,” would be unconstitutional. 132 S. Ct. at 2599-2600 (citations
6 omitted). But such questions were not raised or addressed in that case.
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9 Plaintiff Coons has a constitutionally-protected privacy right not to be compelled to
10 disclose his personal medical records and other sensitive information. (Doc. 51 at 37-40.) Even
11 construed as a tax, PPACA unduly burdens his ability to exercise that right by forcing him
12 choose between entering into relationships that require him to relinquish such information, or
13 paying a penalty. The Constitution prohibits “obstacles [that] . . . impact[] upon the . . . freedom
14 to make a constitutionally protected decision.” *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977).
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17 Conclusion

18 Counts IV, V, and VIII of Plaintiffs’ Second Amended Complaint are still viable in light
19 of the Supreme Court’s interpretation of PPACA. Accordingly, Plaintiffs’ Motion for Summary
20 Judgment should be granted with respect to Count VIII, and they should be allowed to proceed
21 with discovery on Counts IV and V.
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23 **DATED:** September 13, 2012
24

25 Respectfully submitted,

26 /s/ Christina Sandefur
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CERTIFICATE OF SERVICE

1
2 I, Christina Sandefur, an attorney, hereby certify that on September 13, 2012, I
3
4 electronically filed a Plaintiffs' Rule 12(d) Motion with the Clerk of the Court for the United
5 States District Court, District of Arizona by using the CM/ECF system.

6 I further certify that all participants in the case are registered CM/ECF users and that
7
8 service will be accomplished by the District Court's CM/ECF system.

9
10 /s/ Christina Sandefur
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