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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NICK COONS, *et al.*,	
Plaintiffs,	**No. 2:10-cv-1714-GMS**
v.	**Plaintiffs' Response to Defendants' Motion to Stay**
TIMOTHY GEITHNER, *et al.*,	
Defendants.	

INTRODUCTION

On November 29, 2011, Defendants filed their second Motion to Stay in this case. In this most recent motion, Defendants move to stay the entire proceedings pending resolution of *U.S. Dep't of Health & Human Servs. v. Florida*, No. 11-398; *Nat'l Fed'n of Indep. Business v. Sebelius*, No. 11-393; and *Florida v. U.S. Dep't of Health & Human Servs*. No. 11-400 (referred to collectively herein as the "*Florida* case"), which are currently pending review by the United States Supreme Court. *Coons v. Geithner* has been fully briefed on Defendants' Motion to Dismiss and the parties' cross-motions for summary judgment since September 19, 2011.

Defendants claim that this case should be stayed because the *Florida* case "presents one of the same constitutional questions presented in this case" – whether the Individual Mandate exceeds Congress's authority under the Commerce Clause – and thus, the "outcome of the Supreme Court proceedings in the *Florida* litigation will substantially affect the outcome in this case." (*See* Defs.' Mot. Stay, 2-3.) Defendants further claim that Plaintiffs' constitutional challenge to the Independent Payment Advisory Board ("IPAB") should also be stayed pending the Supreme Court's decision on the severability issue. (*Id*. at 3.) Their motion relies on *Landis v. North Am. Co*, 299 U.S. 248, 254-55 (1936), and is solely premised on the notion of judicial economy. (Defs.' Mot. Stay 1.) However, according to *Landis*, it is the moving party's burden to make a clear case that hardship or inequity would result absent a stay, and Defendants have not even alleged – let alone shown – that hardship or inequity would result. *See*, *Landis*, 299 U.S. at 255. Accordingly, Defendants' Motion should be denied in part, to the extent it seeks to stay anything other than Counts I, II and III of Plaintiffs' Second Amendment Complaint – which are Plaintiffs' Commerce Clause, Necessary and Proper Clause and Taxing Power claims. In the *Florida* case, the Supreme Court will directly address these claims. Further, Counts IV[1] and V[2], are counts on which Plaintiffs will seek discovery; therefore, Plaintiffs do not object to a stay of these claims.

I. DEFENDANTS FAILED TO MEET THEIR BURDEN TO SUPPORT THEIR MOTION

[1]Count IV alleges violations of the Fifth and Ninth Amendments' guarantee of medical autonomy.

[2]Count V alleges violations of the Fourth, Fifth and Ninth Amendments' guarantee of privacy.

In deciding whether to stay a case, the Court considers five factors:

> (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Melendres v. Maricopa County, 2009 WL 2515618 *1 (D. Ariz.) (Aug. 13, 2009) (Snow, Murray J.) (unpublished) (citing *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 325 (9th Cir. 1995)). *See also Landis, 299 U.S. at 255.*

While Plaintiffs recognize that the decision on Defendants' motion to stay calls for the Court's "exercise of judgment" that "must weigh competing interests and maintain an even balance," including the "time and effort for itself, counsel and the litigants," "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 254-55. Moreover, the movant of a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will work damage to someone else." *Id.* at 255. Defendants did not even attempt to make a case of hardship or inequity in seeking their stay, which Plaintiffs submit they could not have done in any event because they will suffer no adverse effect at all by its denial.

II. PLAINTIFFS WILL BE PREJUDICED BY A STAY IN THIS CASE

While Defendants will not be prejudiced by denial of their Motion, Plaintiffs will be prejudiced by granting it because there is a "fair possibility" that a stay would harm Plaintiffs.

Id. at 255. Plaintiffs have a strong interest in resolving their claims expeditiously. Plaintiffs seek injunctive relief against ongoing and future harm, further counsels against a stay." *Melendres*, 2009 WL 2515618 at *2 (citing *Lockyer v. Mirant Corp.*, 398 F.3d. 1098, 1112 (9th Cir. 2005).

Count VIII: Plaintiffs' Non-Preemption Claim

Article XXVII, § 2, of the Arizona Constitution, known as the Health Care Freedom Act ("HCFA"), 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." In Count VIII of the Second Amended Complaint, Plaintiff Coons alleges that the Patient Protection and Affordable Care Act ("PPACA"),[3] violates the HCFA but does not preempt it. As such, Plaintiff's claim is not before the Supreme Court as part of its review in the *Florida* case, and therefore will not be addressed in the event the Court upholds the Mandate. For this reason, Plaintiffs will be prejudiced by being delayed in their opportunity to prosecute this claim and thus, a stay should not be granted.

Unless it is stricken, the Mandate will be enforced beginning on January 1, 2014; however, many of PPACA's mandates are already in effect. The Act's "minimal essential coverage" provisions have been in effect since September 2010, *see* PPACA § 1004, and include: a prohibition on lifetime or annual limits on insurance benefits, *see* 42 U.S.C. § 300gg-11; preventative coverage mandates, *see* § 300gg-13; and dependant coverage mandates. *See* §

[3]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).

300gg-14. All of these current mandates are already impacting Plaintiffs and at the same time, other provisions that directly impact Plaintiffs require significant steps to be taken to make compliance possible by the impending effective dates, *see e.g.*, PPACA's health insurance exchange provisions, 42 U.S.C. § 18031 *et seq.*, which limit the types of plans and providers that can participate in the market.

Further, the Act currently prohibits the very kind of insurance the HCFA gives Plaintiff Coons the freedom to purchase (Plfs.' Sec. Am. Compl. ¶ 14), which is the insurance of his choice, catastrophic insurance coverage. *See* § 1302(d), (e). This prohibition strikes the heart of the very freedoms the Arizona HCFA protects: the freedom to purchase (or not) the insurance and medical care that best suits an individual's needs. And it is the freedoms guaranteed by the HCFA that Plaintiffs seek to protect through their non-preemption claim.[4]

The protection of the health of its citizens is a core concern of the State's traditional police powers, to which the presumption against preemption applies. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Wyeth v. Levine*, 555 U.S. 555, 565 n. 3 (2009). The party asserting preemption bears the burden of proving it, *see e.g., DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976), and as Plaintiffs have shown through their briefing on the two dispositive motions

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[4]Plaintiffs' fully-briefed Motion for Summary Judgment and Reply in Further Support set forth Plaintiffs' non-preemption claim and the legal support therefor. *See* Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss and in Support of their Motion for Summary Judgment, 51-56; and Plaintiffs' Reply in Further Support of their Motion for Summary Judgment and in Response in Opposition to Defendants' Motion for Summary Judgment, 12-14.)

pending in this Court, Defendants failed to do so.[5] The Supreme Court recently reaffirmed the bedrock principle that "[f]ederalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, __ U.S. __, 131 S. Ct. 2355, 2364 (2011). The Individual Mandate and the other PPACA provisions cited above eviscerate the fundamental protections of individual liberty that the Arizona HCFA safeguards. Plaintiffs should not be deterred or slowed down in vindicating these freedoms by imposing a stay in this lawsuit.

Plaintiffs would be prejudiced by a delay in vindicating rights guaranteed by the Arizona Constitution, while Defendants would not be burdened by the denial of a stay. Moreover, this case has been fully briefed for three months and enormous public interests are at stake. Therefore, Defendants' Motion to Stay Plaintiffs' non-preemption claim should be denied. *See Melendres*, 2009 WL 2515618 at *1.

Count VII of Plaintiffs' Complaint: Plaintiffs' Constitutional Challenge to the Independent Payment Advisory Board

Funding for IPAB began October 1, 2011, the start of fiscal year 2012. 42 U.S.C. § 1395kkk(m)(1)(A). Accordingly, as of the date of this filing, federal funds totaling at least $15

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[5]In the closest case on point, *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court found that federal law did not empower the Attorney General to prohibit physicians from providing drugs for assisted suicide in conformance with state statute. To hold otherwise, the Court found, would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality." *Id.* at 275.

million are already being drawn from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Trust Fund to pay for IPAB. § 1395kkk(m)(2). Right now, the President can begin appointing Board members. In turn, IPAB in turn can begin developing public reports, 42 U.S.C. § 1395kkk(n), reports that must be taken into account in developing IPAB's legislative proposals that become law in 2014, without administrative rulemaking or review, meaningful congressional oversight or judicial review. §§ 1395kkk (c)(2)(B); (d)(3); (e)(2)(B); (e)(1); and (e)(5). Under PPACA, these reports will be immune from administrative rulemaking and review, meaningful congressional oversight and judicial review.

Under Defendants' stay scenario, this Court's consideration of Plaintiffs' Complaint will be delayed until the end of June 2011, with a decision to come sometime after that. Then, the inevitable appeals process would follow in the Ninth Circuit. Therefore, once this claim even has a chance to get out of the District Court and to the Ninth Circuit, the appeals process would then most likely extend for more than 16 months and thus, well into 2014. *See* Judicial Business of the United States Courts, 2010 Annual Report of the Director, Table B-4, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (which reports the average time for a Ninth Circuit appeal). At that point, IPAB will not only be operational; it is probable that a decision on Supreme Court review, let alone a Supreme Court decision, would not occur before IPAB issued its first legislative proposals, which are due January 15, 2014. § 1395kkk(c)(3). This means that because IPAB legislative proposals are practically certain to become law as early as April 2014, § 1395kkk(d)(2), there is more than a "fair possibility" that any Supreme Court decision would come after that date. Clearly, under

this scenario, the stay Defendants are seeking would have more than a "fair possibility" of injuring Plaintiffs. *See Landis*, 299 U.S. at 255. Indeed, if all of Plaintiffs' claims are stayed in the District Court, Plaintiffs would be foreclosed from pursuing expedited appellate review that would at least give Plaintiffs a chance to receive a determination on IPAB's unconstitutionality and avoid a situation where IPAB has been able to enact law before their challenge can be heard. Moreover, a resolution of IPAB's constitutionality will serve Plaintiffs', Defendants', Congress's and the taxpayers' interests by preventing the potentially unnecessary expenditure of resources, should IPAB be declared unconstitutional.

The only way that cases currently before the Supreme Court will have an effect on IPAB is if the Court: 1) finds that no procedural obstacles prevent a decision on the merits of the Individual Mandate; 2) holds the Mandate unconstitutional; and 3) concludes that the Mandate is not severable from the remainder of PPACA, thus striking down the entire law. Otherwise, IPAB will remain operative. Accordingly, the only thing that is absolutely certain is that the Supreme Court in the cases currently before it will *not* be considering the constitutionality of IPAB; and for that reason, Defendants' Motion for Stay should be denied.[6]

CONCLUSION

[6]Plaintiffs also maintain that IPAB is not severable from the remainder of the Act. Based on the sheer breadth of PPACA and its multiple references to Medicare reform, wholly apart from the provisions creating IPAB, it would be impossible to ascertain on a section-by-section basis if a particular statutory provision could stand (and was intended by Congress to stand) independently of IPAB. This claim is not before the Supreme Court; therefore, it should not be subject to a stay in this case.

Given this case has been fully briefed since September 19, there is no judicial economy or adverse effect on the litigants to be spared by further prolonging a decision in this case. Plaintiffs respectfully submit that the best use of the parties' and judicial resources would be to issue a decision, rather than suspending the decision altogether in a case that has been litigated for more than a year and has been fully briefed on two dispositive motions. The parties' and the public's interests in receiving a decision, coupled with the injunctive nature of the relief sought, militate against a stay. *See Melendres*, 2009 WL 2515618 at *5.

Defendants failed to meet their burden in support of their Motion to Stay. While Plaintiffs do not object to the stay on Counts I-V, Plaintiffs do object to a stay of the entire case. Accordingly, for the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Stay and proceed with the issuance of a decision in this fully briefed case.

DECEMBER 13, 2011

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Diane Cohen, an attorney, hereby certify that on December 13, 2011, I electronically filed Plaintiffs' Response to Defendants Motion for Stay 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/ Diane S. Cohen