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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 10-4600

NEW JERSEY PHYSICIANS, INC., MARIO A. CRISCITO, M.D. and PATIENT ROE,

v.

THE HON. BARACK OBAMA, President of the United States, *in his official capacity;* THE HON. TIMOTHY GEITHNER, Secretary of the Treasury of the United States, *in his official capacity;* THE HON. ERIC HOLDER, Attorney General of the United States, *in his official capacity;* and THE HON. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, *in her official capacity.*

NEW JERSEY PHYSICIANS, INC., MARIO A. CRISCITO, M.D. and PATIENT ROE,

Appellants.

On Appeal From the United States District Court
for the District of New Jersey
D.C. Civil Action No. 2:10-cv-1489 (SDW-MCA)
(Honorable Susan D. Wigenton, U.S.D.J.)

APPELLANTS' REPLY BRIEF

OF COUNSEL:

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ARGUMENT

THE PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.

In its brief, the government attempts to cast this action as though it were a challenge to the validity of a typical legislative or administrative enactment, which affects a relatively few number of individuals in a direct manner. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). In such a case, of course, a plaintiff has no standing to sue based upon claims of "only harm to his and every citizen's interest in proper application of the Constitution." *Goode v. City of Philadelphia*, 539 F.3d 311, 322 (3d Cir. 2008). However, this case does not involve such an abstract notion of the "proper application of the Constitution." This case involves a mandate that virtually each and every citizen of this nation engage in a specified economic activity, or face a penalty for failure to do so. Such an effort is unprecedented, and goes far beyond the boundaries to which the federal government has ever attempted to extend its power. As such, every citizen who will be directly affected by this legislation has standing to challenge it.

In its brief, the government argues that the plaintiffs have no standing to challenge "a provision that ultimately may have no application to the plaintiff." Rb

at 15. This statement is flatly wrong. Whether the plaintiffs, or the members of New Jersey Physicians, have health insurance, do not have health insurance or otherwise, they will all be subject to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)("PPACA"), and its individual mandate, Section 1501, when that provision of the PPACA goes into effect in 2014. It is the right of every citizen to be free from illegal, unconstitutional compulsion. If the PPACA goes into effect, both the individual plaintiffs, and the members of New Jersey Physicians, will be subject to this illegal mandate. They have standing to bring an action to prevent that from occurring. This is something much more than "every citizen's interest in proper application of the Constitution."

In addition to being in the same situation that virtually every other citizen of the United States is in, the certainty of being subject to the mandate when the PPACA goes into effect in 2014, Dr. Criscito and the members of New Jersey Physicians will be affected in other ways, as well. The government cannot seriously dispute that the PPACA will effect a profound change in the way medical care is delivered and paid for in the United States. Indeed, that is one of the avowed, stated purposes

for which this legislation was enacted. It is America's physicians who will be most directly affected by these aspects of the PPACA. Dr. Criscito has standing to assert these claims on his own behalf, and New Jersey Physicians has associational standing to assert these claims on behalf of its physician members. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

In an act of pure political gamesmanship, the PPACA, including the individual mandate, will not go into full force and effect until 2014. This date is, of course, after the upcoming presidential election in 2012, so that the full effects of this statute, including the individual mandate, will not be felt until after the electorate has had an opportunity to pass judgment upon the current administration at the ballot box.

Presumably, the administration fears that the actual effects of the PPACA will be far different than the rosy picture it paints. However, in light of the certainty of the PPACA's effective date in 2014, the government cannot argue that the effects of the statue are remote or speculative. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy

that there will be a time delay before the disputed provisions will come into effect." *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, - U.S. -, 130 S.Ct. 1758, 1767 n. 2 (2010)(*quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)). If "the enforcement of a statute is certain, a pre-enforcement challenge *will not be rejected on ripeness grounds." Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008)(emphasis added). This is particularly true where, as here, the challenge mainly raises questions of law. *See Pc. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201-3 (1983)(case ripe where "predominantly legal" question raised). Unless stopped by a Court or repealed by Congress, the PPACA will certainly go into effect as scheduled and when it does, the compulsion of the individual mandate will apply to the individual plaintiffs and the members of New Jersey Physicians, and the statute's impact upon the practice of medicine, and thereby upon Dr. Criscito and all the members of New Jersey Physicians, will be felt.

It is curious indeed, in light of the fevered rush which accompanied the enactment of the PPACA, and the calls from the current administration for the urgent need to enact this legislation immediately, if not sooner, that the

legislation does not take full effect until some four years after its rather precipitate enactment. However, the government should not be permitted to use the fact that the effective date of the PPACA is in the future in order to shield the Act from Constitutional challenges from citizens who will be directly and profoundly affected by the individual mandate, and the other provisions of the statute, when the PPACA inevitably goes into effect.

There is no contingency or uncertainty about the injuries which all the citizens of the United States will suffer if the individual mandate is allowed to go into effect. All the citizens of this nation have the right not to be subject to unconstitutional laws. The unprecedented broadness of the applicability of the individual mandate means that every citizen who will be affected by it must have standing to challenge it. Physicians, whose practices will be most directly and profoundly affected, cannot be denied an opportunity to challenge the statute.

Finally, a large portion of the government's brief consists of a recitation of the supposed salutary benefits which the PPACA will bring to the nation. Again, if it is such a beneficial piece of legislation, and will bring such marvelous advantages to the nation, it is curious that the effective date was placed so far in the future. However,

at this stage of this action, where the case has been dismissed on standing grounds, the merits, or lack thereof, of the PPACA are simply not relevant. Indeed, if the individual mandate exceeds the legislative powers granted under the Commerce Clause and is unconstitutional, it does not matter how beneficial the statute might be; if it is unconstitutional, it is unconstitutional. However, at this stage of this action, it simply does not matter whether the PPACA is good, bad or neutral.[1] The plaintiffs will be directly and profoundly affected when the PPACA goes into effect, and they have standing to mount a legal challenge to the statute.

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[1] Of course, if the statute is not Constitutional, then it also does not matter whether it is good, bad or indifferent. If, in enacting the PPACA, and its individual mandate, Congress overstepped the powers granted to it under the Constitution, then the supposed merits of the statute are simply irrelevant. Indeed, in singing the praises of the PPACA, the government seems to be advancing the position that since the statute is "good," it does not matter whether its enactment was within the scope of the powers granted to the federal government by the Constitution. This is not only a flawed argument; it is also a dangerous one, as the concept of "good" and "bad" legislation depends entirely upon the subjectivity of the individual or entity which makes such determination.

CONCLUSION

Nothing in the government's brief constitutes a competent challenge to the arguments put forth in the plaintiffs' principal brief. For the reasons set forth herein, as well as for the reasons set forth in the plaintiffs' principal brief, the decision of the District Court must be reversed and the matter remanded for consideration of the merits of the plaintiffs' claims.

Respectfully submitted,

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By: /s/ Robert J. Conroy
Robert J. Conroy

Dated: Bridgewater, New Jersey
March 28, 2011

COMBINED CERTIFICATIONS

CERTIFICATION OF BAR MEMBERSHIP

All attorneys who appear on this brief are members of the bar of this Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(A)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains 165 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word 2003 with 12-point Courier New Typeface, having ten (10) characters per inch.

3. The text of the paper brief is identical to the text in the paper copies.

4. The electronic version of this brief was scanned for viruses using Trend Micro Office Scan™ Client, version 10.0, virus scan engine (32-bit) 9.205.1002, and no virus was detected.

DECLARATION OF FILING AND SERVICE

1. I am an Attorney-At-Law of the State of New Jersey, a Member of the Bar of the United States Court of Appeals for the Third Circuit and a principal of the law firm of Kern, Augustine, Conroy & Schoppmann, P.C., counsel for the appellants in the above-captioned appeal, New Jersey Physicians, Inc., Mario A. Criscito, M.D. and Patient Roe. I have personal knowledge of the facts set forth herein.

2. On March 28, 2011, the Appellants' Reply Brief was filed with the Clerk of the United States Court of Appeals for the Third Circuit and served upon counsel of record for the respondents by means of the Court's electronic filing system, pursuant to L. App. R. 31.1(a).

3. On March 28, 2011, the original, and nine (9) true paper copies, of the Appellants' Reply Brief were sent to the Clerk of the United States Court of Appeals for the Third Circuit via First Class Mail, postage prepaid, pursuant to L. App. R. 31.1(a) and 30.1(b), for filing.

DECLARATION AS TO ALL CERTIFICATIONS AND DECLARATIONS

I declare under penalty of perjury that the foregoing statements made by me, in all the above certifications and declarations, are true.

By: /s/ Robert J. Conroy
Robert J. Conroy

Attorney for Appellants

Dated: Bridgewater, New Jersey
March 28, 2011