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Goudy-Bachman v. HHS - Plaintiffs' Reply Brief

Barbara Goudy-Bachman

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BARBARA GOUDY-BACHMAN; and GREGORY BACHMAN	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 1:CV-10-763**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY, and TIMOTHY F. GEITHNER, in his capacity as Secretary of the United States Department of the Treasury,	:	(Judge Conner)
Defendants	:	*Electronically Filed*

PLAINITFFS' REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Paul A. Rossi
Counsel for Plaintiffs
(PA 84947)
873 East Baltimore Pike, #705
Kennett Square, PA 19348
Office: 717.285.2858
Cell: 717.615.2030
Email:panthonyrossi@comcast.net

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INTRODUCTION

Plaintiffs' file this succinct reply to defendants' brief in opposition to plaintiffs' motion for summary judgment to focus this Court's attention on those issues which are dispositive in favor of plaintiffs' motion for summary judgment.

ARGUMENT

I. THE BROADEST EXTENT OF THE COMMERCE AND NECESSARY AND PROPER CLAUSES ARE CAPPED BY THE DENIAL OF A GENERAL POLICE POWER TO CONGRESS.

At bottom, defendants' argument in opposition to plaintiffs' motion for summary judgment requires this Court to ignore or overlook the fact that the Supreme Court has consistently denied Congress a police power to compel individuals and states to engage in any action not directly tied and incidental to the exercise of an enumerated power. In *Printz v. United States*, 521 U.S. 898 (1997) the Court denied to Congress the power to compel states to implement federal regulatory schemes because such power to command was not included in the grant of power from the states to the federal government and inconsistent with the constitutional framework of dual sovereigns. *Id*. at 916-20. The Tenth Amendment provides that powers not delegated to the federal government are reserved not only to the states but also to the people. As such, Congress cannot compel individuals, in support of congressional regulatory scheme to achieve universal health care coverage, to purchase health care insurance they otherwise would choose not to purchase.

The power to compel an individual to purchase health care insurance is an exercise of police power in excess of the congressional authority under the Commerce and Necessary and Proper Clauses. It does not matter if the attempted exercise of police power is in aid of a policy

that Congress or this Court may find worthy or that Congress or this Court may determine will solve a perceived flaw in an interstate market.

Even if this Court accepts defendants' argument that the choice not to purchase health care insurance, without more, implicates a substantial impact on interstate commerce, the police power is not within the congressional Commerce Clause quiver to remedy the alleged interstate impact. And again, even if this Court, were to determine that future contingent commercial activity upon the purchase of health care services can be considered as imparting on the present state of repose a substantial impact on interstate commerce, even then, compelled market participation is an exercise of police power outside the ambit of the Commerce or the Necessary and Proper Clauses.

The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *United States v. Lopez*, 514 U.S. 549, 552-53 (1995). The commerce power is thus limited to permit Congress to set the rules by which those who seek to engage in commerce must abide when their commercial conduct has a substantial impact on interstate commerce. The Commerce Clause does not comprehend the power to command individuals to engage in commerce in the first instance.

The power to command commerce is greater than, and not merely incidental (as required under the Necessary and Proper Clause) to, the power to regulate commerce. As a matter of first principle, Congress only has the power to regulate commerce that has a substantial impact on interstate commerce. The Commerce Clause does not give Congress the power to regulate or command any state of human condition or affairs that might have some arguable future impact (even a substantial one) on interstate commerce (i.e., inference upon inference). Yes, the choice not to purchase health care insurance (like any other choice not to purchase a good or service) is

a choice with an economic dimension – but an economic choice (without more) is not commerce sufficient to trigger the first "prong" of the Commerce Clause. As Justice Kennedy explained in *Lopez* : "In a sense any conduct in our interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far" and "[i]f Congress attempts the extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Lopez* at 563. Regulation of the insurance industry is traditionally an area of almost exclusive state concern.

Defendants cite no case in their brief in opposition to plaintiffs' motion for summary judgment where an economic choice is adjudged to be commerce sufficient to trigger the commerce power. First, you must have commerce, without "commerce" there is no further analysis as to whether or not the human condition that Congress seeks to regulate has a substantial impact on interstate commerce. Defendants lose without any further analysis. The power to command commerce is, therefore, larger and more powerful than the mere power to regulate and, therefore, also beyond the confines of even the Necessary and Proper Clause.

II. CONSUMERS ARE NOT SUBJECT TO COMMERCE CLAUSE JURISDICTION.

Consumers are not subject to the personal jurisdiction of congressional power and/or regulation. Congress can ban the purchase and/or possession of a good or service placed into interstate commerce, such as illicit drugs and light bulbs, because they are in interstate commerce. Congress can also impose civil and/or criminal liability on any individual who might purchase any such banned good or service as part of its authority under the Necessary and Proper Clause. Such authority, however, does not extend to empower Congress to place the person of the consumer under a continuing regulatory scheme merely because they have decided to purchase a legal good and/or service in interstate commerce.

The fiction created by defendants' that the choice not to purchase health care insurance is a commercial act that has a substantial impact on interstate commerce sufficient to trigger the commerce power, is shown to be thread-bare when considered from the angle that even consumers who have purchased health care insurance cannot be compelled to maintain such coverage forever because it demonstrates that a consumer choice, without more – no matter what the decision – is insufficient to support the commerce power.

For instance, the hotelier in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), having chosen to engage in interstate commerce could avoid congressional regulation by dropping out of the business of running a hotel (no one has suggested that Congress could compel, under the Commerce Clause power, the hotel owner to remain in the hospitality business against his/her will – a result placed in doubt under defendants' expanded notion of commerce power). Further, those persons in interstate commerce whom Congress sought to protect and who might seek to stay at the *Heart of Atlanta* hotel were not subject to congressional regulation under the Commerce Clause. Travelers and consumers crossing interstate lines do not trigger congressional power over their persons based on the mere fact that they might or might not make the economic decision to rent a hotel room at the *Heart of Atlanta* hotel.

If a consumer who makes the economic decision to actually engage in commerce is not subject to the commerce power then it must be obvious that those who make the economic decision not to engage in commerce also cannot be compelled to engage in commerce under the commerce power. Congress has no authority to command those who have made the choice to purchase health care insurance to continue to maintain coverage merely because they chose to purchase health care insurance coverage; conversely, those who have made the economic decision not to purchase health care insurance, being even further remove from interstate

commerce, cannot be compelled by Congress to purchase health care insurance under the Individual Mandate.

Wal-Mart provides the economic service of filling drug prescriptions. At some level Wal-Mart is a willing participant in one segment of the health care industry. Wal-Mart is an interstate commercial and economic juggernaut. If defendants' argument is to be accepted by this Court, Congress could, under its commerce power, force Wal-Mart (as part of a regulatory scheme to inject fresh competition into the "unique" interstate market for health insurance) into the business of providing health care insurance (because health care is such a "unique" market) to the public on the same terms as all other health care insurance providers. Further, if defendants' argument is to be accepted by this Court, Wal-Mart could not refuse such a mandate by making the economic choice to drop out of the interstate market altogether, because such a choice would itself be economic in nature sufficient to allow Congress to compel Wal-Mart from dropping out of this unique market in which defendants' assert everyone can be compelled to participate.

The commerce power merely allows Congress to set the rules by which those who willingly seek to engage in commercial activity must abide. Congress can set up the field, but no one can be forced by Congress to play on the field it has set. The power to compel is vacant from the Commerce Clause. Defendants offer no citation to refute this key reality.

III. THE FREE RIDER PROBLEM AND "UNIQUENESS" AS A CONSTITUTIONALLY LIMITING STANDARD IS NOT SUFFICIENT TO SURVIVE JUDICIAL SCRUTINY

Defendants' argument that the health care market is "unique" rests, largely, on the free-rider issue. Defendants argue that anyone can be stricken by a heart attack and suffer crippling medical bills which, if not paid by the patient, is shifted to society thereby warranting

congressional regulation to make sure everyone can pay their medical bills through insurance coverage.

First, every commercial market suffers from some level of free-riding and cost shifting. Billions of dollars of student loans go unpaid shifting the cost of education to the taxpayer. Energy companies are forbidden to turn off heat to deadbeat customers during the winter months, shifting the costs to all other consumers of energy and/or the taxpayers.

In the health care market, the free-riding problem is substantially one of Congress's own creation. The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, requires hospitals with emergency departments to provide the care necessary to stabilize patients with emergency medical conditions, without regard to a patient's ability to pay for the care received. As brutish as it may sound, if Congress removed its own impediments to a more free market health care system the free-rider problem would not exist to the extent that the health care market would be sufficiently "unique" to warrant the grant of the police power to Congress in exercise of the Commerce Clause. As stated in prior briefs and at oral argument, "uniqueness" is not a constitutional standard sufficient to bind the new found congressional power to "compel" to the health care insurance industry alone. Such a standard would merely invite Congress to distort any market in which it wanted to compel participation by creating free-rider and cost-shifting problems in order to bootstrap the greater power to compel citizens to participate in a targeted or favored market.

And what is really rich is that Congress is, by far, the largest free-rider in the health care industry by an order of magnitude. Congress forces doctors to provide medical services at reimbursement rates lower than cost. Through the Medicare and Medicaid programs, the federal government is itself a free-rider to the tune of *hundreds of billions of dollars*. By comparison,

the occasional uninsured individual who cannot afford the care that Congress has itself mandated that doctors provide has, in the aggregate, a fairly insubstantial impact on interstate commerce.

In any event, the *Lopez* and *Morrison* Courts rejected cost shifting causation as a basis for the commerce power. *Lopez*, 514 U.S. at 564; *United States v. Morrison*, 529 U.S. 598, 615 (2000). The Individual Mandate must be considered solely by reference to the "economic nature of the regulated activity" and not by future economic conditions that the regulated activity might or might not spawn. *United States v. Morrison*, 529 U.S. 598, 610 (2000); *Lopez* 514 U.S. at 559-61; *Gonzales v. Raich*, 545 U.S. 1, 25 (2005). Market participation is necessary to have an impact on that market. Any other analysis is piling "inference upon inference" in order to strain logic to find an economic impact. Even in the aggregate, zero times one-million is still zero.

CONCLUSION

In *Lopez* and *Morrison* the Supreme Court clearly signaled that it has placed the brakes on further expansion of Congress's power to regulate under the Commerce Clause. While the Court refused to overturn the holding of *Wickard* in *Raich* (*Raich* being *Wickard* on Marijuana), this new Commerce Clause paradigm clearly sets forth that the current Court majority is disinclined to expand the commerce power beyond the outer confines of *Wickard* and *Raich*. Defendants' novel legal theory that consumer choice and consumers themselves are proper subjects of congressional regulation in support of "unique" markets under the Commerce Clause is not supported by any decision of the Supreme Court, nor by our history as a people, nor by the fight waged by this country during the Cold War in opposition to the very kind of centralized economic government power that defendants' argument in support of the Individual Mandate would plant as a seedling at the very core of the Constitution.

With respect, plaintiffs suggest that this Court must consider the liberty interests of not only those who are born, but those who are yet to be born. Declaring the Individual Mandate constitutional and conferring upon Congress a boundless general police power under the Commerce Clause places the liberty interest of future generations at grave risk. Today's contrivance that the health care industry is sufficiently "unique" to prevent the expansion of congressional police power, is naïve at best, and will fade with the passage of time and inflict great harm on the liberty interests of future generations of Americans.

If the Supreme Court decides to chart this new path, that Court may do so. But this Court, bound by current precedent, must look past the "lofty goal" of universal health care coverage and constrain Congress within the current bounds of the Commerce Clause. Accordingly, plaintiffs are entitled to prevail on their instant motion for summary judgment.

Respectfully submitted,

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/s/ Paul A. Rossi, Esq.

Paul A. Rossi, Esq.
Pennsylvania Attorney I.D. # 84947
873 East Baltimore Pike, #705
Kennett Square, PA 19348
(O) 717.285.2858
(C) 717.615.2030
paularossi@comcast.net

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of August, 2011, a copy of the foregoing "Plaintiffs' Reply Brief to Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment" was served on counsel of record for all Defendants through the Court's Notice of Electronic Filing System

/s/ Paul A. Rossi, Esq.

Paul A. Rossi, Esq.
Pennsylvania Attorney I.D. #84947
873 East Baltimore Pike, #705
Kennett Square, PA 19348
(O) 717.285.2858
(C) 717.615.2030
paularossi@comcast.net