7-6-2011

U.S. Citizens Ass'n v. Sebelius - Brief of United States

Kathleen Sebelius
United States Secretary of Health and Human Services

No. 11-3327

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

U.S. CITIZENS ASSOCIATION, ET AL.,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR APPELLEES

TONY WEST
Assistant Attorney General

STEVEN M. DETTELBACH
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
DANA KAERSVANG
(202) 307-1294
Attorneys, Appellate Staff
Civil Division, Room 7209
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs contend that the minimum coverage provision of the Patient Protection and Affordable Care Act will violate their constitutional rights to liberty, intimate and expressive association, and privacy. Given the importance of the minimum coverage provision, appellees respectfully request oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Their second amended complaint challenged the minimum coverage provision of the Patient Protection and Affordable Care Act ("Affordable Care Act") on four legal theories set out in four counts. The district court dismissed Counts 2, 3, and 4 of the complaint on November 22, 2010. Acting *sua sponte*, the court entered judgment on those counts pursuant to Fed. R. Civ. P. 54(b) on February 28, 2011. Plaintiffs filed a notice of appeal on March 18, 2011. This Court lacks appellate jurisdiction for reasons discussed in the Argument.

STATEMENT OF THE ISSUES

1. Whether this Court lacks appellate jurisdiction.

2. If the Court has appellate jurisdiction, whether the district court correctly held that the minimum coverage provision does not violate plaintiffs' constitutional rights to liberty, expressive and intimate association, or privacy.

STATEMENT OF THE CASE

Plaintiffs challenge the constitutionality of the Affordable Care Act's minimum coverage provision. When that provision takes effect in 2014, it will require that non-exempted individuals maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. § 5000A. Plaintiffs' second amended complaint (R. 45) advanced four different legal theories as to why the provision is unconstitutional: that

it exceeds Congress's Commerce Clause power (Count 1); violates plaintiffs' right to freedom of expressive and intimate association under the First and Fifth Amendments (Count 2); violates plaintiffs' substantive due process right to liberty to refuse payment for unwanted medical services (Count 3); and violates plaintiffs' constitutional right to privacy (Count 4).

The district court dismissed Counts 2, 3, and 4, holding that those counts did not plausibly allege a violation of plaintiffs' constitutional rights. *See* R. 58-1 at 10-11. The court declined to rule on Count 1, noting that the question of Congress's Article I power to enact the minimum coverage provision was then pending before this Court in *Thomas More Law Center v. Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. 2011). *See* R. 58-1 at 4-5.

Acting *sua sponte*, the district court entered final judgment on Counts 2, 3, and 4 pursuant to Fed. R. Civ. P. 54(b). *See* R. 82. Plaintiffs filed a motion for clarification, in which they asked the district court to rule promptly on Count 1. R. 83-1. They explained that "bifurcated appeals by the same plaintiffs on the same core of operative facts would disserve judicial economy and conflict with precedent concerning administration of the United States courts of appeal." *Id*. at 9. The district court denied the motion, concluding that it is "within the sound discretion of

the Court to defer a ruling in anticipation of binding precedent and/or guidance from the Sixth Circuit on an issue presently before the Court." R. 86 at 2-3.

On June 29, 2011, this Court issued its decision in *Thomas More*. This Court upheld the minimum coverage provision on its face as a valid exercise of Congress's commerce power.

STATEMENT OF FACTS

I. Statutory Background

The Affordable Care Act is a comprehensive reform of our national health care system. The Act seeks to ameliorate the crisis in the interstate market for health care services, which accounts for more than 17% of the nation's gross domestic product.

Millions of people without health insurance consume many billions of dollars worth of health care services each year. As a class, they fail to pay the full cost of those services and shift the uncompensated costs of their care — totaling $43 billion in 2008 — to health care providers regularly engaged in interstate commerce. Providers pass on much of this cost to insurance companies, which also operate interstate. The result is higher premiums that, in turn, make insurance unaffordable to even more people. At the same time, insurers use restrictive underwriting practices to deny coverage or charge higher premiums to millions because they have pre-existing medical conditions.

The Affordable Care Act addresses these national problems through measures designed to make affordable health care coverage widely available, protect consumers from restrictive underwriting practices, and reduce the uncompensated care that is obtained by the uninsured and paid for by other participants in the health care market.

First, the Act builds upon the existing nationwide system of employer-based health insurance, the principal private mechanism for health care financing. Congress established tax incentives for small businesses to purchase health insurance for their employees. 26 U.S.C.A. § 45R. It also prescribed tax penalties for certain large employers if the employer does not offer full-time employees adequate coverage and at least one full-time employee receives a tax credit to assist with the purchase of coverage in a health insurance exchange established under the Act. *Id*. § 4980H.

Second, the Act provides for the creation of health insurance exchanges to allow individuals, families, and small businesses to use their collective buying power to obtain prices competitive with those of large-employer group plans. 42 U.S.C.A. § 18031.

Third, for individuals and families with household income between 133% and 400% of the federal poverty line who purchase insurance through an exchange, Congress offered federal tax credits for payment of health insurance premiums. 26 U.S.C.A. § 36B(a), (b). Congress also authorized federal payments to help cover

out-of-pocket expenses such as co-payments or deductibles for eligible individuals who purchase coverage through an exchange. 42 U.S.C.A. § 18071. In addition, Congress expanded eligibility for Medicaid to cover individuals with income up to 133% of the federal poverty line. *Id.* § 1396a(a)(10)(A)(i)(VIII).

Fourth, the Act regulates insurers to prohibit industry practices that have prevented people from obtaining and maintaining health insurance. The Act bars insurers from refusing coverage because of pre-existing medical conditions, canceling insurance absent fraud or intentional misrepresentation of material fact, charging higher premiums based on a person's medical history, and placing lifetime dollar caps on benefits. *Id.* §§ 300gg, 300gg-1(a), 300gg-3(a), 300gg-4(a), 300gg-11, 300gg-12.

Fifth, the minimum coverage provision at issue here will require, beginning in 2014, that non-exempted individuals maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. § 5000A. The minimum coverage requirement may be satisfied through enrollment in an eligible employer-sponsored plan; an individual market plan, including one offered through a health insurance exchange; a grandfathered health plan; certain government-sponsored programs such as Medicare, Medicaid, or TRICARE; or similar coverage to be recognized by the Secretary of Health and Human Services ("HHS") in coordination with the Secretary of the Treasury. *Id*. § 5000A(f). The tax penalty will not apply to individuals whose

household income is insufficient to require them to file a federal income tax return, whose premium payments would exceed 8% of their household income, or who establish (under standards set by the HHS Secretary) that the requirement would impose a hardship. *Id.* § 5000A(e).

In enacting the minimum coverage provision, Congress made detailed findings that establish the foundation for the exercise of its commerce power. Congress found that the minimum coverage provision "regulates activity that is commercial and economic in nature" — how people pay for services in the interstate health care market. 42 U.S.C.A. § 18091(a)(2)(A). Congress found that, as a class, people who "forego health insurance coverage and attempt to self-insure" fail to pay for the medical services that they consume, and shift substantial costs to providers and insured consumers, raising average family premiums by more than $1,000 a year. *Id.* § 18091(a)(2)(A), (F). In addition, Congress found that the minimum coverage requirement is "essential" to the Act's guaranteed issue and community rating reforms that will prevent insurers from relying on medical condition or history to deny coverage or set premiums. *Id.* § 18091(a)(2)(I). Congress found that, without the minimum coverage requirement, many people would exploit these new consumer protections by waiting to purchase health insurance until they needed care, which would undermine the effective functioning of insurance markets. *Ibid.*

The Congressional Budget Office has projected that the Act's various provisions, taken in combination, will reduce the number of non-elderly people without insurance by about 33 million by 2019. Letter from Douglas W. Elmendorf to John Boehner, Speaker, U.S. House of Representatives, at 8, table 3 (Feb. 18, 2011).

II. District Court Proceedings

Plaintiffs are two individuals, James Grapek and Maurice Thompson, and the U.S. Citizens Association ("USCA"), a "national civic league." R. 45 ¶ 12 (Second Amended Complaint). The individual plaintiffs state that they do not have health insurance and "prefer to select and receive health care outside of the present health insurance system from physicians who accept payment out of pocket." R. 50-6, ¶ 7 (Thompson Decl.); R. 50-5, ¶ 6 (Grapek Decl.) (similar).

Plaintiffs' second amended complaint focused on a single provision of the Affordable Care Act — the minimum coverage provision — alleging that the requirement to obtain minimum coverage is unconstitutional on four legal grounds, set out in four counts. Count 1 alleged that the provision exceeds Congress's authority under the Commerce Clause. *See* R. 45 at 15-17. Count 2 alleged that the same provision violates plaintiffs' freedom of expressive and intimate association under the First and Fifth Amendments. *Id*. at 17-19. Count 3 alleged that this

provision also violates plaintiffs' substantive due process liberty right to refuse payment for unwanted medical services. *Id*. at 19-20. And Count 4 alleged that the provision violates plaintiffs' right to privacy. *Id*. at 21-23.

The district court granted the government's motion to dismiss Counts 2, 3, and 4, explaining that plaintiffs failed to allege any plausible violation of their rights to association, substantive due process, or privacy. *See* R. 58-1 at 10-11.

The government moved to stay proceedings on Count 1 in light of the appeal that was then pending before this Court in *Thomas More Law Center v. Obama*, No. 10-2388, which also presented an enumerated powers challenge to the minimum coverage provision. *See* R. 60 & 60-1. Plaintiffs opposed a stay. *See* R. 61. The district court declined to stay proceedings and ordered summary judgment briefing. *See* R. 64.

Subsequently, the district court, acting *sua sponte*, entered final judgment on Counts 2, 3, and 4 pursuant to Fed. R. Civ. P. 54(b). *See* R. 82. The court did not address plaintiffs' Commerce Clause challenge or the government's alternative argument that the minimum coverage provision is also a valid exercise of Congress's taxing power. The court noted that other cases presenting such issues were already pending before this Court and other courts of appeals, and it "question[ed] the relevance of any ruling it may make regarding the Commerce Clause issue given the

more advanced stage of challenges to the Act in other jurisdictions and the ultimate impact of the appellate rulings in those cases on the instant case." *Id*. at 3.

In entering judgment on Counts 2, 3, and 4, the district court reasoned that its prior opinion "entirely disposes of those claims," and concluded that "the nature of the constitutional challenges in Claims 2, 3, and 4 are independent from" Count 1. *Id*. at 2-3. The court held that "the litigants are best served by allowing an immediate appeal of the Court's dismissal of Counts 2, 3 and 4 given the uncertainty of the time period in which the constitutionality of the Act relative to the Commerce Clause will be determined in the federal courts." *Id*. at 3.

Plaintiffs filed a motion for clarification and/or reconsideration, in which they asked the district court to clarify that it would rule promptly on their Commerce Clause claim. R. 83-1. They urged the district court to rule on Count 1 in order "to avoid an unintended consequence: prejudice to their appellate rights and denial of certain argument necessary for the Court of Appeals to adjudicate the constitutionality of the Individual Mandate on all potentially dispositive grounds." R. 83-1 at 2. Plaintiffs stated that, without such a ruling, they would "be required to proceed with two separate appeals to the Sixth Circuit arising from the same core of operative facts" regarding this single provision. *Id*. at 9. They advised the district court that "bifurcated appeals by the same plaintiffs on the same core of operative

facts would disserve judicial economy and conflict with precedent concerning administration of the United States courts of appeal." *Ibid*.

The district court denied plaintiffs' motion. *See* R. 86. The court noted that this Court's decision in *Thomas More* "will likely control — or at a minimum inform — the outcome of the instant action with respect to Count 1." *Id*. at 2. The court concluded that it was "within the sound discretion of the Court to defer a ruling in anticipation of binding precedent and/or guidance from the Sixth Circuit on an issue presently before the Court." *Id*. at 2-3.

STANDARD OF REVIEW

The district court's rulings present issues of law that are subject to *de novo* review in this Court.

SUMMARY OF ARGUMENT

I. This appeal should be dismissed for lack of appellate jurisdiction. Rule 54(b) of the Federal Rules of Civil Procedure permits a district court to direct the entry of final judgment with respect to "fewer than all the claims" in a case if the court determines that there is no just reason for delay. However, different theories of liability regarding the same provision, arising from the same set of "operative facts," do not constitute distinct claims within the meaning of Rule 54(b). *See Lowery v. Fed. Express Corp*., 426 F.3d 817, 821 (6th Cir. 2005). Here, plaintiffs

challenged the minimum coverage provision on four legal theories. Thus, plaintiffs correctly advised the district court that all of their counts "aris[e] from the same core of operative facts." R. 83-1 at 9. The Rule 54(b) certification was improper, and this Court lacks appellate jurisdiction.

II. If the Court were to reach the merits, the judgment of the district court should be affirmed. The district court correctly held that plaintiffs failed to allege any plausible violation of a constitutionally protected liberty interest, right to intimate or expressive association, or right to privacy. Indeed, plaintiffs misunderstand what the minimum coverage provision, by its plain terms, will require. The provision directs that, beginning in 2014, non-exempted individuals maintain a minimum level of health insurance or pay a tax penalty. It will not require plaintiffs to accept unwanted medical care; it will not prevent plaintiffs from expressing their views about insurance (or any other matter); and it will not require plaintiffs to undergo medical examinations or disclose personal medical information.

Even if plaintiffs' reading of the minimum coverage provision were correct, their understanding of the Constitution is not. There is no substantive due process right "to refuse payment for unwanted medical service." Pl. Br. 8 (Question 1). Associations with insurance companies do not implicate the freedom of intimate or expressive association. *Ibid*. (Question 2). And the disclosure of medical

information to insurance companies does not implicate any constitutionally protected right of privacy. *Ibid*. (Question 3).

ARGUMENT

I. This Court Lacks Appellate Jurisdiction.

The Federal Rules of Civil Procedure permit a district court to "direct the entry of a final judgment as to one or more, but fewer than all, claims or parties" if the court determines that there is no just reason for delay. Fed. R. Civ. P. 54(b). The propriety of a Rule 54(b) certification presents a threshold issue of appellate jurisdiction. "[T]his Court is without appellate jurisdiction if the certification was improper." *Lowery*, 426 F.3d at 820 (citing *Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc*., 807 F.2d 1279, 1282 (6th Cir. 1986)). Accordingly, this Court must determine *de novo* whether a judgment represents "'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Lowery*, 426 F.3d at 821 (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980)).

Different theories of liability do not constitute different claims within the meaning of Rule 54(b). *Lowery*, 426 F.3d at 821. In *Lowery,* for example, the plaintiff sued under Title VII alleging that his employer had retaliated against him for a prior grievance that he had filed. He also alleged that the employer had breached the contract settling the prior grievance, which had promised that there

would be no retaliation. The district court dismissed the Title VII count, but not the contract cause of action, and certified the order for appeal under Rule 54(b). This Court dismissed the appeal, holding that retaliation was the gravamen of both "claims." The Court cited its repeated rulings that, "'[e]ven though different theories of liability may have been asserted, the concept of a "claim" under Rule 54(b) denotes the aggregate of operative facts which give rise to a right enforceable in the courts.'" *Ibid*. (quoting *McIntyre v. First Nat'l Bank of Cincinnati*, 585 F.2d 190, 192 (6th Cir.1978) (citations omitted)).

Just as a statutory and contract challenge to a single act of employment discrimination constitute a single claim, so do multiple theories for challenging the constitutionality of a single statutory provision constitute a single claim. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim — that the ordinance effects an unconstitutional taking.").

In this case, the four counts set forth in the second amended complaint do nothing more than assert alternative theories for invalidating the minimum coverage provision, "separate *arguments* in support of a single claim." *Ibid*. Plaintiffs correctly advised the district court that all of the counts "aris[e] from the same core

of operative facts." R. No. 83-1 at 9. The district court's Rule 54(b) certification was improper, and this Court therefore lacks appellate jurisdiction.

II. The Minimum Coverage Provision Does Not Violate Plaintiffs' Constitutional Rights to Liberty, Association, or Privacy.

If this Court were to reach the merits, it should affirm the decision of the district court. The minimum coverage provision does not even touch upon, much less violate, any of the fundamental rights that plaintiffs invoke.[1]

A. The Minimum Coverage Provision Does Not Violate Plaintiffs' Fundamental Liberty Interests.

The Due Process Clause protects those fundamental liberty interests that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation omitted). These freedoms include the "rights to marry," "to have children," "to direct the education and upbringing of one's children," "to marital privacy," "to use contraception," "to bodily integrity," and "to abortion." *Id*. at 720. The Supreme Court also has "assumed, and strongly suggested, that the Due Process

[1] The government does not dispute that plaintiff Grapek adequately alleged standing to challenge to the minimum coverage provision. *See* R. 50-5 at 5 (Grapek Decl.) (representing that Grapek must begin saving immediately to have the funds to pay for health insurance when the minimum essential coverage provision takes effect).

Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Ibid*.

The Supreme Court has cautioned against recognizing new fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of th[e] Court." *Ibid*. Thus, this Court explained, "'identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, as the list of fundamental rights is short.'" *Grinter v. Knight*, 532 F.3d 567, 573 (6th Cir. 2008) (quoting *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007)). "When reviewing a substantive due process claim, [a court] must first craft a 'careful description of the asserted right,' ... and then determine whether that right is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that it can be considered a 'fundamental right.'" *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 500 (6th Cir. 2007) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993), and *Glucksberg*, 521 U.S. at 721). The Supreme Court has "expressly counseled lower courts to be 'reluctant to expand the concept of substantive due process because guideposts for decision making in this unchartered area are scarce and open-ended.'" *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393-94 (6th Cir. 2005) (quoting *Glucksberg*, 521 U.S. at 720).

Plaintiffs invoke a fundamental right "to refuse unwanted medical service." Pl. Br. 25. In *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), the Supreme Court explained that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [its] prior decisions." *Id*. at 278. For example, the *Cruzan* Court explained, in *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905), the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. *See Cruzan*, 497 U.S. at 278. Similarly, in *Washington v. Harper*, 494 U.S. 210 (1990), the Court "recognized that prisoners possess 'a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.'" *Id*. at 221-22 (quoted in *Cruzan*, 497 U.S. at 278).

The Affordable Care Act's minimum coverage provision in no way implicates this fundamental right to refuse unwanted medical care. By its plain terms, the provision will not require that people obtain medical services of any kind. Instead, when the provision takes effect in 2014, it will require that non-exempted individuals maintain a minimum level of health insurance or else pay a tax penalty. 26 U.S.C.A. § 5000A. Whether they have insurance or not, individuals will still be able to determine whether to obtain medical care, what care to obtain, when, and from whom.

Indeed, though they invoke the *Cruzan* line of cases, plaintiffs do not actually contend that the minimum coverage provision will require them to obtain unwanted medical care. Instead, they assert that the provision will interfere with their economic freedom by requiring them to pay for insurance or tax penalties. However, "no court has invalidated [an insurance] mandate under the Due Process Clause or any other liberty-based guarantee of the Constitution." *Thomas More*, 2011 WL 2556039, *32 (Sutton, J., concurring in the judgment). While such a claim, derived from freedom of contract, "would have found Constitutional support in the Supreme Court's decisions in the years prior to the New Deal legislation of the mid-1930's, when the Due Process Clause was interpreted to reach economic rights and liberties," the *Lochner*-era doctrine "has long since been discarded." *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161 (N.D. Fla. 2010).[2] Plaintiffs cite no support for the "right not to pay" that they would have the Court deem fundamental. Pl. Br. 27.

[2] Cross-appeals are pending in the *Florida* case, but the plaintiffs did not challenge the district court's dismissal of their substantive due process claim. *Florida v. U.S. Dep't of Health & Human Servs.*, Nos. 11-11021 & 11-11067 (11th Cir.).

B. The Minimum Coverage Provision Does Not Violate Plaintiffs' Rights to Freedom of Intimate or Expressive Association.

1. The provision does not violate plaintiffs' right to intimate association.

Plaintiffs allege that the minimum coverage provision will "violate Plaintiffs' freedom of intimate association." R. 45 at 18 (Second Amended Complaint). They allege that they have a "fundamental privacy right to select a doctor of their choosing, one whose methods and approaches they approve," and "a right not to associate with doctors who, and insurers that cover, methods or approaches rejected by Plaintiffs." *Ibid*.

As an initial matter, the Constitution's protection of intimate association does not extend to the relationships that plaintiffs describe. The right to intimate association is derived from the due process right to privacy and "'protects those relationships ... that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life.'" *Anderson v. City of LaVergne*, 371 F.3d 879, 881-82 (6th Cir. 2004) (quoting *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (internal citation omitted)). Intimate associations are "highly personal relationships" characterized by "relative smallness, a high degree of selectivity in decisions to begin

and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 620 (1984). "The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family-marriage." *Id*. at 619.

By contrast, association with a "large business enterprise" such as an insurance company does not qualify as intimate. *Id*. at 620. Nor are relationships with doctors the type protected by the freedom of intimate association. *See Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) (rejecting claim that the psychoanalyst-patient relationship warrants intimate association protection).

But, again, even if plaintiffs had a constitutional right to associate with doctors of their choosing, the minimum coverage provision would not affect it. Plaintiffs claim that, if they spend money on health insurance or tax penalties, they will not have the "resources they need" to pay medical providers of their choosing. R. 45 ¶ 44. But "[m]oney is fungible," *Sabri v. United States*, 541 U.S. 600, 601 (2004), and any government-imposed expenditure such as taxes or mandatory car insurance could be said to reduce funds available for other commercial associations. That is not

the type of regulation of the "precise ... associational right in question" that implicates the freedom of intimate association. *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 343-44 (3d Cir. 2004).

2. The provision does not interfere with plaintiffs' right of expressive association.

The right of expressive association is the "right to associate for the purpose of speaking." *Rumsfeld v. FAIR*, 547 U.S. 47, 68 (2006). It is a "correlative freedom to engage in group effort" to the end of exercising First Amendment rights. *U.S. Jaycees*, 468 U.S. at 618, 622. It is protected because "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State" without also protecting a right to associate for these purposes. *Ibid*.

In keeping with its purpose, the right to expressive association is implicated only where there is a group engaged in constitutionally protected expression. This occurs where there is interference in the membership of a group that "'engage[s] in expressive activity that could be impaired'" and "the government action in question 'significantly burden[s]' the group's expression." *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (citation omitted, alterations in original). When the government regulates "mere association" not related to membership in a group engaged in expression, the right is not implicated. *FAIR*, 547 U.S. at 69.

The minimum coverage provision does not impair plaintiffs' ability to engage in expressive conduct. Plaintiffs remain "free to associate to voice their disapproval" of insurance, or, for that matter, to advance any other opinion. *Id.* at 69-70. Nor is plaintiff U.S. Citizens Association required to admit insurance companies as members of the organization. *U.S. Jaycees*, 468 U.S. at 623. The Supreme Court has made plain that an organization "cannot erect a shield" against a law "simply by asserting that mere association would impair its message." *FAIR*, 547 U.S. at 69, 70 (quotation marks omitted) (holding that "[a] military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message"). Thus, plaintiffs' expressive association claim has no basis.

C. The Minimum Coverage Provision Does Not Violate Plaintiffs' Right to Privacy.

Plaintiffs allege that the government cannot constitutionally "compel disclosure of USCA members' private medical information to a private insurer, including, but not limited to, data concerning or derived from (1) blood samples, (2) DNA samples, (3) urine samples, (6) physical examinations, and (6) past or current illnesses, diseases, or medications." R. 45 ¶ 53. They allege that such forced disclosures would violate plaintiffs' "Right to Privacy arising from the Fifth Amendment liberty provision, the Ninth Amendment rights retained by the people, and rights emanating

from the First, Third, Fourth, Fifth, and Ninth Amendments to the United States Constitution." *Id*. ¶ 56.

The minimum coverage provision does not, however, compel any such disclosures; it requires that non-exempted individuals maintain a minimum level of insurance or pay a tax penalty. Plaintiffs assert that insurance companies will choose to seek such information because "the health of its customers is essential to profit margins." Pl. Br. 53-54. Beginning in 2014, however, the Affordable Care Act will bar insurance companies from denying coverage or setting premiums on the basis of an individual's medical condition or history. *See* 42 U.S.C.A. §§ 300gg, 300gg-1(a), 300gg-3(a), 300gg-4(a). Thus, plaintiffs' asserted injury is speculative. *See Wilson v. Collins*, 517 F.3d 421, 430 (6th Cir. 2008) (rejecting due process claim where concerns about possible future disclosure of DNA sample were "purely speculative").

Moreover, another federal law — the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") — imposes strict limits on the manner in which insurance companies may use or disclose individuals' medical information. 42 U.S.C. §§ 1320d, *et seq*.; 45 C.F.R. § 164.502. The Supreme Court recently rejected an "informational privacy" claim based in part on protections against disclosure to the public. *See NASA v. Nelson*, 131 S. Ct. 746, 761-63 (2011).

In any event, "legitimate requests for medical information do not constitute an invasion of the right to privacy." *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987); *see also Moore v. Prevo*, 379 F. App'x 425, 427 (6th Cir. 2010) (distinguishing between disclosure of inmate's HIV status to another inmate and disclosure to a corrections officer). "'[D]isclosures of private medical information to doctors, to hospital personnel, *to insurance companies*, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.'" *In re Zuniga*, 714 F.2d 632, 641 (6th Cir. 1983) (quoting *Whalen v. Roe*, 429 U.S. 589, 603 (1977)) (this Court's emphasis). Thus, even if the plaintiffs were correct in their speculation that insurers in the future will seek medical information from them, they have not plausibly alleged that the minimum coverage provision will violate their constitutional privacy rights.

CONCLUSION

This appeal should be dismissed for lack of appellate jurisdiction. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

TONY WEST
Assistant Attorney General

STEVEN M. DETTELBACH
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
DANA KAERSVANG /s/
(202) 307-1294
Attorneys, Appellate Staff
Civil Division, Room 7209
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

JULY 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel WordPerfect 12, the foregoing brief contains 5,081 words. The text of the brief is composed in 14-point Times New Roman typeface.

/s/ Dana Kaersvang
Dana Kaersvang

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2011, I filed and served the foregoing Brief for Appellees and served it on all registered counsel by causing a copy to be electronically filed via the appellate CM/ECF system.

/s/ Dana Kaersvang
Dana Kaersvang

DESIGNATION OF DISTRICT COURT DOCUMENTS

The defendants-appellees hereby designate the following portions of the district court record for the Court's consideration:

Description of Entry	Date	Record Entry No.
Plaintiffs' Second Amended Complaint	09/16/2010	R. 45
Grapek Declaration	10/28/2010	R. 50-5
Thompson Declaration	10/28/2010	R. 50-6
Appendix to Memorandum Opinion and Order	11/22/2010	R. 58-1
Defendants' Motion for a Stay of Proceedings	12/03/2010	R. 60
Brief in Support of Defendants' Motion for a Stay of Proceedings	12/03/2010	R. 60-1
Plaintiffs' Opposition to Motion for a Stay of Proceedings	12/10/2010	R. 61
Order Denying Motion to Stay	12/20/2010	R. 64
Judgment Entry Pursuant to Rule 54(b)	02/28/2011	R. 82
Memorandum in Support of Plaintiffs' Motion for Clarification or Reconsideration of Order	03/07/2011	R. 83-1
Order Denying Motion for Clarification or Reconsideration	03/17/2011	R. 86