

FILED: May 23, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1057
(3:10-cv-00188-HEH)

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
in his official capacity as Attorney General of Virginia,

Plaintiff – Appellee,

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human
Services, in her official capacity,

Defendant – Appellant,

v.

RAY ELBERT PARKER; AMERICAN CENTER FOR LAW & JUSTICE ET
AL.; SMALL BUSINESS MAJORITY FOUNDATION, INCORPORATED;
CENTER FOR AMERICAN PROGRESS; FEDERAL RIGHTS PROJECT
NATIONAL SENIOR CITIZENS LAW CENTER; WASHINGTON LEGAL
FOUNDATION; LIBERTY GROUP; CONSTITUTIONAL LAW PROFESSORS;
CATO INSTITUTE; LANDMARK LEGAL FOUNDATION; RANDY E.
BARNETT, Professor; COMPETITIVE ENTERPRISE INSTITUTE; W.
SPENCER CONNERAT, III; STEVEN J. WILLIS; PACIFIC LEGAL
FOUNDATION; YOUNG INVINCIBLES; WILLIAM P. BARR; EDWIN
MEESE, III; RICHARD L. THORNBURGH; EVE ELLINGWOOD, a/k/a Cohen
Sternlight, Judge, Retired; AMERICANS FOR FREE CHOICE IN MEDICINE;
MOUNTAIN STATES LEGAL FOUNDATION; VIRGINIA ORGANIZING,

Movants,

AMERICA'S HEALTH INSURANCE PLANS; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amici Curiae,

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; THE ARC OF THE UNITED STATES; BREAST CANCER ACTION; FAMILIES USA; FRIENDS OF CANCER RESEARCH; MARCH OF DIMES FOUNDATION; MENTAL HEALTH AMERICA; NATIONAL BREAST CANCER COALITION; NATIONAL ORGANIZATION FOR RARE DISORDERS; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL SENIOR CITIZENS LAW CENTER; NATIONAL WOMEN'S HEALTH NETWORK; THE OVARIAN CANCER NATIONAL ALLIANCE; AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED; AMERICAN MEDICAL STUDENT ASSOCIATION; CENTER FOR AMERICAN PROGRESS, d/b/a Doctors for America; NATIONAL HISPANIC MEDICAL ASSOCIATION; NATIONAL PHYSICIANS ALLIANCE; CONSTITUTIONAL LAW PROFESSORS; YOUNG INVINCIBLES; KEVIN C. WALSH; AMERICAN CANCER SOCIETY; AMERICAN CANCER SOCIETY CANCER ACTION NETWORK; AMERICAN DIABETES; AMERICAN HEART ASSOCIATION; DR. DAVID CUTLER, Deputy, Otto Eckstein Professor of Applied Economics, Harvard University; DR. HENRY AARON, Senior Fellow, Economic Studies, Bruce and Virginia MacLaury Chair, The Brookings Institution; DR. GEORGE AKERLOF, Koshland Professor of Economics, University of California-Berkeley; DR. STUART ALTMAN, Sol C. Chaikin Professor of National Health Policy, Brandeis University; DR. KENNETH ARROW, Joan Kenney Professor of Economics and Professor of Operations Research, Stanford University; DR. SUSAN ATHEY, Professor of Economics, Harvard University; DR. LINDA J. BLUMBERG, Senior Fellow, Urban Institute, Health Policy Center; DR. LEONARD E. BURMAN, Daniel Patrick Moynihan Professor of Public Affairs, The Maxwell School, Syracuse University; DR. AMITABH CHANDRA, Professor of Public Policy, Kennedy School of Government, Harvard University; DR. MICHAEL CHERNEW, Professor, Department of Health Care Policy, Harvard Medical School; DR. PHILIP COOK, Dr. Philip Cook, ITT/Sanford Professor of Public Policy, Professor of Economics, Duke University; DR. MICHAEL T. FRENCH, Professor of Health Economics, University of Miami; DR. CLAUDIA GOLDIN, Henry Lee Professor of Economics, Harvard University; DR. TAL GROSS, Department of Health Policy and Management, Mailman School of Public Health, Columbia University; DR. JONATHAN GRUBER, Professor of Economics, MIT;

DR. JACK HADLEY, Associate Dean for Finance and Planning, Professor and Senior Health Services Researcher, College of Health and Human Services, George Mason University; DR. VIVIAN HO, Baker Institute Chair in Health Economics and Professor of Economics, Rice University; DR. JOHN F. HOLAHAN, Ph. D., Director, Health Policy Research Center, The Urban Institute; DR. JILL HORWITZ, Professor of Law and Co- Director of the Program in Law & Economics, University of Michigan School of Law; DR. LAWRENCE KATZ, Elisabeth Allen Professor of Economics, Harvard University; DR. GENEVIEVE KENNEY, Senior Fellow, The Urban Institute; DR. FRANK LEVY, Rose Professor of Urban Economics, Department of Urban Studies and Planning, MIT; DR. PETER LINDERT, Distinguished Research Professor of Economics, University of California, Davis; DR. ERIC MASKIN, Albert O. Hirschman Professor of Social Science at the Institute for Advanced Study, Princeton University; DR. ALAN C. MONHEIT, Professor of Health Economics, School of Public Health, University of Medicine & Dentistry of New Jersey; DR. MARILYN MOON, Vice President and Director Health Program, American Institutes for Research; DR. RICHARD J. MURNANE, Thompson Professor of Education and Society, Harvard University; DR. JOSEPH P. NEWHOUSE, John D. MacArthur Professor of Health Policy and Management, Harvard University; DR. LEN M. NICHOLS, George Mason University; DR. HAROLD POLLACK, Helen Ross Professor of Social Service Administration, University of Chicago; DR. MATTHEW RABIN, Edward G. and Nancy S. Jordan Professor of Economics, University of California-Berkeley; DR. JAMES B. REBITZER, Professor of Economics, Management, and Public Policy, Boston University School of Management; DR. MICHAEL REICH, Professor of Economics, University of California at Berkeley; DR. THOMAS RICE, Professor, UCLA School of Public Health; DR. MEREDITH ROSENTHAL, Department of Health Policy and Management, Harvard School of Public Health; DR. CHRISTOPHER RUHM, Professor of Public Policy and Economics, University of Virginia; DR. JONATHAN SKINNER, Professor of Economics, Dartmouth College, and Professor of Community and Family Medicine, Dartmouth Medical School; DR. KATHERINE SWARTZ, Professor, Department of Health Policy and Management, Harvard School of Public Health; DR. KENNETH WARNER, Dean of the School of Public Health and Avedis Donabedian Distinguished University Professor of Public Health, University of Michigan; DR. PAUL N. VAN DE WATER, Senior Fellow, Center on Budget and Policy Priorities; DR. STEPHEN ZUCKERMAN, Senior Fellow, The Urban Institute; JANET COOPER ALEXANDER, Frederick I. Richman Professor of Law, Stanford Law School; ERWIN CHEMERINSKY, Founding Dean, University of California-Irvine School of Law; AMANDA FROST, Professor of Law, American University Washington College of Law; ANDY HESSICK, Associate Professor of Law, Arizona State

University Sandra Day O'Connor College of Law; A.E. DICK HOWARD, White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law; JOHN CALVIN JEFFRIES, JR., David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law; JOHANNA KALB, Assistant Professor, Loyola University New Orleans College of Law; LUMEN N. MULLIGAN, Professor of Law, University of Kansas School of Law; EDWARD A. PURCELL, JR., Joseph Solomon Distinguished Professor of Law, New York Law School; CAPRICE L. ROBERTS, Professor, Visiting Professor, Catholic University Columbus School of Law; Professor of Law, University of West Virginia School of Law; STEPHEN I. VLADECK, Professor of Law, American University Washington College of Law; HOWARD M. WASSERMAN, Associate Professor, FIU College of Law; AARP; COMMONWEALTH OF MASSACHUSETTS; THE NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN COLLEGE OF NURSE-MIDWIVES; AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES; AMERICAN MEDICAL WOMEN'S ASSOCIATION; THE ASIAN AMERICAN JUSTICE CENTER; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; THE ASIAN PACIFIC AMERICAN LEGAL CENTER; THE BLACK WOMENS HEALTH IMPERATIVE; THE COALITION OF LABOR UNION WOMEN; CHILDBIRTH CONNECTION; THE CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; THE FEMINIST MAJORITY FOUNDATION; IBIS REPRODUCTIVE HEALTH; INSTITUTE OF SCIENCE AND HUMAN VALUES; MARYLAND WOMEN'S COALITION FOR HEALTH CARE REFORM; MENTAL HEALTH AMERICA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL COALITION FOR LGBT HEALTH; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; THE NATIONAL RESEARCH CENTER FOR WOMEN & FAMILIES; OLDER WOMEN'S LEAGUE; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; RAISING WOMEN'S VOICES; SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW; SOUTHWEST WOMEN'S LAW CENTER; WIDER OPPORTUNITIES FOR WOMEN; THE WOMENS LAW CENTER OF MARYLAND, INCORPORATED; WOMENS LAW PROJECT; VIRGINIA ORGANIZING; AMERICAN HOSPITAL ASSOCIATION; ASSOCIATION OF AMERICAN MEDICAL COLLEGES; CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES; FEDERATION OF AMERICAN HOSPITALS; NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS; NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS;

CONSTITUTIONAL ACCOUNTABILITY CENTER; MATTHEW H. ADLER, Leon Meltzer Professor of Law, University of Pennsylvania Law School; REBECCA L. BROWN, Newton Professor of Constitutional Law, University of Southern California Gould School of Law; JESSE HERBERT CHOPER, Earl Warren Professor of Public Law, University of California, Berkeley, School of Law; MICHAEL C. DORF, Robert S. Stevens Professor of Law, Cornell University Law School; DANIEL FARBER, Sho Sato Professor of Law, University of California, Berkeley, School of Law; BARRY FRIEDMAN, Jacob D. Fuchsberg Professor of Law, New York University School of Law; WILLIAM P. MARSHALL, Kenan Professor of Law, University of North Carolina School of Law; GENE NICHOL, Professor of Law, Director, Center on Poverty, Work & Opportunity, University of North Carolina School of Law; WILLIAM J. NOVAK, Professor of Law, The University of Michigan Law School; RICHARD H. PILDES, Sudler Family Professor of Constitutional Law, Co-Director, Center on Law and Security, New York University School of Law; RICHARD A. PRIMUS, Professor of Law, The University of Michigan Law School; JUDITH RESNIK, Arthur Liman Professor of Law, Yale Law School; THEODORE W. RUGAR, Professor of Law, University of Pennsylvania Law School; ROBERT A. SCHAPIRO, Professor of Law, Emory University School of Law; DAVID L. SHAPIRO, William Nelson Cromwell Professor, Emeritus, Harvard Law School; SUZANNA SHERRY, Herman O. Loewenstein Professor of Law, Vanderbilt University Law School; NEIL S. SIEGEL, Professor of Law and Political Science, Duke University School of Law; PETER J. SMITH, Professor of Law, George Washington University Law School; ADAM WINKLER, Professor of Law, UCLA School of Law; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF IOWA; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; CHRISTINE GREGOIRE, Governor of Washington; SERVICE EMPLOYEES INTERNATIONAL UNION; CHANGE TO WIN,

Amici Supporting Appellant,

THE AMERICAN CENTER FOR LAW AND JUSTICE; PAUL BROUN, United States Representative; ROBERT ADERHOLT, United States Representative; TODD AKIN, United States Representative; MICHELE BACHMANN, United States Representative; SPENCER BACHUS, United States Representative; ROSCOE BARTLETT, United States Representative; ROB BISHOP, United States Representative; JOHN BOEHNER, United States Representative; LARRY BUCSHON, United States Representative; DAN BURTON, United States Representative; FRANCISCO "QUICO" CANSECO, United States Representative; ERIC CANTOR, United States Representative; STEVE CHABOT,

United States Representative; MIKE CONAWAY, United States Representative; BLAKE FARENTHOLD, United States Representative; JOHN FLEMING, United States Representative; BILL FLORES, United States Representative; RANDY FORBES, United States Representative; VIRGINIA FOXX, United States Representative; TRENT FRANKS, United States Representative; SCOTT GARRETT, United States Representative; LOUIE GOHMERT, United States Representative; RALPH HALL, United States Representative; TIM HUELSKAMP, United States Representative; BILL JOHNSON, United States Representative; WALTER JONES, United States Representative; MIKE KELLY, United States Representative; STEVE KING, United States Representative; JACK KINGSTON, United States Representative; JOHN KLINE, United States Representative; DOUG LAMBORN, United States Representative; JEFF LANDRY, United States Representative; JAMES LANKFORD, United States Representative; ROBERT LATTA, United States Representative; DONALD MANZULLO, United States Representative; THADDEUS MCCOTTER, United States Representative; CATHY MCMORRIS RODGERS, United States Representative; GARY MILLER, United States Representative; JEFF MILLER, United States Representative; RANDY NEUGEBAUER, United States Representative; STEVE PEARCE, United States Representative; MIKE PENCE, United States Representative; JOE PITTS, United States Representative; MIKE POMPEO, United States Representative; SCOTT RIGELL, United States Representative; PHIL ROE, United States Representative; ED ROYCE, United States Representative; LAMAR SMITH, United States Representative; TIM WALBERG, United States Representative; THE CONSTITUTIONAL COMMITTEE TO CHALLENGE THE PRESIDENT & CONGRESS ON HEALTH CARE; MATTHEW SISSEL; PACIFIC LEGAL FOUNDATION; AMERICANS FOR FREE CHOICE IN MEDICINE; AMERICAN PHYSICIANS AND SURGEONS, INCORPORATED; JANIS CHESTER, MD; MARK J. HAUSER, MD; GUENTER L. SPANKNEBEL, MD; GRAHAM L. SPRUIELL, MD; WASHINGTON LEGAL FOUNDATION; CONSTITUTIONAL LAW SCHOLARS; CATO INSTITUTE; COMPETITIVE ENTERPRISE INSTITUTE; RANDY E. BARNETT, Professor; JUSTICE AND FREEDOM FUND; KURT ALLEN ROHLFS; MOUNTAIN STATES LEGAL FOUNDATION; LANDMARK LEGAL FOUNDATION; BOB MARSHALL, Virginia Delegate; GUN OWNERS OF AMERICA, INCORPORATED; GUN OWNERS FOUNDATION; AMERICAN LIFE LEAGUE, INCORPORATED; INSTITUTE ON THE CONSTITUTION; THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION; PUBLIC ADVOCATE OF THE UNITED STATES; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; THE LIBERTY COMMITTEE; DOWNSIZE DC FOUNDATION; DOWNSIZEDC.ORG; POLICY ANALYSIS CENTER; FAMILY RESEARCH

COUNCIL; WILLIAM BARR, Former United States Attorney General; EDWIN MEESE, III, Former United States Attorney General; DICK THORNBURGH, Former United States Attorney General; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; AMERICAN CIVIL RIGHTS UNION; PHYSICIAN HOSPITALS OF AMERICA,

Amici Supporting Appellee,

ORDER

The court directs the parties to file supplemental briefs, not to exceed 10 pages, by the close of business on May 31, 2011 addressing the following questions:

1. When applicable, does the Anti-Injunction Act, 26 U.S.C. § 7421(a), deprive a federal court of subject-matter jurisdiction? See J.L. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5-8 (1962). If so, does it divest federal courts of jurisdiction in this case? See Bob Jones University v. Simon, 416 U.S. 725, 736-48 (1974).

2. Can a court determine that a challenged exaction qualifies as a “tax” for purposes of the Anti-Injunction Act without reaching the question of whether the exaction qualifies as a “tax” for purposes of Art. I, § 8, cl. 1? Compare Bailey v. George, 259 U.S. 16 (1922), with Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

3. Assuming the Anti-Injunction Act does apply in this case, does a plaintiff have the ability to challenge the exaction provided by § 5000A in a refund suit or otherwise? See 26 U.S.C. § 7422(a); 28 U.S.C. §§ 1331, 1340, 1346.

Entered at the direction of Judge Motz with the concurrence of Judge Davis
and Judge Wynn.

For the Court

/s/ Patricia S. Connor, Clerk