

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 CHERMERINSKY, 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,

O R D E R

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