

FILED: May 23, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-2347
(6:10-cv-00015-nkm-mfu)

LIBERTY UNIVERSITY, INCORPORATED, a Virginia Nonprofit Corporation;
MICHELE G. WADDELL; JOANNE V. MERRILL,

Plaintiffs – Appellants,

and

MARTHA A. NEAL; DAVID STEIN, M.D.; PAUSANIAS ALEXANDER;
MARY T. BENDORF; DELEGATE KATHY BYRON; JEFF HELGESON,

Plaintiffs,

v.

TIMOTHY GEITHNER, Secretary of the Treasury of the United States, in his
official capacity; KATHLEEN SEBELIUS, Secretary of the United States
Department of Health and Human Services, in her official capacity; HILDA L.
SOLIS, Secretary of the United States Department of Labor, in her official
capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his
official capacity,

Defendants – Appellees,

MOUNTAIN STATES LEGAL FOUNDATION; REVERE AMERICA
FOUNDATION,

Amici Supporting Appellant,

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INCORPORATED; 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; HARRY REID, Senate Majority Leader; NANCY PELOSI, House Democratic Leader; DICK DURBIN, Senator, Assistant Majority Leader; CHARLES SCHUMER, Senator, Conference Vice Chair; PATTY MURRAY, Conference Secretary; MAX BAUCUS, Senator, Committee on Finance Chair; TOM HARKIN, Senator, Committee on Health, Education, Labor and Pensions Chair; PATRICK LEAHY, Senator, Committee on the Judiciary Chair; BARBARA MIKULSKI, Senator, HELP Subcommittee on Retirement and Aging Chair; JOHN D. ROCKEFELLER, IV, Senator, Committee on Commerce Chair; STENY HOYER, Representative, House Democratic Whip; JAMES E. CLYBURN, Representative, Democratic Assistant Leader; JOHN B LARSON, Representative, Chair of Democratic Caucus; XAVIER BECERRA, Representative, Vice Chair of Democratic Caucus; JOHN D DINGELL, Representative, Sponsor of House Health Care Reform Legislation; HENRY A. WAXMAN, Representative, Ranking Member, Committee on Energy and Commerce; FRANK PALLONE, JR., Representative, Ranking Member, Commerce Subcommittee on Health; SANDER M LEVIN, Representative, Ranking Member, Committee on Ways and Means; FORTNEY PETE STARK, Representative, Ranking Member, Ways and Means Subcommittee on Health; ROBERT E. ANDREWS, Representative, Ranking Member, Education and Workforce Subcommittee on Health; JERROLD NADLER, Representative, Ranking Member, Subcommittee on Constitution; GEORGE MILLER, Representative, Ranking Member, Education and the Workforce Committee; JOHN CONYERS, JR., Representative, Ranking Member, Committee on the Judiciary; JACK M BALKIN, Knight Professor of Constitutional Law and the First Amendment, Yale Law School; GILLIAN E METZGER, Professor of Law, Columbia Law School; TREVOR W MORRISON, Professor of Law, Columbia Law School; 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 HOSPITAL ASSOCIATION; ASSOCIATION OF AMERICAN

MEDICAL COLLEGES; FEDERATION OF AMERICAN HOSPITALS; NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS; CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES; NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS; CHRISTINE O GREGOIRE, Governor; 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, 2001 Nobel Laureate; 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 1972 Nobel Laureate; DR. SUSAN ATHEY, Professor of Economics, Harvard University, 2007 Recipient of the John Bates Clark Medal for the most influential American economist under age 40; DR. LINDA J. BLUMBERG, Senior Fellow, The Urban Institute, Health Policy Center; DR. LEONARD E. BURMAN, Daniel Patrick Moynihan Professor of Public Affairs at 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, ITT/Sanford Professor of Public Policy, Professor of Economics, Duke University; 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. 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, 2007 Nobel Laureate; 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. 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, 2001 Recipient of the John Bates Clark Medal for the most influential American economist under age 40; 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 University, Harvard School of Public Health; DR. CHRISTOPHER RUHM, Professor of Public Policy and Economics, Department of 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; NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; AMERICAN MEDICAL WOMEN'S ASSOCIATION; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; BLACK WOMEN'S HEALTH IMPERATIVE; CHILDBIRTH CONNECTION; 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 EDUCATION ASSOCIATION; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; 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; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; WOMEN'S LAW PROJECT,

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