Nos. 11-11021 & 11-11067

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, by and through Attorney General Pam Bondi, et al.,
Plaintiffs-Appellees / Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants / Cross-Appellees.

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

RESPONSE TO PETITION FOR HEARING EN BANC

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Pursuant to this Court's order of March 11, 2011, the federal government respectfully submits this response to plaintiffs' petition for hearing en banc.

STATEMENT

Plaintiffs are twenty-six states, two individuals, and the National Federation of Independent Business. Their second amended complaint included six causes of action — described at pages 1-2 of plaintiffs' en banc petition — that challenged the constitutionality of several provisions of the Patient Protection and Affordable Care Act ("Affordable Care Act") on various constitutional grounds.

After considering threshold issues of standing, the district court declared that Congress lacked Article I authority to enact the Affordable Care Act's minimum coverage provision, which will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. *See* 26 U.S.C.A. § 5000A. The court concluded that the provision, which becomes effective in 2014, is not a valid exercise of either Congress's Commerce Clause authority or its taxing power.

The court rejected plaintiffs' other constitutional challenges to the statute. The court dismissed a substantive due process challenge to the minimum coverage provision, and also upheld the employer responsibility provision, 26 U.S.C.A. § 4980H, which in specified circumstances will impose a tax penalty on large employers that fail to make adequate coverage available to their full-time employees. The court also dismissed plaintiffs' claim that provisions of the Act establishing

health insurance exchanges, 42 U.S.C.A. § 18031, impermissibly "coerce" state governments, and likewise rejected plaintiffs' contention that the provision of the Act that will expand eligibility for the Medicaid program in 2014, 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII), is impermissibly "coercive."

Notwithstanding its rejection of all of plaintiffs' challenges except for the Article I challenge to the minimum coverage provision, the district court declared the Act invalid in its entirety. The court acknowledged that, "[i]n a statute that is approximately 2,700 pages long and has several hundred sections — certain of which have only a remote and tangential connection to health care — it stands to reason that some (perhaps even most) of the remaining provisions can stand alone and function independently of the individual mandate." 1/31/11 Op. 65. The court also recognized that, "because a ruling of unconstitutionality frustrates the intent of democratically-elected representatives of the people, the 'normal rule' — in the 'normal' case — will ordinarily require that as little of a statute be struck down as possible." *Id*. at 71-72. Nevertheless, the court held that the minimum coverage provision is not severable from any other provision of the Act, based primarily on the absence of an express severability clause. *Id*. at 67-68.

Subsequently, the district court clarified that it intended its declaratory judgment to be the practical equivalent of an injunction with immediate application

to the parties to this case. 3/3/11 Order. The court recognized, however, that its ruling would be "extremely disruptive," *id*. at 16, and issued a stay of its order pending appeal, conditioned on the federal government filing a notice of appeal within one week of its order (approximately three weeks before the due date set by the Federal Rules) and seeking expedited appellate review in this Court or the Supreme Court. 3/3/11 Order 19.

The federal government filed a notice of appeal and sought expedited review, and the plaintiff states filed a notice of cross-appeal. This Court ordered expedited briefing, which will close on May 25. The Court also directed the federal government to respond to plaintiffs' separately filed request that the case be heard en banc during the week of June 6.

ARGUMENT

Whether to grant initial en banc review is, of course, a matter within this Court's discretion. The federal government stands ready to proceed before the en banc court or before a panel of the Court as the Court deems appropriate. We do not, ourselves, seek an en banc hearing, however, and we do not believe that the case warrants the "extraordinary procedure" of initial en banc. Eleventh Circuit Rule 35-3 (en banc procedure is intended "to bring to the attention of the entire court a precedent-setting error of exceptional importance" or "a panel opinion that is

allegedly in direct conflict with precedent of the Supreme Court or of this circuit").

Initial hearing en banc is typically reserved for cases in which a party claims that panel review would be futile in the face of binding circuit precedent. Plaintiffs' en banc petition identifies two district court rulings that they contend warrant en banc review: the ruling that declares unconstitutional the Affordable Care Act's minimum coverage provision, and the ruling that declares the provision non-severable from any other provision of the Act. *See* Pet. xvi. Plaintiffs do not suggest that resolution of either of these questions will require this Court to reconsider any prior Circuit precedent. They thus fail to make any showing that a panel of this Court would not be free to engage in precisely the same legal inquiry as the full Court. And while this case raises important issues, the importance of the issues argues for considering them "in a calm, orderly, and deliberative fashion" rather than "attempting to resolve what is a sensitive case in a procedurally atypical way." *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 856 (4th Cir. 2000) (Wilkinson, J., concurring in denial of initial hearing en banc). Indeed, the one other court of appeals to rule on a request for initial hearing en banc in a challenge to the Affordable Care Act denied the petition: in *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.), plaintiffs appealed a decision upholding the minimum coverage provision and petitioned for initial en banc review. On March 17, 2011, the D.C. Circuit denied the petition with no member of

the court requesting a vote.

Plaintiffs frankly acknowledge that their goal in seeking initial en banc review is to expedite their appeal so that it may be considered by the Supreme Court as a possible candidate for certiorari next term, potentially along with challenges to the minimum coverage provision of the Affordable Care Act now pending in other circuits. Three of these appeals, which arise from decisions issued prior to the district court decision in this case, have already been calendared for argument. On May 10, pursuant to a joint motion by the federal government and the Commonwealth of Virginia, a panel of the Fourth Circuit will hear oral argument in *Commonwealth of Virginia v. Sebelius*, Nos. 11-1057 & 11-1058, which is the only other case in which a district court invalidated the minimum coverage provision.[11] The same Fourth Circuit panel, pursuant to another joint request for expedition by the federal government and the plaintiffs in the case, will hear argument the same day in *Liberty University, Inc. v. Geithner*, No. 10-2347, an appeal from a decision that upheld the minimum coverage provision. The Sixth Circuit will hear oral argument during its May 30-June 10 sitting pursuant to a consented to expedition request in *Thomas More Law Center v. Obama*, No. 10-2388, which, like *Liberty University*, is an appeal from

[1] The Commonwealth of Virginia filed a petition for a writ of certiorari before judgment, which is pending.

a judgment upholding the minimum coverage provision. In addition, the D.C. Circuit has directed that oral argument in *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.), an appeal from a recent decision upholding the minimum coverage provision, be calendared for September. [2]

Plaintiffs are anxious to accelerate their challenge in an effort to catch up with these appeals, explaining that their goal is to maximize the Supreme Court's "opportunity for review in its 2011 Term of the decision in this appeal along with those in other pending appeals involving related issues regarding the constitutionality of the Act." Pl. Response to Appellants' Motion for Expedited Appeal 4. They are thus less concerned with obtaining en banc review than with obtaining an early date for oral argument. Accordingly, plaintiffs' initial en banc petition is explicitly conditioned on the scheduling of an en banc argument during "the week of June 6, 2011." Pet. 6 n.4. If the case is not heard at that en banc sitting, plaintiffs ask that it instead be heard by a panel on an expedited basis. *See ibid*. ("En banc review is requested only for the week of June 6, 2011. If en banc review is available only at a later date, such as the en banc sitting scheduled in the Fall of 2011, it is not

[2]Briefing has also been completed in *Baldwin v. Sebelius*, No. 10-56374 (9th Cir.), in which the plaintiffs appeal a dismissal on standing grounds and also seek review on the merits. The *Baldwin* plaintiffs' petition for initial en banc hearing is pending. As noted *supra*, plaintiffs' petition for initial en banc hearing in *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.) has been denied.

requested," and, instead, "panel review and resolution at the earliest practicable date is requested.").

Seeking review by the full Court is not the best means for obtaining an early decision. The purpose of en banc review is not to achieve expedition and, by its nature, en banc review is more time consuming than consideration by a three-judge panel. *Cf. Federal Election Comm'n v. Lance*, 635 F.2d 1132, 1137 (5th Cir. Jan. 1981) (en banc) (per Tjoflat, J.) ("It has been suggested that the effect of an en banc requirement may be to impede rather than expedite.").

Nor is it apparent that the briefing schedule would provide adequate time for the Court to review the district court's opinions and the briefs submitted by the parties and their *amici*. Under the Court's order, briefing will conclude on May 25, which would give the full Court only two weeks before the June 6 en banc sitting to consider an appeal that, in plaintiffs' view, "is unprecedented in its scope, scale, and importance." Pet. 1. The district court issued three significant decisions in this case. Its ruling on the government's motion to dismiss is 38 pages in its published form. *See* 716 F. Supp. 2d. 1120, 1127-1165. In unpublished form, its January 31 summary judgment ruling is 78 pages, and its March 3 decision on the government's motion for clarification is 20 pages. As noted, the decisions address questions of standing; Congress's Article I authority under its commerce and taxing powers to enact the

minimum coverage provision; the validity of the employer responsibility provision; and whether the expansion of the Medicaid program and the establishment of health insurance exchanges impermissibly coerce the states. The first two pages of plaintiffs' petition set these issues out in full. Moreover, if the Court were to conclude that Congress lacked authority to enact the minimum coverage provision, it would also be necessary to address the district court's conclusion that principles of severability require that the Affordable Care Act be held invalid in its entirety. In considering these questions, the Court will likely receive a significant number of briefs from *amici curiae*. For example, in the *Virginia* appeal that is pending in the Fourth Circuit, 19 amicus briefs have already been filed, and amicus briefs in support of the Commonwealth have not yet been submitted.

To consider these issues in the ordinary course of appellate review rather than invoking the exceptional procedure of initial hearing en banc will not unduly delay the proceedings. The case is proceeding on an expedited briefing schedule with briefing to be completed on May 25, and the government does not oppose oral argument on any date thereafter that would be convenient and appropriate for the Court.

In sum, the Court can address plaintiffs' concern for expedition without setting this case for en banc review. Whether to grant initial en banc consideration is,

however, a matter of the Court's discretion, and we stand ready to proceed in whatever manner the Court deems appropriate.

Respectfully submitted,

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MARCH 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2011, I filed the foregoing motion with the Court by federal express, overnight delivery and served copies on the following counsel by email, by agreement of the parties:

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