

1 TONY WEST  
Assistant Attorney General

2 IAN HEATH GERSHENGORN  
3 Deputy Assistant Attorney General

4 ANN BIRMINGHAM SCHEEL  
United States Attorney, District of Arizona

5 JENNIFER RICKETTS  
6 Director

7 SHEILA LIEBER  
Deputy Director

8 ETHAN P. DAVIS  
9 JOEL McELVAIN  
10 TAMRA T. MOORE  
Attorneys  
11 United States Department of Justice  
Civil Division, Federal Programs Branch  
12 20 Massachusetts Ave. NW  
Washington, D.C. 20001  
(202) 514-2988  
Joel.McElvain@usdoj.gov

13 *Attorneys for Defendants*

14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE DISTRICT OF ARIZONA**

16 Nick Coons; et al.,

17 Plaintiffs,

18 vs.

19 Timothy Geithner; et al.,

20 Defendants

) Case No.: CV-10-1714-PHX-GMS

) **REPLY MEMORANDUM IN**  
) **SUPPORT OF MOTION TO STAY**  
) **CASE**

21  
22  
23 The Supreme Court of the United States has granted certiorari in three cases  
24 raising challenges to the constitutionality of the Patient Protection and Affordable Care  
25 Act (ACA). *See Nat'l Fed'n of Indep. Business v. Sebelius*, No. 11-393; *U.S. Dep't of*  
26

1 *Health & Human Servs. v. Florida*, No. 11-398; *Florida v. U.S. Dep't of Health &*  
2 *Human Servs.*, No. 11-400. The Supreme Court's resolution of these cases will  
3 substantially affect the outcome of this case. The Government accordingly has moved for  
4 a stay of proceedings pending the Supreme Court's disposition of the cases before it.  
5 Plaintiffs oppose the Government's motion only in part, contending that this case should  
6 proceed with respect to Counts VII and VIII of their second amended complaint. Judicial  
7 economy would not be served by the plaintiffs' request to bifurcate their case in this  
8 manner.  
9

10           Count VII concerns the plaintiffs' challenge to the constitutionality of the  
11 Independent Payment Advisory Board (IPAB, or the Board). The Plaintiffs contend that  
12 there is a "fair possibility" that plaintiff Novack would suffer an injury from the  
13 operations of IPAB during a stay. But the Board cannot even make proposals regarding  
14 Medicare spending until January 15, 2014 at the earliest. 42 U.S.C. § 1395kkk(c)(1)(B),  
15 (c)(3)(A). Even then, it may only do so if the per capita growth rate in Medicare  
16 spending exceeds a target growth rate. 42 U.S.C. § 1395kkk(c)(3)(A)(i)-(ii). The  
17 Congressional Budget Office ("CBO") has determined – and plaintiffs do not dispute –  
18 that the statutory target rate will not be exceeded, and that consequently the Board will  
19 not issue any proposals, for at least the next ten years. CBO, *CBO's Analysis of the*  
20 *Major Health Care Legislation Enacted in March 2010* at 26 (Mar. 30, 2011); CBO,  
21 *2011 Long Term Budget Outlook* at 38 (June 21, 2011). Even after 2021, it is entirely  
22 speculative that the Board would issue any proposals that would affect plaintiff Novack's  
23 Medicare payments. Under these circumstances, judicial economy would be served – and  
24  
25  
26

1 no party would be harmed – by a brief stay of this count, pending the Supreme Court’s  
2 resolution of the Affordable Care Act cases before it.<sup>1</sup>

3           Count VIII concerns the plaintiffs’ assertion that the Arizona Health Care  
4 Freedom Act preempts federal law. But this assertion adds nothing to the plaintiffs’  
5 primary challenge to the constitutionality of the minimum coverage provision, 26 U.S.C.  
6 § 5000A. If the Supreme Court upholds that provision, the plaintiffs could not cite the  
7 Arizona statute to avoid its terms, given that “state action cannot circumscribe Congress’  
8 plenary commerce power.” *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). It thus would be  
9 pointless to review Count VIII in advance of a ruling from the Supreme Court on the  
10 constitutionality of Section 5000A.  
11

12           In any event, the plaintiffs are mistaken in their belief that it would expedite  
13 matters to bifurcate their complaint. A final judgment would not be reached in this case  
14 until all of the counts in the second amended complaint have been decided. Absent  
15 certification of an interlocutory appeal, accordingly, this case would proceed to the Ninth  
16 Circuit on the same schedule whether the Court stays some or all of the plaintiffs’ counts.  
17

18           In sum, there is every reason that judicial economy would be served if this Court  
19 were to wait to rule until it receives guidance from the Supreme Court, and there is no  
20 reason that the Court should hurry its ruling in advance of that guidance. The  
21 Government accordingly respectfully requests a stay.  
22

23  
24  
25 <sup>1</sup> Because plaintiff Novack’s claim of injury is entirely speculative, he lacks standing to  
26 challenge the constitutionality of the Board. The Government has moved to dismiss Count VII  
for this reason.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

DATED: December 20, 2011

Respectfully submitted,  
TONY WEST  
Assistant Attorney General  
IAN HEATH GERSHENGORN  
Deputy Assistant Attorney General  
ANN BIRMINGHAM SCHEEL  
United States Attorney, District of  
Arizona  
JENNIFER RICKETTS  
Director  
SHEILA LIEBER  
Deputy Director  
*s/ Joel McElvain* \_\_\_\_\_  
ETHAN P. DAVIS  
JOEL McELVAIN  
TAMRA T. MOORE  
Trial Attorneys  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave. NW  
Washington, D.C. 20001  
Phone: (202) 514-2988  
Fax: (202) 616-8202  
E-mail: Joel.McElvain@usdoj.gov  
*Attorneys for Defendants*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2011, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Clint D. Bolick, Goldwater Institute, [cbolick@goldwaterinstitute.org](mailto:cbolick@goldwaterinstitute.org)

Diane S. Cohen, Goldwater Institute, [dcohen@goldwaterinstitute.org](mailto:dcohen@goldwaterinstitute.org)

Nicholas C. Dranias, Goldwater Institute, [ndranias@goldwaterinstitute.org](mailto:ndranias@goldwaterinstitute.org)

s/ Joel McElvain

JOEL McELVAIN