



Photo: The Newland family of Colorado is fighting Obamacare's HHS Mandate regulation. (L to R: James "Jim" Newland, Andrew "Andy" Newland, Paul Newland, William "Bill" Newland)

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## Federal judge in Colorado issues first injunction against HHS Mandate; Expect more to come

A federal district court in Colorado granted a preliminary injunction against a controversial Obamacare regulation on July 27, 2012.

This is no small matter. Courts only grant injunctions under extraordinary circumstances. Plaintiffs seeking an injunction must meet a very difficult standard. Not only must they show that they will suffer irreparable harm without the injunction, they must also prove that they are likely to win their case. Therefore, when a federal court grants an injunction, it is making a preliminary assessment that the law is on the side of the plaintiffs.

The plaintiffs in this case are the Newland family, of Colorado, owners of a Denver HVAC manufacturing company called, Hercules Industries.<sup>1</sup> The Newlands seek to operate Hercules Industries in a way that conforms to their Catholic beliefs.<sup>2</sup> Their beliefs, however, run contrary to a Department of Health and Human Services' (HHS) mandate that businesses must provide contraceptive services to their employees free of charge.

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## Maine's shot across Obamacare's bow

The state of Maine on August 1, 2012, sent a shot across the bow of Obamacare in the form of a letter to Secretary of Health and Human Services (HHS), Kathleen Sebelius.<sup>1</sup> The letter requests a reduction to Maine's Medicaid eligibility threshold by September 1, 2012 and threatens to sue if the Obama Administration does not agree to the changes. The letter, written by Maine Governor Paul LePage asserts Maine's right not to be coerced by the federal government—a right confirmed by the Supreme Court's Obamacare decision, *NFIB v. Sebelius*, not quite two months ago.

Gov. LePage hopes the proposed changes, expected to save Maine nearly \$20 million, will help solve Maine's fiscal woes.<sup>2</sup>

But a provision of Obamacare, called the "maintenance of effort" (MOE) requirement, bans states from lowering their Medicaid eligibility threshold until they establish a state health exchange.<sup>3</sup> Just like the Medicaid expansion requirement, declared

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## Judge issues injunction against HHS Mandate (continued)

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While the law provides a narrow exemption for churches and an “accommodation” for religious organizations, it makes no concessions to individuals or other entities operating for-profit businesses. Without this injunction, Hercules Industries would have been subject to millions of dollars in fines.<sup>3</sup>

The Newland’s legal case relies on the Religious Freedom Restoration Act and is so strong that even Judge John L. Kane, appointed by President Jimmy Carter, has had to make the preliminary assessment that the Obama Administration has violated the Religious Freedom Restoration Act. Judge Kane is not exactly a right-wing conservative. For instance, in a University of Denver video he suggests that the entire Federal Rules of Civil Procedure should be scrapped and rewritten.<sup>4</sup>

Judge Kane, did however make a mild concession to the Obama Administration, saying that the question of whether a for-profit business has First Amendment, Free Exercise Clause rights is a question that “merit[s] more deliberate investigation.”<sup>5</sup>

This only shows the unprecedented nature of the HHS mandate.

“This lawsuit seeks to ensure that Washington bureaucrats cannot force families to abandon their faith just to earn a living,” said attorney for the Plaintiffs, Matt Bowman. “Americans don’t want politicians and bureaucrats deciding what faith is, who the faithful are, and where and how that faith may be lived out.”<sup>6</sup>

ObamacareWatcher.org was created to monitor and respond to Obamacare regulations. The HHS mandate is the first Obamacare regulatory policy to receive substantial pushback in the courts.

Earlier this year, we predicted that non-profits would find it difficult to establish

standing to sue until closer to August 2013 and that it would be for-profit businesses that would first get to challenge the HHS mandate.

The law is so clear, that we can expect further injunctions against the HHS Mandate in the weeks and months ahead.

Said Bowman, “Every American, including family business owners, should be free to live and do business according to their faith. For the time being, Hercules Industries will be able to do just that.”<sup>7</sup>

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<sup>1</sup> Brief in Support of Motion for Preliminary Injunction, *Newland v. Sebelius*, No. 12-cv-01123-JLK (D. Colo. Filed Apr. 30, 2012) at 3 available at <http://www.adfmedia.org/files/NewlandPIbrief.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> News Release, Alliance Defending Freedom, Hercules shows strength, halts Obama abortion pill mandate (July 27, 2012) <http://www.adfmedia.org/News/PRDetail/7524>.

<sup>4</sup> “Judge John L. Kane Says Civil Justice Overhaul Overdue,” YouTube.com (Uploaded Sep. 24, 2009) <http://www.youtube.com/watch?v=nle9b530YXE>.

<sup>5</sup> Order, *Newland v. Sebelius*, No. 12-cv-01123-JLK (D. Colo. July 27, 2012) at 12 available at <http://obamacarewatcher.org/sites/default/files/newlandvsebelius-preliminary-injunction.pdf>.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> *Id.*

## Maine's shot across Obamacare's bow (continued)

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unconstitutional by a vote of seven to two justices at the Supreme Court, states that violate the MOE requirement risk losing all Medicaid funding.<sup>4</sup>

*The Wall Street Journal* reported that “within hours” of the Supreme Court’s decision in *NFIB v. Sebelius*, Maine’s Attorney General’s office was studying what effect the case might have on Obamacare’s MOE requirement. After studying the issue, the state’s Attorney General, William Schneider, says he’s convinced that Maine’s challenge to Obamacare is “on solid legal ground.”<sup>5</sup>

Early reports of Maine’s requested change claimed that HHS<sup>6</sup> and the Congressional Research Service (CRS)<sup>7</sup> disagree with Maine. But HHS and CRS did not then have the benefit of seeing Maine’s legal analysis. In a July 11, 2012 letter to Health and Human Services (HHS), Gov. LePage told HHS Secretary, Kathleen Sebelius, that he believed she would “reserve judgment until the law and facts are fully-presented.”<sup>8</sup>

Now that Maine has presented the “law and the facts” we know that it has two arguments.

First, Maine argues that Obamacare’s MOE requirement is “part and parcel” of its Medicaid expansion provision and thus was struck along with that provision.

But its stronger argument is that even if the MOE requirement was not overturned by *NFIB v. Sebelius*, the constitutional doctrine identified in that case renders the MOE requirement unconstitutional. The Court in that case said, “Though Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or ‘retroactive’ conditions.”<sup>9</sup> Obamacare’s MOE requirement, Maine argues, is such a “surprise,” “post-acceptance” condition that

creates “gun to the head” coercion by threatening to revoke all Medicaid funding if a state reduces its eligibility threshold.

If we are correct in assuming that the Obama Administration is unlikely to permit Maine to make this change to its Medicaid program, then we can hope that Maine’s ultimatum will result in giving the Supreme Court another opportunity to reprimand Congress for unconstitutionally using its spending powers to coerce the states.

<sup>1</sup> Letter from Paul R. LePage, Governor of the State of Maine, to Kathleen Sebelius, Secretary, U.S. Dep’t of Health and Human Servs. (August 1, 2012) *available at* <http://www.maine.gov/dhhs/documents/Sebelius-Kathleen-Letter-8-1-2012.pdf>.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Patient Protection and Affordable Care Act, P.L. 111-148 § 2001(b)(2) (March 23, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> Christopher Weaver and Louise Radnofsky, *THE WALL STREET JOURNAL*, “States Interpret Ruling to Cut Medicaid Now” (July 6, 2012) <http://online.wsj.com/article/SB10001424052702303684004577511103843368654.html>.

<sup>6</sup> See Letter from Kathleen Sebelius, Secretary, U.S. Dep’t of Health and Human Servs. to the governors of the United States (July 10, 2012) *available at* <https://docs.google.com/file/d/0B61rrpmRSrQWRkVFQzNNVWJ4LWM/edit?pli=1>.

<sup>7</sup> See Memorandum from Kathleen S. Swendiman, Legislative Attorney, Congressional Research Serv., to Evelyne P. Baumrucker, Analyst in Health Care Financing, Congressional Research Serv., “Selected Issues Related to the Effect of

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## How to Comment on a Regulation

1. Go to the Regulations page at: [ObamacareWatcher.org](http://ObamacareWatcher.org)
2. Choose a regulation.
3. Click on the "Comment Now" link to be directed to the Regulations.gov website.
4. Click "Submit a Comment" which is located towards the top of the page.
5. Fill out the comment form.

## Glossary of Agency Abbreviations

<b>CMS:</b>	Centers for Medicare and Medicaid Services
<b>DOL:</b>	Department of Labor
<b>EBSA:</b>	Employee Benefits Security Administration
<b>HHS:</b>	Department of Health and Human Services
<b>HRSA:</b>	Health Resources and Services Administration
<b>IRS:</b>	Internal Revenue Service
<b>OIRA:</b>	Office of Information and Regulatory Affairs
<b>TREAS:</b>	Department of the Treasury

### Regulations open for comment

#### Health Insurance Premium Tax Credit

**RIN:** 1545-BJ82      **Agency:** TREAS-IRS  
**Status:** Final rule; Public comments accepted through August 21, 2012.

#### Disregarded Entities and the Indoor Tanning Services Excise Tax

**RIN:** 1545-BK38      **Agency:** TREAS-IRS  
**Status:** Final and temporary regulations. Public comments accepted through September 24, 2012.

#### Additional Requirements for Charitable Hospitals

**RIN:** 1545-BK57      **Agency:** TREAS-IRS  
**Status:** Notice of proposed rulemaking. Public comments accepted through September 24, 2012.

For the latest status on these and other regulations, visit us at:

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### Maine's shot across Obamacare (cont.)

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*NFIB v. Sebelius* on the Medicaid Expansion Requirements in Section 2001 of the Affordable Care Act," (July 16, 2012) available at <https://docs.google.com/file/d/0B61rrpmRSrQWV0paN3dSa21WbEE/edit>.

<sup>8</sup> Letter from Paul R. LePage, Governor of the State of Maine, to Kathleen Sebelius, Secretary, U.S. Dep't of Health and Human Servs. (July 11, 2012) available at <http://capsules.kaiserhealthnews.org/wp-content/uploads/2012/07/ltr-Sebelius-re-Pingree-11JUL2012.pdf>.

<sup>9</sup> Letter from Mary C. Mayhew, Commissioner, Maine Department of Health and Human Services, to Richard R. McGreal, Associate Regional Administrator, Center for Medicare and Medicaid Services, U.S. Department of Health and Human Services (August 1, 2012) at 9 (quoting *NFIB v. Sebelius*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2556 (2012) at 54 of slip opinion) available at <http://www.maine.gov/dhhs/documents/SPA-12-010-Eligibility-Cover-Letter-8-12-2012.pdf>.

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