

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

ARTHUR ENLOE, et al.,

Plaintiffs,

CASE NO: 5-11CV0026-C

v.

BARACK OBAMA, et al.,

Defendants

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY
JUDGMENT OR ALTERNATIVELY A STATEMENT PURSUANT TO 28 U.S.C.
1292(b)**

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	2
Table of Authorities	3
Summary	6
Introduction	7
Contrary to the Clear Meaning of the Constitution, <i>Wickard v. Filburn</i> Leaves No Limits on Congressional Authority to Regulate Non-Criminal Activity	9
Supreme Court has Indicated that it is Willing to Reconsider <i>Wickard</i>	12
Summary Judgment Standard	13
No Genuine Issue of Fact	14
Tax and Spend Authority	15
Entitled to Judgment as a Matter of Law	17
Conclusion	17
Certificate of Service	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Anderson v. Liberty Lobby Inc.</i> , 477 U.S. 242 (1986)	15
<i>Bond v. United States</i> , 564 U.S. ___, 2011 WL 2369334 (2011)	8, 10, 14-16, 18
<i>Boys Markets, Inc. v. Retail Clerks Union, Local 770</i> , 389 U.S. 235 (1970)	13
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936)	11
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	15
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	14
<i>Hammer v. Dagenhart</i> , 247 U.S. 251 (1918)	10
<i>Heisler v. Thomas Colliery Co.</i> , 260 U.S. 245 (1922)	11
<i>Helvering v. Hallock</i> , 309 U.S. 106 (1940)	13
<i>Hill v. Wallace</i> , 259 U.S. 44 (1922)	11
<i>Howard v. Illinois Central R. Co.</i> , 207 U.S. 463 (1908)	10
<i>Hunt v. Washington State Apple Advertising Cmm'n</i> , 432 U.S. 333 (1977)	15
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	7, 10
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)	15

TABLE OF AUTHORITIES (cont.)

<u>Cases</u>	<u>Page</u>
<i>New York v. United States</i> , 505 U.S. 144 (1992)	14
<i>Nigro v. United States</i> , 276 U.S. 332 (1928)	18
<i>Oliver Iron Co. v. Lord</i> , 262 U.S. 172 (1923)	11
<i>Patterson v. McLean Credit Union</i> , 485 U.S. 617 (1988)	13
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 164 (1989)	13
<i>Railroad Retirement Board v. Alton R. Co.</i> , 295 U.S. 333 (1935)	11
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	13
<i>Schechter Corp. v. United States</i> , 295 U.S. 495 (1935)	11
<i>Smith v. Allwright</i> , 321 U.S. 649 (1944)	13
<i>Swift & Co. v. Wickham</i> , 382 U.S. 111 (1965)	13
<i>Thomas More Law Center v. Obama</i> , __F.3d__, 2011 WL 2556039 (6 th Cir. 2011)	8, 11-13, 16
<i>United States v. Dewitt</i> , 9 Wall. 41 (1869)	11
<i>United States v. E.C. Knight Co.</i> , 156 U.S. 1 (1895)	10
<i>United States v. Steffens</i> , 100 U.S. 82 (1879)	11

TABLE OF AUTHORITIES (cont.)

<u>Cases</u>	<u>Page</u>
<i>U.S. v. Lopez</i> , 514 U.S. 549 (1995)	11
<i>Utah Power & Light Co. v. Pfof</i> , 286 U.S. 165 (1932)	11
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942)	10, 11
<u>Books & Articles</u>	<u>Page</u>
<i>Here the People Rule</i> , Edward Banfield (AEI Press, 1991)	18
<i>The Federalist No. 45</i> , James Madison	10
<i>The Nature of the Judicial Process</i> , B. Cardozo, 149 (1921)	13
<u>Rules</u>	<u>Page</u>
Local R. 56.3	7
Fed. R. Civ. Proc. 56	15
<u>Statutes</u>	<u>Page</u>
26 U.S.C. §4980H	16
26 U.S.C. § 5000A	16
28 U.S.C. § 1292(b)	8, 9, 18, 19
42 U.S.C. §300gg-1(a)	16
42 U.S.C. §300gg-3(a)	16
42 U.S.C. §18031	16
42 U.S.C. §18091(a)	17
<u>U.S. Constitution</u>	<u>Page</u>
U.S. Const. article I §8	7
U.S. Const. amend. X	7

Summary

Pursuant to this Court's Local Rule 56.3 the plaintiffs submit the following summary:

Elements of Abuse of Authority as Pled by Plaintiffs

- An act of Congress purporting to codify or enact law, or invoking any other power; or any agent of the federal government acting to enforce any such law or act under color of federal authority.
- Said act being beyond the scope of the limited and defined powers granted to Congress under the United States Constitution;
- Legal challenge by any individual or entity with standing to challenge said act.

See U.S. Const. article I §8; U.S. Const. Amd. X; *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

Facts and Evidence Supporting Abuse of Authority

- The codification, content, and enforcement of the Patient Protection and Affordable Care Act (hereinafter "Obamacare") is undisputed. The fact that agents of the federal government, including defendants Sebelius, Holder, and the Department of Health and Human Services have enforced and will continue to enforce Obamacare is undisputed.
- The second element of this cause of action is a legal determination to be applied to the undisputed content of Obamacare.
- No genuine issue of fact exists that at least one of the 29,239 current members of Liberty Legal Foundation have standing to challenge

Obamacare. See App. 1-2. Declarations and documents from Liberty Legal Foundation members have been submitted supporting concrete, particular, and redressable injuries caused by Obamacare. See App. 1-15.

See also *Bond v. United States*, 564 U.S.____, 2011 WL 2369334, *9-10 (2011); *Thomas More Law Center v. Obama*, __F.3d __, 2011 WL 2556039, *5-11 (6th Cir.2011).

Elements of Violation of the Tenth Amendment as Pled by Plaintiffs

For purposes of this motion, the elements, facts, and evidence for this cause of action are identical to those set forth above for Abuse of Authority.

Introduction

When substantial grounds for a difference of opinion have been raised on a controlling point of law, U.S. Code provides District Courts with the opportunity to make any rulings based upon such law immediately appealable, even when such rulings would not otherwise be immediately appealable. 28 U.S.C. 1292(b) states:

“When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.”

The instant case presents exactly the situation envisioned by the drafters of 28 U.S.C. 1292(b). Plaintiffs and defendants are in agreement that current commerce clause

precedent grants Congress authority to enact the federal laws collectively known as the Patient Protection and Affordable Care Act (hereinafter “Obamacare”). Complaint ¶ 19; Defs.’ Br. in Support of Mtn. Dismiss p. 22-23. Plaintiffs’ complaint is grounded upon plaintiffs’ assertion that said precedent violates the clear meaning of the U.S. Constitution, and that correct interpretation of the Constitution bars Congress from enacting Obamacare. Complaint ¶¶ 18-19. Determination of plaintiffs’ assertion of law will control the outcome of the instant case.

Plaintiffs understand that this Court may disagree with plaintiffs’ arguments regarding said precedent, or may agree, yet still choose to deny plaintiffs’ motion. Should this Court deny the instant motion for any reason, plaintiffs respectfully request that this Court include in its order a statement as set forth in 28 U.S.C. 1292(b).

The points and authorities below demonstrate “substantial grounds for a difference of opinion” on the “controlling question of law.” Recent rulings from other Courts support plaintiffs’ assertion that current commerce clause precedent leaves no limitations on Congressional authority, in direct contradiction to the clear meaning of the Constitution. This brief also identifies the source of inconsistencies in modern commerce clause precedent, and reveals the simple solution to correct this chaotic and unsettled body of law. Recent Supreme Court rulings also demonstrate that the Court is more than willing, is actually seeking, an opportunity to revisit and substantially revise its commerce clause precedent.

Finally, plaintiffs’ request for a 28 U.S.C. 1292(b) statement should not be taken as an admission that plaintiffs concede the merits of the instant motion. To the contrary, plaintiffs believe that this Court has the authority and duty to uphold and enforce the

Constitution of the United States. As discussed below, plaintiffs and other courts respectfully assert that adhering to current commerce clause precedent destroys federalism, violates fundamental rights of all Americans, and cannot be conformed to the clear meaning of the Constitution. Therefore, the plaintiffs make this motion with the good faith belief that this Court can and should grant this motion.

Contrary to the Clear Meaning of the Constitution, *Wickard v. Filburn* Leaves No Limits on Congressional Authority to Regulate Non-Criminal Activity

The Founding Fathers feared too much power being in the hands of any one branch of the government and were determined to prevent our elected officials from becoming a ruling class.

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” *The Federalist* No. 45 (Madison).

This is why the earliest and most recent Supreme Court precedent confirms that one purpose of the Constitution is to permanently limit the scope of Congressional authority:

“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 5 U.S. 137, 176 (1803); see also *Bond v. United States*, 564 U.S.____, 2011 WL 2369334, *9-10 (2011).

Prior to 1942 it was unquestioned that Congress did not have the authority to enact any regulation as comprehensive and invasive of personal rights as Obamacare. *Id.*; See also *United States v. E. C. Knight Co.*, 156 U.S. 1; *Howard v. Illinois Central R. Co.*, 207 U.S. 463; *Hammer v. Dagenhart*, 247 U.S. 251; *Railroad Retirement Board v. Alton*

R. Co., 295 U.S. 330; *Schechter Corp. v. United States*, 295 U.S. 495; *Carter v. Carter Coal Co.*, 298 U.S. 238; *United States v. Dewitt*, 9 Wall. 41; *United States v. Steffens*, 100 U.S. 82; *Hill v. Wallace*, 259 U.S. 44; *Heisler v. Thomas Colliery Co.*, 260 U.S. 245; *Oliver Iron Co. v. Lord*, 262 U.S. 172; *Utah Power & Light Co. v. Pfost*, 286 U.S. 165.

In 1942 the Supreme Court changed 150 years of Constitutional doctrine with its *Wickard v. Filburn* ruling. 317 U.S. 111 (1942). That Court concluded:

“even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’” *Wickard*, 317 U.S. at 125.

The *Wickard* standard leaves no appreciable limitations on Congressional authority. See *U.S. v. Lopez*, 514 U.S. 549, 565 (1995); *Thomas More Law Center v. Obama*, ___F.3d ___, 2011 WL 2556039, *36 (6th Cir.2011); *Id.* at *64 (Judge Graham, dissenting). *Wickard*'s standard allows one-time activities of individuals to be considered in the aggregate. *Wickard*, 317 U.S. at 125; *Lopez*, 514 U.S. at 559; *Thomas More*, ___F.3d ___, 2011 WL 2556039, *21. In other words, after *Wickard* a single act can be regulated by Congress if that act would have a theoretical effect upon interstate commerce, assuming large numbers of individuals repeated the act. *Id.* While the Supreme Court hasn't openly admitted that *Wickard* leaves no limits on Congressional authority, it has recently noted the possibility: “[D]epending on the level of generality, any activity can be looked upon as commercial.” *Lopez*, 514 U.S. at 565.

The Sixth Circuit recently summarized the current state of commerce clause precedent in its decision upholding Obamacare's individual mandate:

“A short history of decisions in this area shows that the Court has given Congress wide berth in regulation of commerce, frequently adopting

limits on that authority and just as frequently abandoning them, all while continuing to deny that Congress has unlimited national police powers...[O]ne tilts at hopeless causes in proposing new categorical limits on the commerce power...[T]he Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so." *Thomas More*, ___F.3d ___, 2011 WL 2556039, at *36.

While the Sixth Circuit upheld the individual mandate, it appears to be unhappy with its own conclusion. The three-judge panel wrote three opinions with one dissenting. While the Court delivered a split opinion, all three opinions agreed on one point: *Wickard* leaves no appreciable limitations on Congressional authority, other than preventing Congress from creating single-issue criminal statutes that have no effect on interstate commerce. See *Id.* at *36 and *64. The only real disagreement between the Sixth Circuit's panel was what to do about this apparent disconnect between the clear meaning of the Constitution and *Wickard*. Two judges decided to follow *stare decisis* with one describing reservations about the decision. The dissenting judge was so opposed to this clear violation of Constitutional limits on federal authority he instead read a limitation into *Wickard* that simply doesn't exist. *Thomas More*, ___F.3d ___, 2011 WL 2556039, (Judge Graham, dissenting).

In his dissent Judge Graham summarizes the problem, openly urges the Supreme Court to correct its commerce clause precedent, and predicts that it will do just that:

"In *Lopez* the Supreme Court recognized that the direction of its existing Commerce Clause jurisprudence threatened the principle of a federal government of defined and limited powers, and it began the process of developing a new jurisprudence more compatible with the Constitution. That process was interrupted by *Raich*, where a majority of the Court was unwilling to expressly overrule a landmark Commerce Clause case in *Wickard*, which had been the law of the land for over sixty years.

Notwithstanding *Raich*, I believe the Court remains committed to the path laid down by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas to establish a framework of meaningful

limitations on congressional power under the Commerce Clause. The current case is an opportunity to prove it so.

If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power? The ultimate issue in this case is this: Does the notion of federalism still have vitality? To approve the exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit, ...as long as the regulation concerns an activity or decision that, when aggregated, can be said to have some loose, but-for type of economic connection, which nearly all human activity does. Such a power feels very much like the general police power that the Tenth Amendment reserves to the States and the people." *Thomas More Law Center v. Obama*, ___F.3d ___, 2011 WL 2556039, *64 (6th Cir.2011), (Judge Graham, dissenting).

Supreme Court has Indicated that it is Willing to Reconsider *Wickard*

Judge Graham's conclusion that the Supreme Court will significantly alter or overturn *Wickard* in the near future is supported by recent statements of the Court.

First, the Supreme Court has repeatedly established that it is willing to overturn precedent when that precedent proves to be in error. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *Patterson v. McLean Credit Union*, 485 U.S. 617, 617 (1988); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 389 U.S. 235, 240-41 (1970); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); *Smith v. Allwright*, 321 U.S. 649, 665 (1944); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This is particularly true when precedent interprets the Constitution. *Smith*, 321 U.S. at 665. Also, precedent does not necessarily become more entrenched with time: "[P]recedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Patterson*, 491 U.S. at 172, (quoting *Runyon v. McCrary*, 427 U.S. 160, 191 (1976), (Stevens, J., concurring), quoting B. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

Just two weeks before the Sixth Circuit's Thomas More decision the Supreme Court used a review of standing doctrine as applied to Tenth Amendment claims to make several clear statements about the current Court's desire to strengthen federalism:

“State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” *Bond v. United States*, 564 U.S.____, 2011 WL 2369334, *9 (2011), (quoting *New York v. United States*, 505 U.S. 144, 181 (1992), quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991)(Blackmun, J., dissenting)).

“[T]he individual liberty secured by federalism is not simply derivative of the rights of the States. Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.” *Bond*, 564 U.S.____, 2011 WL 2369334, *9-10 (2011).

These statements reflect a Supreme Court that is reasserting the importance of federalism. The idea that federalism protects individual liberty necessarily requires a federalist system that creates real and defined limits upon Congressional authority. Such strong statements cannot logically co-exist with the Court's own conclusions about current commerce clause precedent, as discussed in *Lopez* and *Morrison*.

As asserted by Judge Graham and supported by the *Bond* Court's statements just three months ago, the Supreme Court appears to be seeking an opportunity to correct the mess made by *Wickard* and its progeny.

Summary Judgment Standard

Summary Judgment is proper if the evidence shows that there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Fed. R.

Civ. P. 56 (2002); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

No Genuine Issue of Fact

The facts of Obamacare's existence, enactment, and its content are uncontested.

While the defendants may dispute the facts supporting plaintiffs' standing, review of undisputed facts reveals that no genuine issue of fact exists to support any such dispute. First, only one Plaintiff needs to have standing in order to maintain a suit, *see Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). Next, an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right. *Hunt v. Washington State Apple Advertising Cmm'n*, 432 U.S. 333, 342 (1977). Finally,

“An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.” *Bond v. United States*, 564 U.S. ___, *9-10 (2011).

Therefore, if any one member of Liberty Legal Foundation can show a concrete, particular, and redressable injury caused by Obamacare, then the plaintiffs have standing to challenge the Act.

It is undisputable that Obamacare affects literally every person and entity in America. It is also undisputable that Obamacare causes injuries that are concrete, particular, and redressable, in the form of financial losses, for at least some Americans. Liberty Legal Foundation has more than 29,239 members from all 50 states. App. at 1. An assertion that the plaintiffs do not have standing to challenge Obamacare would

require this Court to believe that not one of Liberty Legal Foundation's members has suffered concrete, particular, and redressable injuries as a result of Obamacare. Such an assertion is simply not credible. Therefore, no genuine issue exists as to such an assertion of fact.

This conclusion is further supported by evidence of concrete, particularized, and redressable injuries suffered by members of Liberty Legal Foundation. App. at 1-15.

This conclusion is further supported by the Sixth Circuit's *Thomas More* ruling in which individuals were found to have standing to challenge Obamacare under essentially identical facts. *Thomas More*, ___F.3d ___, 2011 WL 2556039, *5-11 (6th Cir.2011).

The *Bond* Court also indicated that standing should usually be found in cases asserting federalism:

“If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object...It is appropriate for an individual...[to] challenge a law as enacted in contravention of constitutional principles of federalism.” *Bond v. United States*, 564 U.S.____, *11 (2011).

Tax and Spend Authority

While defendants will likely assert that some aspects of Obamacare are authorized under Congress' tax and spend authority, it is undisputed that much of Obamacare imposes mandates on states, companies, and individuals. See 26 U.S.C. §4980H (requiring large employers to offer health insurance to their employees); 42 U.S.C. §18031 (requiring states to operate “health benefit exchanges”); 42 U.S.C. §§300gg-1(a) & 300gg-3(a) (barring insurance companies from denying coverage to individuals with pre-existing conditions); 26 U.S.C. §5000A (requiring all Americans to obtain “minimum

essential coverage”). None of these aspects of Obamacare are within Congress’ tax and spend authority. All are beyond Congress’ commerce clause scope of authority.

Also, because Congress determined that Obamacare was to be a comprehensive scheme to reform the health care industry, Congress intentionally determined that a severability clause would not be included. This decision indicates that Obamacare should be considered as a whole. Carving pieces out of this mammoth legislation would leave the health care industry much worse off than prior to enactment of the legislation. This is why a severability clause was intentionally not included.

Finally, Congress explicitly invoked its commerce power, not its taxing authority. See 42 U.S. C. §§18091(a)(1), 18091(a)(2)(A), 18091(a)(2)(B), and 18091(a)(3). This coupled with the decision to not include a severability clause leads to the conclusion that Congress did not want to leave part of Obamacare intact if any portion of the legislation was ruled unconstitutional for any reason.

For all of these reasons, the plaintiffs assert that the Obamacare’s sub-parts are not severable from the comprehensive law, and that if any part of Obamacare is beyond Congress’ Constitutional authority, the entire act should be found void.

Alternatively, even if some aspects of Obamacare are within Congress’ tax and spend authority, or any other constitutionally granted authority, the plaintiffs assert that any aspect of Obamacare that is dependent solely upon the commerce clause for Congressional authority to enact, should be found unconstitutional.

Entitled to Judgment as a Matter of Law

The law is clear: “[A] law ‘beyond the power of Congress,’ for any reason, is ‘no law at all.’” *Bond v. United States*, 564 U.S. ___, *2 (2011), Ginsburg J. concurring, (quoting *Nigro v. United States*, 276 U.S. 332, 341 (1928)).

Because Obamacare was enacted beyond the limited scope of authority granted to Congress by the clear language of the U.S. Constitution, the plaintiffs are entitled to judgment as a matter of law.

Conclusion

In his book *Here the People Rule*, political and legal scholar Edward Banfield concluded,

“Nothing of importance can be done to stop the spread of federal power, let alone to restore something like the division of powers agreed upon by the framers of the Constitution. The reason lies in human nature: men cannot be relied upon voluntarily to abide by their agreements, including those upon which their political order depends. There is an antagonism, amounting to an incompatibility, between popular government — meaning government in accordance with the will of the people — and the maintenance of limits on the sphere of government.” Edward Banfield, *Here the People Rule*, 24 (AEI Press, 1991).

This Court has an opportunity to prove Mr. Banfield wrong.

America became great because it was a Constitutional Republic that followed the rule of law and enforced an anti-majoritarian constitution to limit government. This gave men freedom to build a great nation. If the Constitution, the supreme law of the land, can be ignored because it is unpopular or inconvenient, America’s greatness is simply a historic footnote. This Court has the opportunity to prove that men can be relied upon to voluntarily abide by their agreements. This Federal Court can prove that the Federal

government will follow the Constitution. The plaintiffs urge this Court to enforce the clear meaning of the Constitution, and grant their motion.

For all of the reasons stated above, the plaintiffs respectfully request that this Court grant their motion for summary judgment. Alternatively, the plaintiffs respectfully request that this Court include a 28 U.S.C. 1292(b) statement in its denial of the instant motion, recommending that said denial be immediately appealable, and setting forth this Court's reasons for its recommendation.

Respectfully submitted,

s/Van R. Irion
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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2011 I electronically filed the foregoing with the clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the counsel of record for all parties.

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