

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

ANTHONY SHREEVE, et al.

Plaintiffs,

v.

CIVIL ACTION NO:
1:10-cv-71

BARACK OBAMA, in his official capacity as
President of the United States;
HARRY REID, in his official capacity as
Majority Leader of the Senate
NANCY PELOSI, in her official capacity as
Speaker of the US House of Representatives; and
THE UNITED STATES OF AMERICA,

Defendants

**PLAINTIFFS' REPLY REGARDING MOTION FOR PRELIMINARY
INJUNCTION**

Pursuant to this Court's Rule 7.1(c), Plaintiffs submit this Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction.

I. **25,445 Americans Request a Hearing**

The Defendants' opposition memo did not dispute the substance of Plaintiffs' motion. In fact, as discussed more fully below, Defendants' opposition memo is in complete agreement with Plaintiffs' motion regarding the current condition of our government, as caused by erroneous court precedent. The only disagreement remaining as to substantive matters is: should Congress be left with no limitations on the scope of their authority, or did the Constitution delegate only limited authority to Congress?¹

Because this question is of the highest importance to the future of our nation, the 25,445 Plaintiffs respectfully request a hearing on this motion.

II. **Judicial Oath**

Defendants' assert that this Court cannot overturn Supreme Court precedent, quoting *Hutto v. Davis*: "a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Def.'s Opp. at 16-17, quoting 454 U.S. 370, 375 (1982). Such a rule cannot be followed without violating every Federal Judges' oath.

Every Federal Judge and Justice takes the following oath: "I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God." 28 U.S.C. §453.

¹ Plaintiffs acknowledge the numerous procedural matters raised in Defendants' opposition, and address those matters, ante.

The oath does not say, “I will follow all interpretations of law established by higher courts,” or anything of the sort. The oath certainly *could* be written to require all lower court judges to follow the precedent of higher courts, but it is not. As written the oath requires Federal Judges to discharge the duties incumbent upon them under the Constitution, because we fully expect Federal Judges at every level to follow their consciences in enforcing the highest law of the land, the Constitution.

It may be rare that such duties will conflict with precedent, but in those instances, when a judge is convinced that a Supreme Court precedent violates the Constitution, that judge has a duty to follow the Constitution, not the Supreme Court. The Judges’ highest duty is to their oath, to the Constitution, and to God. That duty requires that they rule in a way that conforms to the Constitution, even when that requires disagreement with a higher court.²

The conclusion in *Hutto* attempts to place a duty on Federal Judges to follow the edicts of the Supreme Court, even when a Judge believes that the Court’s precedent violates the Constitution. Such an edict simply cannot be followed without violating an oath made before God. Such an edict is beyond even the high authority of the Supreme Court.

Such an edict is analogous to the President drafting an executive order stating that all Presidential orders will be followed, even if they violate the Constitution. Every soldier and law enforcement officer is trained that any order that violates the Constitution

² The Plaintiffs are *not* advocating judicial activism. Judicial activism occurs when judges create new rights that do not exist within the Constitution, in order to negate democratically created law, due to the judges’ personal disagreement with the policy underlying the law. The Plaintiffs are advocating only what the Constitution was originally intended to require: judges affirming the dominance of pre-existing rights that are explicitly protected by the Constitution, regardless of the popularity or unpopularity of the underlying policy, and regardless of the judges personal preferences. This is the opposite of judicial activism.

is an unlawful order and cannot be followed, even if such an order comes from the President himself. This rule stands even if the President's order includes a statement that the order doesn't violate the Constitution. Every soldier and law enforcement officer has a *non-dischargeable* duty to determine if an order is unlawful, regardless of any asserted disclaimer of that duty. Without such a rule an order to kill innocent and unarmed civilians could be lawful. Humanity left behind the legal defense that "I was just following orders" during the Nuremburg trials.

If 18 year old soldiers are required, in theory, to say "no" to the President, certainly Federal Judges should be expected to refuse to uphold Supreme Court precedent if they believe it violates the Constitution. The rule in *Hutto* must be ignored under such circumstances.

III. **Overturing Precedent**

The Supreme Court has explained when precedent should be abandoned: "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944). As the Defendants' opposition memo clearly demonstrates, *Wickard v. Filburn* and its progeny could not be more "badly reasoned."

IV. **No Limitations on Congressional Authority**

Defendants' opposition memo points out that "poorer health and shorter lifespan" affect the economy, and therefore "substantially affect interstate commerce." Def.s' Opp.

at 3. It also points out that under *Wickard*, Congress can regulate conduct of individuals if the “class of activities, ‘taken in the aggregate’” affect interstate commerce. *Id.*, citing *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); and *Wickard*, 317 U.S. at 127-28. And, finally, that only a ‘rational basis’ must exist to support Congress’ assertions about these facts, in order to bring the activities within Congressional authority to regulate. Def.’s Opp. at 18, quoting *Gonzales*, 545 U.S. at 16.³

The Plaintiffs defy anyone to describe *any* subject matter that cannot be brought within Congressional authority to regulate under the above precedent and analysis. Please don’t misunderstand, the Plaintiffs acknowledge that certain precedent has limited the *methods* under which Congress may assert its power, such as in *U.S. v. Lopez* and *Printz v. Mack v. United States*, but no *subject matter* is beyond the reach of Congress under current precedent. 514 U.S. 549 (1995); 521 U.S. 898 (1997), respectively. Even where past precedent has deemed certain subject matter to be outside the commerce clause authority, close examination will reveal that what is actually being limited is simply Congress’ *method* of regulation. Under *Wickard* and its progeny, no subject matter is beyond Congress’ authority. This absurd result cannot possibly be conformed to the clear meaning of the Constitution’s specific enumeration of limited Congressional authority in Article I, as reiterated and emphasized by the Tenth Amendment.

Since, as the Defendants’ memo tells us poor health effects interstate commerce, all individual health choices made by every American are within the regulatory authority of Congress. What we eat, whether we exercise, how much sun we get, how often we drive,...etcetera, etcetera, ad infinitum. Every behavior of every American, is now within Congress’ scope of authority to regulate, prohibit, mandate, and fine.

³ Rational basis review amounts to any conceivable set of facts that could reasonably occur.

The Plaintiffs agree with the Defendants' assertion that this is the accurate and inevitable result of *Wickard* and its progeny.⁴ Obamacare is simply the demonstration of this inevitable result. However, this result undeniably and obviously violates the clear meaning of the Constitution. It also demonstrates that *Wickard* is "unworkable" and is "badly reasoned."

Wickard must be overturned, and *this* Court has a duty to the Constitution which is higher than its duty to Supreme Court precedent.

V. Standing

The Defendants' memo asserts that this court lacks subject matter jurisdiction because the Plaintiffs lack standing, "because plaintiffs have alleged no injury." Def.s' Opp. at 7.⁵ However, the Plaintiffs' 2nd amended complaint states that many of the Plaintiffs are individual American citizens.^{6,7} 2nd Amd. Compl. at ¶ 3-4, p. 279. Defendants' own memo states "the act requires that all Americans, with specified exceptions, maintain a minimum level of health insurance coverage." Opp. Memo at 4.

⁴ Defendants' general welfare clause, and necessary and proper clause arguments simply serve to reinforce the absurd and clearly unconstitutional outcome under the current *Wickard* analysis. These arguments, therefore, further support the Plaintiffs' argument.

⁵ Defendants' memo raises several other arguments regarding personal jurisdiction as to the individual Defendants, and immunity from monetary damages. The Plaintiffs will address those arguments in their opposition to defendants' motion to dismiss. However, even if taken as true, the Plaintiffs' remaining claims to injunctive relief, coupled with this memo, suffice to support the present motion because they have a claim against the United States that is redressable via injunctive relief. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)(when a plaintiff is the object of governmental action, "there is ordinarily little question that the action...has caused him injury, and that a judgment preventing...the action will redress it").

⁶ Plaintiffs note that "Only one of the petitioners needs to have standing to permit us to consider the petition for review." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

⁷ The Anti-Injunction Act, 26 U.S.C. §7421(a) does not apply because the individual mandate's stated purpose is not to raise revenue, but to create "effective health insurance markets." See *Goetz v. Glickman*, 920 F. Supp. 1171, 1181 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998, *cert. denied*, 525 U.S. 1102 (1999)(citing *Head Money Cases*, 112 U.S. 580 (1884))(a regulation "will not constitute a tax unless the real purpose and effect of the statute and regulations...is to raise revenues for the general support of the government.")

Defendants admission establishes that “all Americans” will be harmed, presuming as alleged, that Obamacare is beyond Congress’ Constitutional authority to enact.

Nor are Plaintiffs’ injuries too indefinite or remote in time to support standing. Courts have repeatedly found standing to pursue a pre-enforcement Constitutional challenge where the alleged harm will occur in the future. See, *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925). Standing “depends upon the probability of harm, not its temporal proximity.” See *520 S. Mich. Ave. Assocs. V. Devine*, 433 F.3d 961, 962 (7th Cir. 2006). “Immediacy requires only that the anticipated injury occur within some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months.” *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008).

Should this Court find the Plaintiffs’ complaint lacks an explicit enough assertion of injury to establish standing, the proper remedy would be to grant Plaintiffs an opportunity to amend and, “leave shall be freely given when justice so requires.”⁸ Fed. R. Civ. P. 15(a).

VI. Public Interest Always Lies in Protection of Constitutional Rights

The Plaintiffs’ motion cited precedent establishing that the public interest always lies in protecting Constitutional rights. Plf.s’ memo at 2. The Defendants’ attempt to dismiss this conclusive argument by pointing out that the cited precedent was a First Amendment case. Def.s’ Memo at 23-24. However, the cited precedent referred further to

⁸ Plaintiffs hereby move for a motion to amend, should this Court determine that the current complaint lacks sufficient allegations of injury.

Supreme Court precedent making the same point with a more general discussion of Constitutional rights. See *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994), citing *Gannett Co. Inc. v. DePasquale*, 443 U.S. 368, 383(1979).

In general when the fundamental structure of Constitutional authority is at issue balancing tests are inappropriate, and preserving the principal of the Constitution is paramount. See *Printz*, 521 U.S. at 931-933 (discussing separation of powers, and inappropriateness of balancing interests.)

VII. Immediate and Irreparable Harm

Americans are being immediately harmed any time the government willfully violates the Constitution. More specifically, the current economic depression being suffered by all Americans can be directly linked to uncertainty regarding ultimate costs to businesses imposed by Obamacare.

Even more specifically, as of 1 July 2010 Obamacare imposed discriminatory fines upon the Tanning Salon industry under the guise of a 10% tax.⁹ This provision expressly exempts fitness centers and Medical Doctors, thereby creating unfair competitive advantages for specific members of the industry over others. This provision has already resulted in the loss of hundreds of small businesses across the country.

The Supreme Court has noted that where laws at issue were “purported to be taxing measures,” but were really meant to regulate conduct not otherwise subject to the commerce or any other enumerated power, with “the levy of the tax a means to force compliance,” this was held “an unconstitutional abuse of the power to tax.” *United States*

⁹ Several Plaintiffs are Tanning Salon businesses and individual owners of Tanning Salon businesses.

v. Butler, 297 U.S. 1, 70 (1936). The 10% Tanning Salon tax is an overt attempt by Congress to discourage behavior that they deem unhealthy. It is, therefore, an unconstitutional abuse of authority that is causing immediate and irreparable harm to small businesses across the country.

VIII. Relief Requested

The Plaintiffs respectfully request that this Court grant their motion for an injunction preventing defendants from enforcing any aspect of the Patient Protection and Affordable Care Act, pending the outcome of this litigation.

Dated: 9/3/10

s/Van R. Irion
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CERTIFICATE OF SERVICE

It is hereby certified that on September 3, 2010, a copy of "Plaintiffs' Reply Regarding Motion for Preliminary Injunction" was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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