

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' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Pursuant to this Court's Rule 7.1, Plaintiffs submit this Opposition to Defendants' Motion to dismiss.

I. Standard of Review

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1945 (2009).

II. None of Defendants Arguments Negate Plaintiffs' Claims for Injunctive and Declaratory Relief Against the United States

The Defendants' acknowledge that "the Administrative Procedure Act waives sovereign immunity for purposes of plaintiffs' claims for injunctive and declaratory relief

against the United States, *see* 5 U.S.C. §702.” R.10 Def.s’ Mot. Dism. at FN 6. Therefore, this Court has personal and subject matter jurisdiction over Plaintiffs claims for injunctive and declaratory relief against the United States.

III. Plaintiffs Have 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. However, 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.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). 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. Defendants admission establishes that “all Americans” will be harmed, presuming as alleged, that Obamacare is beyond Congress’ Constitutional authority to enact. The Plaintiffs’ 2nd amended complaint states that many of the Plaintiffs are individual American citizens.¹ 2nd Amd. Compl. at ¶ 3-4, p. 279.

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.² See, *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925).

¹ 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).

² The Anti-Injunction Act, 26 U.S.C. §7421(a) also 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.”)

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).

Even more specifically, as of 1 July 2010 Obamacare imposed discriminatory fines upon the Tanning Salon industry under the guise of a 10% tax.³ 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,” was held “an unconstitutional abuse of the power to tax.” *United States 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.

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

³ Several Plaintiffs are Tanning Salon businesses and individual owners of Tanning Salon businesses.

opportunity to amend and, “leave shall be freely given when justice so requires.”⁴ Fed. R. Civ. P. 15(a).

IV. **This Court Has a Higher Duty to the Constitution than to Precedent**

The Defendants’ only remaining argument is 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). However, 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.

The oath does not say, “I will follow all interpretations of law established by higher courts,” or anything of the sort. The oath is written as it is because a judges’ duty is to the Constitution, not to the Supreme Court. The rule in *Hutto* attempts to place the Supreme Court above the Constitution. While the Supreme Court does interpret the Constitution, it has no authority to change the Constitution. If a judge believes that precedent changed rather than interpreted the Constitution, that judge has a duty to follow the Constitution rather than the Supreme Court. That higher duty arises from a solemn oath taken in the name of God.

⁴ Plaintiffs hereby move for a motion to amend, should this Court determine that the current complaint lacks sufficient allegations of injury.

If this Court believes that *Wickard v. Filburn* changed the clear meaning of the Constitution, this Court has an absolute duty to explicitly disclaim the validity of *Wickard*.⁵

V. **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.”

VI. **Obamacare Proves that *Wickard v. Filburn* is Badly Reasoned and Unworkable**

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’” affects 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

⁵ 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.

facts, in order to bring the activities within Congressional authority to regulate. Def.'s Opp. at 18, quoting *Gonzales*, 545 U.S. at 16.⁶

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/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.

The Plaintiffs agree with the Defendants' assertion that this is the accurate and inevitable result of *Wickard* and its progeny.⁷ Obamacare is simply the demonstration of

⁶ Rational basis review amounts to any conceivable set of facts that could reasonably occur.

⁷ 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.

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.

VII. Conclusion

Plaintiffs’ complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Therefore, the Plaintiffs respectfully request that this Court deny defendant’s motion to dismiss.

Dated: 9/17/10

s/Van R. Irion
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CERTIFICATE OF SERVICE

It is hereby certified that on September 17, 2010, a copy of “Plaintiffs’ Opposition to Defendants’ Motion to Dismiss” 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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