

FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

ARTHUR ENLOE, et al.,	)	
	)	
Plaintiffs	)	
	)	
v,	)	Civil Action No. 5-11CV0026-C
	)	
BARACK OBAMA, et al.,	)	
	)	
Defendants	)	
_____	)	

MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS

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

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Defendants	)	
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MEMORANDUM IN SUPPORT OF  
 DEFENDANTS’ MOTION TO DISMISS

INTRODUCTION AND SUMMARY

Last year, plaintiffs Arthur Enloe, Donnie Harwood, Gerard Mazza, Brian Rushing, and Millard Ramsey filed an action against defendants Obama, Reid, Pelosi, and the United States in the United States District Court for the Eastern District of Tennessee. 1st Amended Complaint, *Shreeve v. Obama*, No. 1:10cv71, at 88, 126, 192, 243, 257 (E.D. Tenn. July 19, 2010) (Ex. 1). They claimed, as here, that the Patient Protection and Affordable Care Act (the “ACA”) is unconstitutional. *Id.* at 337-340. They were represented, as here, by the Liberty Legal Foundation, which also seeks to become a plaintiff here. The district court found that plaintiffs lacked standing under Article III to challenge the constitutionality of the ACA. *Shreeve v. Obama*, 2010 WL 4628177 (E.D. Tenn. Nov. 4, 2010) (Ex. 3).

Plaintiffs made a deliberate decision to bypass any appeal: “[W]e don't have to appeal because we can re-file in a better court.”<sup>1</sup> After a search “to identify the best Federal District

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<sup>1</sup> Tim Carter, *Liberty Legal Foundation and the Constitutionality of Obamacare*,  
 (continued...)

Court in which to re-file our lawsuit,”<sup>2</sup> plaintiffs filed in this district and division “[b]ecause Lubbock is the most Constitution following town we could find.”<sup>3</sup>

Plaintiffs should not be allowed to impose on the defendants and the courts the respective obligations to defend and decide a second time arguments that plaintiffs have already had a fair chance to advance, merely because plaintiffs were unsuccessful and, in lieu of pursuing an appeal, prefer to relitigate their claims in a different district. Granted, *Shreeve* was not decided on the merits, so it does not have *claim* preclusive effect. But even cases decided on jurisdictional grounds have *issue preclusive* effect on the jurisdictional issue decided and bar later attempts to bring the same claims in a court where the same jurisdictional limit applies. *Acree v. Air Line Pilots Ass’n*, 390 F.2d 199, 203 (5th Cir. 1968). If plaintiffs disagreed with the jurisdictional ruling in *Shreeve*, their option was to appeal, not to relitigate the issue in however many other district courts it will take to generate a different result.

Moreover, this Court is not one of the limited venues that Congress has authorized to hear this action. The events alleged to give rise to the action did not occur in this district. No real property in this district is at issue. Defendants do not reside in this district. Only one of the plaintiffs resides in the district. Even that one Texas plaintiff does not allege any individual

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<sup>1</sup>(...continued)

<http://www.timcartersfirepit.com/liberty-legal-foundation-and-constitutionality-of-obamacare.html> (quoting Liberty Legal Foundation “Co-Founder,” Dawn Irion).

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

<sup>3</sup> KCBD Channel 11, *President Obama Sued in Lubbock over Health Care Reforms*, <http://www.kcbd.com/story/14022362/president-obama-sued-in-lubbock-over-health-care-reforms?redirected=true> (quoting plaintiffs’ counsel Van Irion).

injury; he has merely volunteered to be the “Texas resident” whom plaintiffs hope to use so they can choose the court they decide will be most likely to rule for them.

Even if the case were being brought for the first time in a permissible venue, it would suffer from numerous other deficiencies. The Anti-Injunction Act and the tax exception to the Declaratory Judgment Act bar plaintiffs’ attempt to seek injunctive and declaratory relief against the “entirety” of an Act that includes many tax provisions. The claims against defendants Reid and Pelosi are barred by the Speech or Debate Clause of the Constitution, *see Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 501-02 (1975), and, insofar as they are sued in their official capacity, by sovereign immunity, *see Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972). The claims against President Obama are similarly barred by presidential immunity.

Finally, plaintiffs’ claim on the merits, that *Wickard v. Filburn*, 317 U.S. 111 (1942), was wrongly decided and should be overturned by this Court, Complaint ¶¶ 18-23, is frivolous. Their claim that Congress lacks authority to regulate any aspect of health care or health insurance – a view that would make even Medicare unconstitutional – is likewise without merit.

#### STATEMENT OF THE CASE

1. Plaintiffs’ Prior Lawsuit (The *Shreeve* case)

Last year, plaintiffs Enloe, Harwood, Mazza, Rushing, and Ramsey became parties to an action against defendants Obama, Reid, Pelosi, and the United States in the United States District Court for the Eastern District of Tennessee when a pre-existing complaint was amended to add them as plaintiffs. 1st Amended Complaint, *Shreeve v. Obama*, No. 1:10cv71, at 88, 126,

192, 243, 257 (E.D. Tenn. July 19, 2010) (Ex. 1).<sup>4</sup> They remained plaintiffs when the complaint was amended a second time. 2d Amended Complaint, *Shreeve v. Obama*, No. 1:10cv71, at 74, 106, 160, 203, 215, 260 (E.D. Tenn. July 27, 2010) (Ex. 2). The plaintiffs argued that the ACA was invalid because it is beyond the authority of the federal government to enact. *Id.* ¶¶ 15-18. They were represented in that action by the Liberty Legal Foundation (“Liberty Legal”), *id.* at 1, the same alleged organization that represents them in this action and that seeks to become a party itself as a representative of the individual plaintiffs and other alleged members.

The district court dismissed the action for lack of a case or controversy justiciable under Article III of the Constitution. Memorandum Opinion, *Shreeve v. Obama*, No. 1:10cv71 (E.D. Tenn. Nov. 4, 2010) (Ex. 3).<sup>5</sup> The court explained that plaintiffs had failed to allege any “particularized injury” from the ACA sufficient to give them a personal stake in the outcome of the litigation. *Id.* at 5-6. The court also denied leave for a third amendment to the complaint, since any such amendment would have been futile. The court explained that the claims against defendants Reid and Pelosi would be barred by the Speech or Debate Clause, *id.* at 8-9, and the claims against President Obama by presidential immunity, *id.* at 9-10. It would also have been

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<sup>4</sup> The plaintiff who sues under the name “Gerald Maza” in this action used the correct spelling of his name, Gerard Mazza, in *Shreeve*. “Gerald Maza” is identified by the complaint in this action (¶¶ 42-46) as a physician who resides in Tennessee, and appears to be Dr. Gerard K. Mazza, a doctor in Cleveland, Tennessee. *See, e.g., Blankenship v. Mars, Inc.*, 1999 WL 77257 at \*2 (Tenn. Sp. Workers Comp. Feb. 18, 1999) (identifying Dr. Gerard K. Mazza as family practice doctor providing evidence). Defendants have found no record of any Tennessee physician (or Tennessee non-physician, for that matter) named Gerald Maza either through Westlaw’s “Combined (People-All)” database or through Google searches reasonably calculated to locate references to a Dr. Gerald Maza of Tennessee.

<sup>5</sup> The opinion is reported at 2010 WL 4628177. The pinpoint cites in this brief are to the opinion as filed by the court and attached as exhibit 3 rather than to the Westlaw version.

futile, the court found, to add a challenge to the tanning tax provision of the ACA both because there was little or no likelihood that such a claim could succeed on the merits and because the plaintiffs had not specified who among them had been affected by the tanning tax. *Id.* at 10-11.

Plaintiffs deliberately chose not to appeal. Dawn Irion, “Co-Founder” of Liberty Legal, explained the decision to bypass the appellate process as follows:

Because the Tennessee Court based its dismissal on a supposed lack of standing, we can refile our case with a court that has a good Constitutional track record. . . . [W]e have been intensively researching Federal District Courts across the country. . . . We're actively consulting with [Liberty Legal's friends] in order to identify the best Federal District Court in which to re-file our lawsuit. We have identified several Federal Court judges that are likely to follow the Constitution in this case. . . .

Many of you may ask why we aren't appealing our dismissal. We certainly have that right. However, doing so would delay our battle unnecessarily. As explained above, we don't have to appeal because we can re-file in a better court.<sup>6</sup>

## 2. Plaintiffs' Second Lawsuit (This Action)

Plaintiffs attempt to present the same claims as in their dismissed Tennessee case. In language virtually identical to that used in *Shreeve*, they argue that “[a]ny law passed by the Federal Government that is not within the specific authority granted by the Federal Government is null and void”; that “[n]othing in the Constitution grants the Federal Government authority to regulate health care or the health care industry”; and that, because the ACA “is a Federal law that purports to regulate health care and health insurance,” it is “in its entirety. . . unconstitutional.” Complaint ¶¶ 10, 12, 13; *see* 2d Amended Complaint in *Shreeve* ¶¶ 15, 17, 18.

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<sup>6</sup> Tim Carter, *Liberty Legal Foundation and the Constitutionality of Obamacare*, <http://www.timcartersfirepit.com/liberty-legal-foundation-and-constitutionality-of-obamacare.html> (quoting Dawn Irion).

Although the complaint argues at one point that all individual plaintiffs are “presently and concretely harmed by the ACA,” Complaint ¶ 69, plaintiff-specific allegations to that effect are made only with respect to plaintiffs Harwood, Mazza, Rushing, and Ramsey, *id.* ¶¶ 41, 46, 50, 55, 60. There is no individually tailored allegation of harm to plaintiff Enloe, whose role in the case is instead described as being the “Texas Resident.” Complaint at 12. (There is a paragraph under the heading for Enloe that alleges individual injury, but it is injury to Ramsey, not Enloe, *id.*, ¶ 55.)

Plaintiffs Harwood, Mazza, Rushing, and Ramsey allege that each of them is “concretely and continuously harmed because he is compelled to adjust his fiscal affairs now to prepare himself to pay thousands of dollars over the next several years” as allegedly required by unidentified provisions of the ACA. *Id.* ¶¶ 41, 46, 50, 55, 60. Harwood, Mazza, and Rushing make further allegations arising out of their respective professions. Harwood, a nurse, argues that his “work conditions and terms of employment as a health professional” are adversely affected in some unknown respect by provisions of the ACA he does not identify. *Id.* ¶ 41. Mazza, a physician, argues that he must “provide increased health care services to his patients without compensation” as a result of provisions of the ACA he does not identify. *Id.* ¶ 46. Rushing alleges that his “tanning salon business has been singled out for punitive treatment by the terms of the PPACA.” ¶ 50. Rushing does not allege that he has paid, and sought a refund of, any taxes on indoor tanning services and has had that refund claim denied by the Internal Revenue Service.

The only injury Liberty Legal alleges is injury to its alleged members. *Id.* ¶ 72.

The defendants sued in *Shreeve*, *i.e.*, defendants Obama, Reid, Pelosi, and the United States, are also defendants in this action. The complaint adds as defendants the Department of Health and Human Services, the Secretary of that Department in her official capacity, and the Attorney General in his official capacity. *Id.* ¶ 61-67.

### ARGUMENT

I. The Final Judgment In *Shreeve* Has Issue Preclusive Effect And Establishes That Plaintiffs Lack Standing Under Article III To Challenge The Patient Protection And Affordable Care Act

Plaintiffs had an opportunity to establish their standing to bring their claim in Tennessee. They failed to do so. They had, and knew they had, an opportunity to appeal that ruling. They deliberately chose not to appeal, preferring instead to “re-file in a better court.” That is not the way the federal judicial system is supposed to work. Appeals are to be taken from a district court to a court of appeals, not from one district court to a “better” district court.

Plaintiffs seem to have assumed that since the dismissal in *Shreeve* was not on the merits, it does not have *claim* preclusive effect. That’s true. But even a dismissal for lack of jurisdiction has *issue* preclusive effect on the very issue of jurisdiction decided. “Dismissals for want of subject-matter jurisdiction . . . are preclusive with respect to the jurisdictional ruling . . . as otherwise the plaintiff would be free to refile the identical case in the same court,” *Hill v. Potter*, 352 F.3d 1143, 1146-47 (7th Cir. 2003) (Posner, J.) (citations omitted), or, as here, in a coordinate court in which the same jurisdictional limit applies. As the Court of Appeals has explained:

It is sometimes asserted that a decision has *res judicata* effect only if it is on the merits. But this overstates the case, for as the Supreme Court has said, ‘The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.’ *American Surety Co. v. Baldwin*, 287 U.S. 156, 166, 53 S. Ct. 98, 77 L.

Ed. 231 (1932). *See also Estevez v. Nabers*, 5 Cir., 219 F.2d 321 (1955). It is true that the *res judicata* effect of a jurisdictional decision is more limited than its effect where the decision is on the merits, for it is not binding as to all matters which could have been raised. But a non-merits judgment of this type, whether its abating effect be termed direct estoppel (Restatement, Judgments § 49 (1942)[]) or simply *res judicata*, is conclusive as to matters actually adjudged. *Estevez v. Nabers, supra*; 1B J. W. Moore, *supra*, ¶ 0.405(5). And it is immaterial that the non-merits judgment may have been erroneous.

*Acree v. Air Line Pilots Ass'n*, 390 F.2d 199, 203 (5th Cir. 1968) (emphasis original); *accord, e.g., Equitable Trust Co. v. CFTC*, 669 F.2d 269, 272-74 (5th Cir. 1982).

The requirement that the jurisdictional question have been “actually adjudged” is not a requirement that the issue have been decided following a trial or evidentiary hearing. A disposition on motion papers, as in *Shreeve*, is sufficient. *In re Keaty*, 397 F.3d 264, 270-71 (5th Cir. 2005).

Four of the plaintiffs attempt to evade the consequences of their jurisdictional loss in Tennessee by making allegations of injury that they had failed to make in the first case. *Compare* Complaint ¶¶ 41, 46, 50, 55, 60 (alleging that plaintiffs Harwood, Mazza, Rushing and Ramsey are “concretely and continuously harmed because [each] is compelled to adjust his fiscal affairs now to prepare himself to pay thousands of dollars over the next several years”) *with Shreeve* Mem. Op. at 6 (finding lack of standing in light of failure to make such allegations). However, to whatever extent such allegations are plausible now – and defendants do not concede that they are – they would also have been plausible in Tennessee and could have been pled there.<sup>7</sup>

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<sup>7</sup> For purposes of this threshold motion only, defendants do not dispute these allegations of plaintiffs Harwood, Mazza, Rushing, and Ramsey. In the event that the Court denies defendants’ motion to dismiss, defendants intend to seek limited, prompt and focused discovery into  
(continued...)

As then-Judge Scalia has explained, new allegations of jurisdiction in a second case allow relitigation of a prior jurisdictional dismissal only if the new allegations relate events that have occurred since the dismissal rather than merely, as here, doing a better job of pleading the unchanged underlying facts. *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983). “Under a system which permits liberal amendment of pleadings, it does not make sense to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until it finally satisfies the jurisdictional requirements.” *Magnus Elec. Inc. v. La Republica Argentina*, 830 F.2d 1396, 1401 (7th Cir. 1987); see *Park Lane Resources, Ltd. v. United States Dep’t of Agriculture*, 378 F.3d 1132, 1137 (10th Cir. 2004) (also following *Dozier*).<sup>8</sup> To allow a plaintiff who is unsuccessful in establishing jurisdiction in one court to simply pack his bags and move to another court in these circumstances makes even less sense.

While *Dozier* and *Magnus* state what is now the predominant view, an earlier brief *per curiam* opinion from the Fifth Circuit, *Mann v. Merrill Lynch, Pierce, Fenner & Smith*, 488 F.2d 75 (5th Cir. 1976), is not so clear. Dissenting in *Dozier*, Judge Wald construed *Mann* to have adopted the rule she proposed of allowing plaintiffs whose first case had been dismissed on a jurisdictional ground due to “inartful pleading” to have “a second chance to cure [their] defective

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<sup>7</sup>(...continued)

the basis and veracity of these allegations prior to any summary judgment proceeding that would decide standing issues.

<sup>8</sup> We recognize that the district court in *Shreeve* did not allow a third amendment of the complaint because a third amendment would have been futile. That was a sound exercise of the court’s discretion even given the liberal amendment permitted under the Federal Rules. But if that court had been wrong to deny leave for a third amendment, plaintiffs’ remedy was appealing that denial to the Sixth Circuit, rather than unilaterally granting themselves what amounts to an amendment by re-filing their case in a different district court.

allegation[s]” of jurisdiction. 702 F.2d at 1200-01. However, the better interpretation of this Fifth Circuit precedent is that of Judge Scalia for the *Dozier* majority, *i.e.*, that new allegations allow relitigation of the jurisdictional issue only if they arise from “a new occurrence, rather than through a revision of pleadings with no post-dismissal change in the underlying facts.” *Id.*, at 1193 n.7.<sup>9</sup>

Of course, sometimes there are changes in actual circumstances – not just improvements of previously inartful pleadings – that are relevant to jurisdiction. In particular: “Things ripen.” *Park Lane*, 378 F.3d at 1137. Nevertheless even a jurisdictional dismissal on the often time-dependent ground that a suit is not yet ripe has issue preclusive effect in a later case if no events between the two cases have already occurred to sufficiently ripen the potential controversy. *Id.* Here, the mere possibility that plaintiffs might acquire standing at some third, future date (*e.g.*, if, by time the individual responsibility provision of the ACA takes effect in 2014, events have occurred that will result in plaintiffs owing a penalty) does not justify now revisiting the decision in *Shreeve* that they do not have standing.

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<sup>9</sup> The *Dozier* majority’s construction of *Mann* does differ in one respect from *Dozier*’s own holding, as *Mann* was read as not requiring a plaintiff to make an affirmative showing that the newly pled matter relates to a new event, which *Dozier* does require. 702 F.2d at 1192 n.4, 1193 n.7. That difference, however, ought not matter once, as here, defendant disputes whether circumstances have materially changed, at which point the burden should be on the plaintiff. *Napper v. Anderson, Henley Shields, Bradford & Pritchard*, 500 F.2d 634, 637 (5th Cir. 1974), a case in which there seem to have been neither new post-dismissal events nor a new, more artful pleading of pre-dismissal events, suggests as much: “The federal district court in Arkansas held that as of July 12, 1971, . . . it lacked jurisdiction because plaintiffs were on that date citizens of Texas. To sustain federal jurisdiction in Texas, plaintiffs had the burden of proving that they had changed their citizenship between July 12 and August 13, 1971, when their complaint in the present case was filed.” (Emphasis added). *See also De Aguilar v. Boeing Co.*, 11 F.3d 55, 59 (5th Cir. 1993) (*forum non conveniens* finding entitled to issue preclusive effect where “plaintiffs have made no showing of objective facts that materially alter the considerations underlying the previous resolutions”) (internal quotations omitted).

Although Liberty Legal was counsel, rather than a formal party, in *Shreeve*, its action here is also foreclosed. Liberty's claim to injury is derivative, resting on a claim that alleged members have standing, Complaint ¶ 72. Liberty Legal can rely only on injuries to members that it has identified. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009). Plaintiffs Enloe, Harwood, Mazza, Rushing, and Ramsey are the only members identified in the Complaint. The issue preclusive effect of the holding in *Shreeve* that those members lack standing thus negates a necessary premise of Liberty Legal's attempt to establish its own standing.<sup>10</sup>

Finally, it does not matter that, in addition to the defendants sued in *Shreeve*, plaintiffs now also sue Secretary Sebelius, Attorney General Holder, and the Department of Health and Human Services. "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940).

Because the jurisdictional dismissal in *Shreeve* has preclusive effect in this case, this action, like *Shreeve*, should be dismissed.

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<sup>10</sup> Defendants are moving with respect to Liberty Legal's standing on issue preclusion grounds only and, assume, but only for the purposes of this motion, that Liberty Legal's allegations concerning its standing are correct. In the event that this motion is denied, defendants anticipate taking limited discovery concerning the standing of this alleged organization before briefing standing issues on summary judgment motions.

II. This District Is Not A Venue In Which This Action May Be Brought

Even if the Court were to conclude that this Court has jurisdiction to consider plaintiffs' suit in light of the allegations they did not bother to include in their prior suit, the action is nonetheless subject to dismissal for lack of venue. A plaintiff does not have an unfettered right to stroll through every aisle in a federal forum store and select whichever of 94 different districts he deems most favorable to his claim (or, as here, to try out successive courts *seriatim*) no matter how little connection with the controversy that district may have. Rather, Congress defines which districts may hear an action.

Paragraph 2 of the Complaint cites two venue provisions, 28 U.S.C. §§ 1391(b)(2), 1402, neither of which provides for venue in this district. Nor does a third, uncited provision, 28 U.S.C. § 1391(e), allow for venue in this district.

A. 28 U.S.C. § 1402 Does Not Apply To This Case And Would Not In Any Event Allow For Venue In This District If It Did Apply

Section 1402 governs venue only for the specified types of civil action against the United States, and this is not one of those specific actions. It is not an action against the United States for money damages, but a claim for declaratory and injunctive relief. Nor is it a claim for a tax refund under 28 U.S.C. § 1346(a)(1). Plaintiff Rushing does allege that he is harmed because his tanning salon business has been “singled out for punitive treatment” by the statute, Complaint ¶ 50, and there is a provision of the ACA, albeit uncited by plaintiffs, that does impose an excise tax on indoor tanning services, 26 U.S.C. § 5000B(a).<sup>11</sup> But a district court has no jurisdiction to consider a tax refund claim unless the plaintiff has first both paid the tax and sought a refund

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<sup>11</sup> The provision, however, applies to all indoor tanning services and does not “single out” services at Rushing’s tanning salon in particular.

from the IRS, *see United States v. Dalm*, 494 U.S. 596 (1990). Rushing does not allege that his tanning salon has done so. That is not surprising, since the tax is imposed on the customer, not the tanning salon itself, 26 U.S.C. § 5000B(c)(1).

Section 1402 would not supply venue even if it did apply. For cases where jurisdiction is based on 28 U.S.C. § 1346(a),<sup>12</sup> section 1402(a)(1) does allow venue “in the district where the plaintiff resides.” This requires that each, not just any, named plaintiff reside in this district. *E.g., Favereau v. United States*, 44 F. Supp. 2d 68 (D. Me. 1999); *Davila v. Weinberger*, 600 F. Supp. 599, 603-04 (D.D.C. 1985); *see Smith v. Lyon*, 133 U.S. 315, 317 (1890).<sup>13</sup>

B. 28 U.S.C. § 1391(b) Does Not Provide For Venue In This District

The second venue provision cited by the complaint, 28 U.S.C. § 1392(b), does govern venue with respect to defendants Reid and Pelosi. Under that provision, venue is not proper in this district. The clause of subsection (b) relied upon by the complaint allows for venue in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2).<sup>14</sup>

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<sup>12</sup> The other kinds of cases to which section 1402 applies, torts, quiet title actions, a few kinds of specialized tax cases (*e.g.*, declaratory judgments about an organization’s charitable status), and certain employment actions by persons employed in presidential offices, are not even arguably at issue here, and section 1402 would not supply venue even if they were (*e.g.*, if this actually were a quiet title action, the property would need to be in this district).

<sup>13</sup> Whether unnamed class members must reside in the district in a class action, an issue addressed in cases like *Bywaters v. United States*, 196 F.R.D. 458, 463-65 (E.D. Texas 2000), is not at issue here where (unlike *Bywaters*) not all the named plaintiffs reside in this district.

<sup>14</sup> Plaintiffs do not rely on the other clauses of subsection (b), and for good reason, since those clauses cannot supply venue here. Clause (1) allows for venue in a judicial district where any defendant resides, if all defendants reside in the same state. Defendants Reid and Pelosi do not reside in this district or state. Clause (3) applies only to actions in which “there is no district in which the action may otherwise be brought,” and there is such a district (the District of

(continued...)

While in some cases there may be more than one judicial district in which substantial events or omissions giving rise to the claim occurred, the statute still “requir[es] that the ‘events or omissions supporting a claim’ [of venue] be ‘substantial.’ Events or omissions that might only have some tangential connection with the dispute are not enough.” *Cottman Transmission Systems v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). In particular, it is not enough for plaintiff Enloe to claim that the effect of statute is felt by him in this district and for plaintiffs generally to say that the effect of the statute is felt in every single district in the country, wherever any plaintiff may live. What counts is where the acts or omissions of defendant that give rise to the claim occurred rather than where the effects of those acts will be felt on plaintiff or what decisions plaintiff makes in reaction to defendants' actions: “We think it is far more likely that by referring to ‘events or omissions giving rise to the claim,’ Congress meant to require courts to focus on the relevant activities of defendant, not the plaintiff.” *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995); *see Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408, 431-34 (2d Cir. 2005) (reaching similar result and collecting cases).

The events that gave rise to plaintiffs’ claim against defendants Pelosi and Reid were the votes in the House and the Senate over which they presided, *see* Complaint ¶¶ 14-17, which took place in Washington, D.C., and not in this district. Accordingly, this provision cannot supply venue in this district. *Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1339 (M.D. Ala. 2001) (events giving rise to facial challenge to federal law occurred where law was enacted); *see Seariver Maritime Financial Holdings, Inc. v. Pena*, 952 F. Supp. 455, 460 (S.D. Texas 1996) (venue would be proper in District of Columbia where challenge is to allegedly unconstitutional

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<sup>14</sup>(...continued)  
Columbia).

enactment of federal statute); *see also Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) (under prior statute placing venue in district where claim arose, venue to challenge statute enacted in Idaho not proper in Texas notwithstanding assertion that statute had adverse effects in Texas on the Texas plaintiff).

C. 28 U.S.C. § 1391(e) Does Not Provide For Venue In This District

Plaintiffs do not cite 28 U.S.C. § 1391(e) as a basis for venue, but it is the proper provision to address venue with respect to the United States and the Executive Branch defendants insofar as they are sued in their official capacities. Under this provision, venue is likewise not proper in this district.

First, the provision does not govern venue with respect to legislative branch officials, defendants Reid and Pelosi. *Liberation News Service v. Eastland*, 426 F.2d 1379 (2d Cir. 1970); *see Duplantier v. United States*, 606 F.2d 654, 664 (5th Cir. 1979) (following *Liberation News* to reach similar conclusion with respect to judicial branch officials, since “[s]ection 1391(e)’s reach should not be expanded beyond the executive branch.”) Under subsection (e) of section 1391, such “[a]dditional persons” may be added to the suit only “in accordance with . . . such other venue requirements as would be applicable,” and, as we explain above, the other venue requirements applicable to Reid and Pelosi do not supply venue here.

Second, even if the only defendants were those to whom subsection (e) is applicable, this district is not a venue specified by that subsection.

One such permissible venue is the same as under subsection (b), namely, a judicial district in which “a substantial part of the events or omissions giving rise to the claim occurred,” § 1391(e)(2). As we have shown above with respect to subsection (b), this is not a district in which a substantial part of the events or omissions giving rise to the claim occurred.

A second basis for venue under subsection (e) is the district in which a defendant resides. § 1391(e)(1). However, none of the defendants resides in this district. Federal agencies and federal officers sued under this subsection in their official capacity reside where the agency or officer have their principal offices, *e.g.*, *Reuben H. Donnelly Corp v. FTC*, 580 F.2d 264 (7th Cir. 1978); *Davies Precision Machining, Inc. v. Defense Logistics Agency*, 825 F. Supp. 105, 107 (E.D. Pa.1993), which here is the District of Columbia.<sup>15</sup>

The third and final basis for venue permitted under subsection (e) where, as here, no real property is involved, is the district in which “the plaintiff resides.” § 1391(e)(3). Plaintiffs apparently assume that, since they have added Arthur Enloe to the action to serve in the role of “Texas Resident,” Complaint at 12 (heading), venue will be proper even though the other plaintiffs do not reside in Texas. But it is not enough that merely “a plaintiff” resides in the district. Under the statute, this third venue choice is available only when “the plaintiff” resides in the district.

Congress’ choice of “the plaintiff” rather than “a plaintiff” was no accident. The House version of the bill that introduced section 1391(e) into the United States Code (H.R. 1960, 87th Congress) actually did provide for venue in any district in which “a plaintiff” resides. H.R. REP. NO. 87-536, at 6 (1961). The Senate replaced this with the language that appears to this day in the enacted version of section 1391(e), providing for venue in the district in which “the plaintiff” resides. 108 CONG. REC. 18783 (1962). The House accepted the Senate’s amendments, which

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<sup>15</sup> Nor can plaintiffs justify venue under this provision on a theory that any action naming the United States as a party “may be brought anywhere in the United States because the United States is a resident of every judicial district. As a general matter, the ‘residence’ of the United States is simply not relevant for venue purposes.” *Misko v. United States*, 77 F.R.D. 425, 429 n.7 (D.D.C. 1978) (Sirica, J.). *Accord, e.g.*, 14D Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3814, at 367-68 & n.22 (2007).

were intended to "clarify and limit" the pertinent provisions of the House bill. *Id.* at 20094. Thus, the provision's legislative history shows that Congress specifically rejected language allowing suit where "a plaintiff" resides precisely in order to "limit" the scope of venue.

That rejection is especially important because the Supreme Court had already told Congress, in no uncertain terms, how it would continue to construe venue statutes that use the term "the defendant." Construing a statute that had allowed suit to be brought "only in the district of the residence of the plaintiff or the defendant," in 1890 the Supreme Court noted what was even then already a "long-continued construction" that "the defendant" meant each defendant, and that it was "not readily to be conceived that the congress . . . intended that that language should be given a construction . . . which would be directly contrary to that heretofore placed upon it by this court." *Smith v. Lyon*, 133 U.S. 315, 317 (1890). At the time Congress amended the venue statute at issue here, a pre-existing Revision Note to the very Code section Congress was amending further reminded Congress of that well established judicial interpretation of the phrase "the plaintiff." Revision Notes to 28 U.S.C. § 1391 at ¶ 7.

It was in light of this long-standing usage of "the plaintiff" that Congress decided to allow an action to be brought where "the plaintiff," not merely "a" or "any" plaintiff, resides. Had Congress wanted to allow multiple plaintiffs to sue in any district where just one of them resided, it could have easily used the words "a" or "any," as indeed the same Congress that enacted this provision did allow a multiple-defendant case to be brought in any district where "a defendant" resides. *Manchester Modes Inc. v. Schuman*, 426 F.2d 629, 633 n.7 (2d Cir. 1970). Congress' contemporaneous use of different language in different paragraphs of the same subsection, §§ 1391(e)(1) and (e)(3), shows that Congress knew the difference between "a" and "the" and chose those different words deliberately.

It is thus no wonder that, after the current provision was enacted, the Supreme Court assumed that a party cannot obtain venue under this provision merely because a co-plaintiff resides in the district. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 156 n.20 (1967).

Defendants recognize that a number of lower courts, beginning with and then following *Exxon Corp. v. FTC*, 588 F.2d 895, 898-99 (3d Cir. 1978), have subsequently read 28 U.S.C. § 1391(e)(3) as if it said "a plaintiff" and have thus allowed plaintiffs to pick and choose any district in which any of them reside. *E.g.*, *Sidney Coal Co. v. Social Security Admin.*, 427 F.3d 336, 345-46 (6th Cir. 2005); *Matsuo v. United States*, 416 F. Supp. 2d 982, 997 (D. Haw. 2006); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 383 (E.D. La. 1986), *vacated on other grounds*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part, and remanded on other grounds*, 489 U.S. 656 (1989). *Exxon* and the cases that follow it argue in favor of the broader "a plaintiff" reading of the venue statute for policy reasons. 588 F.2d at 898-99. However, the policy decision here belongs to Congress. The courts are not authorized to unilaterally adopt the "a plaintiff" House version of the venue provision that was specifically rejected by the Senate as being too broad and was, therefore, never enacted into law. Thus, § 1391(e)(3) must be understood as making this third venue option available only where "the plaintiff," *i.e.*, each plaintiff, resides.

This case illustrates the mischief that can result from broadening venue beyond what Congress has allowed and instead permitting a case to be filed in literally any district in the country as long as a plaintiff who lives in that district can be recruited. Plaintiffs have made no secret that they are forum shopping. According to a statements made by plaintiffs' non-local counsel to the press, plaintiffs decided that "Lubbock is the most Constitution following town we

could find,"<sup>16</sup> and "Slaton resident Arthur Enloe . . . volunteered to serve as a plaintiff."<sup>17</sup> Even in the complaint, the role in the case of this venue-creating volunteer is not described as "Arthur Enloe, Person With His Own Injury," but as "Arthur Enloe, Texas Resident." Complaint at 12. (Though there is a paragraph under the heading for Enloe that alleges an individual injury, tellingly, it is not an alleged injury to Enloe, but to out-of-state plaintiff Ramsey, *id.*, ¶ 55.<sup>18</sup>)

The notion that there are Constitution-following and not-so-Constitution-following federal courts can contribute to an erosion of respect for the federal judicial process and the judiciary, especially when plaintiffs can boast of having hand-picked the best court for their case from among every district in the country. Of course, that plaintiffs have decided that the court they have chosen is the most favorable to their position that they can find does not imply that defendants share that judgment or reciprocally view the same court as the least favorable to their own position. This memorandum should not be understood as making any particularized

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<sup>16</sup> KCBD Channel 11, *President Obama Sued in Lubbock over Health Care Reforms*, <http://www.kcbd.com/story/14022362/president-obama-sued-in-lubbock-over-health-care-reforms?redirected=true>.

<sup>17</sup> Logan G. Carver, *Class Action Lawsuit Against President Obama and Others Filed in Lubbock Court*, LUBBOCK AVALANCHE JOURNAL, Lubbock Online, <http://lubbockonline.com/filed-online/2011-02-14/class-action-lawsuit-against-president-obama-and-others-filed-lubbock-court> (Feb. 14, 2011) (emphasis added).

<sup>18</sup> While it might be possible that Ramsey's name appears in paragraph 55, which is identical to paragraph 60, as an incomplete cut-and-paste intended to refer to Enloe, it is also possible (based on only the limited information available to defendants about Enloe without having already taken discovery) that plaintiffs deliberately refrained from making any allegation of harm about Enloe because no such allegation could truthfully be made. Defendants have taken plaintiff at what appears to be their word in alleging injury to Ramsey rather than Enloe and have not sought discovery on an allegation of individualized injury to Enloe that the complaint does not make. However, in the event that plaintiffs either seek to amend the complaint to allege injury to Enloe or contend in opposing this motion that the complaint should be construed as already alleging such injury, defendants intend to seek limited discovery from Enloe on that point in order to further support this motion.

assertion or complaint to that effect. Nor is such a particularized assertion required. What counts is that as a general matter a venue statute that would allow plaintiffs to freely choose to file in any district court from throughout the country would tend systemically and unfairly to prejudice the government in the long run of cases. That is not the venue statute that Congress chose to enact.<sup>19</sup>

### III. The Court Lacks Subject Matter Jurisdiction Over This Suit For Injunctive and Declaratory Relief Against Federal Taxes

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Declaratory Judgment Act, 28 U.S.C. § 2201(a), similarly bars declaratory relief with regard to federal taxes, creating a declaratory remedy "except with respect to Federal taxes." The scope of the Declaratory Judgment Act is coterminous with that of the Anti-Injunction Act. *See, e.g., Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 4 (D.C. Cir. 1979).

Those provisions bar jurisdiction over plaintiffs' challenge (Complaint ¶ 17) to the ACA "in its entirety." The ACA includes many provisions that clearly are taxes, for example, the indoor tanning services excise tax, 26 U.S.C. § 5000B, to which the complaint alludes (but does not cite), Complaint ¶ 50. Plaintiffs have chosen to challenge the "entirety" of the ACA – their complaint does not expressly cite to even one specific provision – including the tax provisions. This action, as thus deliberately structured by the plaintiffs, is accordingly a suit for the purpose of restraining the assessment or collection of the federal taxes that are included in that "entirety"

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<sup>19</sup> Venue is a defense that defendants may waive, and federal officers, like other defendants, often do so in cases that lack the indicia of forum-shopping that prompt defendants to assert the defense here.

of the ACA. Under the express terms of the Anti-Injunction Act, this Court lacks subject matter jurisdiction over such an action.

IV. The Claims Against Defendants Pelosi And Reid Are Barred By The Speech Or Debate Clause And Sovereign Immunity And The Claims Against Defendant Obama Are Barred By Presidential Immunity

Plaintiffs' suit against defendants Reid and Pelosi attempts to do what the Speech or Debate Clause of the Constitution, article I, section 6, clause 1, prohibits: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." This clause grants Members of Congress absolute immunity from suit for any civil actions, whether for declaration, injunction, or damages, that "fall within the 'sphere of legitimate legislative activity.'" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975); *Shreeve*, at 8-9.

All plaintiffs' claims against defendants Reid and Pelosi challenge activity that falls within the legitimate legislative sphere and thus within the compass of legislative immunity. Plaintiffs allege that, by "supporting" and "voting for" the ACA, defendants abused their authority and violated their oaths of office. Complaint ¶ 15. These actions fall squarely within the broad category of legislative activity protected by the Speech or Debate Clause. *See Eastland*, 421 U.S. at 504 (Clause protects all activities "integral" to the "consideration and passage or rejection of proposed legislation"); *Gravel v. United States*, 408 U.S. 606, 617 (1972) (Speech or Debate immunity "equally cover[s]" "the act of voting" as it does actual speech or debate); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (Clause applies to "things generally done in a session of the House by one of its members in relation to the business before it," including "the act of voting").

That Plaintiffs claim defendants Reid and Pelosi have violated the Constitution is of no significance; such a claim does not evade the Speech or Debate bar, as legislative immunity is absolute. *See Eastland*, 421 U.S. at 509-10 (applying absolute legislative immunity to Members of Congress with respect to First Amendment claim). Accordingly, all plaintiffs' claims against defendants Reid and Pelosi are barred by legislative immunity

Insofar as Reid and Pelosi are sued in some official capacity, the claims against them are also barred by sovereign immunity. *See Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (suit against Congress to challenge legislative action distressing plaintiff was "frivolous" and barred by sovereign immunity).

Similarly, any claim for damages against the President is barred by Presidential immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 756-57 (1982); *Shreeve*, at 9, while separation of powers principles bar injunctive or declaratory relief in these circumstances as well, *id.* at 9-10; *see Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866); *Anderson v. Obama*, 2010 WL 3000765 (D. Md. July 28, 2010) (court lacks jurisdiction to enjoin President from enforcing the ACA), *appeal dismissed*, No. 10-1951 (4th Cir. Sep. 8, 2010), *cert. denied*, 131 S. Ct. 940 (2011).

V. Plaintiffs' Merits Claim Is Frivolous

On the merits, plaintiffs' far-reaching claim seeks, and would require, a revolution in our nation's constitutional understanding. Plaintiffs challenge as beyond the authority of Congress to enact any and all legislation about either "health care" or the "health insurance" industry. Complaint ¶ 12. Plaintiffs' theory would invalidate not just the ACA, but venerable statutes like Medicare, Medicaid, and ERISA, to mention just a few. Indeed, plaintiffs' own description of their claim is that they are challenging, not just a few or some provisions of the

ACA, but the ACA “in its entirety,” Complaint ¶ 13, necessarily including those provisions of the ACA that amend such pre-existing statutes as Medicare or the Indian Health Care Act.

Plaintiffs’ claim that federal legislation may not touch on health care or health insurance cannot be reconciled with the Constitution as interpreted by the Supreme Court. Even plaintiffs recognize this and therefore ask this Court to ignore a controlling Supreme Court decision -- a unanimous decision authored by Justice Jackson, no less<sup>20</sup> – and substitute its own interpretation of the Constitution for that of the Supreme Court. Complaint ¶¶ 18-23.

“[T]he hierarchy of the federal court system” is itself created by the Constitution and Congress. Admittedly, the Members of [the Supreme] Court decide cases by virtue of their commissions, not their competence. . . . But unless we wish anarchy to prevail within the federal judicial system, 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.” *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (internal quotation omitted). Plaintiffs’ claim, which even they recognize would require this Court to depart from Supreme Court precedent, is an invitation to such every-judge-for-himself anarchy, is wholly without merit, and should be dismissed.

#### CONCLUSION

For the reasons stated above, defendants’ motion to dismiss should be granted.

Respectfully submitted,

TONY WEST  
Assistant Attorney General

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<sup>20</sup> Complaint ¶ 19, citing *Wickard v. Filburn*, 317 U.S. 111 (1942). Plaintiffs’ argument is inconsistent with numerous other Supreme Court decisions as well, e.g., *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944), but the one acknowledged inconsistency is sufficient to illustrate why their claim must fail.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2011, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal rule of Civil Procedure 5 (b)(2).

/s/ Brian G. Kennedy  
Brian G. Kennedy