

**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 PLAINTIFFS' OPPOSITION TO MOTION TO
DISMISS**

Respectfully submitted,

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I. Summary

The Patient Protection and Affordable Care Act (hereinafter “Obamacare”) requires that all Americans, with specified exceptions, maintain a minimum level of health insurance coverage, or pay a penalty. Pub. L. No. 111-148, §§ 1501, 10106. Almost Thirty Thousand Americans have joined Liberty Legal Foundation (LLF) for the specific purpose of being represented by LLF in a legal challenge to Obamacare. Yet the Defendants claim that none of these individuals have suffered particularized and concrete harm caused by Obamacare. Plaintiffs will demonstrate here that this is simply not true.

Defendants also claim that issue preclusion from *Shreeve v. Obama* prevents this Court from determining whether this Court has subject matter jurisdiction in the instant case. However, it is well established that issue preclusion, like claim preclusion, only applies to the parties in the previous case. LLF is a party to the instant case, was not a party to *Shreeve v. Obama*, and currently represents 3,820 LLF members that were not parties to *Shreeve v. Obama* and that have joined LLF after the *Shreeve v. Obama* lawsuit was dismissed. Several of these new parties have provided documents establishing concrete and particularized harm caused to them by Obamacare. Also, issue preclusion does not apply where new facts have arisen since the previous decision. In the instant case new harm has arisen since the *Shreeve v. Obama* lawsuit was dismissed, including lost insurance coverage and increased costs.

Defendants’ arguments regarding venue are simply contrary to precedent, and are opposite to rulings from other Texas District Courts.

The Anti-Injunction Act and the tax exception to the Declaratory Injunction Act are inapplicable to the instant case because Obamacare’s primary purpose is to regulate, not to tax.

The Plaintiffs acknowledge that individual Defendants Pelosi, Reid, and Obama have valid claims to immunity under current law. Because these individuals are necessarily accused of serious violations in support of the Plaintiffs other claims, the Plaintiffs named these individuals in order to give them an opportunity to waive their immunity defense and substantively address these serious accusations.

Finally, Defendants' motion asserts that Plaintiffs' Complaint is substantively frivolous. However, based upon Supreme Court precedent from last week, Defendants' assertion could not be more wrong. *See Bond v. United States*, 564 U.S. __ (2011). Defendants' own assertions that Plaintiffs' claims would have profound effects upon "venerable statutes," prove that these claims are the opposite of "frivolous." The Constitutional grounds upon which Plaintiffs' claims are founded were specifically described by last week's Supreme Court as "protect[ing] the liberty of the individual from arbitrary power." *Id.* at slip op.10.

II. Arguments

A. Standing/Issue Preclusion

Defendants' memo correctly highlights the difference between issue preclusion and claim preclusion. However, the arguments asserted do not apply to the instant case for at least three reasons: In the instant case different Plaintiffs are filing in a different court, and are basing their claims in part on new facts.

a. Different Parties

Like claim preclusion, issue preclusion applies only to the parties involved in the previous litigation. *Gorski v. U.S.*, 94 Fed.Cl. 253 (2010); *citing Taylor v. Sturgell*, 553 U.S. 880, 890 (2008). Issue preclusion simply does not apply to individuals that were not party to the

previous litigation. *Id.* This is true because denying individuals an opportunity to defend their rights when they were not party to previous litigation would be a gross deprivation of due process. *Id.* In the instant case over 3,820 individuals currently represented by Liberty Legal Foundation, were not parties to the previous case asserted by the Defendants. Decl. Van Irion, App. 1-3.

The 2nd amended complaint in *Shreeve v. Obama* named 25,419 individual plaintiffs. Decl. Van Irion, App. 1-3. Liberty Legal Foundation (LLF) was not a named party in *Shreeve v. Obama*. *Id.* Since the 2nd amended complaint was filed in *Shreeve v. Obama*, 3,820 more individuals have joined LLF for the specific purpose of being represented as plaintiffs in the instant lawsuit. *Id.* These 3,820 individuals were also not named as parties in *Shreeve v. Obama*.¹ *Id.* They are represented in the instant lawsuit through their membership in LLF and LLF's status as a party to the instant suit.

If necessary LLF is willing and able to amend its complaint to name individual LLF members that were not parties in the *Shreeve v. Obama* suit, and to assert facts proving that said members have damages arising after the *Shreeve v. Obama* suit was dismissed (discussed further in next section).² *Id.*

Because LLF represents thousands of individuals that were not party to the previous litigation, and because LLF was not a party to the previous litigation, Defendants claim to issue preclusion must be denied.

¹ Over four hundred of these new Plaintiffs reside in Texas.

² Federal Rules of Civil Procedure, Rule 15 allows "liberal" amendment and supplementation of pleadings and such "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *See also Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C.Cir.1983). Also, Rule 21 permits joinder of new parties "at any time."

b. Different Facts: Change of Circumstances

Defendants' memo acknowledges that issue preclusion does not apply where new allegations relate events that have occurred since the previous dismissal. Def. Memo. at 9; *citing Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C.Cir.1983).

LLF currently represents 29,239 individual members for the purposes of this litigation. Decl. Van Irion, App. 1-3. 3,820 of those members have joined since the *Shreeve v. Obama* 2nd Amended Complaint was filed. *Id.* Specifically, this group of new members includes one LLF member currently residing in Amarillo Texas who specifically alleges that his health insurance deductibles have increased 80% as of January 2011 (after *Shreeve v. Obama* was dismissed) as a direct result of Obamacare. *Id.*; *see also* App. 4. Another new LLF member currently residing in San Antonio Texas alleges that as of November 23, 2010 (after *Shreeve v. Obama* was dismissed), her insurance will no longer cover counseling for her autistic son, as a direct result of Obamacare. *Id.*; *see also* App. 11. Another new member of LLF from Rockwall Texas states that his small company will not be hiring any new employees in 2011 as a direct result of Obamacare. *Id.*; *see also* App. 5. Another Texas resident and new LLF member provided documentation that his CIGNA health insurance would cost more "effective January 1, 2011." Another LLF member from Pearland Texas provided documentation that he, along with all Hobby Lobby employees would be suffering increased health care costs and reduced benefits as of January 2011 due to "the National Health Care Reform Law (Public Law No:1112-148)."³ *Id.*; *see also* App. 8-10.

³ LLF is willing and able to supplement its complaint pursuant to FRCP 15(d) with declarations from these individuals and other LLF members in order to establish LLF's standing to bring suit on behalf of its members pursuant to *Hunt v. Washington State Apple Advertising Cmm'n*, 432 U.S. 333, 342 (1977). LLF is also willing and able to amend its complaint naming additional parties that were not parties to *Shreeve v. Obama*, should this Court deem it necessary.

All of these examples represent specific facts arising after the November 2010 ruling in *Shreeve v. Obama*. Most are from individuals that were not named Plaintiffs nor members of LLF at the time *Shreeve v. Obama* was dismissed.

Because new facts are alleged in the instant lawsuit, the Defendants' claim of issue preclusion must be denied. *Dozier*, 702 F.2d 1189.

c. Different Court

The Defendants' motion also glosses over a critical distinction between the cases they assert and the instant case. In all the precedent cited by the Defendants an individual court had determined that it lacked subject matter jurisdiction, and upon re-filing of identical claims by identical plaintiffs, *in the same court*, that court applied issue preclusion. In the instant case however, this Court has never made a determination on its jurisdiction. One court determining that it doesn't have jurisdiction does not necessarily mean that a different court does not have jurisdiction.⁴ This is particularly true when new facts have been added to the complaint and new plaintiffs have joined the suit.

The effect of claim preclusion is more limited than issue preclusion. *Acree v. Air Line Pilots Ass'n*, 390 F.2d 199, 203 (5th Cir. 1968). This is particularly true when the issue is an individual court's determination that it does not have subject matter jurisdiction. Claim preclusion, following full adjudication on the merits, prevents re-litigation of "all matters that could have been raised." *Id.* Whereas an individual court's determination that that individual court lacks subject matter jurisdiction, should not preclude other courts from resolving whether

⁴ The Plaintiffs appreciate that two District Courts theoretically apply the same standards regarding subject matter jurisdiction. This issue is raised here to highlight the lack of apparent precedent supporting one court precluding another court from making its own determination on jurisdiction. While this point alone may not be dispositive in the instant case, the change of parties and change of facts still prevent application of issue preclusion.

the new court has subject matter jurisdiction. *See Magnus Elec. Inc. v. La Republica Argentina*, 830 F.2d 1396, 1401 (7th Cir. 1987).

Defendants' assertion that filing in another court "makes even less sense" is notably unsupported by any authority. *See* Def.s' Memo at 9. This lack of authority is not surprising because such authority would strip the new court of its authority to determine the scope of its own jurisdiction, and it would prevent plaintiffs from relocating to a court that does have proper jurisdiction.

Reluctance to determine jurisdiction for other courts also arises from the fact that jurisdiction determinations are party-specific, fact-specific, and rest on subjective determinations of fact early in the litigation process. These factors all support the conclusion that determinations on subject matter jurisdiction are not generally portable from court to court.

As explained by the 7th Circuit: "Dismissals for want of subject-matter jurisdiction are always denominated without prejudice, because they signify that the court did not have the power to decide the case on the merits, ... as otherwise the plaintiff would be free to refile the identical case *in the same court.*" *Hill v. Potter*, 352 F.3d 1142, 1146-1147 (2003) (emphasis added). In the instant case the plaintiffs are different, the facts alleged are different, and the suit has been filed *in a different court*.

d. Plaintiffs Have Standing

The Defendants' motion doesn't technically assert that Plaintiffs' lack standing. Rather, Defendants' motion simply asserts issue preclusion. While the Plaintiffs have already demonstrated that the Defendants' issue preclusion arguments fail for several reasons, the Plaintiffs further assert that they do have standing.

Just last week the Supreme Court ruled that “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. ___ (2011), at slip op. 10.

More generally, 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). Also, only one Plaintiff needs to have standing to permit adjudication of the matter. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Regarding ripeness, 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).

In the instant case Plaintiffs’ allegations took into account the recent holding of the Eastern District of Michigan in *Thomas More Law Center v. Obama*, ruling “This court finds that the injury-in-fact in this case is the present financial pressure experienced by plaintiffs due to the requirements of the Individual Mandate.” 720 F.Supp.2d 882, 889 (E.D.Mich.2010). Based upon this and other precedent the plaintiffs in the instant case similarly allege that they are

“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 required by the PPACA.” Compl. ¶¶41, 46, 50, 55, 60. Specifically, “All individual Plaintiffs are presently and concretely harmed by the PPACA because they are compelled to adjust their fiscal affairs now to prepare themselves to pay thousands of dollars over the next several years as required by the PPACA. Through 2020 Plaintiffs will each be required to pay, at a minimum, a total of \$3,895. Most individual Plaintiffs will be required to pay more than \$3,895 depending upon income and number of dependants.” Compl. ¶69. All of these factual allegations must be taken as true for purposes of Defendants’ motion to dismiss. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

As discussed above, many LLF members have also provided documents showing specific financial damages directly caused by Obamacare. Decl. Van Irion, App. 1-3. Also as discussed above, these allegations include at least one resident of this Court’s District that alleges health insurance deductibles increasing 80% as a direct result of Obamacare. *Id.* This individual was not a party to the *Shreeve v. Obama* suit, and his increased deductibles occurred after the Tennessee Court’s dismissal of *Shreeve v. Obama. Id.*

An association has standing to bring suit on behalf of its members when: a) its members would otherwise have standing to sue in their own right; b) the interests it seeks to protect are germane to its organization’s purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Cmm’n*, 432 U.S. 333, 342 (1977). This lawsuit is germane to LLF’s purpose because protection of individual rights and state sovereignty as established in the Constitution is necessary for the protection of basic human rights. Participation of all LLF members is not required because LLF represents its members’ common interests in opposing federal violations

of federal law and the U.S. Constitution. Most importantly, LLF has members that would otherwise have standing to sue in their own right, including but not limited to the LLF member from the Northern District of Texas that has suffered recent and concrete financial harm as a direct result of Obamacare. Therefore, LLF has standing in the instant case.

Because only one Plaintiff needs to have standing in order to maintain a suit, *see Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), and because LLF has standing, the Defendants' motion to dismiss for lack of standing must be **DENIED**.

e. Conclusion Regarding Standing and Issue Preclusion

Because the Plaintiffs to the instant suit represent thousands of new individuals, and because many of the facts alleged in the instant suit arose after the Tennessee Court's ruling, the Defendants' assertion of claim preclusion must fail. The Defendants assertion of claim preclusion must, therefore, be **DENIED**.

Because the Plaintiffs have asserted specific financial and non-financial harm directly caused by the challenged Federal law, the Plaintiffs have clearly shown standing to challenge the constitutionality of the law. The Defendants motion to dismiss for lack of standing must, therefore, be **DENIED**.

B. Venue is Proper

28 U.S.C. § 1391 (b)(2) states:

“A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in: 2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated”

Similarly, 28 U.S.C. § 1391 (e)(2) states:

“A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or...”

a. A Substantial Part of the Events Giving Rise to the Claim

The Defendants’ conclusion that these venue statutes require all persons challenging an act of Congress to file suit in Washington D.C. is simply contrary to the overwhelming majority of precedent interpreting these statutes. *In Re Enron Corp.*, 317 B.R. 701, 708 (Bkrcty.S.D.Tex.2004); *Safety Nat. Cas. Corp. v. U.S. Dept of Treasury*, 2007 WL 7238943, at *5 (S.D.Tex.2007); *Udeobong v. Hawkins*, 2009 WL 7326072 (S.D.Tex.2009); *Andrade v. Chojnacki*, 934 F.Supp. 817 (S.D.Tex.1996); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F.Supp.2d 1239 (N.D.Okla.2006); *National Council on Compensation Ins., Inc. v. Caro & Graifman, P.C.*, 259 F.Supp.2d 172 (D.Conn.2003); *Park Inn Intern., L.L.C. v. Mody Enterprises, Inc.*, 105 F.Supp.2d 370 (D.N.J.2000); *Etienne v. Wolverine Tube, Inc.*, 12 F.Supp.2d 1173 (D.Kan.1998); *Saferstein v. Paul, Mardinly, Durham, James, Flandreau & Rodger, P.C.*, 927 F.Supp. 731 (S.D.N.Y.1996); *Neufeld v. Neufeld*, 910 F.Supp. 977 (S.D.N.Y.1996).

Contrary to the Defendants’ assertion, the site of passage of legislation is not the only proper place for venue under these statutes. *Bishop v. Oklahoma ex rel. Edmondson*, 447 F.Supp.2d 1239 (N.D.Okla.2006).

More generally, it is well established that a plaintiff is not required to establish that his chosen venue has the “most substantial” contacts to the dispute, nor the most numerous contacts. *National Council on Compensation Ins., Inc. v. Caro & Graifman, P.C.*, 259 F.Supp.2d 172

(D.Conn.2003); *Park Inn Intern., L.L.C. v. Mody Enterprises, Inc.*, 105 F.Supp.2d 370 (D.N.J.2000); *Neufeld v. Neufeld*, 910 F.Supp. 977 (S.D.N.Y.1996). Multiple venues may be proper under the statutes, and a plaintiff *need not show* that his chosen venue is the *best* forum for the lawsuit. *Id.* Venue is proper even if contacts with another district were more substantial. *Etienne v. Wolverine Tube, Inc.*, 12 F.Supp.2d 1173 (D.Kan.1998). The fact that substantial activities may have taken place in other districts is not dispositive of venue questions. *Saferstein v. Paul, Mardinly, Durham, James, Flandreau & Rodger, P.C.*, 927 F.Supp. 731 (S.D.N.Y.1996), affirmed 127 F.3d 1096. A District Court should accept venue if activities that transpired in the forum district were not insubstantial. *Andrade v. Chojnacki*, 934 F.Supp. 817 (S.D.Tex.1996).

The Defendants rely upon *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir.2005) in support of their proposition that a District Court should only consider the activities of a defendant when determining whether “a substantial part of the events” giving rise to the claims occurred in the chosen venue. However, the Southern District of Texas has repeatedly and expressly rejected *Woodke* on this point. *In Re Enron Corp.*, 317 B.R. 701, 708 (Bkrtcy.S.D.Tex.2004)(“The Court respectfully disagrees with the analysis in *Woodke*...The court declines to follow *Woodke*’s reading of § 1391(b) to the extent it focuses on defendant's activities only.”); *Safety Nat. Cas. Corp. v. U.S. Dept of Treasury*, 2007 WL 7238943, at *5 (S.D.Tex.2007)(“As to *Woodke*, the Court respectfully disagrees with the Eight Circuit’s interpretation of Section 1391.”)(*citing In Re Enron*); *Udeobong v. Hawkins*, 2009 WL 7326072 (S.D.Tex.2009) (Declining to follow *Woodke* and considering actions of plaintiffs, as well as effects of the challenged law on Texas businesses.)

In the instant case LLF represents members currently residing in Lubbock, Amarillo, Dallas, and Wichita Falls, (as well as many other communities across Texas, and across the nation). Decl. Van Irion, App. 1-3. LLF currently has 2,902 members that are Texas residents and that have specifically indicated that they want LLF to represent them in this litigation. *Id.* More than four hundred of those members were not named parties to the *Shreeve v. Obama* lawsuit. *Id.* These members have suffered changes to their health coverage, changes to their employment, and changes to their businesses, all within the Northern District of Texas. If they refuse to follow the mandates of Obamacare Federal agents in the Northern District of Texas will punish them in the Northern District of Texas.

As a specific example, one LLF member and resident of Amarillo, Texas alleges an 80% increase in the cost of his families' health insurance coupled with decreased benefits, as a result of Obamacare. Decl. Van Irion, App. 4. Another LLF member and resident of Rockwall, Texas alleges that his small business suffered increased health insurance premiums of 23% as a direct result of Obamacare, and decided to not hire any new employees in 2011 for this reason. Decl. Van Irion, App. 5. Yet another LLF member residing in Texas provided a document from Hobby Lobby informing its employees that health benefits would be reduced and would cost the employees significantly more money in 2011 as a direct result of Obamacare.⁵ Decl. Van Irion, App. 8-10.

Considering the almost 3000 LLF members residing in Texas, all of whom allege that “they are compelled to adjust their fiscal affairs now to prepare themselves to pay thousands of

⁵ Time constraints did not allow LLF to obtain signed declarations from these individuals for purposes of this opposition. However, partially redacted, signed documents provided to LLF by these individuals are included in the Appendix. LLF is willing and able to amend its complaint to include these specific allegations and provide signed declarations from these and other LLF members if this Court deems it necessary. Decl. Van Irion, App. 2.

dollars over the next several years as required by” Obamacare, coupled with the specific examples given above, venue is proper in this Court.

b. Residence of the Plaintiff

28 U.S.C. § 1391 (e)(3) states:

“A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.”

Plaintiff Enloe resides in Slaton, Texas. Compl. at ¶53. For this reason alone, venue is proper under this statute.

Defendants’ memo dedicates several pages in an attempt to change this clear result. *See* Def.s’ Memo. at 16-19. However, even the Defendants are forced to acknowledge that all courts have decided this issue contrary to the assertion of the Defendants. *Id.* at 18; *citing by way of example Sidney Coal Co. v. Social Security Admin.*, 427 F.3d 336, 345-46; *Matsuo v. United States*, 416 F.Supp2d 982, 997 (D.Haw.2006); *National Treasury Employees Union v. Von Raab*, 649 F.Supp. 380 (E.D.La.1986). In contrast, the Defendants cannot point to a single case from any court that directly supports their proposition that statutory language “the plaintiff” should be construed to destroy otherwise proper venue simply because a single additional plaintiff residing in another district is added to the suit.^{6,7}

⁶ If Defendants’ proposition was correct, venue would be proper if all Plaintiffs except Arthur Enloe voluntarily dismissed their claims. In theory this would also allow 2901 other Texas residents to then file 2901 separate lawsuits with proper venue in Texas Federal Courts under practically identical pleadings (Along with thousands of motions

Considered in a vacuum, Defendants' arguments regarding Congressional intent might be persuasive. However, it is clear from the precedent that several courts have considered Congressional intent and have determined that venue is proper under the circumstances found in the instant case.

Because venue is proper in this Court pursuant to 28 U.S.C. §§ 1391 (b)(2), 1391 (e)(2), and 1391 (e)(3), Defendants' motion to dismiss for lack of venue must be **DENIED**.

C. The Anti-Injunction Act is Inapplicable Because Obamacare is a Regulation, Not a Tax

The Defendants' motion also requests dismissal on grounds that "This is an action for injunctive and declaratory relief against federal taxes," citing the Anti-Injunction Act, 26 U.S.C. §7421(a) and the "tax exception to the Declaratory Injunction Act, 26 U.S.C. §2201(a)." Def.s' Mot. at 2; Def.s' Memo at 20, *citing Investment Annuity, Inc. v. Blumenthal*, 609 F.2. 1, 4 (D.C.Cir.1979). This argument fails because Obamacare's primary purpose is to regulate, not to tax.

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 as means to force compliance," this was held "an unconstitutional abuse of the power to tax." *United States v. Butler*, 297 U.S. 1, 70 (1936); *See also 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.

to proceed in forma pauperis). This is the opposite of judicial efficiency. It is clear from the volume of precedent against the Defendants' proposition that the Courts understood that they were preventing judicial chaos.

⁷ Defendants' assertion that *Abbott Laboratories v. Gardener*, 387 U.S. 136, 156 n.20 (1967) supports Defendants' interpretation of §1391 (e)(3) is misleading. The note in *Abbott* simply acknowledges that an issue regarding venue was raised by the parties, but it then specifically refuses to construe the venue statute. Also, the venue statute at issue was a previous version of the current statute, which has been "liberalized" by amendment. *See Udeobong v. Hawkins*, 2009 WL 7326072 at *2 (S.D.Tex.2009).

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.”)

The Anti-Injunction Act, 26 U.S.C. §7421(a) does *not* apply to the instant case because the stated purpose of Obamacare is not to raise revenue, but to comprehensively “regulate activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.” Pub. L. No. 111-148 §§ 1501(a)(2)(A), 10106(a).

D. Hiding Behind Immunity

Defendants correctly assert the Speech or Debate Clause and Sovereign Immunity defenses as they apply to individual defendants Pelosi, Reid, and Obama.

Claims against these individuals were included in Plaintiffs’ Complaint to allow these individuals an opportunity to substantively defend their actions in light of factually grounded allegations that they have abused their authority, violated the clear meaning of the Constitution, and violated their oaths of office. Facts supporting these claims are necessarily included in the Plaintiffs Complaint in order to establish background support and elements of claims against other defendants. While the Plaintiffs appreciate the policy concerns underlying the asserted immunity defenses, they also understand that such defenses are occasionally waived in order to substantively address serious charges leveled against governmental officials.

Thirty thousand Americans from all 50 states have accused Pelosi, Reid, and Obama of abusing their authority, violating the Constitution, and violating their oaths of office. The Plaintiffs had hoped that such serious accusations from so many Americans would induce a response from these individual defendants, beyond simply allowing a government attorney to

assert immunity. The Plaintiffs are disappointed, but not surprised, that these individual defendants chose to hide behind immunity rather than substantively defend their actions.

E. Regardless of the Ultimate Outcome, Plaintiffs' Claims Are the Opposite of "Frivolous"

For 150 after our Constitution's ratification it was understood by all courts that the purpose of Article I §8 was to grant limited and specific powers to Congress. In 1942 the Supreme Court interpreted one phrase, the commerce clause, in such a way that this one clause negated the purpose of Article I §8. *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* removed all substantive limits on Congressional authority, effectively releasing the hounds of government on a previously free society. Since 1942 the Federal government has grown like a cancer, as a direct result of *Wickard* and its progeny.

Through Obamacare Congress now tells us that poor health effects interstate commerce, and that 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. This is exactly the type of government that the Constitution was intended to prevent.

While the Defendants certainly have a right to disagree with this assessment, their assertion that it is "frivolous" couldn't be further from the truth. The fact that an issue is very important hardly makes it frivolous. Quite the opposite is true. The common meaning of the word "frivolous" is "of little weight or importance, lacking in seriousness, or marked by unbecoming levity." Webster's 9th New Collegiate Dictionary, 494, (Frederick Mish ed. Merriam Webster 1986). Contrary to the Defendants assertion, allegations that our Constitution has been

negated and our freedom has been stolen hardly qualifies as “of little weight or importance, lacking in seriousness, or marked by unbecoming levity.” The legal definition of “frivolous” is “lacking a legal basis or legal merit; not serious.” Black’s Law Dictionary 7th Ed, 677 (Bryan Garner ed. West 1999). The instant case is based upon Constitutional rights, and is a serious request to correct seriously flawed 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). *Wickard v. Filburn* and its progeny could not be more “badly reasoned.”

While the Supreme Court has recently placed some limits upon Congress’ ability to regulate criminal activity, and the methods Congress may use to regulate non-criminal activity, close examination will reveal that what has actually been limited to date 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.

Just last week the Supreme Court revealed its renewed interest in Constitutional limits on Federal authority:

“The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived...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 v. United States*, 564 U.S.____ (2011), at slip op. 8-10; citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Based upon this very recent decision, it seems that the Supreme Court would disagree with the Defendants’ assertion that the instant case is “frivolous.”

Defendants’ memo notes that Plaintiffs’ claims would invalidate not only Obamacare, but also “venerable statutes like Medicare, Medicaid, and ERISA, to mention just a few.” Def.s’ Memo. at 22. This is correct. However, this makes the instant case less frivolous, not more. Revolutionary changes to law are hardly “of little importance.”

Our Constitutional Republic is not a democracy. The purpose of the Constitution is to protect every individual from a tyrannical majority infringing upon individual rights, and from government asserting authority that is beyond the authority granted to the government by the people “from whom all governmental powers are derived.” *Bond*, 564 U.S.____ , at slip op.10. A Constitution becomes meaningless if principals are allowed to fall in the face of arguments that upholding those principals would invalidate “venerable statutes.”

This case asks the question, is freedom more important than ERISA? Are principals protected by the Constitution more important than the desires of a tyrannical majority? Are individual rights more important than unlimited Federal authority? These opposing concepts cannot coexist. Attempts to force them to coexist simply eliminates freedom, rights, and the Constitution.

III. Conclusion

For the reasons set forth here and supported by Plaintiffs’ accompanying Brief, the Plaintiffs respectfully request that Defendants’ motion be granted in part to dismiss individual

Defendants Pelosi, Reid, and Obama, and that the remainder of Defendants' motion be
DENIED.

Dated: 6/21/11

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 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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