

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

STATE OF FLORIDA, by and)	
through PAM BONDI, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 3:10-cv-91-RV/EMT
)	
UNITED STATES DEPARTMENT)	
OF HEALTH AND HUMAN)	
SERVICES, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

Case No. 3:10-cv-91-RV/EMT

REPLY IN SUPPORT OF DEFENDANTS’ MOTION TO CLARIFY

The Court’s January 31 order specifically declined to enter an injunction. Several plaintiff states, like defendants, have understood that the ruling did not operate as an immediate injunction. Other plaintiff states, however, have publicly announced a different view. Because it is important that the parties know specifically what steps the Court anticipated they would take in response to its judgment, defendants moved the Court for clarification. In that motion, defendants noted a variety of reasons for their conclusion that the Court’s determination not to enter an injunction was purposeful, and asked the Court to confirm that its declaratory judgment does not automatically relieve the parties of their rights or obligations under the Patient Protection and Affordable Care Act (“Affordable Care Act,” “ACA,” or the “Act”) while appellate review is pending.

Plaintiffs’ opposition to defendants’ motion to clarify rests on the premise that the Court clearly intended its order to operate as an immediately effective injunction, and defendants,

therefore, must actually be seeking a stay. That assertion is belied by plaintiffs' own actions as well as by the statements of many plaintiff states agreeing with defendants' interpretation. Given that the parties' briefing and the Court's decisions addressed only a handful of the Act's provisions and never discussed hundreds of others, the conclusion of defendants and several plaintiff states that the Court did not anticipate that defendants would immediately halt implementation of the entire Act with respect to plaintiffs is a reasonable and responsible interpretation of the Court's judgment. The reasonableness of that understanding is further confirmed by the fact that the Court did not address the standing of 24 of the 26 plaintiff states, and did not otherwise make clear who is entitled to rely on the judgment. And that understanding is consistent with defendants' representation in their summary judgment papers that they would adhere to a declaratory judgment after appellate review. Based on that understanding, defendants have not believed that they need to seek a stay at this juncture. They intended this motion to be what it is labeled — a request that the Court, in light of the conflicting views on the issue, confirm that defendants' understanding of its judgment is correct.

1. Despite plaintiffs' claim that the declaratory judgment operates as an immediately effective injunction, their statements and actions are consistent with defendants' understanding.

At least eight plaintiff states have publicly stated that they do not view the declaratory judgment as barring them from continuing to implement the Act.¹ Moreover, although an

¹ Defs.' Mem. 6 n.3 (Georgia, Iowa, Mississippi, Ohio, Wisconsin); *see also* Andrew Doughman, *Nevada Pushes Ahead To Implement 'Unconstitutional' Health Care Reform*, Nevada News Bureau, Feb. 28, 2011 (quoting Nevada governor Brian Sandoval as stating that, pending appeal, "the law imposes many deadlines, and we cannot wait until litigation is resolved"), *available at* <http://www.nevadanewsbulletin.com/2011/01/27/nevada-pushes-ahead-to-implement-unconstitutional-health-care-reform>; Jon Walker, *Health Law Stands in S.D.: Despite Court Win, State Won't Freeze Reform*, Argus Leader, Feb. 4, 2011 (quoting spokesperson for South Dakota governor Dennis Daugaard as stating, "We're really in a phase where we're planning, and those plans are still going forward"), *available at* <http://www>.

injunction against implementation across the entire range of ACA provisions as applied to plaintiffs would necessarily bar expenditures and tax credits under the Act, *see, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990) (federal funds may not be drawn from the Treasury unless authorized and appropriated by an Act of Congress), since the Court entered its judgment on January 31, at least 24 of the 26 plaintiff states have applied for additional grants authorized or appropriated by the ACA, continued to draw down grant funds previously awarded under the ACA, or otherwise availed themselves of resources made available by the ACA. Indeed, South Carolina has continued to draw down exchange planning grant funds, even though it has declared the Act “void and unenforceable.”² Similarly, Utah has described the declaratory judgment as an “injunction against further implementation” of the Act, but has continued to draw down Pre-existing Condition Insurance Plan (“PCIP”) funds and to request Early Retiree Reinsurance Program (“ERRP”) reimbursements.³

With respect to plaintiff NFIB, plaintiffs state only that members of the organization “are perfectly capable of asserting their rights” under the Court’s judgment if the ACA is enforced against them. Pls.’ Opp’n 12. But plaintiffs fail to acknowledge that under an injunction barring

argusleader.com/article/20110204/NEWS/102040311/Health-law-stands-S-D-; Kathie Durbin, *State Health Battle Brewing*, *The Columbian*, Feb. 13, 2011 (quoting Washington attorney general Rob McKenna as stating that, pending appeal, “whether or not to suspend implementation of the health care law in our state is a question for our legislators and the Governor”), *available at* <http://www.columbian.com/news/2011/feb/13/state-health-battle-brewing> (all Internet addresses last visited Feb. 28, 2011).

² Letter from South Carolina attorney general Alan Wilson to governor Nikki Haley, Feb. 2, 2011, *available at* <http://www.scag.gov/newsroom/pdf/2011/healthcareletterhaley.pdf>.

³ The Constitutionality of the Affordable Care Act, Hearing Before the U.S. Senate Committee on the Judiciary, Feb. 2, 2011 (statement of Mark L. Shurtleff, Attorney General of Utah), *available at* http://www.attorneygeneral.utah.gov/cmsdocuments/Obamacare_2011_Senate_Testimony_1.pdf.

implementation, NFIB's members would lose the right to claim tax credits authorized by the Act. In sum, the clarity asserted in plaintiffs' briefs has proved elusive to them in practice.

2. Neither plaintiffs nor the Court addressed the impact of treating the Court's declaration as an injunction immediately effective as to the hundreds of provisions of the ACA, a fact that further supports defendants' understanding.

As noted, defendants understand the declaratory judgment as not, of its own force and in a self-executing manner, relieving the parties of their rights and obligations pending appeal. But defendants do not regard the issue as free from doubt, and several plaintiffs — at least in their out-of-court statements — appear to agree. Therefore, defendants have asked the Court to clarify specifically what the Court anticipated that the defendants would *do* while the case is on appeal.

The reasons why clarification is appropriate are, for the most part, the same reasons why defendants do not believe that the Court anticipated that its declaration would have the effect of bringing all implementation of the Act with respect to the plaintiffs to an immediate halt. The Act, as the Court observed, has about 450 provisions. About 440 of those provisions were never even discussed in the parties' papers or in the Court's opinions.⁴ In particular, neither the parties nor the Court addressed the practical implications of treating the Court's declaratory judgment as an injunction immediately effective as to all 450 provisions, many of which are already operative, years before the minimum coverage provision takes effect. Nor did the Court's judgment provide guidance as to the specific steps that the parties would be required to take or to refrain from taking if it was anticipated that they would immediately treat the declaration as an injunction. *See* Fed. R. Civ. P. 65(d). The lack of such specific direction is one reason why

⁴ The Court sustained the constitutionality of all other provisions, other than the minimum coverage provision, that plaintiffs specifically challenged.

defendants concluded that the best reading of the Court's judgment was as not anticipating that defendants would suspend implementation of all 450 or so provisions as to plaintiffs pending appeal. Defs.' Mem. 7-13.

In addition, halting implementation of the many provisions currently in effect as to plaintiffs would be extraordinarily disruptive. Defendants concluded that the Court did not, without any discussion, anticipate such widespread disruption. For instance, there is no indication that the Court considered or anticipated that defendants would rescind Medicare provider and physician payment rates that have already been implemented through a series of complex rulemakings and that govern payment of roughly one hundred million claims each month. Nor is there any indication that the Court considered or anticipated that hundreds of millions of unspent dollars in federal grants to plaintiff states would be frozen or recouped pending appellate review. Yet, these would be the inevitable results of an injunction as to plaintiffs.

Plaintiffs completely fail to grapple with these practical problems and make no effort to answer the kinds of very specific questions that defendants' motion showed plaintiffs' view of the Court's judgment would raise. Nor do plaintiffs provide any explanation whatsoever as to why they believe the Court intended such disruption. Rather, they dismiss these inarguable and potentially overwhelming consequences with the glib response that the Court's order requires defendants to figure out and then "reinstate the preexisting status quo." Pls.' Opp'n 9. A few examples demonstrate the difficulties that would arise if plaintiffs were correct that the Court's declaratory judgment should be treated as an immediate injunction, even though it lacks the specific guidance contemplated under Rule 65, and why plaintiffs' vague invocation of the status quo ante answers none of the practical questions that such a reading would raise.

a. Medicare provider payment rates — which affect almost every physician (including any NFIB member physicians), hospital, skilled nursing facility, home health agency, and durable medical equipment supplier (including any owned or operated by NFIB members or plaintiff states), as well as Medicare beneficiaries who make copayments (including any NFIB members with Medicare benefits)⁵ — are recalculated every year in massive, separate rulemaking proceedings. Defs.’ Mem. 7-8 & n.6. For each of the many types of providers, the rates for 2011 included changes required by the ACA, as well as annual and other changes and recalculations mandated by other statutes. What is the “status quo ante” here? The 2010 rates, which were not affected by the ACA, but which do not reflect the updates and changes mandated for 2011 by other statutes? Or a hypothetical calculation of the 2011 rates without the ACA provisions taken into account, even though no such calculations (which would themselves be complex and time-consuming) have ever existed, let alone any rulemakings implementing them? Moreover, further difficulties are created by the uncertainties of trying to identify which providers or beneficiaries are NFIB members. What proof of NFIB membership would be required to obtain the non-ACA rate? Would defendants need to obtain NFIB’s membership list? As of what date?

b. For some ACA provisions — for example, the small employer health care tax credit — IRS systems are already programmed and are now accepting returns claiming the credit. *See* Defs.’ Mem. 7. Does the Court’s judgment anticipate that the IRS will cease allowing NFIB taxpayers this credit? In order to deny taxpayers the credit, the IRS would have to make changes to its return processing computer systems. IRS would have to briefly suspend accepting all

⁵ The amounts that Medicare pays to providers can also affect beneficiaries, whose copayments depend on the Medicare-approved charges.

returns in order to deploy the systems changes during filing season. This would result in delay and other risks for all taxpayers. Taxpayers claiming the credit would face significant delays in processing.

c. State governments, including plaintiff state governments, have accepted millions of dollars in federal funds made available under various ACA programs, such as the Early Retiree Reinsurance Program, *see* Defs.' Mem. 7-11, and have continued to request additional funds since the Court's judgment. Does plaintiffs' principle that the status quo ante must be restored, not to mention the principle that he who seeks equity must do equity, require those moneys to be returned? As of what date?

Plaintiffs ignore these and the many other specific questions that their view of the immediate effect of the Court's judgment would raise for the 450 or so very different provisions of the ACA. Directing defendants to the status quo ante is neither an adequate answer nor the kind of detail an injunction would have been required to provide.

3. The difficulties with plaintiffs' position are compounded by the uncertainties about who is entitled to rely on the judgment.

According to plaintiffs, defendants are required to do whatever the judgment requires with respect to NFIB members without even knowing who those members are. Pls.' Opp'n 12. On plaintiffs' theory, defendants will find out they have violated the Court's order only after NFIB members decide which provisions of the Act they wish to invoke, and identify themselves by coming forth to do so. *Id.* That would be like no injunction known to American jurisprudence, which instead requires that the parties *enjoined* be told in advance what actions they must take or avoid, *see Gunn v. Univ. Comm. to End the War in Vietnam*, 399 U.S. 383, 389 (1970), not that they be informed after the fact that they have violated terms of the injunction known only to

undisclosed plaintiffs.⁶ Defendants should not be required to guess at who might be covered by an order intended to operate as an immediate injunction, only to be apprised in a later proceeding that they guessed incorrectly.

Moreover, contrary to plaintiffs' view, there is nothing "puzzling" about the rule that a court may grant relief only to a party with standing. Pls.' Opp'n 12 n.4. "Each plaintiff must have standing to seek each form of relief in each claim." *Bronsen v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007). It is true that only "one named plaintiff must have standing for each of the claims" in order to vest the court with "jurisdiction." *Jackson v. Okaloosa County*, 21 F.3d 1531, 1536-37 (11th Cir. 1994) (emphasis added).⁷ But where the scope of *relief* is at issue, as here, a court must "examine each named plaintiff individually to determine whether that plaintiff has standing to make each claim." *Id.* at 1536-37.⁸ In fact, it appears that it is plaintiffs who are

⁶ Moreover, plaintiffs' reliance on *NAACP v. Alabama*, 357 U.S. 449 (1958), for the proposition that NFIB members may insist on anonymity here is misplaced. *See* Pls.' Opp'n 12. In that case, the Alabama attorney general brought suit to compel the state chapter of the NAACP to disclose the names and addresses of its members, which they contended violated their First Amendment rights to free speech and assembly. In holding that the chapter had third-party standing to assert the rights of its members, the Court found that a contrary rule "would result in nullification of the right at the very moment of its assertion." *Id.* at 459. Here, by contrast, there is no First Amendment claim at stake; it is NFIB, not the government, that has invoked the power of the Court; and it is only by revealing their identities that NFIB members could vindicate their principal claim for relief — immunity from enforcement of the minimum coverage provision.

⁷ *See also Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004) ("Where the legal issues on appeal are fairly raised by 'one plaintiff [who] had standing to bring the suit, the court need not consider the standing of the other plaintiffs.' . . . As our jurisdiction and our duty to answer the questions raised here would be unaffected by the resolution of Idaho's challenge to Planned Parenthood's standing, we decline to decide the issue.").

⁸ *See also Planned Parenthood*, 376 F.3d at 918 ("We note, however, that on remand, when the district court enters the appropriate injunctive relief against enforcement of the statute, it may need to decide whether Planned Parenthood is a proper plaintiff. Only a proper party to an action can enforce an injunction that results from a final judgment."); *Allandale Neighborhood Ass'n v. Austin Transp. Study Policy*, 840 F.2d 258, 263 & n.15 (5th Cir. 1988)

requesting reconsideration, asking the Court to reach an issue it has twice declined to reach: whether plaintiff states other than Idaho and Utah have standing. Pls.' Opp'n 12 n.4.⁹

It is only under plaintiffs' view of the Court's judgment that the Court would be required to decide these standing issues. That the Court did not decide whether the other plaintiff states have standing is thus one of the solid indications that the Court did not anticipate that its ruling would of its own force relieve the parties of any obligations or deny them any rights under the Affordable Care Act while the judgment is the subject of appellate review. Indeed, plaintiffs' contrary reading of the judgment would embroil the known parties, the more numerous anonymous parties, and the Court in the kinds of detailed pragmatic problems that the declaratory judgment does not address. Those problems would unnecessarily complicate and delay any final resolution of the case.

4. Defendants' understanding of the anticipated effect of the Court's order is consistent with the position defendants took in their brief on the merits.

Contrary to plaintiffs' characterization, no one doubts that a declaratory judgment is a statement of "the rights and other legal relations" of the parties and has "the force and effect of a final judgment." *Id.* at 3-4 (quoting 28 U.S.C. § 2201(a)). That simply repeats the text of

("[I]f the two remaining Plaintiffs had success on the appeal, we would seemingly be compelled to reach the constitutional standing question in order to be able to decide whether the three other Plaintiffs would be entitled to share in that success. But the appeal of the two remaining Plaintiffs is ultimately unsuccessful.").

⁹ The plaintiff states may not bootstrap their standing to challenge the ACA's Medicaid eligibility expansion into standing to challenge the minimum coverage provision, even given this Court's conclusion that the two are not severable. *See* Pls.' Opp'n 12 n.4. Plaintiffs' challenge to the Medicaid eligibility expansion was unsuccessful. And "a plaintiff must establish that he has standing to challenge each provision of an ordinance by showing that he was injured by application of those provisions." *Covenant Media of S.C. v. City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007); *see also Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross.").

the Declaratory Judgment Act. The key question, as defendants have said, is one of *timing*. Plaintiffs argue that, despite defendants' representation in their summary judgment papers that they would adhere to a declaratory judgment "*after appellate review is exhausted*," Defs.' Opp'n to Pls.' Mot. for Summ. J. 43 (emphasis added), the Court surely anticipated otherwise. Pls.' Opp'n 3-4. Nothing in the Court's silence signals a rejection of defendant's representation.

Defendants' position then, and their understanding now, is fully consistent with *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 155 (1963), which explained that a declaratory judgment "affect[s] an Act of Congress in a totally noncoercive fashion," with "no interdiction of the operation at large of the statute." Accordingly, absent "an injunctive sanction," the government is "free to continue to apply [a] statute" "pending review in the Court of Appeals and in [the Supreme] Court." *Id.* Plaintiffs argue that *Mendoza-Martinez* is "wholly inapposite" because the statute at issue there has since been repealed. Pls.' Mem. at 4. That is immaterial. In that case, the Court considered whether the action should initially have been heard by a three-judge district court, because only such a court could enjoin an Act of Congress at that time. 372 U.S. at 152-53 (citing 28 U.S.C. § 2282). It concluded that a three-judge court was unnecessary because it was clear that the district court had issued a declaratory judgment, not an injunction. *Id.* at 153-55. The case turned not on a construction of the particular statute, the meaning of which was clear, but on the characteristics of a declaratory judgment.

5. It is appropriate for defendants to have analyzed the Court's order and now to seek clarification.

Plaintiffs profess surprise at defendants' "inexplicabl[e] delay" in seeking this clarification but, at the same time, they continue to take advantage of numerous provisions of the Act that they did not challenge and that the Court did not address. As plaintiffs' own conduct

illustrates, it should come as no surprise that the potential impact of the Court's judgment has required careful analysis, given the breadth of the statute and the lack of the specific guidance or weighing of the applicable equitable factors that would be required for injunctive relief. That careful review led defendants to conclude that the Court did not anticipate that its declaratory judgment would lead to an inevitable halt in the implementation of all provisions of the Act with respect to all plaintiffs and, therefore, that a stay is not necessary at this time.

If a stay motion becomes necessary, defendants can and will make the appropriate showing of likelihood of success and of irreparable harm and will demonstrate why plaintiffs' assertions of irreparable harm during the pendency of an appeal lack merit. The only ACA provision that the Court found unconstitutional in and of itself — the minimum coverage provision — does not go into effect until 2014, so defendants will not implement and enforce that provision pending appeal. In the meantime, the likelihood of irreparable harm, if any, is “minimal.” *Virginia ex rel. Cucinnelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. Dec. 13, 2010).¹⁰

At this juncture, however, these arguments are premature, as neither side has moved for a stay. Rather, defendants ask the Court to clarify that its declaratory judgment was not anticipated to have the immediate effect of relieving the parties to this case of any obligations or denying them any rights under the Affordable Care Act while the judgment is the subject of appellate review. As shown above, defendants do not understand the Court to have anticipated

¹⁰ See also Colorado Health Reform website, at <http://www.colorado.gov/cs/Satellite/GovernorsHealthReform/GOVR/1251573981995> (“The Act will not ‘bust’ Colorado's budget as some have claimed. In fact, there will be no state General Fund impact until at least 2017.”); Kansas Health Reform Website, at [http://www.khpa.ks.gov/ppaca/download/5-18-10%20Health%20Reform%20Executive%20Summary%20SS%20AA%20Final%20\(2\).pdf](http://www.khpa.ks.gov/ppaca/download/5-18-10%20Health%20Reform%20Executive%20Summary%20SS%20AA%20Final%20(2).pdf), (“State government spending is likely to remain relatively flat, depending on policy options the state chooses to adopt.”).

that, pending appellate review, they would halt and dismantle the many programs established, regulated, or otherwise affected by the ACA with respect to plaintiffs. Clarification is appropriate so that defendants know how to proceed in this litigation and in implementing the Act, and to dispel the confusion of the public and many plaintiff states regarding their rights and obligations going forward.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court clarify that its January 31, 2011, declaratory judgment was not expected to have the immediate and self-executing effect of relieving the parties of their rights and obligations under the Affordable Care Act while the declaratory judgment is the subject of appellate review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2011, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Plaintiffs' counsel of record.

/s/ Eric Beckenhauer

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