No. 10-369

In The Supreme Court of the United States

STEVE BALDWIN and
PACIFIC JUSTICE INSTITUTE,

Petitioners,

v.

KATHLEEN SEBELIUS, in her Official Capacity as Secretary of the U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA L. SOLIS, in her Official Capacity as Secretary of the U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; TIMOTHY F. GEITHNER, in his Official Capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Ninth Circuit

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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DUE TO THE DECISION IN THE FLORIDA HEALTH CARE CASE, *STATE OF FLORIDA v. U.S. DEPT. OF H.H.S.*, THE COURT SHOULD GRANT THE PETITION BECAUSE NOW THERE ARE CONFLICTING DISTRICT COURT DECISIONS IN FOUR CIRCUITS: THE FOURTH, SIXTH, NINTH, AND ELEVENTH CIRCUITS

Pursuant to Rule 15.8, Petitioners respectfully submit this supplemental brief in support of their petition for writ of certiorari for the purpose of bringing to the Court's attention the October 14, 2010, decision of the U.S. District Court for the Northern District of Florida in *State of Florida, et al. v. U.S. Dept. of HHS*, ___ F.Supp.2d ___, 2010 WL 4010119 (N.D. Fla.) ("*Florida*"). Contrary to the district court's decision in the case at Bar, in *Florida* the district court held that:

1. The plaintiffs have standing under Article III to challenge the Individual Mandate provision of the Act. *Id*. at 17-21.

2. The plaintiffs' challenge to the Individual Mandate provision of the Act was ripe for review, even though that provision does not become effective until 2014. *Id*. at 21-23.

In finding that plaintiffs had standing to challenge the Individual Mandate provision even though it is not effective until 2014, the district court in *Florida* concluded:

> "[T]he injury alleged in this case will not occur at 'some indefinite future time.' **Instead, the date is definitively fixed in the Act and will occur in 2014, when the individual mandate goes into effect and the individual plaintiffs are forced to buy insurance or pay the penalty**. See ACLU of Florida, Inc. v. Miami-Dade County School Bd., 557 F.3d 1177, 1194 (11th Cir. 2009) (standing shown in pre-enforcement challenge where the claimed injury was 'pegged to a sufficiently fixed period of time'). Because time is the primary factor here, this case presents a durational issue, and not a contingency issue. 'A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But, one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (citations and brackets omitted)."

Id. at 18 (emphasis added).

In *Florida*, the government raised a temporal argument that since 2014 was forty months away it is so far off in time that plaintiffs do not have standing. The district court rejected this argument:

> "The defendants concede that an injury does not have to occur immediately to qualify as an injury-in-fact, but they argue that forty

> months 'is far longer than typically allowed.' Def. Mem. at 27. It is true that forty months is longer than the time period at issue in the particular cases the defendants cite . . . But, the fact that the harm was closer in those cases does not necessarily mean that forty months is ipso facto 'too far off.' . . . Imposition of the individual mandate and penalty, like the fee in Village of Bensenville, is definitively fixed in time and impending. **And absent action by this court, starting in 2014, the federal government will begin enforcing it**."

Id. (citations omitted; emphasis added).

As to the issue of ripeness, in *Florida* the government argued that since the Individual Mandate does not become effective until 2014, there can be no injury until that time. In rejecting this argument, the district court cited this Court's decision in *Blanchette v. Connecticut Gen. Ins. Corps*., 419 U.S. 102, 143 (1974) ("Blanchette"):

> "However, '[w]here the inevitability of the operation of a statute against [plaintiffs] is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect.' [Blanchette]. 'The Supreme Court has long . . . held that where the enforcement of a statute is certain, a pre-enforcement challenge will not be rejected on ripeness grounds.' NAACP, supra, 522

> F.3d at 1164 (citing Blanchette, supra, 419 U.S. at 143)."

Florida, supra, at 22.

As to the issue of ripeness, the district court further concluded that the Individual Mandate provision is the cornerstone of the Act and will be enforced, and, therefore, is ripe to be challenged before its effective date:

> "The complained of injury in this case is 'certainly impending' as there is no reason whatsoever to doubt that the federal government will enforce the individual mandate and employer mandate against the plaintiffs. Indeed, with respect to the individual mandate in particular, the defendants concede that it is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss. It will clearly have to be enforced. See Commonwealth of Pennsylvania v. State of West Virginia, 262 U.S. 553, 592-93, 262 U.S. 553, 43 S. Ct. 658 (1923) (suit filed shortly after the challenged statute passed into law and before it was enforced was not premature where the statute 'certainly would operate as the complainant states apprehended it would')."

Id.

Finally, the district court in *Florida* went on to find that the Individual Mandate provision may be

unconstitutional because it exceeds Congress' power under the Commerce Clause. *Id*. at 33-35.[1] Consequently, *Florida* is in direct conflict with the decision in the Michigan case, *Thomas More Law Center v. Obama*, ___ F.Supp.2d ___, 2010 WL 3952805 (E.D. Mich.) ("*Thomas More*"), which found that the Individual Mandate provision did not exceed Congress' power under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari before judgment in the court of appeals should be GRANTED.

Respectfully submitted,

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October 15, 2010.

[1] However, the district court was not required to decide the question at this point because it denied the government's F.R.Civ.P., Rule 12(b)(6) motion to dismiss because "*plaintiffs have at least stated a plausible claim*" that the Individual Mandate transgresses the Commerce Clause. *Id*. at 35.