IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

ANTHONY SHREEVE, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:10-cv-00071
BARACK OBAMA, et al.,	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs' response to Defendants' motion to dismiss demonstrates two things: first, plaintiffs dislike certain provisions of the Patient Protection and Affordable Care Act ("ACA"), and second, plaintiffs recognize that the ACA must be upheld under long-standing Supreme Court precedent. Dislike, however, is not sufficient to establish standing to challenge the ACA, and, whether plaintiffs like it or not, Supreme Court precedent is binding on this Court.

Plaintiffs do not dispute that their claims against the President are barred by presidential immunity, that their claims seeking money damages against the United States are barred by sovereign immunity, and that their claims against the Speaker of the House and the Majority Leader of the Senate are barred by both the Speech or Debate Clause and for lack of personal jurisdiction. *See* Defs.' Mem. at 9-15. Accordingly, each of those claims should be dismissed without more. *See Williams v. WCI Steel Co., Inc.*, 170 F.3d 598, 607 (6th Cir. 1999) (holding that plaintiff waived arguments in district court where plaintiff failed to raise those arguments in response to defendants' motion to dismiss); E.D.TN. LR. 7.2.

With regard to their standing to sue, Plaintiffs posit that "'all Americans' will be harmed" by the ACA because, beginning in 2014, the minimum coverage provision of the Act will require all individuals who are not exempt to maintain a minimum level of health insurance coverage or pay a penalty. Pls.' Opp'n at 2; *see also* Pub. L. No. 111-148, 124 Stat. 119, §§ 1501, 10106. A general assertion of harm from government action is not sufficient to allege an injury in fact, which is the constitutional requisite for standing to sue. *See Fednav, Ltd. v. Chester*, 547 F.3d 607, 618 (6th Cir. 2008). If the law were otherwise, the standing requirement would be meaningless; any plaintiff would have standing to challenge any law simply by asserting the obligation not to violate it.

At the very least, plaintiffs must explain how the minimum coverage provision harms them. *See Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007). They have not done that here. Plaintiffs do not even allege that they currently lack health insurance coverage such that, without a change in their circumstances, in 2014, if they are not exempted, they will either have to obtain insurance they do not otherwise have or be subject to a penalty. Even if they had made such an allegation, it would not, and could not, demonstrate an injury in fact. *See* Order, *Baldwin v. Sebelius*, No. 10-1033, at 3 (S.D. Cal. Aug. 27, 2010) ("even if [the plaintiff] does not have insurance at this time, he may well satisfy the minimum coverage provision of the Act by 2014: he may take a job that offers health insurance, or qualify for Medicaid or Medicare, or he may choose to purchase health insurance before the effective date of the Act"). Despite plaintiffs' observation that some future injuries can support standing, Pl.'s Opp'n at 2-3, they identify no future injury they will suffer, much less one that is "certainly

impending" as required to establish standing. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).[1]

Plaintiffs next assert that the ACA's tax on indoor tanning services, *see* Pub. L. No. 111-148, § 10907, "creat[es] unfair competitive advantages" for some members of the tanning salon industry and has "resulted in the loss of hundreds of small businesses across the country." Pls.' Opp'n at 3. Plaintiffs did not mention this tax, or allege any injury resulting from it, in their Second Amended Complaint. They cannot do so now in seeking some predicate to survive Defendants' facial attack on subject matter jurisdiction. *See Bishop v. Lucent Tech., Inc.*, 520 F.3d 516, 522 (6th Cir. 2008); 2 Moore's Federal Practice, § 12.34[2] (Matthew Bender 3d ed.) ("The court may not . . . take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a)."). In any event, these allegations establish no such predicate. They come no closer to establishing any injury in fact. The tax on indoor tanning salon services is imposed on individuals on whom such services are performed, Pub. L. No. 111-148, § 10907(b), not on plaintiffs' tanning salon businesses. Plaintiffs do not allege that the tax has caused any of *their* tanning salon businesses to lose customers or has otherwise affected *them*. Nor do plaintiffs explain what competitive

[1] Any challenge to the minimum coverage provision at this time is also unripe and barred by the Anti-Injunction Act ("AIA"). *See* Defs.' Mem. at 12 n.9. The applicability of the AIA does not turn, as plaintiffs' claim, Pls.' Opp'n at 2 n.2, on whether the minimum coverage provision is designed to raise revenue (although the provision is in fact projected to raise about $4 billion). The AIA applies to "any tax," 26 U.S.C. § 7421(a), and 26 U.S.C. § 6671(a) directs that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter," *i.e.*, *subchapter B of chapter 68* (emphasis added). The minimum coverage provision, 26 U.S.C. § 5000A(g)(1), in turn directs that "[t]he penalty provided by this section shall . . . be assessed and collected in the same manner as an assessable penalty *under subchapter B of chapter 68*." (emphasis added).

disadvantages *they* have experienced or how any such disadvantages have injured *them*.[2] Because plaintiffs' response, like their Second Amended Complaint, contains only "naked assertion[s]" of harm, "devoid of [any] factual enhancement," *White v. United States*, 601 F.3d 545, 551-52 (6th Cir. 2010) (citation omitted), plaintiffs' claims should be dismissed for lack of jurisdiction.[3]

Plaintiffs also do not dispute that their claims can succeed on the merits only if this Court overrules *Wickard v. Filburn*, 317 U.S. 111 (1942). *See* Pls.' Opp'n at 5, 7. This Court cannot overrule the Supreme Court. *See* Def.'s Mem. at 16. The case plaintiffs rely on in arguing to the contrary, Pls.' Opp'n at 5, merely suggests circumstances in which the Supreme Court may overrule its *own* precedent. It identifies no source of authority for this Court to strike down Supreme Court decisions. Moreover, plaintiffs' assertion that this Court would violate the judicial oath by adhering to Supreme Court precedent is precisely the opposite of this Court's obligation. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *Ortega Melendres v. Arpaio*, 2009 WL 2132693, *14 (D. Ariz. July 15, 2009) ("every district court judge has taken the same oath to faithfully apply the law, which includes applying binding precedent from the U.S. Supreme Court").

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[2] Plaintiffs do not even identify which of the thousands of plaintiffs listed in the complaint are tanning salon businesses.

[3] Even if plaintiffs' belated assertions regarding the indoor tanning services tax were sufficient to allege an injury in fact, they could confer standing only on the plaintiffs who are tanning salon businesses (not the remaining plaintiffs) and only to challenge the indoor tanning services tax (not any other provision of the ACA). *See Lewis v. Casey*, 518 U.S. 343, 355 n.6 (1996) ("Standing is not dispensed in gross."); *Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008) ("[S]tanding is both plaintiff- and provision-specific."). Furthermore, any challenge to the tax, other than in a suit for a refund, is barred by the AIA. *See* 26 U.S.C. § 7421(a).

In addition, plaintiffs nowhere dispute that Congress can regulate insurance and health care services and that it has done so repeatedly for more than 35 years. *See* Defs.' Mem. at 19 & n.15. Instead, they maintain that, under current Commerce Clause jurisprudence, "[e]very behavior of every American is now within Congress' scope of authority to regulate, prohibit, mandate, and fine." Pls.' Opp'n at 6. This is both untrue and irrelevant: the issue here is the constitutionality of the ACA, not of some hypothetical statute never to escape the confines of plaintiffs' imagination. Nevertheless, a decision upholding the ACA under the Commerce Clause does not extend—much less eliminate, as plaintiffs claim—the bounds of Congressional regulation in markets that lack the unique characteristics of the health care market.

The health care market is unique in combining three attributes. First, everyone inevitably will need medical services, that is, they will participate in the market. Second, no one can predict what services they will need, or when, or at what cost. And third, when the need for life-saving medical services arises, access is guaranteed. Health insurance is the tool for dealing with these attributes, in particular, the risk of enormous, unexpected expenses. Congress determined that individuals without health insurance still receive medical services, for which they often cannot pay, with the result that billions of dollars in costs are shifted to other market participants. In the unique context of this particular market, Congress found that decisions regarding how to pay for health care services – in advance, through insurance, or out-of-pocket at the time services are rendered – substantially affect interstate commerce. Recognizing Congress's authority under well-established precedent to regulate the method of paying for medical services sheds no light on whether the Commerce Clause extends to subjects other than method of payment in markets other than health care.

Congress further found that existing insurance industry practices, like exclusion of individuals with pre-existing medical conditions, results in the denial or termination of coverage to those who need it most, prevents individuals from freely changing jobs, and precipitates personal bankruptcies. These problems necessitated the reforms of the commercial insurance market included in the ACA—reforms that Congress determined could succeed only alongside the minimum coverage provision. *See* Pub. L. No. 111-148, §§ 1501(a)(2)(H), (I), 10106(a). The minimum coverage provision is integral and essential to larger reforms of the health care market, and, under established precedent, it therefore falls within Congress's commerce powers.

Plaintiffs' final contention, that the ACA's tax on indoor tanning services exceeds Congress's Commerce Clause power and is meant to "discourage behavior that [Congress] deem[s] unhealthy," Pls.' Opp'n at 3, finds no support in the case law that has controlled for the last 70 years. Even if true, plaintiffs' assertions would not render the tax unconstitutional. Congress may use its taxing power under the General Welfare Clause even for purposes that would exceed its powers under other provisions of Article I, *United States v. Sanchez*, 340 U.S. 42, 44 (1950), and Congress may impose taxes as a means of discouraging behavior that it deems to be harmful, as it has done on numerous other occasions. *Sanchez*, 340 U.S. at 44 ("a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed"); *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (observing, in upholding tax on firearms dealers, that an "Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed"); *see, e.g.*, 26 U.S.C. § 4681 (taxing ozone-depleting chemicals); *id.* § 5001 (distilled spirits); *id.* § 5051 (beer); *id.* § 5701 (tobacco products).

For the reasons set forth above and in defendants' opening brief, this case should be dismissed.[4]

Dated: September 24, 2010

Respectfully submitted,

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[4] Plaintiffs' attempt, in a footnote, Pls.' Opp'n at 4 n.4, to move to amend their complaint should be denied. "[A] bare request in an opposition to a motion to dismiss-without any indication of the particular grounds on which amendment is sought-does not constitute a motion within the contemplation of [Federal Rule of Civil Procedure] 15(a)." *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 699 (6th Cir. 2004) (citation omitted); *see also Begala v. PNC Bank*, 214 F.3d 776, 784 (6th Cir. 2000) ("What plaintiffs may have stated, almost as an aside to the district court in a memorandum in opposition to the defendant's motion to dismiss is . . . not a motion to amend.").

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, a true and correct copy of Defendants' Reply in Support of Defendants' Motion to Dismiss was served, by electronic case filing, upon the following:

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