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Baldwin v. Sebelius - Appellants' Petition for En Banc Review

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No. 10-56374

In The

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEVE BALDWIN and PACIFIC JUSTICE INSTITUTE,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, et al.,

Defendants-Appellees.

On Appeal From the United States District Court for the Southern District of California
No. 10-cv-01033-DMS (Sabraw, J.)

APPELLANTS' PETITION FOR HEARING *EN BANC*

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FEBRUARY 7, 2011

GROUNDS FOR GRANTING PETITION FOR HEARING *EN BANC*

Appellants, Steve Baldwin and Pacific Justice Institute ("Appellants"), pursuant to Federal Rule of Appellate Procedure ("FRAP"), Rule 35(b)(1)(A)&(B) and Circuit Rule 35, hereby petition for hearing *en banc*[1] on the following grounds:

1. *En Banc* Consideration is Necessary to Create Uniformity within the Ninth Circuit, FRAP 35(b)(1)(A); and

2. This Case Presents Constitutional Questions of Exceptional Importance, FRAP 35(b)(1)(B).

AUTHORITY FOR GRANTING PETITION FOR HEARING *EN BANC*

The power of circuit courts to consider matters *en banc* arises from 28 U.S.C. § 46(c). That statute reflects "a grant of power" and the Court is "vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." *Western Pacific Ry. Corp. v. Western Pacific Ry. Corp.*, 345 U.S. 247, 259 (1953). The Federal Rules of Appellate Procedure state that "*en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the

[1] There has not been any decision of a panel in this case. Accordingly, this is not a petition for rehearing but rather a request that the initial hearing on the appeal be heard *en banc* pursuant to FRAP 35(b)(1)(A)&(B). In addition, this petition is being submitted electronically as a motion because the CM/ECF system would not permit it to be filed except as a petition for rehearing, which required a date of a panel decision. As no panel decision has occurred this petition could not be filed except under the motion category in the CM/ECF system. Therefore, Appellants respectfully request that this petition be distributed to circuit judges for consideration.

proceeding involves a question of exceptional importance." FRAP 35(a). The following justifications are provided for granting the petition.

JUSTIFICATION FOR GRANTING THIS PETITION

On January 31, 2011, the United States District Court for the Northern District of Florida issued its decision declaring the recently passed Health Care Legislation[2] unconstitutional in its entirety. *State of Florida, et al. v. United States Dept. of Health and Human Services, et al.*, ___ F.Supp.2d ___, 2011 WL 285683 (N.D.Fla.2011)("*Florida*").

In *Florida*, U.S. District Judge Roger Vinson concluded that not only the individual mandate provision but also the entire Act was unconstitutional:

> "The individual mandate is outside Congress' Commerce Clause power, and it cannot be otherwise authorized by an assertion of power under the Necessary and Proper Clause…Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void."

Id. at *33, *40.

Since the decision in *Florida* was released there has been an ongoing discussion as to whether or not Judge Vinson's order enjoins the government from any further enforcement of the Act. However, Judge Vinson's order is unequivocal as to this point:

> "The last issue to be resolved is the plaintiffs' request for injunctive relief enjoining implementation of the Act, which can be disposed of very quickly. Injunctive relief is an 'extraordinary' and 'drastic' remedy. It is

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[2] The *Patient Protection and Affordable Care Act*, P.L. 111-148, 124 Stat. 119 (2010), as amended by the *Health Care and Education Reconciliation Act of 2010*, P.L. 111-152, 124 Stat. 1029 (2010)(collectively the "Act").

> even more so when the party to be enjoined is the federal government, for there is a long-standing presumption 'that officials of the Executive Branch will adhere to the law as declared by the court. As a result, ***the declaratory judgment is the functional equivalent of an injunction***. [***D]eclaratory judgment is***, in a context such as this where federal officers are defendants, ***the practical equivalent of specific relief such as an injunction*** ... since ***it must be presumed that federal officers will adhere to the law as declared by the court***.' There is no reason to conclude that this presumption should not apply here. Thus, the award of declaratory relief is adequate and separate injunctive relief is not necessary."

Id. at *39-*40 (emphasis in original and added)(internal citations omitted). In other words, Judge Vinson did not issue an injunction because the Act is void, and, therefore, the government may no longer enforce any of its provisions. Consequently, there is nothing to enjoin. *Id*.

Measured in constitutional dimensions, the legal effect of *Florida* is truly extraordinary, as it creates two distinct classes of citizens within the Ninth Circuit's jurisdiction. In particular, the States of Alaska, Arizona, Idaho, Nevada, and Washington are plaintiffs in *Florida*, *Id*. at *1, fn. 1, and therefore, their citizens are **not** required to comply with the Act. *Id*. at *39-*40. Contrariwise, the citizens of the States of California, Hawaii, Montana, and Oregon are still subject to the Act's provisions. Viewed from a national level, the Act no longer applies in over half of the states (i.e., 26 states are plaintiffs in *Florida*, *Id* at. *1, fn. 1). Consequently, *Florida* creates an Equal Protection problem in this circuit for citizens of California, Hawaii, Montana, and Oregon.

The legal disability created by *Florida* requires judicial resolution so that Appellants are returned to a level playing field with citizens of the States of Alaska, Arizona, Idaho, Nevada, and Washington. Accordingly, in order to have uniformity of laws within all of the nine States in this circuit, this Court should hear this case *en banc* to resolve the following constitutional issues:

1. Whether *Florida* should be given effect in this circuit to include the States of California, Hawaii, Montana, and Oregon.

2. Whether the individual mandate provision is unconstitutional because Congress exceeded its power under the Commerce Clause.

3. Whether the entire Act is unconstitutional because the Individual Mandate is not severable from the Act.

As to the parties' detailed legal positions on the foregoing constitutional questions, the parties' principal briefs in this case are located in the Court's electronic docket as follows:

Appellants' *Opening Brief*, Court Doc. No. 15;

Appellees' *Answering Brief*, Court Doc. No. 27; and

Appellants' *Reply Brief*, Court Doc. No. 30.

BASED ON THE FOREGOING, Appellants respectfully request the Court to grant a hearing *en banc* due to the constitutional issues created by *Florida* and the importance of determining the constitutionality of the individual mandate and the Act. FRAP 35(b)(1)(A)&(B).

Dated: February 7, 2011. By: **/s/ Peter D. Lepiscopo**

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 32(A)(7)(C) AND CIRCUIT RULE 32-1

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached APPELLANTS' PETITION FOR HEARING *EN BANC* is proportionally spaced, has a typeface of 14 points, and contains **865** words, exclusive of exempted portions.

By: **/s/ Peter D. Lepiscopo**
Peter D. Lepiscopo, Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on **February 7**, 2011, I electronically filed the foregoing APPELLANTS' PETITION FOR HEARING EN BANC of appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and provides them with true and correct copies thereof on **February 7**, 2011.

All counsel of record are registered CM/ECF users.

I certify and declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on this **7TH** day of **February, 2011**.

By: **/s/ Peter D. Lepiscopo**
Peter D. Lepiscopo, Counsel of Record