1-1-2011

Bryant v. Holder - Lieutenant Governor Bryant's Response to the U.S. Motion to Dismiss

Phil Bryant

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

LT. GOV. PHIL BRYANT, in his private and individual capacity, on behalf of himself and others similarly situated RYAN S. WALTERS, MICHAEL E. SHOTWELL and RICHARD A. CONRAD, ET AL., on behalf of themselves and others similarly situated **PLAINTIFFS**

VS. **NO.2:10-cv-76**

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and HILDA L. SOLIS, in her official capacity as Secretary of the United States Department of Labor **DEFENDANTS**

PLAINTIFF, LT. GOV. PHIL BRYANT'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

COMES NOW, Plaintiff, Lt. Gov. Phil Bryant, in his private and individual capacity (hereinafter referred to as "Plaintiff"), by and through his attorney of record, who separately files this his Response to Defendants Eric H. Holder, Jr., in his official capacity as Attorney General of the United States; the United States Department of Health and Human Services ("HHS");

Kathleen Sebelius, in her official capacity as Secretary of HHS; the United States Department of the Treasury; Timothy F. Geithner, in his official capacity as the Secretary of the Treasury; the United States Department of Labor; and Hilda L. Solis, in her official capacity as Secretary of Labor (hereinafter referred to as "Defendants") Motion to Dismiss and would respectfully show unto the Court the following:

I. LT. GOV. BRYANT HAS STANDING TO BRING THE SAME CONSTITUTIONAL CLAIMS AS THE NON-STATE EMPLOYEE PETITIONERS.

Lt. Gov. Bryant is filing this brief as a separate response to Defendants' Tenth Amendment arguments, which are of a different character than their other arguments due to Lt. Gov. Bryant's unique position as a state official who is using private party standing to bring a Tenth Amendment claim. Specifically, Petitioner Lt. Gov. Phil Bryant, in his individual capacity, brings an individual action and a statewide class or sub-class action pursuant to Fed. R. Civ. P. 23. His claims allege class-wide unconstitutional activity on behalf of all Mississippi state employees and is particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive.

We wish to make clear, however, that petitioner Bryant has also joined the Amended Petition in his capacity as a private citizen, and as such he has the same standing to bring suit as the other private-party plaintiffs who originally filed this lawsuit. *See* Amended Petition, para. 1-90. In other words, should the court rule that there is no private party standing under the Tenth Amendment or that petitioners have failed to state a claim under the Tenth Amendment upon which relief can be granted, Lt. Gov. Bryant should still be allowed to proceed as a private party along with the other Petitioners.

II. LT. GOV. BRYANT HAS PLED "ENOUGH FACTS TO STATE A CLAIM FOR RELIEF THAT IS PLAUSIBLE ON ITS FACE," AND DISMISSAL IS THEREFORE INAPPROPRIATE.

A motion to dismiss under rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982). Rule 12(b) (6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court must not dismiss a complaint for failure to state a claim unless the plaintiff has failed to plead "enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *Sonnier v. State Farm*, 509 F.3d 673, 675 (5th Cir. 2007). In ruling on motion to dismiss pursuant to Rule 12(b)(6), the district court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 204 (5th Cir. 2007). The reviewing court must also "resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff." *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993).

A. Lt. Gov. Bryant has private party standing to bring commandeering claims under the Tenth Amendment.

Defendants argue that "the Tenth Amendment provides a right against commandeering, that right belongs to states, not to individuals." This assertion is wholly incorrect, and misunderstands the fact that the Constitution consistently protects the rights of individuals, not the rights of states. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X. It is important to recognize that the Tenth Amendment is part of the Bill of Rights, the purpose of which is to protect the rights of the people:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments *for the protection of individuals*.

New York v. United States, 505 U.S. 144, 181 (1992). Since the Tenth Amendment is meant for the protection of individuals, it is illogical to assert that no individual may have standing to petition for a redress of grievances under the Tenth Amendment. Whether the State of Mississippi approves of the PPACA simply does not matter - the people do not have to tolerate the complicity of the state and federal officials in robbing individuals of their rights:

> Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. . . . The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

New York v. United States, 505 U.S. at 192. Thus, the Court specifically rejected the argument that state governments could consent to and ratify a violation of the Tenth Amendment. Defendants seek to take advantage of the inaction by this state's government in order to expand federal power. However, because the Tenth Amendment is designed to protect individuals, Lt. Governor Bryant has the authority to reject the state's inaction and directly sue for a redress of his grievance.

In their attempt to elevate the "rights" of states over the rights of individuals, Defendants cite to *States v. Johnson*, 652 F. Supp. 2d 720, 726 (S.D. Miss. 2009), in which this court rejected the proposition that the federal sex offender registration law "requir[ed] State Officials to administer federal law" because "a private citizen, acting on his own behalf and not in an official capacity or on behalf of the state citizenry, lacks standing to raise a Tenth Amendment claim," citing only *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 143-44 (1939).

However, the *Tennessee* case did not hold that a private citizen can never have standing to raise a Tenth Amendment claim. Instead, the Court first held that "[t]he sale of government property in competition with others is not a violation of the Tenth Amendment," and in rather confusing *dicta*, the Court added, "[a]s we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment." The only thing clear about this "holding" is that it was *dicta* - certainly, the Court did not plainly state that no private person can ever have standing under the Tenth Amendment. Moreover, as discussed below, standing requirements have been considerably relaxed since *Tennessee Electric Power* was rendered in 1939.

Indeed, there are quite a few decisions in which courts have upheld private party standing under the Tenth Amendment, including decisions that directly address the *Tennessee Electric Power* case. For example in *Gillespie v. City of Indianapolis*, the court faced a challenge to the Gun Control Act's 1996 amendments. 185 F.3d 693, 697 (7th Cir. 1999). Although the court eventually upheld the federal legislation, it first undertook an extensive analysis of Gillespie's standing to raise the claim. Looking initially at *Tennessee Electric Power*, the court recognized that the government's argument that "any aspect of state sovereignty impinged upon by the Gun Control Act is one that the State, rather than an individual, must assert" had "the apparent support of the Supreme Court's opinion in [*Tennessee Electric Power*]." 185 F.3d at 700. The court noted, however, that standing requirements had been relaxed since the time of that case, and the court proceeded to examine Gillespie's standing based on modern standing requirements. The court next agreed that the connection between Gillespie's injury and the constitutional infirmity might be weak (stating "[i]t is really the State's ox being gored"), but then found that

any such nexus requirement had been abolished in *Duke Power*. 185 F.3d at 701. Finally, the court addressed standing limitation that a plaintiff "'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Id*. at 703 (quoting *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 80 (1978). On this point, the court looked to *New York v. United States* and found that the anti-commandeering rights Gillespie was asserting were not rights of the state, but instead were rights belonging to individuals. "[A]s *New York* explains, the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals." As a result, the court held that Gillespie had standing to raise the Tenth Amendment challenge "notwithstanding what state or local officials themselves may have to say about the propriety of the statute." *Id*. at 703-04.

Other courts have reached the same result: "Although the Supremacy Clause and the Tenth Amendment (both structural constitutional norms) directly regulate relations between governments rather than the relations between governments and individuals, nevertheless, individuals should have standing to assert constitutional protections derived from them." *Gilliard v. Kirk*, 633 F. Supp. 1529 (W.D.N.C. 1986), rev'd on other grounds, 483 U.S. 587 (1987). Other cases directly indicating that private parties have Tenth Amendment, albeit reluctantly, such as *Seniors Civil Liberties Ass'n, Inc. v. Kemp,* 965 F.2d 1030, 1033 n.6 (11th Cir. 1992) ("Because this court has said before that, if injury or threatened injury exists, private parties have standing to assert Tenth Amendment challenges, we conclude, with admitted doubts, that the Riedels and SCLA have standing to advance this Tenth Amendment claim"); *Nance v. EPA,* 645 F.2d 701, 716 (9th Cir. 1981) (assuming questionable standing to assert Tenth Amendment challenge); *U.S. v. Tonry,* 605 F.2d 144, 148 n.12 (5th Cir. 1979) (same), *abrogation recognized by U.S. v. Texas Tech University,* 171 F.3d 279, 287 (5th Cir. 1999). In

Atlanta Gas Light Co. v. U.S. Dep't of Energy, the Eleventh Circuit granted Tenth Amendment standing to non-governmental plaintiffs for two reasons. 666 F.2d 1359, 1369 n.16 (11th Cir.1982). First, "during the New Deal era the Supreme Court granted such standing by implication in considering the merits of the Tenth Amendment claims brought by private parties." *Id.* (citing *Helvering v. Davis,* 301 U.S. 619, 637, 640 (1937); *Steward Machine Co. v. Davis,* 301 U.S. 548, 573, 585 (1937)). Second, the Supreme Court has expressly limited the nexus requirement of standing. *Id.* (citing *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59 (1978)).[1]

B. The PPACA's mandate accomplishes an unconstitutional conscription of state officials by the federal government.

As for the substance of commandeering claim made by Lt. Gov. Bryant, Defendants simply do not address it. The Amended Petition states:

> Consequently, State employees are directly affected and commandeered by the PPACA, since the law necessarily substitutes the judgment of Congress and the Executive branches of the federal government for that of the employees and their employer, which is a State government, regarding the composition of health insurance plans that may be offered to and accepted or rejected by employees.

Amended Petition, para. 93. The Amended Petition thus raises the issue of whether the prohibition against commandeering (or "conscripting") state employees and officials extends to

[1] In *Gaubert v. Denton*, 1999 WL 350103 (E.D. La. 1999), aff'd, 210 F.3d 368 (5th Cir. 2000) (decision without published opinion), the Eastern District of Louisiana discussed these cases but ultimately concluded that no right to private party standing existed, stating that "[t]he cases granting Tenth Amendment standing to private parties have done so without confronting *Tennessee Electric*." However, the *Gaubert* court did not have the benefit of *Gillespie v. City of Indianapolis*, supra, which was rendered two months after *Gaurbert*. The published circuit court decision in *Gillespie*, as discussed above, did not consider the dicta in *Tennessee Electric* as dispositive but instead held that private parties do have standing under the Tenth Amendment.

an interference by the federal government with the terms of conditions of employment by a state with its workers.

The Supreme Court has never squarely addressed the boundaries of the prohibition against commandeering, nor has it ever explicitly delineated the limits of state sovereignty with regards to the terms and conditions of employment with a state. Certainly, this is an important question, since the state has no shape, existence or power to act whatsoever except through its employees. If Congress can interfere with the states' employer-employee relationship to the extent suggested by Defendants and set forth in the PPACA, then Congress will have unlimited power to direct the states to conform to the will of Congress, thereby making an "end run" around the Tenth Amendment.

Thus, the Court has stated that Congress may not "conscript" the State's officers directly, whether or not "policymaking" is involved:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that *Congress cannot circumvent that prohibition by conscripting the State's officers directly*. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 521 U.S. 898, 935 (1997). The Court has therefore shown that it will not allow the federal government to direct the work of state employees.

The Court has also refused to allow certain federal employment laws apply to state policymakers. In *Gregory v. Ashcroft*, the Court upheld the validity of a Missouri Constitution provision that provided a mandatory retirement age for judges and determined that Congress's

Age Discrimination in Employment Act ("ADEA") did not apply. 501 U.S. at 473. The Court held that the state constitutional provision was at the heart of the Tenth Amendment because it dealt directly with how states define and structure their governments. In order to avoid a conflict with the Tenth Amendment, the Court interpreted the ADEA as not applying to "policy-making" appointees such as state court judges. *Id.* at 460. The Court stated that "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers." *Id.* at 460. The Court's holding emphasized that Congress was interfering with a decision of the people of Missouri, not just a decision or right of the State of Missouri. According to the Court, "[i]n the tension between federal and state power lies the promise of liberty." *Id.* at 459.

The PPACA directs State of Mississippi to offer health insurance plans to its employees, and directs what those plans must consist of. Congress is therefore directly ordering the States' officers to administer or enforce a federal regulatory program. Moreover, Defendants must acknowledge that health insurance plans are major "benefit" for employees and a major part of their pay. Thus, Congress is dictating the terms and conditions of employment for state employees - up to and including the terms and conditions of one of the state's highest officers -- the Lieutenant Governor - who is thus one of the state's major policy-makers. Congressional interference with employment relationship between the people of Mississippi and one of their chief constitutional officers has upset the usual constitutional balance of federal and state powers. Cf. *Gregory v. Ashcroft*, *supra* at 459-60.

III. CONCLUSION.

State employees will clearly suffer a deprivation of liberty, in that they may no longer exercise the discretion to choose a healthcare plan that does not conform to the PPACA's mandates either from their employer or on the open market. They will no longer be able to negotiate a major

term of their employment contracts with the state. Moreover, by imposing the individual mandate on state employees, Congress has upset the constitutionally mandated balance of power -- the "compound republic" guaranteed to us by the founders. State officials like Lt. Gov. Bryant who completely oppose this unwarranted federal intrusion for themselves individually and because it represents a deprivation of liberty for all state employees will nonetheless be made to enforce this federal program. Clearly, Congress has unconstitutionally interfered with the states' employment relationship with every state employee, including policymakers, and Lt. Governor Bryant is entitled to a declaratory judgment in his favor.

Respectfully submitted this day of November 15, 2010.

LT. GOVERNOR PHIL BRYANT

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served using the Court's ECF system, on Monday, November 15, 2010 to the counsel of record for all Defendants:

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