

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DURK PEARSON, ET AL.,)	
)	
Plaintiffs)	
)	
v.)	Civil Action No. 95-1865 (GK)
)	
DONNA E. SHALALA, SECRETARY,)	
UNITED STATES DEP'T OF HEALTH)	
AND HUMAN SERV., ET AL.,)	
)	
Defendants.)	

**APPLICATION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR EXPEDITION**

Durk Pearson, Sandy Shaw, and the American Preventive Medical Association, by counsel and pursuant to LCvR 65.1(c), this Court's inherent power to enforce its own judgments, and the All Writs Act, 28 U.S.C. § 1651, hereby apply to this Honorable Court for a preliminary injunction. The Plaintiffs respectfully request that the Court issue a preliminary injunction to bar FDA from enforcing four rules held invalid in *Pearson v. Shalala*, 164 F.3d 650, 661 (D.C. Cir. 1999) (holding unconstitutional under the First Amendment 21 C.F.R. §101.71(a), (c), (e) and 101.79(c)(2)(i)(G)), *reh'g denied en banc*, 172 F.3d 72 (D.C. Cir. 1999), so long as the health claims unlawfully suppressed by those rules are accompanied by the disclaimers found acceptable to the *Pearson* Court. 164 F.3d at 658-659. The Plaintiffs ask that the injunction remain in place until such time as FDA adopts final rules authorizing the four health claims with the disclaimers specified by the *Pearson* court or with such other disclaimers as the agency reasonably deems necessary.

For over fourteen months after the Court's January 15, 1999 decision and for almost one year after this Court issued its April 20, 1999 mandate to FDA, FDA has continued to enforce the rules *Pearson* invalidated. FDA has done so despite repeated entreaties from the Plaintiffs that the agency abide by the Court's constitutional order and authorize--with the disclaimers specified by the *Pearson* Court--the health claims FDA unconstitutionally suppressed. FDA has refused to state a reasonable date certain by which it will authorize the claims with disclaimers. FDA's refusal to state a date certain ensures continued violation of the *Pearson* Court's order, indefinite denial of the Plaintiffs' claims, indefinite violation of the Plaintiffs' First Amendment rights, and indefinite postponement of the relief granted the Plaintiffs by the *Pearson* Court.

The Plaintiffs attach hereto a Memorandum of Points and Authorities and affidavit and documentary evidence in support of their Application. In accordance with LCvR 65.1, the Plaintiffs respectfully request a hearing on this application no later than twenty days after the March 31, 2000 filing date, unless the Court earlier decides the motion on the papers. Good cause exists for expedition. As the facts set forth in the Memorandum of Points and Authorities establish, the Plaintiffs have spent the better part of an entire year urging this agency to obey the law and implement the Court's constitutional mandate—all to no avail. The FDA has expressly refused to discontinue enforcement of the four invalidated rules. The FDA has refused to permit the health claims that the Court held unconstitutionally suppressed, with the disclaimers the Court recommended. The FDA has failed to set any date certain by which it will abide by the Court's constitutional order. Thus, unless this Court enjoins FDA from continuing to enforce the constitutionally invalid rules, the Court's order will go unfulfilled, the

Plaintiffs will not receive the relief they were granted by the *Pearson* Court, and the Plaintiffs will not receive the protection for their First Amendment liberties that is their right. Indeed, to the contrary, the First Amendment violations that begot the *Pearson* Court's decision will continue unabated.

For the foregoing reasons explained in greater detail in the attached memorandum, the Plaintiffs respectfully request the grant of expedited review (draft order attached) and the grant of their Application for Preliminary Injunction (draft order attached) at the earliest possible moment.

Respectfully submitted,

DURK PEARSON,
SANDY SHAW,
and the AMERICAN PREVENTIVE
MEDICAL ASSOCIATION,

By _____
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