IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**No. 6:11-cv-00030-RAW**
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; and NEAL S. WOLIN, in his official capacity as Acting Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Introduction

Beginning in 2014, an estimated 380,000 Oklahomans will receive federal premium tax credits to assist them with the purchase of health insurance under the Patient Protection and Affordable Care Act ("Affordable Care Act," or "Act"). These individuals will save more than $5,000 per person annually on their federal tax liabilities. The State of Oklahoma seeks to prevent the federal government from providing these tax credits to the state's residents. Oklahoma plainly lacks standing to litigate its residents' federal tax liabilities in this manner.

The federal courts may hear only actual cases or controversies. Under this principle, a state may not stand in the shoes of its absent citizens to litigate their rights or obligations under federal law. Oklahoma nonetheless argues that it has suffered an "injury to the State in its sovereign capacity," ECF 53 at 3, in that it prefers that its residents not obtain the more than $1.5 billion in tax credits that would accrue to them annually under the Affordable Care Act, and that the federal government has not honored its preference on this score. But Oklahoma suffers no injury to its "sovereignty" that gives it standing to challenge these federal tax credits merely because the federal government disagrees with its reading of federal law. (Likewise, Oklahoma suffers no injury that could give it standing to challenge the Act's minimum coverage provision.)

Oklahoma also contends that, as a large employer, it could become subject to a federal tax penalty if its employees are eligible for premium tax credits under the Act. But that tax penalty can apply only if a large employer fails to provide coverage to its full-time employees that meets certain minimum standards. Oklahoma already offers generous coverage to its employees. It is therefore very unlikely that it will become subject to the tax penalty at all. As it can offer only conjecture that it will suffer any injury-in-fact arising from the operation of the tax penalty, Oklahoma lacks standing to raise a challenge in its capacity as an employer.

Moreover, Oklahoma seeks relief that would have the effect of restraining the Treasury from assessing and collecting the large employer tax penalty. The Anti-Injunction Act ("AIA") prohibits a suit for this purpose. Oklahoma objects that it has not asked directly for an injunction against the operation of the tax penalty. But Oklahoma's self-described goal in this litigation is to prevent the assessment and collection of the tax penalty. The AIA precludes a suit with that practical effect, regardless of how the plaintiff chooses to describe the relief that it seeks.

Argument

I. Oklahoma Lacks Standing

A. Oklahoma Lacks Standing to Litigate Its Residents' Eligibility for Federal Tax Credits, or Their Potential Federal Tax Liabilities

It is a well-settled principle that a "State does not have standing as a *parens patriae* to bring an action on behalf of its citizens against the federal government because the federal government is presumed to represent the State's citizens." *Wyoming v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992). This principle reflects the rule that a federal court has jurisdiction only over actual cases or controversies, and thus "may not pronounce on questions of law arising outside of such cases and controversies." *Virginia v. Sebelius*, 656 F.3d 253, 267 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012) (internal quotation omitted). Oklahoma's suit violates this prohibition against the adjudication of hypothetical cases. It seeks to litigate the application of the Affordable Care Act's premium tax credits, as well as the Act's large employer tax penalty, to Oklahoma residents who are absent from this litigation. Fundamental principles of justiciability prevent the court from deciding the rights and obligations of these absent parties.

Oklahoma argues that it is litigating its own right, as a sovereign, to express its policy preferences with respect to the application of federal law to its residents. ECF 53 at 5. But this is merely *parens patriae* standing by another name. It is settled that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Virginia*, 656 F.3d at 269. The mere fact that Oklahoma and the federal government disagree in their reading of federal law does not give the state standing; "a generalized grievance that the government is not acting in a way in which the State maintains is in accordance with federal laws is insufficient to demonstrate standing." *Wyoming v. Lujan*, 969 F.2d at 883 (internal quotation and alterations omitted).

Oklahoma cites to *Wyoming v. United States*, 539 F.3d 1236 (10th Cir. 2008), as a case in which a state government was found to have standing to sue the federal government. ECF 53 at 15. But that case, unlike this one, did not involve the purely abstract question of how federal law would apply to the state's residents. Instead, the state government's *own* regulatory activities were at stake, as the manner in which the state operated its concealed-carry-permit program would have been affected by the outcome of the litigation. *See Wyoming v. United States*, 539 F.3d at 1243. That case thus stands for the principle that "only when a federal law interferes with a state's exercise of its sovereign power to create *and enforce* a legal code does it inflict on the state the requisite injury-in-fact." *Virginia*, 656 F.3d at 269 (discussing *Wyoming v. United States* and similar cases; emphasis in original).

Here, in contrast, Oklahoma does not allege that its own regulatory activities would be affected in any way if the federal government were to extend premium tax credits to its residents. It does not allege any injury that it experiences due to the federal government's interpretation of federal law, other than that it disagrees with that interpretation. But "[t]here is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination." *United States v. West Virginia*, 295 U.S. 463, 474 (1935).

Nor does Oklahoma revive its claim to standing by asserting, in Count V, that the award of federal tax credits to Oklahoma residents would violate the Tenth Amendment. It claims that the state's legislative powers would be "commandeer[ed]" if participants in federally-facilitated exchanges were to receive federal tax credits on the same footing as participants in state-based exchanges. ECF 53 at 17. But this claim does not state any injury-in-fact that is cognizable under the Tenth Amendment or otherwise. A state might have an injury-in-fact supporting a Tenth Amendment claim if a federal law commanded it to take action, or prohibited it from taking action. *E.g.*, *New York v. United States*, 505 U.S. 144 (1992). But there is no sense in which, simply by providing federal tax credits to Oklahoma residents, the federal government has commanded Oklahoma officials to do, or refrain from doing, anything. Oklahoma suffers no concrete injury from the mere fact that it disagrees with the federal government's interpretation of federal law. *See, e.g.*, *Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 372-73 (7th Cir. 1997) (state lacked cognizable injury where ability to enforce statutes was not hindered).[1]

B. Oklahoma Does Not Have Standing to Challenge the Possibility that It Would Be Subject to the Large Employer Tax Penalty

Oklahoma also asserts (in Count IV) that it has standing in its capacity as an employer to challenge the award of federal tax credits to its state employees, and its potential liability for the Affordable Care Act's large employer tax penalty, 26 U.S.C. § 4980H. ECF 53 at 8. Under

[1] Oklahoma also contends that Congress has granted it statutory standing to pursue its claim. ECF 53 at 8. It cites no statute granting it, or any other state, a cause of action to litigate its citizens' federal tax liabilities, and no such statute exists. In any event, although a statute may create legal rights supporting a claim of standing, a plaintiff must still possess a "concrete, *de facto* injur[y]" in order to claim standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Again, Oklahoma alleges no concrete injury merely by claiming that the federal government has misinterpreted federal law; "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984); *see also Wyoming v. Lujan*, 969 F.2d at 881.

Oklahoma's theory, it may be subject to the Section 4980H assessment as a large employer, but it could avoid that possible liability if its state employees were found to be ineligible for premium tax credits. Oklahoma asserts that any imposition of the Section 4980H assessment against it as an employer would violate the Tenth Amendment.[2] But Oklahoma fares no better in claiming standing as an employer than it does as a sovereign. To demonstrate standing, a plaintiff must allege an injury that is certainly impending; "standing is not conferred by conjecture or speculation about future [events]." *Schultz v. Thorne*, 415 F.3d 1128, 1135 (10th Cir. 2005). Because Oklahoma can offer, at best, conjectural and hypothetical speculation that it might, at some future date, be subject to the Section 4980H penalty, it lacks standing here.

As the defendants have shown, Oklahoma offers coverage to its employees that renders its very unlikely that it will be subject to the large employer tax penalty. That tax penalty may apply to a large employer that offers health coverage to its full-time employees, only if at least one of its full-time employees is certified as having enrolled in a qualified health plan in an exchange, and that employee is allowed premium tax credits or cost-sharing reductions. 26 U.S.C. § 4980H(b)(1). Such an employee, however, will only receive premium tax credits or cost-sharing reductions if the employer-sponsored coverage fails to meet certain standards for adequate coverage, *i.e.*, if its plan fails to cover at least 60% of the total allowed costs of benefits under the plan, or if the employee is required to pay more than 9.5% of his household income for that coverage. 26 U.S.C. § 36B(c)(2)(C). Accordingly, a large employer that offers adequate

[2] Oklahoma acknowledges that this claim is foreclosed by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which permits the federal government to regulate state employers on equal terms with private employers. Count IV may be dismissed for lack of jurisdiction in light of this acknowledgement. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (dismissal for lack of subject-matter jurisdiction is proper when claim is foreclosed by Supreme Court precedent). Oklahoma disputes this principle, ECF 53 at 13, but as *Steel Co.* itself explains, this is a long-established practice in the federal courts. *See id.*

coverage to its full-time employees cannot be subject to the Section 4980H tax penalty. Oklahoma's health coverage almost certainly meets the standards for adequate coverage, and so Oklahoma is very unlikely to incur the large employer tax penalty. *See* Okla. Employee Benefits Dep't, *2013 Benefits Enrollment Guide* at 3-6.

Oklahoma does not dispute that its benefits plan would satisfy the standards for adequate coverage. It nonetheless argues that it faces potential liability under Section 4980H, for two reasons. First, it contends that, under proposed regulations recently promulgated by the Treasury Department, it *might* be found not to provide its employees with an effective opportunity to enroll in or to opt-out of its health plan, because state employees must be covered by another group health plan before they are disenrolled from the coverage that Oklahoma offers. ECF 53 at 11. This does not describe a circumstance that could lead to a Section 4980H assessment against the state. Coverage under any group plan precludes eligibility for the Section 36B tax credits. Accordingly, whether Oklahoma's employees are covered by the state plan or by another group plan, they would not receive premium tax credits, and Oklahoma's liability for the Section 4980H assessment could not be triggered. 26 U.S.C. § 36B(c)(2)(B)(i), (c)(2)(C)(iii). Moreover, so long as the state employees are eligible for adequate coverage under their employer's plan – and they are so eligible – they are not eligible for premium tax credits, even if they decline that coverage. 26 U.S.C. § 36B(c)(2)(B)(i), (c)(2)(C)(i).

Second, Oklahoma speculates that, under the same proposed regulations, it *might* face liability for temporary workers who are not offered coverage by its health plan. ECF 53 at 12. It fails to note, however, that the proposed regulations would not apply an assessable payment with respect to an employee who works for less than three full calendar months. Moreover, the proposed regulations contemplate further rules under which seasonal workers could be employed for as many as 13 full calendar months without the possibility of an assessable payment being incurred. *See* 78 Fed. Reg. 218, 227, 229 (Jan. 2, 2013). Oklahoma does not allege that it would, or even might, incur liability for the Section 4980H tax penalty under these provisions.

Oklahoma's citation to *proposed* Treasury regulations underscores the conjectural nature of its claimed injuries. Oklahoma must allege an injury that is "certainly impending" to show its standing, *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005), and it bears the burden "clearly to allege facts demonstrating" that it has standing, *Schaffer v. Clinton*, 240 F.3d 878, 883 (10th Cir. 2001). It has not done so. It has not pled in its complaint, or even argued in its brief, any specific facts that provide more than conjecture that it will be subject to a Section 4980H tax penalty. And because Oklahoma almost certainly already offers adequate coverage that satisfies Section 4980H, its claim that it is "forced to consider how to implement" what it is already doing, ECF 53 at 9, does not support any claim that the statute has caused it any injury.

Oklahoma also argues that, even though it offers adequate coverage, it still must "comply with record keeping practices designed to establish compliance" with Section 4980H. ECF 53 at 10. It apparently refers to 26 U.S.C. § 6056, which requires a large employer to submit information returns to the IRS identifying, *inter alia*, the coverage that it has offered to its full-time employees. But Section 6056 applies to *every* large employer, whether or not the employees of that employer receive premium tax credits. Thus, if Oklahoma suffers any legally cognizable injury from this record-keeping requirement, it is not an injury that would be redressed in this lawsuit; Oklahoma would still be obliged to comply with Section 6056 regardless of any relief it receives here. Oklahoma must show that it is "likely as opposed to merely speculative that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It has not met this burden.

C. Oklahoma Lacks Standing to Litigate the Validity of the Minimum Coverage Provision

For similar reasons, Oklahoma lacks standing to challenge the minimum coverage provision, 26 U.S.C. § 5000A. As the defendants have noted, the Supreme Court has upheld that provision as an exercise of Congress's taxing power. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) ("*NFIB*"). Oklahoma asks this Court to decide whether the provision is also justified under Congress's commerce power. It still, however, has failed to identify any reason why it would matter whether Section 5000A is constitutional under one, or more than one, of Congress's enumerated powers. It "raises only 'abstract questions of political power,'" *Virginia*, 656 F.3d at 271 (quoting *Mellon*, 262 U.S. at 485), and not any case or controversy over which this Court could have jurisdiction.

Oklahoma reasons that it has standing to explore the validity of a provision of state law that declares a right not to participate in "any health care system," OKLA. CONST. art. II, § 37(B)(1). ECF 53 at 18. But a suit against the federal government is not the proper vehicle to explore that question; Oklahoma plainly could not enforce that provision against the federal government. And if the question is simply whether the provision is valid as a matter of state law, the federal government has no interest in that dispute; the question should be addressed instead in a case between other parties where the answer under state law might matter. In other words, "the mere existence of a state law like [Oklahoma's constitutional amendment] does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts." *Virginia*, 656 F.3d at 269; *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983) ("federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law").

II. The Anti-Injunction Act Bars Oklahoma's Attempt to Restrain the Assessment and Collection of the Large Employer Tax Penalty

This Court lacks jurisdiction for a second reason. Oklahoma asks this Court for relief that would restrain the application of the Section 4980H large employer tax penalty against employers in this state. The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, divests this Court of jurisdiction over such a suit.

Oklahoma argues that it has asked only to enjoin the government from offering premium tax credits to Oklahoma residents, and any restraint on the application of the Section 4980H tax penalty would occur, in its view, only indirectly. ECF 53 at 23. But "plaintiff['s] decision to characterize [its] claim as a non-tax suit does not necessarily make it so." *Wyoming Trucking Ass'n v. Bentsen*, 82 F.3d 930, 933 (10th Cir. 1996). No matter how a plaintiff describes its complaint, if the relief that it seeks "would necessarily preclude" the Treasury from assessing or collecting a tax, the AIA applies. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 (1974). Under Oklahoma's strained theory, if its residents could not claim the premium tax credit because a federally-facilitated exchange operated in the state, the Section 4980H assessment would not be triggered against it as an employer. Indeed, that is Oklahoma's avowed purpose for bringing this suit. *See* ECF 35, ¶¶ 14, 70. Because Oklahoma "would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain" taxation, *Alexander v. Americans United, Inc.*, 416 U.S. 752, 761 (1974), its suit is "for the purpose of restraining the assessment or collection" of the tax penalty, and so is barred, 26 U.S.C. § 7421(a).

Oklahoma also contends that the Section 4980H tax penalty does not qualify as a "tax" that would be subject to the AIA. ECF 53 at 21. Its argument is difficult to understand. The AIA applies to protect the assessment or collection of "any tax" under Title 26 of the United States Code, and Section 4980H expressly describes the assessment it imposes as a "tax." *See* 26

U.S.C. § 4980H(b)(2); *see also* 26 U.S.C. § 4980H(c)(7). Section 4980H thus differs from the minimum coverage provision, which the Supreme Court held was not subject to the AIA because that provision did not explicitly describe its assessment as a "tax." *NFIB*, 132 S. Ct. at 2583.

Oklahoma also argues that the AIA does not apply because federal tax revenues would increase if it prevails here. As Oklahoma explains it, because individual Oklahomans stand to lose far more in forgone premium tax credits than Oklahoma employers stand to gain in avoiding potential liability for the large employer tax penalty, the net result of its suit would be a gain for the federal treasury, at the expense of Oklahoma residents. ECF 53 at 20. It cites case law under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, holding that challenges to state tax credits are not barred by that statute, and reasons that it therefore may challenge any federal tax so long as it also challenges a federal tax credit or deduction. But "there is simply nothing . . . suggesting that federal courts can entertain challenges to . . . taxes on the basis of predictive judgments that doing so will not harm state [or federal] coffers; rather our jurisdiction is precluded by the plain language of the TIA in *all* cases seeking to enjoin the levy or collection of taxes under State law." *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007). The same result holds here; the plain language of the AIA bars pre-enforcement challenges to *any* federal tax, even if a plaintiff argues that the relief it seeks would on balance gain revenue for the federal treasury.[3]

CONCLUSION

For the reasons set forth above, the plaintiff's amended complaint should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

[3] It is not clear why Oklahoma disputes whether the AIA is jurisdictional, given that its claims must be dismissed in either circumstance. In any event, the Tenth Circuit has squarely held the AIA to be jurisdictional. *See Sterling Consulting Corp. v. United States*, 245 F.3d 1161, 1167 (10th Cir. 2001). *See also NFIB*, 132 S. Ct. at 2582 ("Before turning to the merits, we need to be sure we have the authority to do so.").

DATED this 8th day of February, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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