UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 1:13-cv-1612-WTL-TAB
	)	
INTERNAL REVENUE SERVICE, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs respectfully request leave to file a sur-reply memorandum in opposition to Defendants' Motion to Dismiss the Amended Complaint in order to address a new "waiver" argument asserted for the first time in Defendants' reply memorandum. In support of this motion, Plaintiffs assert as follows:

1. Defendants filed their Memorandum in Support of the Motion to Dismiss the Amended Complaint on January 31, 2014. In that Memorandum, Defendants claimed that Counts II and III of the Amended Complaint, which assert violations of the Tenth Amendment, should be dismissed on grounds of claim preclusion and issue preclusion. *See* Defs.' MTD Br., Dkt. 37, at 28-31. Late in a 34-page brief, Defendants also included one paragraph briefly asserting that the Tenth Amendment claims lack merit because *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is good law and because the intergovernmental tax immunity doctrine is not implicated in this case. *See* MTD Br., Dkt. 37, at 31-32. Defendants added in a footnote that if Count III were to fail, then Count IV would necessarily fail as well. *See* MTD Br., Dkt. 37, at 32 n.7.

2. Plaintiffs filed responses in Opposition to the Motion to Dismiss Amended Complaint on February 12, 2014. The State focused its arguments relating to Counts II and III on Defendants' preclusion defenses. State's Resp. to MTD Br., Dkt. 38, at 22-31. It also argued that *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601 (2012), "raises new doubts about whether Congress may regulate States as sovereigns through the Commerce Clause, and thus about whether the rule articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is good law." State's Resp. to MTD Br., Dkt. 38, at 28. The State's memorandum also argued that the provisions challenged in Counts II and III are taxes, *see id.* at 27-28; that the intergovernmental tax immunity doctrine properly applies here; and that Plaintiffs would fully develop those arguments at the merits stage, *see id.* at 28-31.

3. Defendants filed a Reply Memorandum in Support of their Motion to Dismiss on March 10, 2013, where they have made the stunning assertion that Plaintiffs somehow "waived" their Tenth Amendment claims because they did not take the "opportunity to defend the merits" of those claims in their Opposition briefs. Defs.' MTD Reply, Dkt. 55, at 16.

4. Plaintiffs have not waived their Tenth Amendment claims, and hereby seek leave to address Defendants' surprising claim. The Federal Government did not raise a substantial merits argument in its opening Motion to Dismiss brief, and while the State explicitly outlined Plaintiffs' Tenth Amendment theories in its Motion to Dismiss Opposition brief, full development of those complex arguments was not the purpose or focus of the briefing on the Motion to Dismiss. The State included sufficient material in its Amended Complaint and Opposition brief to demonstrate that all claims should be decided on the merits, and then fully briefed the merits of the Tenth Amendment (and APA) claims in its subsequent Memorandum in Support of its Motion for Summary Judgment. *See* Dkt. 45, at 15-33. Even more perplexing,

Defendants were served with the State's merits-stage summary judgment briefs five days before filing their Motion to Dismiss reply brief claiming that Plaintiffs had "waived" their Tenth Amendment claims.

5. Asserting in a reply brief that one's opponents—here, a co-sovereign and many of its political subdivisions—have effectively defaulted on multiple claims is a serious charge. Particularly given the stakes of this litigation, which asserts grave constitutional infirmities with significant provisions of the Affordable Care Act, Plaintiffs should be granted leave to address this new "waiver" claim with a short (eight-page) sur-reply brief, tendered herewith.

Wherefore, the Plaintiffs respectfully request that this Court grant them leave to file a sur-reply brief in Opposition to Defendants' Motion to Dismiss the Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2014, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

The Federal Government has argued in its Reply Memorandum in Support of its Motion to Dismiss the Amended Complaint that the State and the School Plaintiffs have "waived" their Tenth Amendment claims because they did not take the "opportunity to defend the merits" of those claims in their briefs in opposition to the Motion to Dismiss. Defs.' MTD Reply, Dkt. 55, at 16. This is not true. Under no commonsense (or even technical) understanding of the term can Plaintiffs fairly be described as having "waived" their Tenth Amendment claims.

I. First, the Federal Government's Motion to Dismiss brief in no way focused on the merits of *any* claims asserted in the Amended Complaint. It instead addressed standing and preclusion issues in an attempt to end this case *before* the merits could be discussed. *See* Defs.' MTD Br., Dkt. 37, at 16-18 (arguing lack of Article III jurisdiction); *id.* at 18-21 (arguing Plaintiffs lack standing as employers); *id.* at 25-28 (arguing Plaintiffs must pursue tax refund action instead of APA challenge); *id.* at 28-32 (arguing preclusion of constitutional claims).

Only in a single paragraph embedded on pages 31 and 32 of a 34-page brief, in a section otherwise devoted to estoppel, did the Federal Government mention—in passing—its view that the Tenth Amendment claims lack merit. *See* Defs.' MTD Br., Dkt. 37, at 31-32. It included

merely a single sentence (that misstates the law) on the Commerce Clause. *See id.* at 31 ("The Tenth Amendment is not offended when Congress regulates the states' own activities as employers, at least where, as here, the regulation is one of general applicability."). This is followed by a single sentence (that also misstates the law) on the Tax Clause. *See id.* at 32 ("Likewise, the intergovernmental tax immunity doctrine is not implicated where Congress subjects state employers to a nondiscriminatory tax.").

These conclusory assertions, accompanied by one citation each, were neither preceded by argument headings, nor accompanied by other indicators suggesting the Federal Government was embarking on a serious merits argument, nor followed by substantial development of the Federal Government's legal theories. In context, the Federal Government's bare mention of the "merits" offers mere indirect support for its res judicata and estoppel defenses, as if the Federal Government were saying only, "the court may as well dismiss the Tenth Amendment claims on preclusion grounds because those claims lack merit anyway." It plainly did not warrant a full-blown, summary-judgment-style merits response from the Plaintiffs. Accordingly, in response to the Federal Government's multi-faceted Motion to Dismiss that focused attention on nearly everything *except* the merits of Plaintiffs' claims, the State used all thirty-five pages allowed under the rules to focus, appropriately, on the dismissal-stage arguments that must be fully briefed at this stage. To avoid unnecessary page-limit extensions, Plaintiffs discussed the merits of their claims only as necessary to proceed to summary judgment.

As is proper, Plaintiffs' summary judgment briefs fully address the merits of the Tenth Amendment claims. Indeed, the Federal Government's argument that Plaintiffs have "waived" their Tenth Amendment claims is especially inappropriate given that it has been fully aware that extensive summary judgment briefing would be necessary on the merits. The Federal

Government was advised on this plan for briefing issues in advance during a status conference with the Magistrate Judge on February 28. *See* Minute Order on Feb. 28, 2014, Telephonic Status Conference, Dkt. 52. Then, a full five days before the Federal Government filed its reply brief, Plaintiffs filed their briefs supporting their Motions for Summary Judgment—one full-size brief (35 pages) and one over-sized brief (45 pages) on March 5, 2014, *see* Dkt. 45, 54. The State's brief spends *18 pages* discussing the merits of the Plaintiffs' Tenth Amendment claims. State's Memo. in Supp. of MSJ, Dkt. 45, at 15-33.

Accordingly, even aside from the contents of Plaintiffs' memoranda in opposition to the Motion to Dismiss, the Federal Government's "waiver" argument falls far short of plausibility.

II. Plaintiffs have offered ample legal bases sufficient to preserve their Tenth Amendment claims. Far from "waiving" any claims, Plaintiffs' memoranda in opposition to the Motion to Dismiss easily satisfy the Rule 12(b)(6) standard to avoid dismissal of their Tenth Amendment claims on the merits. A motion to dismiss tests only the facial sufficiency of the Complaint. *See Sadat v. Mertes*, 615 F.2d 1176, 1189 (7th Cir. 1980); *accord Boley v. Astrue*, No. 3:12-cv-27, 2013 WL 275891, at *2 (S.D. Ind. Jan. 24, 2013); *see also In re Policy Mgmt. Sys. Corp.*, Nos. 94-2254, 94-2341, 1995 WL 541623, at *3 (4th Cir. Sept. 13, 1995) (holding that for Rule 12(b)(6), "[a] motion to dismiss tests only the facial sufficiency of the complaint"). To survive such a motion, Plaintiffs must merely show that the counts in the Complaint are *legally plausible*. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-58 (2007).

When deciding whether Plaintiffs fail to state a claim upon which relief can be granted, a court is determining whether they are making a plausible legal argument in terms of law and facts. Pleadings-stage filings do not require exhaustive arguments on the merits. On that score,

the cases that the Federal Government cites for its "waiver" argument state only that "the non-moving party must proffer some legal basis to support his cause of action." Defs.' MTD Reply, Dkt. 55, at 16 (citing *Potter v. ICI Americas Inc*., 103 F. Supp. 2d 1062, 1072 (S.D. Ind. 1999)). The Federal Government also suggests that a claim is waived if a party "fail[s] to respond" to an argument. *Id.* (citing *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1075 (7th Cir. 2013)).

Under these (or any other) waiver standards, the parties' memoranda in opposition to the Motion to Dismiss are more than sufficient to preserve their Tenth Amendment claims. Plaintiffs responded directly to *every* point raised by Defendants *without* seeking leave to exceed page limitations so as to develop merits-stage arguments better left for summary judgment.

As an initial matter, the Amended Complaint itself provides sufficient legal bases. *See* Am. Compl., Dkt. 22, at ¶ 180 ("These reporting and certification requirements [in ACA Section 1514] are together a separate and independent exertion of federal power in the ACA" from those considered in *Florida*.); *id*. at ¶ 208 ("The Employer Mandate, like the Individual Mandate, is a tax. The Federal Government, however, is barred by the Tenth Amendment doctrine of intergovernmental tax immunity from imposing taxes *on States*.") (emphasis added); *id*. at ¶ 209 ("Furthermore, while the Supreme Court held in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that Congress may impose employment obligations on States notwithstanding the Tenth Amendment, it has never held that Congress may levy a *tax* on States that refuse to carry out federal policy."); *id*. at ¶ 215 ("Both the natural reading of the text of ACA § 1514 and the Supreme Court's decision in *NFIB* show ACA § 1514 to be a tax on Plaintiffs. Such a tax exceeds Congress's enumerated powers as applied to the sovereign States . . . under the Intergovernmental Tax Immunity Doctrine."); *id*. at ¶ 216 ("If ACA § 1514 were alternatively construed as an exercise of federal authority under the Commerce Clause of the

Constitution as a saving construction of the provision, it would still exceed Congress's enumerated powers as applied to the sovereign States and their agencies and political subdivisions, and thus would still violate the Tenth Amendment.").

Next, the State's Brief in Opposition explains that because *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601 (2012), held "that Congress may not use its Commerce Clause power to compel (and then regulate) commercial activity by noncommercial actors, it raises new doubts about whether Congress may regulate States as sovereigns through the Commerce Clause, and thus about whether the rule articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is good law." State's Resp. to MTD Br., Dkt. 38, at 28. It further stated that "[t]hese doubts are particularly significant in light of the intergovernmental immunity arguments mentioned above. Indiana should be given the opportunity to present what are essentially new arguments from *NFIB* about the limits of Congress's power to regulate States under the Tenth Amendment." State's Resp. to MTD Br., Dkt. 38, at 28. Those intergovernmental tax immunity arguments were likewise invoked in the Brief in Opposition, as was a description of Plaintiffs' argument that Sections 1513 and 1514 are taxes that cannot be imposed on the States under the Tax Clause. *See id.* at 27-28 (describing five factors from *NFIB* for a construing a provision as a tax, and why Sections 1513 and 1514 are taxes); *id.* at 27 (arguing under the intergovernmental tax immunity doctrine that the "Supreme Court has never held that Congress may impose tax and related tax-filing burdens directly on States as sovereigns"); *id.* at 27-28 (explaining how the Supreme Court had modified intergovernmental immunity doctrine, "thereby undermin[ing] other provisions of the Act that regulate States as sovereigns, including Sections 1513 and 1514." (citing *NFIB*, 132 S. Ct. at 2601-06)); *id.* at 28 (arguing "*NFIB* holds that Congress may not use

its Commerce Clause power to compel (and then regulate) commercial activity by non-commercial actors" such as States).

Thus, it simply is not true that the Plaintiffs "failed to respond" to the Federal Government's one-paragraph assertion (functionally comprising two sentences) that the Tenth Amendment claims fail on the merits. In fact, Plaintiffs devoted *more* space to supporting the merits of their Tenth Amendment claims in their Opposition briefs (multiple times over the course of five pages) than Defendants have devoted to attacking the merits (a lone paragraph buried deep in an argument over estoppel).

The Federal Government may be saying that Plaintiffs somehow failed to incant the proper legal jargon to get to summary judgment. But magic-words formalism is not a valid reason to dismiss a claim. *See Geinosky v. City of Chicago.*, 675 F.3d 743, 748 (7th Cir. 2012) ("To require more would elevate form over substance."); *Dausch v. Rykse*, 52 F.3d 1425, 1434 n.6 (7th Cir. 1994) (Ripple, J., concurring in part) (stating "it would exalt form over substance to expect the plaintiff to repeat the same argument twice here."); *cf. N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 453 n.4 (7th Cir. 1998) (noting flexibility regarding the content courts require to survive a Motion to Dismiss "comports with the traditionally generous nature in which we view pleadings.").

Accordingly, in no way have Plaintiffs "waived" their Tenth Amendment claims. They first described their legal theories in detail in the Amended Complaint, then in the Brief in Opposition defended the claims against the Federal Government's contention that they had been precluded—including by outlining their Tenth Amendment theories—and finally defended them on the merits with extensive argumentation in their Summary Judgment briefs. The Federal Government's "waiver" argument is therefore utterly implausible.

III. The Federal Government also mentions Count IV in the context of its argument about "waiver" of constitutional claims, MTD Reply, Dkt. 55, at 16-17 n.6, but this theory has no more plausibility than the rest of the "waiver" argument, not least because severability is not even a substantive constitutional claim. First, Defendants never opposed Count IV on the merits in their MTD Brief. The only mentions of Count IV are in a point heading, then in a footnote asserting that Count IV arises only if Count II fails but Count III succeeds. Defs.' MTD Br., Dkt. 37, at 32 n.7. (This is partially incorrect, as this Court would also have to rule on severability if Count II succeeds, or if both Count II and Count III succeed.) Defendants neither offered argument that Count IV would fail on its merits, nor cited to severability case law.

Second, the severability of Sections 1513 and Section 1514 has never before been an issue, so preclusion is not plausible. The Supreme Court's decision in the *Florida*/*NFIB* case considered solely whether the Individual Mandate, ACA § 1501; 26 U.S.C. § 5000A, could be severed from the remaining provisions of the Affordable Care Act. The question whether Section 1513 could be severed never arose. And since Section 1514 was not an issue in *Florida*—neither litigated to final judgment, nor dealt with in the district court's dismissal of the Section 1513 claim—no severability question arose regarding it, either. *See Bernstein v. Bankert*, 733 F.3d 190, 226 (7th Cir. 2013) (requiring final judgment on an issue for preclusion to apply).

Finally, Plaintiffs' claim of non-severability is not a substantive constitutional claim subject to waiver. It is a remedial question that automatically arises whenever a court invalidates part of a statute and the court must determine—even if *sub silentio*—whether the remaining statutory provisions survive. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329-30 (2006). As such, it need not be pled as a separate issue and can even be raised *sua sponte* by a court. The last time the Supreme Court held a statute nonseverable was in *Randall v.*

Sorrell, 548 U.S. 230 (2006), where none of the three consolidated certiorari petitions raised a severability question. *See* Petition for Writ of Certiorari at i, *Randall*, 540 U.S. 230 (No. 04-1528); Petition for Writ of Certiorari at i, *Vermont Republican State Comm. v. Sorrell*, *cert. granted sub nom. Randall*, 540 U.S. 230 (No. 04-1530); Conditional Cross-Petition for Certiorari at i, *Sorrell v. Randall*, *cert. granted sub nom. Randall*, 540 U.S. 230 (No. 04-1697). Yet after invalidating provisions of a Vermont statute, the Court held other provisions nonseverable because it could not "foresee which of many different possible ways the legislature might respond to the constitutional objections we have found." *Randall*, 540 U.S. at 262 (plurality opinion). *Randall* demonstrates the unavoidability—and nonwaivability—of severability analysis when portions of statutes are invalidated. A court cannot dismiss the possibility that a constitutionally invalid statutory provision is only partially severable.

CONCLUSION

For these reasons and the reasons provided in Plaintiffs' Amended Complaint and memoranda in opposition to the motion to dismiss and in support of their motions for summary judgment, all claims withstand dismissal and warrant judgment for Plaintiffs.

Respectfully submitted,

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