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

STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**Case No. CIV-11-030-RAW**
KATHLEEN SEBELIUS, et al.,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN SUPPORT OF MOTION TO INTERVENE

On December 6, 2012, GC Restaurants SA, LLC, Old England's Lion & Rose, LTD, Old England's Lion & Rose at Castle Hills, LTD, Old England's Lion & Rose at Sonterra, LTD, Old England's Lion & Rose Forum, LLC, and Old England's Lion & Rose at Westlake, LLC ("the Private Employers"), filed a Motion to Intervene in this case (Doc. #44). For the reasons set forth below, Plaintiff fully supports the Motion to Intervene, and requests that the Court enter an order permitting the Private Employers to intervene in the case.

Argument and Authorities

The Private Employers seek to intervene in this case because they, like the State of Oklahoma, have been injured by the challenged IRS rule. The federal government primarily argues that the Motion to Intervene should be denied based on jurisdictional defenses raised in a motion to dismiss the State of Oklahoma's Amended Complaint—a motion that not only hasn't been decided by the Court, but hasn't even been fully briefed by the parties.[1] The Court should decline the federal

[1] The federal government's response actually goes much further than just arguing that the Motion to Intervene should be denied. It instead urges the Court to (1) dismiss the Amended (continued...)

government's invitation to prematurely decide those jurisdictional questions, and should instead allow the intervention and then address all the jurisdictional issues simultaneously, after the State of Oklahoma and the Private Employers have had a chance to fully brief those issues. This will allow the Court to decide those jurisdictional issues with all the parties and all the claims before it, so that it has a clear and complete picture of the case when deciding those issues.

But to be clear, there is no jurisdictional bar that would prevent the Court from allowing the intervention. The federal government does not claim that the Private Employers lack standing to challenge the rule. It instead argues that the State of Oklahoma lacks standing,[2] and that this is reason to deny intervention. Hardly so. The Amended Complaint more than demonstrates that it is "plausible" that the State of Oklahoma has been injured by the IRS rule, and once the Private Employers are in the case, with their unchallenged standing, the standing question will become moot.[3]

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[1](...continued)
Complaint, (2) treat the Complaint in Intervention as a separate action, and (3) dismiss the Complaint in Intervention.

[2] In making this argument, the federal government miscasts the State of Oklahoma's case as a *parens patriae* case. The State of Oklahoma, however, is not relying on injuries to its citizens as its basis for standing, but rather is relying on an array of injuries directly suffered by it in its capacity as a sovereign state, as a large employer, and as the entity designated by the PPACA to decide between the availability of premium tax credits coupled with disincentives for employment growth, or employment growth without premium tax credits.

[3] *See, e.g.*, *Florida ex rel. Attorney General v. U.S. Department of Health & Human Services*, 648 F.3d 1235 (11th Cir.2011)("Although the question of the state plaintiffs' standing to challenge the individual mandate is an interesting and difficult one, in the posture of this case, it is purely academic and one we need not confront today. The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim—as is the case here—we need not address whether the remaining plaintiffs have standing.").

The federal government also argues that 26 U.S.C. § 7421 ("the Anti-Injunction Act") bars the complaint in intervention. But like the State of Oklahoma will argue in response to an identical argument made in the federal government's Motion to Dismiss, the claims raised are not the type barred by the Anti-Injunction Act because they are not a challenge to the collection of a tax; they are a challenge to the illegal promulgation of a rule. Additionally, the Patient Protection and Affordable Care Act ("PPACA") and its legislative history is hardly clear that Congress intended the large employer penalty authorized by the rule to be treated as a "tax" for purposes of the Anti-Injunction Act. Indeed, the large employer mandate (26 U.S.C. § 4980H) is difficult to distinguish from the individual mandate (26 U.S.C. § 5000A) and the contraception mandate (26 U.S.C. § 4980D), the former of which the Supreme Court decided was not a tax for purposes of the Anti-Injunction Act and the latter of which the federal government recently admitted was not a tax for purposes of the Anti-Injunction Act.[4] And as a categorical rule, Congress never intended the Anti-Injunction Act to bar lawsuits that if successful would actually result in a net *increase* in tax revenues—as the federal government's Motion to Dismiss suggests it would.[5]

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[4] *See National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2587 (2012)("The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti–Injunction Act."); *see Autocam Corp. v. Sebelius*, No. 1:12-cv-01096-RJJ (W.D. Mich. Dec. 21, 2012), Def.'s Supplemental Brief (Doc. #41).

[5] Matthew A. Melone, *A Leg to Stand On: Is There a Legal and Prudential Solution to the Problem of Taxpayer Standing in the Federal Tax Context*, 9 Pitt. Tax. Rev. 97, 147-48 (2012) ("The Supreme Court has held…that neither the Anti-Injunction Act nor the Tax Injunction Act operates to bar proceedings that, if successful, have the effect of increasing tax revenue.")(*citing Hibbs v. Winn*, 542 U.S. 88, 102-12 (2004); *see also* Congressional Budget Office, Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act, March 2012, Table 2, p. 11, http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf

(continued…)

The federal government next argues that the Eastern District is an improper venue for the Private Employer's claims. Even were this true, the Eastern District is unquestionably a proper venue for the State of Oklahoma's claims. As a result, the Court can allow the Complaint in Intervention without any concerns over venue.[6]

Lastly, the federal government argues that indispensable parties are missing, namely those individuals employed by the Large Employers. Conveniently, the federal government also argues that it is impossible to join these absent individuals because they reside in Texas.[7] This argument is unconvincing because it turns on the federal government's incorrect assertions that (1) "[Movants'] employees must be joined in this action in order for the Movants to gain complete relief under their theory", and (2) it "could face conflicting obligations from different courts" because the judgment of this Court would not bind those individuals. Both assertions are wrong. The claims raised in the both the Amended Complaint and Complaint in Intervention relate solely to the IRS's promulgation

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[5](...continued)
(concluding that for 2012 through 2022, the premium-assistance tax credits and cost-sharing subsidies—plus a few much smaller provisions—would increase federal deficits by $808 billion, while penalties under the individual and employer mandates would cause federal revenues to rise by $54 billion and $113 billion, respectively.)

[6] *See, e.g.*, *Moncrief v. Pennsylvania R.R. Co.*, 73 F.Supp. 815, 816 (D.C.Pa.1947) (holding that if a particular claim or party is so closely related to the original action that it can be considered ancillary, venue statutes cannot bar the intervention).

[7] The Court will notice that the federal government did not make a similar argument with regard to the State of Oklahoma in its role as a large employer—precisely because the State of Oklahoma's employees *could be* joined. This highlights the motivation of the federal government's claim in this regard—it has nothing to do with the need for additional parties and everything to do with trying to prevent the merits of this case from being reached.

of a rule that lacks statutory authorization. A judgment in the State of Oklahoma and the Private Employers' favor—a judgment against the federal defendants—will give the State of Oklahoma and the Private Employers complete relief because it will render the IRS rule invalid and will bind the parties that needs to be bound: the federal defendants. So the relevant question is not whether the Private Employers' employees would be bound—indeed, it is not their actions that the Interveners seek to enjoin—but rather whether the federal government would be bound with respect to those employees. And the answer is "yes", it would be.[8]

Conclusion

For these reasons, rather than accepting the federal government's invitation to prematurely decide jurisdictional issues that are not yet fully briefed, the Court should enter an order permitting the Private Employers to intervene in the case. This course of action will allow the Court to decide the jurisdictional issues with a complete picture of the parties and claims that are before it.

Respectfully submitted,

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[8] Additionally, those employees are unnecessary because the federal defendants are more than capable of defending their own rules. Unless the federal government is suggesting that restaurant workers from Texas are better situated to defend the rule than it is, nothing is added to this litigation by joining them.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Joel McElvain
Susan S. Brandon

Graydon Dean Luthey, Jr.
Craig A. Fitzgerald

s/ PATRICK R. WYRICK