

**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,)
in her official capacity as)
Secretary of the United States)
Department of Health and)
Human Services;)
and)
TIMOTHY GEITHNER,)
in his official capacity as)
Secretary of the United States)
Department of the Treasury,)

Defendants.)

PLAINTIFF’S MOTION TO LIFT STAY AND BRIEF IN SUPPORT

On November 23, 2011, the Court ordered this litigation stayed pending decision by the United States Supreme Court in cases involving similar issues (Dkt. #30). On June 28, 2012, the Supreme Court announced its decision in *National Federation of Independent Business et al. v. Sebelius et al.*, No 11-393, (U.S. June 28, 2012) (“*NFIB*”), resolving the Commerce Clause and Necessary Proper Clause issues raised in this case.

Despite what Defendants say in their recently filed Notice of Supplemental Authority (Dkt. #31), the *NFIB* decision does not “foreclose plaintiff’s claim on the merits.” Rather, the *NFIB* decision confirms that Section 5000A of the Patient Protection and Affordable Care Act (“PPACA”) in most respects does *not* preempt Article II, Section 37 of Oklahoma’s Constitution.

Specifically, the *NFIB* Court held that the Commerce Clause and Necessary and Proper Clauses of the United States Constitution do not give Congress the authority to compel individuals to purchase health insurance. *Nat'l Fed'n of Indep. Bus. et al.*, No. 11-393, slip op. at 30. (“Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a >necessary and proper= component of the insurance reforms. The commerce power thus does not authorize the mandate.”); see also *id.* at *45 (“The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command.”). The Court nonetheless upheld the so-called “individual mandate” by construing it as a tax, which by its very definition cannot *compel* conduct. *Id.* at 45-46 (“The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.”); see also *id.* at 43 (“If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.”)

The *NFIB* Court thus confirmed that Section 5000A, to the extent it is a mandate, violates the constitution in exactly the manner described in Plaintiff’s complaint. And as a result, Article II, Section 37 of Oklahoma’s Constitution has not been preempted insofar as it protects Oklahomans from being forced to buy health insurance.

The *NFIB* decision, however, raises new, and potentially significant constitutional questions about the validity of the PPACA as a revenue-raising measure. Additionally, since this Court stayed the litigation, the Internal Revenue Service has promulgated rules relating to certain assessments made on large employers in states without state-run health insurance exchanges. The IRS rules directly contradict the plain language of the PPACA, which does not authorize such assessments on large employers in states that have not created health insurance exchanges—states like Oklahoma.

Plaintiff is still analyzing the *NFIB* decision and the Internal Revenue Service rule described above in order to determine whether an amended complaint is warranted. As a result, the stay should be lifted and the Court should allow Plaintiff 30 days to file an amended complaint or other appropriate pleadings. If no such amended complaint or other pleading is filed at the conclusion of that 30 days, the Court should enter a judgment in the case disposing of the claims brought in the complaint in a manner consistent with the *NFIB* decision.¹

Respectfully submitted,

s/ PATRICK R. WYRICK

Patrick R. Wyrick, OBA #21874

Solicitor General

Oklahoma Office of the Attorney General

313 NE 21st Street

Oklahoma City, OK 73105

(405) 521-3921

(405) 522-0669 (facsimile)

Service email: fc.docket@oag.state.ok.us

patrick.wyrick@oag.ok.gov

Attorney for Plaintiff

¹ In accordance with LCvR 7.1(g), counsel for Plaintiff conferred in good faith with counsel for Defendants. Because the distance between counsels' offices rendered a personal conference infeasible, the conference was conducted electronically. Counsel for Defendants stated as follows: "The defendants do not concur with the plaintiff's characterization of the *NFIB* decision, and believe in any event that a characterization of that decision is unnecessary for purposes of the present motion. The defendants do not oppose the plaintiff's request to lift the stay. Nor do the defendants oppose the plaintiff's request that judgment be entered if the plaintiff does not file an amended complaint within 30 days; the defendants understand the plaintiff's request to entail that judgment would be entered in the defendants' favor, in the absence of an amended complaint."

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2012, 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

s/ PATRICK R. WYRICK