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.	)	

NOTICE OF SUPPLEMENTAL AUTHORITIES

On July 11, 2013, the Fourth Circuit Court of Appeals decided *Liberty University v. Lew*, 10-2347, 2013 WL 3470532 (4th Cir. July 11, 2013), becoming the first appeals court to squarely address whether the Anti-Injunction Act barred challenges to the large-employer mandate and whether a large employer had standing to bring such a challenge. The appeals court unanimously held that the Anti-Injunction Act did not apply, and that Liberty University had standing to challenge the mandate–even in light of the federal government's recent decision to delay implementation.

Liberty University involved a large employer (Liberty University) who claimed that the large-employer mandate exceeded Congress's Commerce Clause and Taxing Power.[1] The federal government argued that this facial challenge was barred by the Anti-Injunction Act, and that Liberty

[1] Liberty University's claims on the merits, which the appeals court rejected, were thus significantly different from those asserted by the State of Oklahoma here.

University lacked standing to challenge the mandate because it was unlikely they would be penalized because it appeared that the university offered its employees adequate coverage.

In rejecting the federal government's Anti-Injunction Act arguments, the appeals court relied on the text of Section 4980H, which it concluded gave no indication that Congress intended the Anti-Injunction Act to apply :

> When concluding that Congress did not intend to bar pre-enforcement challenges to the individual mandate, the Court in *NFIB* found it most significant that Congress chose to describe the shared responsibility payment as a "penalty" rather than a "tax." *See id*. (noting that "[t]here is no immediate reason to think that a statute applying to 'any tax' would apply to a 'penalty' "). Thus, we begin our AIA inquiry with particular attention to how Congress characterized the exaction set forth in the employer mandate.
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> In maintaining that the AIA bars this challenge to the employer mandate, the Secretary relies heavily on the fact that the Act twice refers to the employer mandate exaction as a "tax." *See* 26 U.S.C. § 4980H(b)(2), (c)(7). In doing so, the Secretary virtually ignores the fact that the Act does not consistently characterize the exaction as a tax. Rather, the Act initially identifies the employer mandate exaction as an "assessable payment." *See id*. § 4980H(a). The Act then proceeds to characterize the exaction as an "assessable payment" six more times. *See id*. § 4980H(b)(1), (c)(2)(D)(i)(I), (d)(1), (d)(2), (d)(3). Additionally, the Act once refers to the exaction as an "assessable penalt[y]." *See id.* § 4980H (c)(2)(D).
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> Further, on one of the two occasions in which the Act refers to the employer mandate exaction as a "tax," it does so in a tax-specific context, where the use of another word would create confusion. Section 4980H(c)(7) provides: "For denial of deduction for the tax imposed by this section, see section 275(a)(6)." Section 275(a) states that "[n]o deduction shall be allowed for the following taxes" and then lists various taxes, including "[t]axes imposed by chapter[ ] ... 43." The employer mandate is codified in chapter 43 of the Code. Thus, the Act presumably refers to the employer mandate exaction as a "tax" when cross-referencing § 275(a)(6) to make clear that, for purposes of determining deductibility, the exaction is a tax imposed by chapter 43.
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> There may be no equally obvious explanation for the other instance in which the Act characterizes the employer mandate exaction as a "tax." *See* 26 U.S.C. § 4980H(b)(2) (providing that the "aggregate amount of tax" assessed for offering coverage that is unaffordable cannot exceed the amount the employer would owe under section 4980H(a) for failing to offer minimum essential coverage). But we simply cannot place much significance on a single unexplained use of that term.

> Because Congress initially and primarily refers to the exaction as an "assessable payment" and not a "tax," the statutory text suggests that Congress did not intend the exaction to be treated as a tax for purposes of the AIA.
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> Furthermore, Congress did not otherwise indicate that the employer mandate exaction qualifies as a tax for AIA purposes, though of course it could have done so. As the Supreme Court pointed out in *NFIB*, 26 U.S.C. § 6671(a) provides that the "penalties and liabilities" found in subchapter 68B of the Internal Revenue Code are "treated as taxes" for purposes of the AIA. *See NFIB*, 132 S.Ct. at 2583. The employer mandate, like the individual mandate, is not included in subchapter 68B, and no other provision indicates that we are to treat its "assessable payment" as a tax. *See id*. (making the same point with regard to the individual mandate).
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> Finally, we note that to adopt the Secretary's position would lead to an anomalous result. The Supreme Court has expressly held that a person subject to the individual mandate can bring a pre-enforcement suit challenging that provision. But, under the Secretary's theory, an employer subject to the employer mandate could bring only a post-enforcement suit challenging that provision. It seems highly unlikely that Congress meant to signal—with two isolated references to the term "tax"—that the mandates should be treated differently for purposes of the AIA's applicability. Tellingly, the Government has pointed to no rationale supporting such differential treatment.
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> For these reasons, we hold that the employer mandate exaction, like the individual mandate exaction, does not constitute a tax for purposes of the AIA. Therefore, the AIA does not bar this suit.

Id. at **5-6.

In rejecting the federal government's standing arguments, the appeals court relied on the fact that, notwithstanding any potential penalties, the mandate imposed substantial compliance costs on Liberty University:

> Liberty has more than fifty full-time employees, and the Secretary does not contest that it is an "applicable large employer" subject to the employer mandate. Nevertheless, the Secretary argues that Liberty has failed to establish standing because it is speculative whether Liberty will be subject to an assessable payment under 26 U.S.C. § 4980H. Specifically, the Secretary contends that the health care coverage Liberty acknowledges it already provides to its employees qualifies as minimum essential coverage that may also satisfy the employer mandate's affordability criteria.

> The Secretary's argument may well be correct—as far as it goes. But Liberty need not show that it will be subject to an assessable payment to establish standing if it otherwise alleges facts that establish standing. In this case, in addition to alleging that it "could" be subject to an assessable payment, Liberty alleges that the employer mandate and its "attendant burdensome regulations will ... increase the cost of care" and "directly and negatively affect [it] by increasing the cost of providing health insurance coverage."
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> "[G]eneral factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted); *see Bennett v. Spear*, 520 U.S. 154, 167–68 (1997). Thus, to establish standing, Liberty need not prove that the employer mandate will increase its costs of providing health coverage; it need only plausibly allege that it will.
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> Liberty's allegation to this effect is plausible. Even if the coverage Liberty currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care. *See generally Ass'n. of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 457–58 (D.C.Cir.2012) (increased compliance costs constitute injury in fact sufficient to confer standing); *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir.2008) (administrative burden constitutes injury in fact for standing purposes); *Frank v. United States*, 78 F.3d 815, 823–24 (2d Cir.1996) (same), vacated on other grounds, 521 U.S. 1114 (1997).
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> Moreover, Liberty's injury is imminent even though the employer mandate will not go into effect until January 1, 2015, as Liberty must take measures to ensure compliance in advance of that date. *See Virginia v. Am. Booksellers Ass'n*., 484 U.S. 383, 392–93 (1988) (holding booksellers had standing though challenged law had not yet been enforced because they "w[ould] have to take significant and costly compliance measures" beforehand "if their interpretation of the statute [wa]s correct"). Thus, Liberty has standing to challenge the employer mandate.

Id. at **6-7.

A copy of the full opinion is attached for the Court's convenience as Exhibit "1".

Respectfully submitted,

E. SCOTT PRUITT
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 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

s/ PATRICK R. WYRICK