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 NOTICE TO THE COURT IN RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITIES

On July 8, 2013, the federal government gave the Court notice of its recent decision to delay implementation of the large-employer mandate. As the Court might imagine, the State has quite a different take on how the Administration's decision to ignore the statutory deadline impacts this litigation.[1]

1. The federal government's decision to delay implementation of the reporting and other regulatory requirements it seeks to impose on large employers in Oklahoma confirms what the State has been saying all along: those reporting and other requirements are burdensome, onerous, and

[1] The Affordable Care Act requires that the large employer mandate go into effect on January 1, 2014. *See* Affordable Care Act, Pub. L. No. 111-148, § 1513(d) ("The amendments made by this section shall apply to months beginning after December 31, 2013."). It appears that the Administration unilaterally decided to ignore the deadline imposed by Congress.

injurious to it and every other large employer in the state. In fact, the IRS has justified the delay by noting that large employers nationwide are finding it impossible to understand and comply with the baffling array of new requirements:

> Over the past several months, the Administration has been engaging in a dialogue with businesses - many of which already provide health coverage for their workers - about the new employer and insurer reporting requirements under the Affordable Care Act (ACA). We have heard concerns about the complexity of the requirements and the need for more time to implement them effectively. . . .
>
> The Administration is announcing that it will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin. This is designed to meet two goals. First, it will allow us to consider ways to simplify the new reporting requirements consistent with the law. Second, it will provide time to adapt health coverage and reporting systems while employers are moving toward making health coverage affordable and accessible for their employees.

Mark J. Mazur, "Continuing to Implement the ACA in a Careful, Thoughtful Manner", available at: http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

The State has argued it has standing in this case as a result of having to comply with the very reporting and other requirements that caused this delay. Despite having apparently known about the severity of the problems for "several months," to this Court the federal government has downplayed the burden imposed by those reporting requirements, and has argued that those requirements do no harm to large employers like the State. Now, however, they have publically acknowledged that the requirements are so "complex" that large employers need a full year to figure out how to comply. The delay is at least an implicit admission by the federal government that the reporting requirements

and other large employer mandate requirements are in fact injuring large employers such as the State.

To deflect attention away from this development, the federal government persists in claiming that the only injury the State might ever incur is the threat of future penalties. The federal government does this so that they can argue that their unilateral decision to delay imposition of those penalties reduces the imminence of *that* injury and deprives the State of standing. This approach is puzzling because the federal government's decision to delay the penalties is irrelevant in that (1) the threat of penalties is not the "now" injury that the State claims provides it standing, and (2) in any event, "standing is determined at the time the action is brought ... and [courts] generally look to when the complaint was first filed, not to subsequent events" to determine if a plaintiff has standing. *Mink v. Suthers*, 482 F.3d 1244, 1253-54 (10th Cir.2007)(citations omitted); *see also Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.").

Also troubling is the federal government's persistence in claiming that the State has failed to even *plead* an injury. This argument can be put to bed by simply looking to the Amended Complaint. The State plainly alleged that it was a large employer subject to the mandate (and the federal government has not disputed that fact): "[T]he Final rule affects. . . the State in its capacity as a large employer that would presumably be subject to the Act's 'employer mandate' and the accompanying possibility of end-of-the-year tax assessments by the IRS." *See* Dkt. #35 at ¶ 14. The State then went on to describe the myriad ways that the mandate was injuring large employers like the State, as well as how it had injured the State in its sovereign capacity:

> If Defendants' interpretation of the Final Rule is upheld, and the Final Rule as so interpreted are upheld, (1) the Federal Government will make Advance Payments under circumstances not authorized by law; (2) Applicable Large Employers will be forced to take actions and incur expenses well in advance of January 1, 2014, to prepare for avoiding and/or minimizing exposure to Section 4980H Assessable Payments that Defendants will assert are triggered by such Advance Payments; (3) employers that maintain self-insured group health plans will be forced to take actions and incur expenses well in advance of January 1, 2014, to prepare for adverse selection against participation in their plans by employees whose purchase of insurance coverage from an Exchange established by HHS under Section 1321(c) is subsidized by such Advance Payments; and (4) the State of Oklahoma will suffer irreparable harm because it will be deprived of an opportunity under the Act to make an important decision affecting the future of its people and its economy, because even if the State of Oklahoma decides that the interests of its people would be better served by the inapplicability of Code Section 4980H to in-State employers, the Final Rule prevents the State from electing that course of action.

See id. at ¶ 33. These allegations are more than enough to satisfy what is required at the pleading stage. *SUWA v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) ("At the pleading stage, general 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.") (internal quotations omitted). But in addition, once the federal government filed its Motion to Dismiss claiming that it was "implausible" that the State could *ever* establish more specific facts showing that it has been injured by the mandate, the State in responding to the Motion to Dismiss gave multiple concrete examples that not only established that its allegations were "plausible," but that they were *provable*. *See, e.g.*, Dkt. 53 at 9-10, 11-12 (describing the specific actions the State is having to take now to comply with the mandate, and describing the specific ways the State-offered insurance coverage differs from what the federal government demands they provide if they wish to avoid penalty).

2. The federal government has argued in this case that the State's attack on the IRS rule authorizing credits and subsidies in every state is really just an attack on the penalties that are imposed on large employers when one of their employees receives one of those credits or subsidies. The federal government thus argues that the suit is essentially a "suit to enjoin the collection of a tax" the likes of which is barred by the Anti-Injunction Act. *See* Dkt. #65 at 6 ("A challenge to the application of Section 4980H thus can only be a challenge to the assessment or collection of a tax, and the AIA bars such a challenge."). But by delaying imposition of the regulatory requirements and the penalties, while nonetheless plowing ahead with the credits and subsidies, the federal government has untethered the penalties from the credits and subsidies and has effectively eliminated its Anti-Injunction Act concerns. Because this action seeks *only* to enjoin the enforcement of the IRS Rule authorizing those credits and subsidies in states that did not set up exchanges, and because those credits and subsidies are no longer "inextricably linked" to the penalties, the federal government can hardly now claim that the Anti-Injunction Act should apply.

3. The federal government also claims that the *Hobby Lobby* case actually bolsters their Anti-Injunction Act argument rather than undercut it. But the case speaks for itself in this regard, and proves exactly what the State has been arguing all along: that the mere fact that a penalty might be a downstream consequence of failure to comply with a regulatory requirement does not mean that a suit to enjoin the regulation is barred by the Anti-Injunction Act. The federal government correctly notes that the *Hobby Lobby* court pointed out that the "regulatory tax is just one of many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement." *Hobby Lobby Stores, Inc. v. Sebelius*, 12-6294, 2013 WL 3216103, **7-8 (10th Cir.

June 27, 2013). Where they go astray, however, is in claiming that those collateral consequences make the contraception mandate legally distinguishable from the large employer mandate for purposes of the Anti-Injunction Act.

First, while the federal government insists that the large employer mandate is no mandate at all, and that large employers are not *required* to do anything (they just have to pay an onerous "tax" if they do not do what the federal government tells them to do), all one must do is look at the hundreds of pages of regulations the federal government has promulgated to understand the disconnect between what they are *saying* here, and what their regulators are *doing* elsewhere. A simple word search of the regulations promulgated by the Treasury Department reveals over 100 instances of the Treasury Department telling large employers what they are "required" to do or otherwise describing the regulatory provisions as "requirements." *See* Prop. Treas. Reg. § 54.4980H, "Shared Responsibility for Employers Regarding Health Coverage," available online at https://www.federalregister.gov/articles/2013/01/02/2012-31269/sharedresponsibility-for-employers-regarding-health-coverage.[2] It short, it seems quite clear that the federal regulators are treating the mandate's requirements as "free-standing legal obligations" that they expect to be followed regardless of whether they ultimately punish any large employer for failing to do so.

And even if *those* "requirements" are viewed as nothing more than "suggestions," the reporting requirement imposed on large employers by 26 U.S.C. § 6056 is exactly the type of "freestanding, non-tax legal obligation" that the federal government claims rendered the Anti-

[2]This in addition to the fact that Congress plainly thought Section 4980H imposed requirements on large employers. *See* 26 U.S.C. § 6056 ("Every applicable large employer *required* to meet the *requirements* of section 4980H with respect to its full-time employees[...]")(emphasis added).

Injunction Act inapplicable to the contraception mandate. *See id.* ("Every applicable large employer required to meet the requirements of section 4980H with respect to its full-time employees during a calendar year shall, at such time as the Secretary may prescribe, make a return described in subsection (b).") So, completely independent of any penalty/tax that might result from the State's failure to comply with 4980H's requirements, the State must separately comply with this reporting obligation. Thus, just as was the case with the contraception mandate, the large employer mandate encompasses a range of regulatory requirements, and the potential to be taxed is just one of several "collateral consequences" of the mandate. Thus, the *Hobby Lobby* court's conclusion that the Anti-Injunction Act did not apply is highly instructive here.[3]

4. The federal government's reliance on the Supreme Court's recent decision in *Hollingsworth v. Perry*, — S. Ct. —, 2013 WL 3196927 (June 26, 2013) simply misses the point with regard to the State's claim that it has been injured by being deprived of a right granted to it by Congress. As the Supreme Court noted, the *Hollingsworth* plaintiffs sought merely "to vindicate the constitutional validity of a generally applicable California law," and that sort of generalized grievance fell squarely within the prohibition against litigants "raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper

[3]In its notice, the federal government also points out that the *Hobby Lobby* court addressed the jurisdiction/non-jurisdictional question in that case only because the federal government had not raised the Anti-Injunction Act as a defense. But why that question arose in that case has no relevance to why the jurisdictional/non-jurisdictional question matters in this case. As we have already explained in response to an identical line of argument from the federal government in its Motion to Dismiss briefing, the question is relevant here because the federal government has argued that the Anti-Injunction Act, if applicable, should require that the case be dismissed *in its entirety*. But if the Anti-Injunction Act is really just a claims-processing rule, even if applicable, the Court need not dismiss the case. Rather, the Court must simply limit the injunctive relief that it grants to the State.

application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Id.* at *7 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)).

Here, the State argues that Congress specifically granted it and the other 49 Sovereign States the right to make a decision about whether certain aspects of the Affordable Care Act would be implemented in the States, yet the executive branch unilaterally acted to deprive the States of that statutory right. It is well-established that this type of claim is not a generalized grievance. *See, e.g.*, *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)(recognizing that Congress "may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."). Thus, *Hollingsworth,* which involved plaintiffs who made no allegation that they had been deprived of statutory right conferred upon them by Congress, simply has no relevance to this case.

5. Lastly, the federal government proffers *Sissel v. U.S. Dep't of Health & Human Servs.*, --- F. Supp. 2d ---, 2013 WL 3244826 (D.D.C. June 28, 2013) as relevant to the Court's disposition of Count I. First, *Sissel* is a Rule 12(b)(6) decision. Here, the federal government has not file filed a Rule 12(b)(6) motion; they have raised only jurisdictional defenses under Rule 12(b)(1). Thus, the fact that the plaintiff in *Sissel* were found to have failed to state claims upon which relief could be granted because those claims were "premised on a misreading of the Supreme Court's opinion in *NFIB*", *Sissel*, 2013 WL 3244826, at *6, has no bearing on whether the State here has standing to ask the Court to dispose of Count I in a manner consistent with the *NFIB* decision.

It bears repeating: the State here is not trying to "revive" Count I, rather it is asking the Court to *dispose* of Count I based on what happened in *NFIB*. Much like when the Supreme Court grants certiorari in one a handful of similar cases, and after deciding the case, remands the similar cases to the lower courts for judgment to be entered consistent with their decision, the State here just asks the Court to enter a judgment that is consistent with the Supreme Court's decision. And if there is any doubt that there remains uncertainty as to how *NFIB* impacts the State's ability to enforce Article II, Section 37 of the Oklahoma Constitution, the Court need look no further than the federal government's own briefing in this case. *See* Dkt. 41-1 at 4 ("[T]he exchanges will...grant certifications that individuals are exempt from the *penalty* under the Act's minimum coverage provision[.]")(emphasis added); *but see National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2600 (2012)(invalidating the individual mandate as a penalty, but upholding it so long as the federal government enforces it only as a tax on otherwise lawful behavior).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th 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