UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-1612-WTL-MPB
	)	
INTERNAL REVENUE SERVICE, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs the State of Indiana and 39 public school corporations respectfully submit this Notice of Supplemental Authority in support of their Motion for Summary Judgment (submitted on March 5, 2014, ECF Nos. 44 (motion) and 45 (memorandum in support))[1] and in opposition to Defendants' Cross-Motion for Summary Judgment, (submitted on April 16, 2014, ECF Nos. 61 (motion) and 62 (memorandum in support)).

In *Texas v. United States*, No. 7:15-cv-00151-O (N.D. Tex. 2016), a group of states, including Indiana, brought a constitutional challenge to a federal requirement that states pay a "Health Insurance Providers Fee" to managed care organizations as part of "actuarially sound" rates under the Patient Protection and Affordable Care Act and implementing regulations. The Plaintiff States in *Texas* alleged that the inclusion of Provider Fees within these rates violated the Tenth Amendment and the intergovernmental tax immunity doctrine. *Texas v. United States*, No. 7:15-cv-00151-O, slip op. at 34 (N.D. Tex. Aug. 4, 2016) (order on motion to dismiss) (copy attached as Attachment 1). Highlighting the same federalism concerns the State cites in the present case, the Plaintiff States in *Texas* contend that forcing states to pay these fees as part of

[1] The 39 school corporations filed their Joinder in State of Indiana's Motion for Summary Judgment on March 5, 2014. ECF No. 49.

their negotiated rate amounts to an unconstitutional direct tax that impermissibly infringes on the "performance of . . . sovereign functions of government." *Id.* at 35 (quotation omitted). The United States filed a motion to dismiss and argued, in part, that these Provider Fees were "nondiscriminatory" and therefore permissible under the Tenth Amendment. *Id.* In an August 4, 2016 order, the United States District Court for the Northern District of Texas refused to dismiss the Plaintiffs States' intergovernmental tax immunity claim, because the states sufficiently demonstrated that "the statutory 'scheme' of the [Provider Fees] . . . 'unavoidably requires' that the States pay the [managed care organizations] the full amount of the [fees] to be paid to the federal government." *Id.* at 39–40 (quoting *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599, 609 (1975)).

The *Texas* decision supplements the State's arguments in this case found at pages 19–20 of its Memorandum in Support of Its Motion for Summary Judgment (ECF No. 45) and at pages 30–31 of its Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply Memorandum in Support of Its Own Motion for Summary Judgment (submitted on April 30, 2014 (ECF No. 65)).

More specifically, the *Texas* court's order supports the State's contention that a direct tax on states is not valid under the Tenth Amendment merely because it is nondiscriminatory. As it has here, the United States in *Texas* argued that non-discrimination is the touchstone for a tax to overcome intergovernmental immunity. *Compare* Attachment 1 at 35, *with* Defs.' Reply Mem. in Supp. of Cross-Mot. for Summ. J. at 26 (ECF No. 69) ("The intergovernmental tax immunity doctrine is not implicated where Congress subjects state employers to a nondiscriminatory tax."). The *Texas* court acknowledged that the Provider Fees at issue were nondiscriminatory, but nevertheless held that nondiscrimination is an insufficient shield against the intergovernmental

tax immunity doctrine. Attachment 1 at 39. Although the *Texas* court's order did not enter judgment for Plaintiff States on the merits, it narrowed the issue to whether the "legal incidence" of the Provider Fees fell on the Plaintiff States in violation of the intergovernmental immunity doctrine. *Id.* at 39–40.

Here, it is undisputed that Congress intended that states bear the legal incidence of the Employer Mandate, because "ACA Section 1514 imposes a direct tax on Indiana and its subdivisions" and treats the State "the same as it treats private corporations." State's Mem. in Supp. of Mot. for Summ. J. at 18–19 (ECF No. 45). Accordingly, the Employer Mandate constitutes a direct tax on Plaintiffs in violation of the Tenth Amendment.

WHEREFORE, Plaintiffs respectfully request that the Court consider this supplemental authority, which was not available before the close of summary judgment briefing in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2016, a copy of the foregoing document 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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