UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 1:13-cv-1612-WTL-TAB
	)	
INTERNAL REVENUE SERVICE, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' JOINT REPLY IN SUPPORT OF JOINT MOTION[1] FOR CONSOLIDATED ORAL ARGUMENT ON PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO DISMISS

The plaintiffs, collectively and by counsel, respectively submit their Joint Reply in Support of Joint Motion for Consolidated Oral Argument on Plaintiffs' Motions for Summary Judgment and Defendants' Motion to Dismiss.

1. The federal government argued in its response to the plaintiffs' request for oral argument that the Court should first conduct one oral argument on its Motion to Dismiss the Amended Complaint to resolve "jurisdictional objections," and then conduct a separate oral argument on the Plaintiffs' motions for summary judgment to resolve the merits. Dkt. 58. The Court should reject the federal government's suggestion and grant the plaintiffs' request for a consolidated oral argument on their motions for summary judgment (and any cross motion for summary judgment) and the defendants' motion to dismiss for the reasons that follow.

[1] To clarify, the "joint motion" was intended to indicate the agreement of the two sets of plaintiffs: the State of Indiana and the School plaintiffs. It was not intended to convey the agreement of the federal government to file the motion. Plaintiffs' opening paragraph specified what was denoted by "joint motion." *See* Dkt. 50, at 1.

2. The defendants cite to *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), to argue that their "jurisdictional objections must be resolved first." Dkt. 58. That proposition—which is not absolute in any event—has little to do with whether to consolidate hearing on the various dispositive motions.

3. First, Article III standing is unlikely to be a significant hurdle, given that several courts have already found that constitutional standing exists to challenge the mandates of the Patient Protection and Affordable Care Act, which makes it all the more likely at least one plaintiff has standing here. *See, e.g.*, *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89-90 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013); *Oklahoma ex rel. Pruitt v. Sebelius*, No. CIV-11-30-RAW, 2013 WL 4052610, at *6-*9 (E.D. Okla. Aug. 12, 2013) (holding that the State of Oklahoma had standing to challenge the IRS Rule in its capacity as an employer based on allegations in the Complaint that referenced "obligations," "actions," and "expenses" that the State incurred as a result of the Rule); *See Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 623 (W.D. Va. 2010)[2] ("The present or near-future costs of complying with a statute that has not yet gone into effect can be an injury in fact sufficient to confer standing."); *see also Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 692 (M.D. Pa. 2011) ("[Plaintiffs] must engage in financial preparation . . . in light of the impending effective date of the individual mandate," and thus suffer "an injury-in-fact that is imminent and the direct result of the individual mandate.").

4. In any event, *Steel Co.* has also been cited for the proposition that merits questions can be decided before prudential standing objections. *See U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 896 (D.C. Cir. 1999), *quoting Steel Co.*, 523 U.S. at 97 n.2

[2]*Rev'd on other grounds, Liberty Univ., Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011), *vacated on other grounds and remanded*, 133 S.Ct. 679 (2012).

("merits questions can be decided before . . . prudential standing questions . . . when the two questions overlap to such an extent that it would be 'exceedingly artificial to draw a distinction between the two.'").

5. Second, in order for the Court to resolve the jurisdictional challenges set forth in the defendants' motion to dismiss, the Court must first understand the merits of the plaintiffs' arguments. Specifically, the Court's thorough understanding that the plaintiffs' challenge to the IRS Rule is a pre-enforcement challenge to the merits of the Rule under the Administrative Procedure Act by those already directly injured by the Rule[3] is essential for the Court to contextualize the defendants' contentions that (1) the plaintiffs lack Article III standing because their "allegation of an injury in fact depends on speculation as to the facts of third parties not before the court," Br. in Supp. Mot. to Dismiss Am. Compl., Dkt. 37, at 19; and (2) the plaintiffs "lack prudential standing to adjudicate the tax liabilities of absent third parties," *id.* at 21.

6. Similarly, the Court's appreciation of the merits of the plaintiffs' Tenth Amendment arguments[4] will assist the Court in addressing the defendants' contentions that these claims are barred by claim and issue preclusion or for other reasons—which is why Plaintiffs spent significant portions of seven pages discussing the merits of their Tenth Amendment claims in response to the Motion to Dismiss. *See* State's Resp. to Mot. to Dismiss Am. Compl., Dkt. 38, at 22-28. For example, Section 1513 of the ACA is written as a commercial regulation predicated upon the Commerce Clause, but plaintiffs contend that, after *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), this provision is a massive, unprecedented, direct federal *tax* upon the sovereign States and their subdivisions. *NFIB*'s holdings regarding both the Commerce Clause and the Tax

[3] *See* Am. Br. in Supp. of Pl. School Corporations' Mot. for Summ. J, Dkt. 51, Ex. 1, at 1-45; and State of Indiana's Mem. in Supp. of its Mot. for Summ. J., Dkt. 45, at 1-12.

[4] *See* State of Indiana's Mem. in Supp. of its Mot. for Summ. J., Dkt. 45, at 15-32.

Clause together represent a major doctrinal shift in constitutional law, satisfying even what the defendants acknowledge is an exception to preclusion. *See* Defs.' Reply in Supp. Mot. to Dismiss Am. Compl., Dkt. 55, at 17-18. And Section 1514 of the ACA is clearly a pure exertion of Tax Clause power,[5] one that is not precluded because it was not even an issue in previous litigation.

7. To be sure, defendants support their Motion to Dismiss by disputing Plaintiffs' arguments concerning the Tenth Amendment claims. Defs.' Reply in Supp. Mot. to Dismiss Am. Compl., Dkt. 55, at 13 ("they [the plaintiffs] are simply wrong in their characterization of Section 4980H; the provision imposes a tax, not a legal obligation to offer health coverage."). But for present purposes, defendants' responses to plaintiffs' arguments actually support the point that whether Sections 1513 and 1514 violate the intergovernmental tax immunity doctrine is a complex legal question, the details of which the Court must understand before resolving the federal government's defenses, including its preclusion arguments.

8. In short, given the likelihood of Article III standing and the complexity and interrelated nature of the several issues presented in the plaintiffs' motions for summary judgment and the defendants' motion to dismiss, the plaintiffs believe that a consolidated oral argument on all of those issues presents the most effective use of judicial and the parties' resources.

[5] Plaintiffs mentioned in their Amended Complaint that Section 1514 is not authorized by the Commerce Clause, either. *See* Am. Compl., Dkt. 22, ¶ 216. But no plausible argument can be made that Section 1514 is anything other than a tax, and plaintiffs included it as an alternative in the Amended Complaint to avoid waiving the issue if defendants attempt to argue any other basis for Congress' authority to enact Section 1514.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2014, a copy of the foregoing "Plaintiffs' Joint Reply in Support of Joint Motion for Consolidated Oral Argument on the Plaintiffs' Motions for Summary Judgment and the Defendants' Motion to Dismiss" 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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