UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

STATE OF INDIANA'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT

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INTRODUCTION

In arguing for dismissal, the Federal Government takes aim at a case far different from the one actually pled. As recast by the Federal Government, this is a case where the State of Indiana is suing as *parens patriae* in order to litigate, and thereby increase, its citizens' individual tax burdens. Defs.' Mem. Supp. Mot. Dismiss ("MTD Br.") at 17. Such a lawsuit would make no sense, of course, and the Federal Government has not provided an accurate or fair characterization of the case. The State is not suing as *parens patriae*; it is not proposing to litigate individual tax burdens; and any impact of a judgment favoring the State on available subsidies would be entirely incidental to what the State actually seeks, which is to lift the burden of the Employer Mandate on the State.

In short, the State is suing as an employer that has altered its workforce policies to comply with federal law, and as a sovereign deprived by an unlawful IRS Rule that exceeds and is contrary to an Act of Congress. The Federal Government does not rebut the State's actual theories of standing, which are set forth directly in the complaint. Am. Compl. at 9-10. And its misconception of the nature of this case leads it to assert additional roadblocks—related to prudential standing to litigate another's tax liabilities and alternative procedures for seeking tax relief—that have no bearing on this case. Accordingly, its theories for dismissal of the Administrative Procedure Act claim must fail—as must its theories targeting the Tenth Amendment and judicial estoppel claims.[1]

[1] The United States asserts in a footnote that the State's claim is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a), which prohibits suits "for the purpose of restraining the assessment or collection of any tax[.]" MTD Br. at 28 n.6. The United States correctly acknowledges that the Seventh Circuit has foreclosed this argument with its holding in *Korte v. Sebelius*, 735 F.3d 654, 669-71 (7th Cir. 2013).

STATEMENT

This case centers on the interaction of two critical objectives of the Affordable Care Act ("ACA" or the "Act"). First, beginning in 2014, the ACA requires large employers to provide employees who work more than 30 hours per week with health care insurance featuring "minimum essential coverage," subject to a tax penalty (the "Employer Mandate"). 26 U.S.C. § 4980H(a)-(c). Second, the ACA also provides for a state-by-state series of on-line marketplaces or "exchanges" where health care insurance providers can market minimum essential coverage to individuals who do not qualify for Medicaid or have access to such coverage through their employers. Each State may elect to create its own exchange, ACA § 1311(b)(1), 42 U.S.C. § 18031(b)(1), but if "a State is not an electing State . . . the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate such Exchange within the State." *See* ACA § 1321(b)-(c); 42 U.S.C. § 18041(b)-(c).

Critical for this case is the difference between an exchange established by *a State* under § 1311 and an exchange established by *the Federal Government* (through the Secretary of Health and Human Services) under § 1321. In the State's view, the Employer Mandate is enforceable only in States with exchanges established by the State itself under § 1311, but in the Federal Government's view, it is enforceable even in States such as Indiana where the Secretary has established an exchange under § 1321. The IRS Rule targeted in this case—26 C.F.R. § 1.36B-1(k)—is the linchpin that connects the Employer Mandate to employers (including the State of Indiana) in States without § 1311 exchanges. To understand the connection, it is important to account for the Act's provisions governing premium assistance subsidies, which on their own do not harm the State, but which the Federal Government uses to impose unlawful burdens on the State.

The ACA provides a premium-assistance subsidy for lower-income individuals who purchase health insurance through an exchange. *See* 26 U.S.C. § 36B; 42 U.S.C. § 18082(c). Subsidy eligibility is important because when the federal government pays a subsidy to an insurance subscriber who works full-time for a large employer, that triggers application of the Employer Mandate's "assessable payments" if the employer did not offer the employee an opportunity to enroll in affordable, employer-sponsored coverage. *See* 26 U.S.C. § 4980H(a)-(b) (providing that the payment is triggered only if at least one full-time employee enrolls in a plan, offered through an Exchange, for which "an applicable premium tax credit . . . is allowed or paid").

Again, the State contends that, by the terms of the ACA, the subsidy is payable only to those who purchase insurance through an exchange established by *a State*, not through one established by the federal government. *See* 26 U.S.C. § 36B(b)(2)(A) (defining subsidy to be paid to a taxpayer "enrolled in through an Exchange *established by the State under [§] 1311* of the Patient Protection and Affordable Care Act") (emphasis added). That is, if no federal subsidies are available in a State because the State has not established its own Exchange, employers in that State will not be subject to the Employer Mandate's tax penalties. Indiana has not established its own Exchange, so by the terms of the ACA Indiana employers should not be subject to the Employer Mandate penalty if they fail to provide sufficient health insurance coverage to full-time employees.

Yet the IRS has promulgated a regulation purporting to authorize subsidies even in States where the federal government, rather than the State, has established the exchange. As a consequence, Indiana employers—including the State of Indiana itself—are subject to Employer Mandate penalties just the same as if the State had established its own exchange. The State, which meets the definition of "large employer" under the ACA, and which has reduced the hours of part-time employees in order to comply with the Act, has brought this case to challenge the IRS regulation under the Administrative Procedure Act.[2]

The State has also asserted a Tenth Amendment challenge to two aspects of the ACA: (1) the Employer Mandate as applied to States; and (2) a separate ACA provision imposing IRS reporting and certification requirements on the State. All of these claims are fully justiciable.

I. The State Has Suffered Direct Injury Owing to the IRS's Subsidy Expansion Rule Because that Rule Has Imposed Compliance Costs Realized Through Altered Workforce Policies

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), held that a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical[.]" *Id.* (internal quotes and citations omitted). Next, "there must be a causal connection between the injury and the conduct complained of[.]" *Id.* And, finally, "it

[2] The Federal Government mentions that, because of the IRS Rule being challenged here, beneficiaries of the Healthy Indiana Plan, which the State offers based on a limited-time waiver of Medicaid requirements granted by the Secretary, may seek subsidies for purchasing insurance on the federal exchange. The Federal Government does not explain how the Healthy Indiana Plan has any bearing on the State's case, however, which is understandable since the availability of federal subsidies is not a term of either the Healthy Indiana Plan or the waiver granted by the Secretary. Regardless of the availability of the subsidies, the Healthy Indiana Plan leverages the State's Medicaid grants in way that serves the most people. In any event, the State's waiver is not permanent, but expires at the end of 2014, with no guarantee of renewal.

must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotes and citations omitted). Here, the State easily fulfills "the irreducible constitutional minimum of standing" established by the Supreme Court. *Id.* at 560.

Indiana has more than 28,000 executive branch employees and already provides to the vast majority of them health insurance coverage that meets or exceeds the benefits prescribed by the ACA for minimum essential coverage. *See* Ex. A at 1. Historically the State has offered health insurance benefits only to employees meeting its own definition of "full-time" and has maintained a work force including several workers who worked more than 30 hours per week but were yet deemed "part-time" and ineligible for employer-sponsored health insurance. Ex. A at 2. The ACA, however, defines "full-time" to include anyone working, on average in a given month, 30 or more hours per week. 26 U.S.C. § 4980H(c)(4)(A).

Because it has not done so in the past, and because the cost would be so high, the State wishes not to provide (in 2014 and beyond) minimum essential coverage to part-time or intermittent employees working between 29 and 37.5 or more hours per week who would be classified as "full-time" by the ACA. *See* Ex. A at 2. Yet because of the IRS Rule and the Employer Mandate, the State must do one of the following: (1) provide health insurance to workers it has not previously insured; (2) pay a tax penalty for failure to provide that insurance; or (3) restructure its workforce so that no part-time employees work more than 30 hours per week.

The State has chosen option 3. *See* Ex. A at 1-2; Attach. 1 to Ex. A. That is, to comply with the ACA's Employer Mandate, made enforceable by the IRS Rule, the State has reduced the hours of several part-time or intermittent employees in order to avoid the "assessable payment" or employer penalty. The new personnel policy changes the definition of "part-time appointment," as defined in 31 Indiana Administrative Code Section 5-1-1(3), to authorize part-time employees to work only 30 hours per week on average. *See* Attach. 1 to Ex. A. The State has adopted this revised personnel plan now in order to follow the law as written, whereby hours worked in 2014 will determine who must be offered insurance under the mandate in 2015. *See* Ex. A at 2; IRS Notice 2012-58. Taking action to comply with the mandate constitutes Article III injury.

In any event, there are forty Plaintiffs in this case. As long as at least one has standing to bring a claim, this Court has jurisdiction to proceed to the merits. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other . . . plaintiffs have standing . . . ."). At this stage, so long as the complaint alleged sufficient facts to raise the claims for relief from mere conjecture to plausibility, this Court requires no more to deny the Motion to Dismiss and allow the case to proceed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-58 (2007).

A. The State's compliance-cost injuries are real, immediate and redressable

The Federal Government argues that the State lacks Article III standing because (i) it is speculative whether any of the State's employees will obtain a subsidy and thus trigger the assessable payments; and (ii) the State's injuries cannot be redressed because its employees are not parties. MTD Br. at 19-21. With regard to Indiana's claims, these arguments miss the mark entirely and in any event have been rejected by every court to address them. *See, e.g.*, *Oklahoma ex rel. Pruitt v. Sebelius*, No. CIV-11-30-RAW, 2013 WL 4052610, at *6-9 (E.D. Okla. Aug. 12, 2013); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89-90 (4th Cir. 2013).

1. Complying with a law rather than defying it and paying a penalty constitutes Article III injury

Bringing a pre-enforcement challenge to a statute or regulation is common federal court practice. The State itself is frequently called upon to defend new, and sometimes old, enactments against plaintiffs who assert that the law being challenged has prompted some change in policy or action that the plaintiff would prefer not to take but has done so to avoid a penalty or other form of enforcement. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951-52 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003); *Union Benefica Mexicana v. Indiana*, No. 2:11-CV-482 JD, 2013 WL 4088690, at *10-11 (N.D. Ind. Aug. 13, 2013); *Hodgkins ex rel. Hodgkins v. Peterson*, 175 F. Supp. 2d 1132, 1140-41 (S.D. Ind. 2001), *rev'd on other grounds*, 355 F.3d 1048 (7th Cir. 2004).

It is black-letter law that compliance with a law justifies a pre-enforcement challenge to that law. *Hays v. City of Urbana, Ill.*, 104 F.3d 102, 103 (7th Cir. 1997) ("What is necessary for standing is a concrete injury, redressable by success in the litigation. Costs of compliance necessary to avoid prosecution can constitute that injury."). And taking steps to comply with a statute or a rule so as to avoid the possibility of future penalties is sufficient to create cognizable injury under Article III. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (standing requirement met when plaintiffs would "have to take significant and costly compliance measures").

Indeed, with regard to the ACA itself, the Seventh Circuit has already held that "[t]he threat of financial penalty and other enforcement action is easily sufficient to establish standing to challenge the mandate prior to its enforcement. The [plaintiffs] need not violate the [contraception] mandate and risk enforcement of the regulatory scheme before bringing suit." *Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013); *see also Pruitt*, 2013 WL 4052610, at *8 (finding standing where Oklahoma anticipates "obligations, actions, and expenses" to ensure compliance) (quotation marks omitted); *Liberty Univ.*, 733 F.3d at 90 ("[Liberty] may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate . . . [and m]oreover, Liberty's injury is imminent . . . as Liberty must take measures to ensure compliance in advance of [the effective] date."); *cf. Halbig v. Sebelius*, No. 13-623(PLF), 2014 WL 129023, at *6 (D.D.C. Jan. 15, 2014) (holding that $20 per year in economic injuries establishes standing for individual plaintiffs). This rule has particular force here, particularly in light of the State's alteration of its workforce policies to avoid the possibility of paying a penalty. Accordingly, there can be no reasonable dispute that the State as employer suffers cognizable Article III harm from the IRS Rule, which effectively triggers application of the ACA Employer Mandate to the State.

2. The State need not wait for employee choices before taking steps to comply with the Employer Mandate

The Federal Government argues that Indiana does not suffer an Article III injury as an employer because it is speculative that any particular State employee would receive a subsidy, even given the IRS Rule. MTD Br. at 19. This argument is unavailing.

Most fundamentally, whether one of the State's employees ever receives a subsidy is irrelevant. Again, the injury at issue here is not the assessable payment the

State would then incur if it fails to offer coverage. It is instead the cost of *complying* with the Employer Mandate—namely, cutting back the hours of some employees—because the State has reasonably decided to comply rather than run the risk of incurring that massive liability. *See, e.g.*, *Liberty Univ.*, 733 F.3d at 89-90 ("Liberty need not show that it will be subject to an assessable payment to establish standing" because "it may well incur additional costs because of the administrative burden of assuring compliance[.]"). In other words, the State has reasonably decided to act to preclude any chance it could be hit with the Employer Mandate penalty, rather than risk liability if one of its employees that the ACA deems eligible for employer-sponsored insurance purchases coverage on the federal exchange and obtains a subsidy—as could happen under the IRS Rule. Am. Compl. at 50-53. That compliance injury is certain, not speculative. *Am. Booksellers*, 484 U.S. at 392 (standing based on "significant and costly compliance measures").

Even contingent liability is sufficient to confer standing where it prompts action designed to avoid liability. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court held that "contingent liability" sufficed for standing since it "immediately and directly affect[ed] the borrowing power, financial strength, and fiscal planning of the potential obligor." *Id.* at 431. *See also, e.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 26 (D.D.C. 2011) (ACA individual mandate case stating that "[i]t is established that the taking of current measures to ensure future compliance with a statute can constitute an injury[.]"); *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."). Here contingent liability has affected the State's employment policies and workforce planning, and that certain injury, while based on contingency planning, suffices to confer standing. Ex. A. at 1-2.

Regardless, even apart from compliance and contingency-planning theories, the test for standing is not absolute certainty, but a "substantial risk" of harm. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013). The State easily satisfies that standard, for it is virtually certain that if the State did not either cut back part-time employee hours or sponsor coverage for all of its employees, at least one such employee would obtain a subsidy. Employees who earn up to 400% of the federal poverty guidelines are eligible for a subsidy. *See* 26 U.S.C. § 36B(b). In 2014, an employee with no dependents could earn up to $45,960 and still qualify. *See* Obama Care Facts: Dispelling the Myths, http://obamacarefacts.com/obamacare-subsidies.php. In Indiana, an average part-time worker could earn up to $26,301.08 per year. *See* Ex. A at 2. So, while it is theoretically possible that none of the individuals who have had their hours cut below 30 by the State would buy subsidized insurance, the "substantial probability" is plainly otherwise.

3. The State's injury will be redressed when the IRS Rule is vacated

The Federal Government further submits that the State lacks standing because its "asserted injury would not be redressable through [its] challenge to the Treasury regulation" because no judgment by this Court "could bind . . . the employees who the [State] contend[s] may receive federal tax credits." MTD Br. at 21.

The State is targeting an IRS Rule that causes it injury, not its employees' individual claims for tax credits. It is seeking to bind *the Federal Government*—to vacate the IRS Rule. *See* 5 U.S.C. § 706(2) (authorizing courts to "hold unlawful and set aside" agency regulations); Am. Compl. at 61-62. That is the typical relief in an APA suit: "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962, 977 (S.D. Ill. 1999) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)), *aff'd*, 230 F.3d 947 (7th Cir. 2000).

The relief the State seeks would completely redress the injuries inflicted by the IRS Rule, even without an injunction precluding employees from seeking subsidies. This suit does not need to stop employees from seeking premium tax credits, MTD Br. at 21, because it would stop the Federal Government from *providing* those credits, and thereby prevent application of the Employer Mandate against the State. *See Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17-18 (D.D.C. 2004) (stating that it is "entirely appropriate" for court to furnish "[g]overnment-wide injunctive relief").

B. The State is also injured because the IRS Rule interferes with State policymaking authority created by Congress; the State is *not* invoking *parens patriae* standing

The Federal Government otherwise directs its ammunition at a theory of standing the State is not invoking: *parens patriae*. MTD Br. at 17-18. When a State litigates as *parens patriae*, it is asserting quasi-sovereign interests in the health, safety, and welfare of its citizens. *LG Display Co. v. Madigan*, 665 F.3d 768, 771 (7th Cir. 2011). Such litigation frequently arises, for example, in the consumer protection context, where, as a result of injuries to identifiable groups of citizens, States seek relief that goes beyond (but may sometimes include) compensation for the victims. *Id.*; *In re Tapper*, 123 B.R. 594, 599 (Bankr. N.D. Ill. 1991). Such relief might include injunctions against particular business practices or relief designed to foster an honest marketplace. *See Hood v. Microsoft Corp.*, 428 F. Supp. 2d 537, 546 (S.D. Miss. 2006). Nowhere does the Amended Complaint in this case assert or even imply that Indiana is litigating to protect the health, safety or welfare of citizens as *parens patriae*. As the Federal Government also seems to recognize, the interests of Indiana as a sovereign may well diverge from the individual interests of some Hoosiers. MTD Br. at 18. Accordingly, Indiana is not litigating to enforce or protect the rights of individual citizens (or any other third parties).

The Federal Government may be confused because Indiana does assert *sovereign* rights. But litigating such rights is different from litigating as *parens patriae*, which involves the wholly distinct notion of *quasi-sovereign* interests. As the Supreme Court recognized in the very *parens patriae* case cited by the Federal Government, States possess "sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code, both civil and criminal[.]" *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 601 (1982). These sovereign rights—which are not the basis for *parens patriae* claims—are "regularly at issue in constitutional litigation." *Id.*[3]

[3] *Parens patriae* standing is also distinct because it requires both a "quasi-sovereign interest" *and* individualized injuries to "a substantial segment" of the state's population such that state regulatory action would be justified. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607-08. Here, the State is not suing in federal court to protect citizens from the sorts of individualized harms that typically are at issue in *parens patriae* litigation, but instead to protect its authority to regulate as a sovereign. Relatedly, the Court in *Snapp* also mentioned that *parens patriae* standing may arise from a State's interest in "not being discriminatorily denied its rightful status within the federal system." *Id.* at 607. But a State's interest "in assuring that the benefits of the federal system are not denied to its general population," is not what Indiana asserts in this case. *Id.* at 608. Rather, in addition to its interest as an injured employer, the State invokes its core rights as a sovereign to make policy decisions.

In recent decades the Supreme Court has repeatedly recognized that States are injured for purposes of Article III's case-or-controversy requirement, and may sue the Federal Government, when state sovereignty is violated *by* the Federal Government. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 149, 174-77 (1992) (invalidating federal law requiring States to enact particular legislation); *Printz v. United States*, 521 U.S. 898, 918-33 (1997) (invalidating federal law requiring state and local officials to administer a federal program). Particularly relevant here, the Supreme Court likewise recognized standing for the States to assert their sovereign interests against the Federal Government in challenging a wholly unrelated provision in the ACA, wherein the Court also found in favor of the States on the merits. *See Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2601 (2012) (adjudicating a dispute between States as sovereigns and the United States over whether the ACA Medicaid expansion was unconstitutionally coercive under the Tenth Amendment).

Here, the injury to the State is agency action impinging State policymaking rights that are a function of the ACA itself. Section 1311 gives each State the option to establish an Exchange but does not require a State to do so. Relatedly, because 26 U.S.C. § 36B makes premium tax credits available only when policies are purchased "through an Exchange established by the State under [§] 1311 of the Patient Protection and Affordable Care Act," a State effectively causes premium tax credits to be available or not depending on whether it creates an exchange. *See* Am. Compl. at 43. Because the ACA uses payment of premium tax credits to trigger Employer Mandate penalties, it effectively affords States the policymaking authority over implementation of the

Employer Mandate. Establish a State exchange, and subsidies will trigger the mandate; choose not to do so, and no subsidies will be available to be that trigger.

The ACA does not tell States how to make this decision. There are no factors that must be taken into account, no policy goal that must be achieved. To the contrary, the ACA places the decision *solely* in the hands of each State. Each State had to decide for itself how to balance competing policy interests. Having balanced competing priorities, the majority of States ultimately decided that the interests of their people as a whole were better served by avoiding the applicability of § 4980H to employers within their boundaries (including their state and local governments). Robert Pear, *Most Governors Refuse to Set Up Exchanges*, N.Y. Times, Dec. 14, 2012, http://www.nytimes.com/2012/12/15/us/most-states-miss-deadline-to-set-up-health-exchanges.html. In Indiana, neither successive Governors nor successive legislatures have taken action to create an exchange. Under the terms of the ACA, subsidies should therefore not be available in Indiana, so the Employer Mandate should not be in effect. Yet now the IRS Rule, by expanding the availability of subsidies to include those who purchase insurance on a federal exchange, has deprived Indiana of its statutory right to effectuate a decision not to implement the Employer Mandate. *See* Am. Compl. at 43.

Because the sovereign interest at stake in this case was created by a federal statute, it is especially clear that a legally-cognizable interest is present, sufficient to establish Article III standing. As *Lujan* stressed, and myriad cases have reiterated, an "injury" is "an invasion of a legally protected interest," even an interest that "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Lujan*, 504 U.S. at 560, 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quotation marks omitted)). While Congress may not simply manufacture standing by "confer[ring] jurisdiction on Art. III federal courts to render advisory opinions," it "may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). This was the foundation of the Supreme Court holding that a State had standing to challenge the Federal Government's administration of federal law. "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). This recently restated rule regarding State standing means that since 2007 it is especially clear that federal courts can adjudicate claims brought by States similar to those brought by Indiana here.

Accordingly, federal courts routinely permit states to litigate against the federal agency action based on these rights. *See, e.g.*, *Okla. Dep't of Envtl. Quality v. E.P.A.*, No. 11-1307, 2014 WL 184624, at *3-4 (D.C. Cir. Jan. 17, 2014) (finding standing where the EPA's promulgation of a rule divested Oklahoma of the ability to implement its own environmental protection standards); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241-42 (10th Cir. 2008) (permitting Wyoming to challenge ATF regulations that interfered with Wyoming's restoration of firearms rights pursuant to 18 U.S.C. § 921(a)(33)(B)(ii)); *see also Ohio ex. rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228 (6th Cir. 1985) (finding standing where promulgation of an agency's rule effectively invalidated a state law).

Finally, because the State is suing in defense of its own sovereign interests, it is entitled to "special solicitude" in the court's analysis of its standing allegations. *Massachusetts*, 549 U.S. at 520. This "special solicitude" reflects the fact that because the States have surrendered some sovereign powers to the Federal Government, the Federal Government owes the States a reciprocal "duty of providing a remedy" for threatened harms to the States as sovereigns. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Such interests include States' "rights under federal law." *Massachusetts*, 549 U.S. at 520 n.17. The Affordable Care Act affords States policymaking authority over implementation of the Employer Mandate, and the IRS Rule has negated that authority. That is a sufficient basis for challenging the IRS Rule.

II. The State Has Prudential Standing

The Federal Government submits that "prudential" doctrine also precludes this case. MTD Br. at 21. It argues that the State's "claims violate one [prudential] limitation, namely, 'the principle that a party may not challenge the tax liability of another.'" *Id.* at 22 (quoting *United States v. Williams*, 514 U.S. 527, 539 (1995)). To the contrary, however, prudential concerns powerfully *favor* adjudicating the legality of billions in subsidies before they are disbursed (and may need to be clawed back).

As a general matter, the IRS Rule infringes upon Indiana's interest in correct agency application of ACA Sections 1311, 1321, and 1401-02. In *Wyoming ex. rel. Crank v. United States*, 539 F.3d 1236, 1244 (10th Cir. 2008), the court held that Wyoming's "interest in influencing the applicability of the Act" the ATF was using to stymie Wyoming's restoration of gun rights was within Wyoming's prudential standing "zone of interests." That interest alone should be sufficient for prudential standing here.

A. The State is not litigating the tax liabilities of third parties, and it is commonplace for facial challenges to federal laws to have incidental consequences on others' tax burdens

The Federal Government argues that the State cannot challenge the IRS Rule's expansion of subsidies because of an allegedly general principle preventing parties from "challeng[ing] the tax liability of another." MTD Br. at 22. Because invalidating the Rule would deprive third parties of tax credits, the Federal Government believes that the State cannot bring this suit. The State, however, is not "challenging the tax liability of another." Rather, it is challenging an IRS Rule that causes the State direct harm, and any impact on the tax liability of individual Hoosiers is incidental. What is more, the Federal Government's alleged general rule does not, in fact, exist.

1. Once again, it is inaccurate to describe this case as a challenge to the tax liability of third parties. While the ACA has placed individual subsidy claims in the causal link between the IRS Rule and the State's obligations under the Employer Mandate, a challenge to the Rule does not equate with a challenge to individual tax liability. That this litigation may have an incidental impact on the tax liabilities of unidentified citizens does not make it a case about those citizens' tax liabilities.

Otherwise, a host of constitutional litigation could be precluded on "prudential standing" grounds. For example, in *Massachusetts v. United States Department of Health & Human Services*, Massachusetts brought a Tenth Amendment challenge to the federal Defense of Marriage Act ("DOMA"). *See* 698 F. Supp. 2d 234, 249-53 (D. Mass. 2010), *aff'd on other grounds*, 682 F.3d 1 (1st Cir. 2012). DOMA "prevent[ed] same-sex married couples from filing joint federal tax returns," which clearly had an incidental effect on the resulting tax liabilities of those couples. 682 F.3d. at 6; *see also* 26 U.S.C. §

1(a)-(c). Yet neither the district court nor the court of appeals ever challenged the standing of Massachusetts to raise its claims on the theory that it challenged the tax liabilities of others.

The few cases cited by the Federal Government where courts have restricted the reach of particular statutory remedies help demonstrate this point. In *First American Title Insurance Company v. United States*, 520 F.3d 1051, 1053-54 (9th Cir. 2008), the court held that 26 U.S.C. § 7426 does not permit a third party obligated to pay another's tax liability the opportunity to "challenge the assessment." Similarly, in *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991), the court stated in a quiet title action under 28 U.S.C. § 2410 that third parties cannot challenge "the merits of the underlying tax assessments." *See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. IRS*, 845 F.2d 139, 144 (7th Cir. 1988). First, whatever the scope of those particular statutes, none applies to APA challenges to IRS rulemaking authority. Second, in each of those cases, the third-party was directly targeting the actual tax assessment of identified taxpayers. Here, in contrast, as the Federal Government itself points out, any impact on individual taxpayers, while likely, remains hypothetical. The State is not seeking to lessen its own burdens by litigating the actual tax burdens of others.

The Federal Government asserts that its third-party tax-litigation principle "applies with particular force where, as here, a plaintiff seeks to *increase* the tax liabilities of third parties who are not before the court." MTD Br. at 23. Again, the State is in no way "seeking" to increase anyone's tax liability. That may be an unfortunate incidental impact of the case, but that is not the same as making an increase in the tax liability of Hoosier workers the objective of the lawsuit. Consider that, as the State reduces part-time employee hours to under 30 per week to prevent them from qualifying for minimum essential coverage sponsored by the State, it may be reducing the tax liabilities of those employees by reducing their taxable income. But no one would say that is the *objective* of the new State part-time hours policy. The Federal Government's chain of logic is unsound.

2. Furthermore, the Federal Government's argument that there is a categorical rule against challenges to laws and rules granting tax credits to others is wholly refuted by the countless cases in which the Supreme Court and other federal courts have entertained precisely such challenges. As the Court observed in *Hibbs v. Winn*, 542 U.S. 88, 110 (2004), "numerous federal-court decisions . . . have reached the merits of third-party . . . challenges to tax benefits[.]" *Hibbs* was a challenge to "income-tax credits for payments to organizations that award . . . tuition grants to children attending private schools," *id.* at 92, and the Court allowed it.

Other examples abound. *See, e.g.*, *Byrne v. Pub. Funds for Pub. Schs. of N.J.*, 442 U.S. 907, 907 (1979) (challenge to tax deduction for third parties), *summarily aff'g* 590 F.2d 514 (3d Cir. 1979); *Franchise Tax Bd. of Cal. v. United Ams. for Pub. Schs.*, 419 U.S. 890, 890 (1974) (same); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 769 (1973) (same); *Grit v. Wolman*, 413 U.S. 901, 901 (1973) (same); *Finlator v. Powers*, 902 F.2d 1158, 1162 (4th Cir. 1990) (challenge to tax exemption for third parties); *Minn. Civil Liberties Union v. Roemer*, 452 F. Supp. 1316, 1318 (D. Minn. 1978) (challenge to tax deduction by third parties); *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889, 896-99 (D.D.C. 1974) (challenge to revenue ruling allowing third parties to avoid federal gift tax); *McGlotten v. Connally*, 338 F. Supp. 448, 452-54 (D.D.C. 1972) (allowing challenge to income-tax exemptions for third parties).

3. The Federal Government says that "the 'general rule' is "that no one can have standing to litigate the application of a tax to another." MTD Br. at 22 (quoting *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1551, 1560 (Fed. Cir. 1988)). None of the Federal Government's cases, MTD Br. at 22-24, holds that there is any rule prohibiting a challenge like this. For example, *National Corn Growers*—the very case quoted for this supposed rule—had to do with exhausting administrative remedies for challenging a customs tariff ruling. *Nat'l Corn Growers*, 840 F.2d at 1559-60. And the court in *Zambrano v. Reinert*, 291 F.3d 964, 970 (7th Cir. 2002), fully adjudicated whether Wisconsin's exclusion of wages earned by some fruit and vegetable processors from the statutory definition of employment violated the Federal Unemployment Tax Act. In a concurrence, Judge Easterbrook noted that allowing people to litigate the tax liabilities of others is a "problem . . . of redressability: A judicial order increasing a third party's taxes may or may not lead to the relief the plaintiff seeks." *Id.* at 975 (Easterbrook, J., concurring). As discussed in Part I.A.3, supra, the State seeks the invalidation of the IRS Rule—not a judicial order increasing the tax liabilities of its employees.

None of the other cases cited by the Federal Government offers any better support for its position. Some expressly decline to address the issue. *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 36 n.14 (1976) ("express[ing] no opinion" on the argument); *Apache Bend Apts., Ltd. v. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993) (en banc) (finding it "unnecessary for us to decide" whether an individual may litigate "another taxpayer's tax liability and, if so, under what circumstances," as plaintiffs "concede[d]" that their injury "cannot be redressed by the relief they seek" and thus obviously lacked standing). In others, the third-party challenges are rejected but on other grounds. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 754-61 (1984) (finding no Article III standing to challenge tax exemptions to discriminatory schools because exemptions were not causing injury); *Louisiana v. McAdoo*, 234 U.S. 627, 633-34 (1914) (in pre-APA case, rejecting suit on sovereign immunity grounds).

And in other cases, the courts actually allowed the third-party challenges to proceed. *See, e.g.*, *United States v. Williams*, 514 U.S. 527, 538-40 (1995) (rejecting the Federal Government's argument that third party's suit was barred); *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1430 (D.C. Cir. 1995) (finding that while a taxpayer organization lacked standing to challenge Section 13208 of the Omnibus Budget Reconciliation Act of 1993 on its own behalf, it did have standing to challenge the statute on behalf of its members).

B. Prudence counsels strongly in favor of reviewing the IRS Rule now

It is ironic that the Federal Government is invoking "prudential" concerns to defer review of the IRS Rule. After all, it concedes that review may permissibly occur at *some* point, MTD Br. at 25-28; School Pls.' Br. at Part II;[4] it merely wants to pay out billions of dollars in subsidies *before* the facial validity of the Rule is resolved.

However, if the IRS Rule is invalidated only *after* "twenty million people, or 80% of people who buy non-group insurance policies through the Exchanges," MTD Br. at 8,

[4] The Federal Government suggests that the State must use the "judicial remedy that is available for the plaintiffs here—an action for a tax refund." MTD Br. at 25. However, as discussed further in the School Plaintiffs' Brief at Part II, the State need not violate the law, incur penalties and seek a tax refund in order to bring their challenge. The State hereby incorporates the School Plaintiffs' arguments on this point.

receive subsidies, the tax liability of those millions of individuals will either have to be individually revised or (if the funds are not or cannot be recouped) the Federal Government will have lost billions of dollars. Moreover, all of the many businesses like the State who were improperly penalized for violating the ACA's Employer Mandate will have to file individual refund suits. All of this is true because the Federal Government refuses to submit to a federal adjudication of whether a rule conflicts, on its face, with clear statutory text. It is hard to imagine a *less* "prudent" course.

III. The State Is Not Estopped from Bringing Tenth Amendment Claims

In *Florida ex rel. McCollum v. United States Department of Health & Human Services*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010), the State contended that Sections 1511, 1513, and 9001 of the ACA violated the Tenth Amendment. *See* Pls.' Mem. Opp'n Defs.' Mot. Dismiss at 54-58. The Federal Government broadly argues that the Tenth Amendment claims raised here are barred by the judgment against the State in *Florida*, but tries to leverage too much from the *Florida* decision. For multiple reasons, the State should not be barred by either claim preclusion or issue preclusion either from relitigating claims and issues raised in the *Florida* litigation or from litigating claims not raised or not addressed in that case.

A. As litigation involving another recent massive federal enactment demonstrates, preclusion doctrine does not apply following material changes in the law, particularly to paramount questions of constitutional law

The Supreme Court's ultimate decision in the *Florida* case (*sub nom. NFIB v. Sebelius*, 132 S.Ct. 2566 (2012)), so materially changed the law governing the State's Tenth Amendment claims that preclusion doctrine should not apply.

1. The Supreme Court has observed "[a] general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945); *see also Dalombo Fontes v. Gonzales*, 498 F.3d 1, 2-3 (1st Cir. 2007) (denial of petition for panel rehearing) (holding that the court lacked jurisdiction to hear the petitioner's res judicata argument, but noting that the petitioner most likely would lose on the merits because the government's claims were not the same as the prior claim and because there is a traditional exception to res judicata as illustrated by *State Farm*); *Omran v. Gonzales*, 208 F. App'x 346, 347 (5th Cir. 2006) (stating that "[r]es judicata does not bar the second proceeding against Omran because the controlling law changed before this proceeding").

Intervening changes in the law are a particularly powerful antidote to preclusion doctrine when the underlying claims and issues involve paramount issues of constitutional law. *See Roche Palo Alto LLC v. Apotex, Inc.*, 531 F.3d 1372, 1380-81 (Fed. Cir. 2008) (recognizing an exception to claim preclusion when cases "involv[e] momentus [*sic*] changes in important, fundamental constitutional rights") (citation omitted); *Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210, 219 (D.C. Cir. 2004) (noting exception to preclusion doctrine "in cases implicating significant questions of constitutional law where there has been a change in controlling legal principles.").

Circuit courts have applied this exception to both claim and issue preclusion. *See, e.g.*, *Kania v. Fordham*, 702 F.2d 475, 476 n.2 (4th Cir. 1983) (affirming the District Court's decision not to apply claim preclusion and stating that "[a]fter *Abood*, it was conceivable that the *Arrington* decision was wrong under current constitutional doctrine;

the University, a state instrumentality, should not be allowed to hide behind that judgment with the possible result that individual constitutional liberties are denied."); *Christian v. Jemison*, 303 F.2d 52, 54 (5th Cir. 1962) ("The defendants' [claim preclusion] argument might be attacked on several bases. But the reason that demonstrates its inapplicability most clearly to us is the momentous change that has occurred in the field of constitutional law since the adjudication of the first suit."); *see also* Restatement (Second) of Judgments § 28 cmt. c (1982) ("Even when claims in two actions are closely related, an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties.").

District courts also have recognized an exception to claim preclusion when there have been changes to constitutional doctrine. *See Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178, 1182 (E.D. Va. 1969) ("The intervening and supervening edicts of the Supreme Court . . . [were] a substantial change in the law . . . [when] private litigation has extensive implications of public import, the rule of [claim or issue preclusion] is not allowed to stultify reassessment of the prior decision."); *cf. Hegna v. Islamic Revolutionary Guard Corps*, 908 F. Supp. 2d 116, 130 (D.D.C. 2012) (recognizing the existence of the exception).

2. Case law involving the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), offers another concrete illustration of this principle. BCRA is an exceptionally large statute, and has given rise to unremitting litigation challenging multiple facets, just like the ACA. Shortly after BCRA was passed, multiple individuals and organizations challenged multiple provisions on constitutional

grounds, and the Supreme Court decided a landmark case rejecting those claims. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

That holding has not precluded later challenges by the same parties to already-adjudicated provisions in light of the intervening Supreme Court decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). The Supreme Court in *McConnell*, where the Republican National Committee was a plaintiff, upheld BCRA Sections 323(a) and (b) bans on "soft money." *See McConnell*, 540 U.S. at 122-24, 131-33, 150-56, 166-71. But following *Citizens United*, the Republican National Committee challenged the soft-money ban once again in *Republican Nat'l Comm v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3544 (2010) ("*RNC*"). There, a three-judge District Court observed both that *Citizens United* "did not disturb *McConnell*'s holding with respect to the constitutionality of BCRA's limits on contributions to political parties," and that the Republican National Committee had been a full party in the *McConnell* case. *Id.* at 153-54. The District Court also found that the challenges to §§ 323(a) and (b), while nominally "as applied," "are essentially the same arguments considered and rejected in *McConnell*. There is nothing substantially new[.]" *Id.* at 161.

Under the Federal Government's argument here, the Republican National Committee's follow-up claims should have been precluded. Indeed, the Federal Government moved for *RNC* to be dismissed on claim preclusion and issue preclusion, making virtually the same arguments as here. *See* Mem. Supp. Mot. to Dismiss at 8-28, *RNC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (No. 1:08-cv-1953-RJL-RMC-BMK). Yet the three-judge court instead proceeded to summary judgment. *RNC*, 698 F. Supp. 2d at 163.

In short, *Citizens United* represented a significant change in constitutional law, and the District Court permitted the new challenge to proceed and issued a final ruling on the merits, rather than dismissing the claim as precluded.

By the same reasoning, Indiana's claims are not precluded here. First, in *Florida*, the States merely asserted that Section 1513 would "burde[n] the States' ability to procure goods and services and to carry out governmental functions." Am Compl. at 30, *Florida*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010). The factual changes detailed in this suit's Amended Complaint, both of specific injuries to the State and to the Schools as discussed in their brief, are concrete developments changing the nucleus of facts between the two suits. As one of the cases the Federal Government cites puts it, claim preclusion "does not bar parties from bringing claims based on material facts that were not in existence when they brought the original suit." *Apotex*, 393 F.3d at 218. Second, as outlined in more detail below, *NFIB* was at least as significant of a change in constitutional law as *Citizens United*. Whether Indiana would succeed on the ultimate merits or not, this Court should hold that its claims are not precluded, and instead decide the case on the merits at summary judgment.

3. The decision in *NFIB* so altered the legal background of the argument that the State's Tenth Amendment claims should not be precluded here. Indeed, these changes to Tenth Amendment doctrine effectively negate the first element of claim and issue preclusion: Indiana simply could not have made its current arguments before *NFIB*.

NFIB has effectuated three major changes in constitutional law. First, it recognized a new doctrine regarding the Tax Clause. Before *NFIB*, a provision such as the Individual Mandate, ACA § 1501, 26 U.S.C. § 5000A, would only be construed under the Commerce Clause. Now the Court has articulated an unprecedented multi-factor test for determining if a provision appearing to be a commercial regulation is instead actually an exertion of federal taxing power under the Tax Clause. *NFIB*, 132 S.Ct. at 2594. When a penalty (1) must be "paid into the Treasury by taxpayers when they file their tax returns[,]" (2) is "found in the Internal Revenue Code and [(3)] enforced by the IRS," which (4) "must assess and collect it in the same manner as taxes[,]" and (5) "produces at least some revenue for the Government[,]" it is a tax. *Id.* at 2594 (internal citations, brackets and quotation marks omitted). Where these factors are met, a requirement can still be a tax even if its "most natural interpretation" is as a Commerce Clause provision, including labeling the exaction a "penalty" instead of a "tax." *Id.* at 2594-95.

ACA Section 1513 meets all these requirements. Employers against whom the tax payments are assessed pay it into the Treasury via their corporate tax return. *See* 26 U.S.C. § 4980H(a)(2). The Employer Mandate is codified in the Internal Revenue Code. 26 U.S.C. § 4980H(a)-(b). It is enforced by the IRS. It is assessed and collected in the same manner as a tax. Indiana should be afforded the opportunity to present these arguments regarding the Employer Mandate that were not possible under the previous legal environment. The Supreme Court has never held that Congress may impose tax and related tax-filing burdens directly on States as sovereigns.

Second, the Supreme Court, in holding that Congress exceeded its powers under the Spending Clause through the Medicaid expansion provision, expanded use of the Tenth Amendment's anti-coercion principle as a form of intergovernmental immunity. *See NFIB*, 132 S. Ct. at 2601-06. The principles articulated by the Supreme Court in delineating the Tenth Amendment line between permissible and impermissible federal exertions over the States constrain Congress' enumerated powers under Article I, Section 8. *Id.* *NFIB* thereby undermines other provisions of the Act that regulate States as sovereigns, including Sections 1513 and 1514. The law has changed for Tenth Amendment claims, and Indiana should be allowed to present these new arguments.

The third major change is the Supreme Court's holding that the ACA Section 1501 Individual Mandate would be invalid under the Commerce Clause, *see NFIB*, 132 S. Ct. at 2586-91 (opinion of Roberts, C.J.); *id.* at 2644-50 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). Because *NFIB* holds that Congress may not use its Commerce Clause power to compel (and then regulate) commercial activity by non-commercial actors, it raises new doubts about whether Congress may regulate States as sovereigns through the Commerce Clause, and thus about whether the rule articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is good law. These doubts are particularly significant in light of the intergovernmental immunity arguments mentioned above. Indiana should be given the opportunity to present what are essentially new arguments from *NFIB* about the limits of Congress's power to regulate States under the Tenth Amendment.

B. The Federal Government proposes an unwarranted expansion of preclusion doctrine

1. The State did not challenge Section 1514 in *Florida*, and is not barred by claim preclusion from challenging it now

As the Federal Government notes, MTD Br. at 29, this case challenges not only Section 1513—the Employer Mandate penalty—but also a section of the ACA not challenged in *Florida*—the reporting requirement of Section 1514. *See* Am. Compl., *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256

(N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT). The Federal Government asserts that the State should be barred from raising this new challenge because the argument "could have been made" in the earlier case. MTD Br. at 29.

Notably, however, the Federal Government cites no cases holding that an entity regulated in multiple ways by a vast congressional enactment must bring all constitutional challenges in a single case. Such a rule would constitute an unnecessary expansion of federal preclusion doctrine. Just because Indiana challenged several provisions of a 2,700-page statute, that surely does not preclude it from challenging any other provisions of this voluminous enactment having many applications to the State.

"[C]laim preclusion does not bar a claim merely because it could have been raised in a prior action between the parties that was resolved by a final judgment on the merits[.]" *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1326 (Fed. Cir. 2008); *see also Cromwell v. Sac Cnty.*, 94 U.S. 351, 356 (1876) ("On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."). Rather, claim preclusion is generally intended to prevent plaintiffs from having a second attempt at litigating from a discrete factual occurrence. *See United States v. Stauffer Chemical Co.*, 464 U.S. 165, 181 n.2 (1984) ("[R]es judicata 'does not apply to unmixed questions of law . . . but a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action.' The distinction is between an abstract legal proposition and the application of that proposition to particular facts." (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)) (brackets and parentheticals omitted). It does not address a State's challenge to a separate provision of an Act of Congress.

Claim preclusion applies only where the prior judgment addressed the same "cause of action." *See Bernstein v. Bankert*, 733 F.3d 190, 226 (7th Cir. 2013). The same "cause of action" exists where the plaintiff can win only by persuading the court that the first judgment was in error." *N.Y. Life Ins. Co. v. Gillespie*, 203 F.3d 384, 387 (5th Cir. 2000). Here, the State need not persuade the court that the *Florida* court erred to prevail on its challenge to Section 1514. The *Florida* case targeted (and the court addressed) Sections 1511 and 1513 only on the asserted grounds that Congress could not use the Commerce Clause to regulate states in light of the Tenth Amendment. *See Florida ex. rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1151-54 (N.D. Fla. 2010). No preclusion applies because this new challenge to Section 1514 targets use of the taxing power, not the Commerce power. Am. Compl. at 64. Section 1514 is a tax reporting requirement not vulnerable to Commerce Clause attack (the subject of the *Florida* suit), so this is a different cause of action.

What is more, Section 1514 is also unrelated to the prior action because it is codified in a separate subtitle of the Internal Revenue Code (26 U.S.C. § 6056) from Section 1513 (26 U.S.C. § 4980H). Section 1513 imposes actual tax penalties on large employers, so is codified under Title 26, Subtitle D, "Miscellaneous Excise Taxes." But Section 1514 is a tax *reporting* provision, so it is codified in Title 26, Subtitle F, "Procedure and Administration." The cause of action challenging section 1514—a classic tax reporting provision authorized only by the taxing power—is thus unrelated to the cause of action challenging Section 1513. These distinctions matter, as claim preclusion doctrine applies only to claims "related" to those actually adjudicated. This case challenges a different burden codified in a different subtitle enacted using a different source of congressional power, so it is not the same "cause of action" litigated in *Florida*.

2. The Section 1514 claim is not barred by issue preclusion

"Issue preclusion bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments § 27 (1980)). This limitation on collateral estoppel applies here because the only Tenth Amendment objection is intergovernmental tax immunity doctrine.

The district court in *Florida* expressly did not address this doctrine on the merits, even with respect to the provisions of the ACA actually challenged there. *Florida ex. rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1154 n.14 (N.D. Fla. 2010). The Florida district court rejected the Federal Government's theory that the ACA Individual Mandate was a tax, *Florida*, 716 F. Supp. 2d at 1130-44, so the theory that Congress could not also use its taxing authority to regulate the States as employers was never squarely before it.

Accordingly, unlike in the *Florida* litigation, the State's intergovernmental tax immunity theory is now presented for adjudication. The Federal Government's contention that Indiana "litigated, and lost, the same issue it seeks to litigate here" is overly broad. *See* MTD Br. at 31. With Tenth Amendment doctrine in such obvious flux anyway, it would be inappropriate to foreclose the State from litigating this issue.

IV. The State May Seek to Estop the Federal Government from Collecting Any Employer Mandate Tax Penalties for Noncompliance In 2014

On July 2, 2013, Mark J. Mazur, Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, posted a blog entry stating that 26 U.S.C. § 6056 would not be in effect for 2014. Mark J. Mazur, U.S. Dep't. of the Treasury, Treasury Notes: Continuing to Implement the ACA in a Careful, Thoughtful Manner, http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx. The blog post also says the "shared responsibility payments (under section 4980H) for 2014[] . . . will not apply for 2014." *Id.* This statement has no legal force. Nothing in the text of ACA Sections 1513 or 1514 authorizes the Federal Government to suspend, extend, or modify taxes and mandates under those provisions, and nothing authorizes regulation via blog posts.

President Obama later elaborated on this temporary suspension of the law, claiming power to "tweak" provisions in a law so long as the modification "doesn't go to the essence of the law[.]" President Barack Obama, Remarks by the President in a Press Conference, Aug. 9, 2013, http://www.whitehouse.gov/the-press-office/2013/08/09/remarks- president-press-conference. Yet while Presidential speeches declare policy, they are not law. President Carter could not even end free parking for government employees without agency regulations. *Am. Fed. of Gov't Emps. v. Carmen*, 669 F.2d 815, 820 n.27 (D.C. Cir. 1981).

Later, an Internal Revenue Bulletin, citing no ACA textual authority, made the same announcement. *See* IRS Notice 2013-45, 2013-31 I.R.B. 116. IRS Notices, however, are merely agency newsletters, not law. 26 C.F.R. § 601.601(d)(1); *United States v. Correll,* 389 U.S. 299, 305-06 (1967) ("IRS Notices are merely announcements or positions of the IRS that are not binding on courts and do not have the force of law."). Accordingly, no source of law states that employers will not be liable under 26 U.S.C. Sections 4980H and 6056 for noncompliance in 2014.

Accordingly, Plaintiffs seek judicial estoppel to secure an actual statement of law to govern consequences for non-compliance in 2014. The Federal Government insists that there is no Article III case or controversy on this point—that employers may freely ignore the plain text of the ACA that says that penalties for noncompliance apply starting in 2014. MTD Br. at 32; ACA § 1514(d) (providing that 26 U.S.C. § 6056, which requires large employers to report on health insurance coverage, "shall apply to periods beginning after December 31, 2013"); ACA § 1513(d) (providing that 26 U.S.C. § 4980H, which spells out the Employer Mandate, "shall apply to months beginning after December 31, 2013"). It does not explain how a blog post, presidential speech, or agency newsletter overrides the express terms of an Act of Congress, has force of law or is consonant with the Bicameralism and Presentment Clause, U.S. Const. art. I, § 7, cl. 2.

As if to underscore the uncertainty surrounding enforcement for non-compliance in 2014, the Federal Government just this week published a formal rule similarly "tweaking" (again without apparent statutory authority) the enforceability of the Employer Mandate for *2015*. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014) (codified at 26 C.F.R. pts. 1, 54, & 301). Significant for present purposes, this final rule conspicuously does *not* codify the administration's statements concerning non-enforcement for 2014. *See id.* at 8544, 8545, 8569-70, 8577. The final rule mentions IRS Notice 2013-45—as if that alone creates administrative law on the subject—but does not promulgate a rule for it. *See id.* at 8577.

Generally speaking, statutory text alone implies a sufficient threat of enforcement to justify a case or controversy brought by those threatened. *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). Here, the threat of statutory text is accompanied by the Federal

Government's conspicuous omission of any rules governing ACA noncompliance for 2014 from its newly minted final rule. The Federal Government argues that the blog post, speech, and agency newsletter sufficiently forswear enforcement until 2015 to make any fear of enforcement unreasonable. But these are not law, and the State has no assurances that, for example, a future administration will not have a different view and seek penalties from employers noncompliant in 2014. It therefore has a reasonable apprehension of someday incurring sanctions for noncompliance during 2014. *See* Ex. A at 2 ("if the Employer Mandate were to be enforced for 2014, the State could be subject to penalties for not providing benefits to all who would qualify….").

The cases the Federal Government cites for the proposition that forswearing collection of penalties for a brief period vitiates a judicial controversy over the legality of that promise do not, in fact, so hold. In *Lawson v. Hill*, for example, the issue was whether the prosecuting attorney could be enjoined from enforcing the flag desecration law by virtue of the plaintiff's First Amendment rights, not whether the prosecutor's disclaimer of enforcement was legally binding in the future. 368 F.3d 955, 956-57 (7th Cir. 2004). Furthermore, the plaintiff had no reasonable fear of enforcement because Supreme Court doctrine already foreclosed prosecution for flag desecration as a matter of law. *Id.* at 957. Here, there is no *law* protecting the State, and the State in effect is seeking what the plaintiff in *Lawson* already had—a judicial declaration of what the *law* is. And in *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), only one among several defendants was dismissed, and then only because there was no evidence of intent to enforce over a span of decades. Here, the administration has no such track record, only a history of "tweak[ing]" the law as it sees fit.

The State is entitled to a declaratory judgment that the State has relief from complying with these provisions or making relevant assessable payments for noncompliance in 2014, and that the Federal Government is estopped from taking any such adverse action. Judicial estoppel "is an equitable doctrine invoked by a court at its discretion[.]" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotations omitted). "[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]" *Id.*

Here, given the apparently unprecedented (and certainly untested) executive branch "tweak" of statutory text, which invites employers to act in breach of plainly stated federal law, and given the implications for the health benefits of millions of employees and billions in potential Employer Mandate penalties, equity points toward adjudication of the State's claim. The State, like the rest of the Nation, needs an actual source of law substantiating that no Employer Mandate penalties will be collected based on failure to comply with all aspects of the ACA in 2014.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Defendants' motion to dismiss the Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2014, 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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