IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**No. 6:11-cv-00030-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.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

Under the Patient Protection and Affordable Care Act ("Affordable Care Act," or "Act"), hundreds of thousands of Oklahoma residents will receive federal premium tax credits, saving, on average, more than $5,000 per person annually on their federal tax liabilities. In this lawsuit, the State of Oklahoma seeks to deny Oklahomans the benefit of these tax credits. Oklahoma lacks standing to sue the federal government to deprive its residents of the benefits of federal law. Its complaint accordingly should be dismissed for lack of jurisdiction.

Congress enacted the Act in response to a crisis in the interstate health care market. The Act includes a series of measures that will expand the availability of affordable health coverage. Of particular relevance here, the Act provides for the establishment of new health insurance exchanges, in which the purchasing power of individuals and small businesses will be combined so that they can buy more affordable insurance. The exchanges will be established by states or, where states choose not to do so consistent with federal standards, by the federal government. The Act provides for subsidies and tax incentives to encourage the purchase of insurance, including premium tax credits for eligible individuals to help defray the cost of insurance purchased through the exchanges. An estimated 380,000 Oklahomans will benefit from these premium tax credits. The Act also creates tax incentives for employers to provide health coverage for their employees, including a tax penalty for certain large employers that fail to offer qualifying health coverage to their full-time employees.

The State of Oklahoma now seeks to deny Oklahoma residents the benefits of the federal premium tax credits that will be available to individuals who obtain their insurance through an exchange. It contends that it will not establish an exchange, leaving to the federal government the responsibility to establish the exchange that will operate in this state. Oklahoma (creatively)

argues that Oklahoma residents cannot obtain premium tax credits for insurance purchased through such a federally-facilitated exchange. It is well settled, however, that the jurisdiction of the federal courts is limited to the resolution of actual cases or controversies, and that a state's attempt to litigate its citizens' rights or obligations under federal law does not create such a case or controversy. (For the same reason, Oklahoma lacks standing to revive its challenge to the Act's minimum coverage provision, which, in any event, has already been sustained by the Supreme Court as an exercise of Congress's taxing power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) ("*NFIB*").)

Oklahoma's explanation for why it seeks to take federal tax credits from its own residents only compounds its jurisdictional difficulties. It notes that, if a large employer does not offer adequate health coverage to its full-time employees, and if one or more of those employees buys insurance through an exchange and receives premium tax credits for that insurance, the employer will be subject to increased federal tax liability. Oklahoma declares that, under its theory, if the federal government establishes the exchange that will operate in this state, and premium tax credits are unavailable for the purchase of insurance on that exchange, then large employers in Oklahoma will not be at risk of this increased tax liability. Oklahoma reasons that the state economy would benefit if these employers were relieved of this potential federal tax liability. This speculative claim of a chain of economic effects does not meet the requirements of Article III, under which a plaintiff must show that it suffers a concrete injury. In any event, any claim for relief from the large employer tax penalty belongs to the employer itself, not the state.

Oklahoma fares no better when it attempts to recast its claim as an attempt to litigate its own potential liability for the Act's large employer tax penalty. Oklahoma can provide no more than conjecture and speculation that it will be subject to that penalty, which applies only if a

large employer fails to provide coverage to its full-time employees that meets certain minimum standards. Oklahoma does not make any allegations in its amended complaint regarding the nature of the coverage that it provides for its employees, or the likelihood that it will be subject to the penalty. Indeed, it appears that Oklahoma offers relatively generous coverage to its employees, and that it is therefore very unlikely that the penalty will apply to the state. Because Oklahoma fails to allege an injury-in-fact arising from the operation of the penalty, it lacks standing to raise its challenge.

In addition, there is a second jurisdictional bar to Oklahoma's challenge to the large employer tax penalty. Oklahoma asks the Court to restrain the Secretary of the Treasury from assessing and collecting that penalty. The Anti-Injunction Act prohibits Oklahoma from maintaining a suit that seeks this relief. An employer that is subject to the tax penalty must instead bring a challenge through the procedures prescribed by law, namely through a refund action brought in district court after paying the tax penalty in full.

BACKGROUND

I. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), to address a crisis in the national health care market. The Act establishes a framework of economic regulation and incentives that will reform health insurance markets, expand access to health care services, control costs, and reduce the market-distorting effects of cost-shifting. The Act's reforms have five main components.

First, for the individual and small-group health insurance markets, Congress established health insurance exchanges "as an organized and transparent marketplace for the purchase of health insurance where individuals and employees (phased-in over time) can shop and compare

health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (2010) (internal quotation omitted). The exchanges will allow individuals and small employers to use the leverage of collective buying power to obtain prices and benefits that are competitive with those of large-employer group plans. 42 U.S.C. §§ 18031-18044. Among other functions, the exchanges will certify and rate the qualified health plans that will be offered in the exchanges; determine the eligibility of individuals to enroll through the exchanges in these qualified health plans; determine the eligibility of individuals for advance payments of the Act's premium tax credits and cost-sharing reductions (discussed below); and grant certifications that individuals are exempt from the penalty under the Act's minimum coverage provision (also discussed below). 42 U.S.C. § 18031(d)(4). If a state decides not to establish an exchange, the Act directs that the Secretary of Health and Human Services shall "establish and operate such Exchange within the State." 42 U.S.C. § 18041(c)(1).

Second, the Act removes barriers to health insurance coverage. Under prior law, a variety of insurance industry practices increased premiums for, or even denied coverage to, those with the greatest health care needs. Beginning in 2014, for example, the Act will bar insurance companies from refusing to cover individuals because of a pre-existing medical condition, 42 U.S.C. §§ 300gg-1(a), 300gg-3(a), or from charging higher premiums based on a person's medical condition or history, 42 U.S.C. § 300gg. The Act also bars insurance companies from canceling insurance absent fraud or intentional misrepresentation of material fact, 42 U.S.C. § 300gg-12, or from placing lifetime dollar caps on the benefits of the policyholder for which the insurer will pay, 42 U.S.C. § 300gg-11.

Third, Congress enacted new premium tax credits and cost-sharing reduction payments as incentives for individuals to maintain a minimum level of health insurance. The Act establishes

federal premium tax credits to assist eligible individuals with household incomes from 133% to 400% of the federal poverty level to purchase insurance through the new exchanges. 26 U.S.C. § 36B. These premium tax credits, which are advanceable and fully refundable such that individuals with little or no income tax liability can still benefit, are designed to make health insurance affordable by reducing a taxpayer's net cost of insurance. For eligible individuals with income up to 250% of the federal poverty level, the Act also provides for federal payments to insurers to help cover those individuals' cost-sharing expenses (such as co-payments or deductibles) for insurance obtained through an exchange. 42 U.S.C. § 18071(c)(2); 45 C.F.R. § 155.305(g). Individuals who purchase coverage either through state-based exchanges or through federally-facilitated exchanges can be eligible for these premium tax credits and cost-sharing reductions. 26 C.F.R. §§ 1.36B-1(k), 1.36B-2(a); 45 C.F.R. §§ 155.20, 155.305. An employee who is eligible for employer-sponsored health coverage may receive premium tax credits or cost-sharing reductions only if the employee is required to pay more than 9.5% of his household income for that coverage, or if the plan fails to cover at least 60% of the total allowed costs of benefits under the plan. 26 U.S.C. § 36B(c)(2)(C).[1]

The Congressional Budget Office ("CBO") has projected that, by 2022, 80% of people who buy non-group insurance policies through exchanges will receive premium tax credits. CBO, *Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision*, tbl. 3 (July 24, 2012). The average subsidy, for each person who receives subsidized coverage through the exchanges, will amount to $5,320 per person in 2014, rising to $7,510 in 2022. *Id.* Those credits, on average, will cover nearly two-thirds of the

[1] In addition, Congress provided for expanded eligibility for Medicaid to cover all individuals with income below 133% of the federal poverty line. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

premiums for policies purchased through the exchanges. CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, at 6 (Nov. 30, 2009). Approximately 381,500 Oklahoma residents will be eligible for the Act's premium tax credits beginning in 2014, resulting in savings on those residents' federal tax liabilities of at least $1.5 billion per year. Jennifer Sullivan et al., *Lower Taxes, Lower Premiums: The New Health Insurance Tax Credit in Oklahoma* at 2-3 & tbls. 1, 2 (Families USA 2010).

Fourth, the Act builds on the existing system of employer-based health coverage, in which most individuals receive coverage as part of employee compensation. As with previous measures designed to encourage employer-based health coverage, Congress used the federal tax laws to help achieve its goal, establishing tax incentives for eligible small businesses to purchase health insurance for their employees, 26 U.S.C. § 45R, and prescribing tax assessments under specified circumstances for certain large businesses that do not offer their full-time employees adequate coverage, 26 U.S.C. § 4980H.

Under the latter provision, a large employer that offers health coverage to its employees will be subject to a "tax," 26 U.S.C. § 4980H(b)(2), *see also* 26 U.S.C. § 4980H(c)(7), if one or more of its full-time employees "has been certified to the employer under [42 U.S.C. § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 U.S.C. § 4980H(b)(1)(B); *see also* 26 U.S.C. § 4980H(a)(2) (same condition for assessment against large employer that offers no coverage to its employees). As noted above, an employee who is eligible for employer-sponsored health coverage is eligible to receive these subsidies only if the coverage offered by the employer fails to meet certain standards for adequate coverage. *See* 26 U.S.C. § 36B(c)(2)(C). Accordingly, a large employer that offers coverage to its full-time

employees that meets these standards cannot be subject to the Section 4980H tax penalty.

Fifth, Congress added the minimum coverage provision to the Internal Revenue Code, which, beginning in 2014, requires non-exempted individuals to maintain a minimum level of health insurance or else pay a tax penalty with their annual income tax return. 26 U.S.C. § 5000A.[2] The penalty does not apply to, among others, individuals whose household income is insufficient to require them to file a federal income tax return, whose contributions toward coverage exceed 8% of their household income, who establish that the requirement imposes a hardship, or who satisfy certain religious exemptions. 26 U.S.C. § 5000A(d), (e).

II. This Litigation

The State of Oklahoma filed suit in January 2011, alleging that Congress had exceeded its Article I powers by enacting the Act's minimum coverage provision. (Compl., ECF 2.) The defendants moved to dismiss the complaint for lack of jurisdiction. (Defs.' Mot. to Dismiss, ECF 22.) This Court stayed proceedings in this case pending the resolution of a case in the Supreme Court raising similar issues. (Order, ECF 30.) On June 28, 2012, the Supreme Court sustained the minimum coverage provision as an exercise of Congress's Article I taxing power. *NFIB*, 132 S. Ct. at 2598 ("Congress had the power to impose the exaction in § 5000A under the taxing power.").

Oklahoma then filed an amended complaint. (Am. Compl., ECF 35.) It contends that it will not establish an exchange, and that the Secretary of Health and Human Services will instead establish the exchange that will operate within the state. (*Id.*, ¶ 12.) The amended complaint

[2] An individual may satisfy this provision through enrollment in any employer-sponsored insurance plan, an individual market plan including a plan offered through the new exchanges, a grandfathered health plan, certain government-sponsored insurance programs such as Medicare, Medicaid, or TRICARE, or similar coverage recognized by the Secretary of Health and Human Services in coordination with the Secretary of the Treasury. 26 U.S.C. § 5000A(f).

raises five counts. First, Oklahoma asks this Court to declare that the minimum coverage provision exceeds Congress's Article I power to regulate interstate commerce, and to enjoin the defendants from "enforcing [26 U.S.C. § 5000A] in a manner inconsistent with the above-described declaration." (*Id.*, ¶ 44.) Second, it asks the Court to award declaratory and injunctive relief holding that, because the federal government will establish the exchange that will operate in Oklahoma, no Oklahoma residents will be eligible to receive premium tax credits under 26 U.S.C. § 36B, and, consequently, the 26 U.S.C. § 4980H tax penalty may not be assessed or collected against any large employers in Oklahoma. (*Id.*, ¶ 55.) Third, it contends that the Treasury Department improperly promulgated a regulation that permits premium tax credits to be awarded to individuals who purchase coverage through federally-facilitated exchanges, and it asks the Court to invalidate that regulation. (*Id.*, ¶ 73; *see* 77 Fed. Reg. 30,377 (May 23, 2012)). Fourth, Oklahoma contends that it would be unconstitutional to subject its state government to the employer responsibility penalty. It acknowledges that this claim fails under the authority of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), but it reasons that *Garcia* "should be overruled." (ECF 35, ¶ 76.) Last, it contends that, if federally-facilitated exchanges are treated as the equivalent of state-based exchanges for the purposes of the Affordable Care Act, this treatment would constitute a commandeering of the State's legislative powers in violation of the Tenth Amendment. (*Id.*, ¶ 81.)

STANDARD OF REVIEW

The defendants move to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Oklahoma bears the burden to show that this Court has jurisdiction over its complaint. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005).

ARGUMENT

I. OKLAHOMA LACKS STANDING

A. A State Does Not Have Standing to Litigate Its Citizens' Rights and Obligations Under Federal Law

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation omitted). "A federal court may not pronounce on 'questions of law arising outside' of such 'cases and controversies.'" *Virginia v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012) (quoting *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011)). The requirement of a case or controversy is essential to ensure that a federal court will involve itself only in live disputes between the parties actually before it, and not "hypothetical cases" involving absent third parties. *United States v. Raines*, 362 U.S. 17, 22 (1960); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 317 (1966) (holding that state lacked standing to challenge provision of federal law before it had been enforced in that state). Oklahoma's complaint does not present an actual case or controversy. It asks the Court to adjudicate the validity of the Affordable Care Act's minimum coverage provision, and the application of the Act's premium tax credits and large employer tax penalty, with respect to Oklahoma residents. Longstanding principles governing *parens patriae* standing, however, prohibit the State of Oklahoma from litigating against the United States on its citizens' behalf.

Insofar as Oklahoma's complaint asserts any cognizable rights, they are the rights of its residents, both individuals and businesses. The Supreme Court has long held, however, that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing

Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923), and *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)). As the Supreme Court explained in *Mellon*, the citizens of a state "are also citizens of the United States," and "[i]t cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Mellon*, 262 U.S. at 485. The Court stressed that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.* at 485-86. "In that field it is the United States, and not the state, which represents them as parens patriae." *Id*. at 486; *see also Virginia*, 656 F.3d at 269.

These principles control here. Oklahoma's complaint asks this Court "to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government." *Mellon*, 262 U.S. at 484-85. Such abstract questions do not present a justiciable issue. Oklahoma's suit falls squarely within the rule that a "State does not have standing as a *parens patriae* to bring an action on behalf of its citizens against the federal government because the federal government is presumed to represent the State's citizens." *Wyoming v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *see also Texas v. ICC*, 258 U.S. 158, 162 (1922) (state's claim of infringement upon state sovereignty was merely "an abstract question of legislative power," not a justiciable case or controversy); *New Jersey v. Sargent*, 269 U.S. 328, 337 (1926) (allegations that provisions of federal law "go beyond the power of Congress and impinge on that of the state . . . do not suffice as a basis for invoking an exercise of judicial power").

B. Oklahoma Lacks Standing to Litigate the Validity of the Minimum Coverage Provision

Under these principles, Oklahoma lacks standing to litigate any of the counts in its amended complaint. It asks the Court (in Count I) to adjudicate the application of the Act's

minimum coverage provision with respect to Oklahoma residents. On this score, it acknowledges that the Supreme Court has upheld the validity of the minimum coverage provision as an exercise of Congress's taxing power, *see NFIB*, 132 S. Ct. at 2598, but it contends that this Court should decide whether the provision is also justified under Congress's commerce power. It asks the Court to enjoin the defendants from "prospectively enforcing Section 5000A of [the] Act in a manner inconsistent with" the decision of the Supreme Court upholding the provision as an exercise of the taxing power, ECF 35, ¶ 44, but it fails to identify any circumstances where a distinction between the commerce power and the taxing power might matter. Any dispute whether Section 5000A is constitutional under only one, or more than one, of Congress's enumerated powers "raises only 'abstract questions of political power,'" *Virginia*, 656 F.3d at 271 (quoting *Mellon*, 262 U.S. at 485), and does not raise any case or controversy over which this Court could have jurisdiction.

Moreover, even if there were some circumstances in which the distinction could matter (and there are none), the proper party to litigate the issue would be an individual who is subject to the minimum coverage provision, not a state government. Oklahoma's reading of the Affordable Care Act presents only a "difference of opinion" between the state and the federal government, not a case or controversy. *United States v. West Virginia*, 295 U.S. 463, 473-74 (1935). *See also Florida v. Mellon*, 273 U.S. 12, 17 (1927) (alleged conflict between state and federal inheritance tax laws did not give state standing to sue); *Texas v. United States*, 523 U.S. 296, 302 (1998) (state's claim of "threat to federalism" from application of federal law was mere "abstraction," in absence of concrete injury to state). Oklahoma's enactment of a state constitutional amendment that declares a right not to participate in "any health care system," OKLA. CONST. art. II, § 37(B)(1), does not change this result. As the Fourth Circuit concluded in

rejecting another state's identical claim of standing to challenge the minimum coverage provision, "the mere existence of a state law like [Oklahoma's constitutional amendment] does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts." *Virginia*, 656 F.3d at 269; *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983) ("federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law").

C. Oklahoma Lacks Standing to Litigate Its Residents' Eligibility for Federal Tax Credits, or Potential Federal Tax Liabilities

Oklahoma fares no better in its challenge (in Counts II and III) to the application of the Act's premium tax credits and large employer tax penalty to Oklahoma residents. (Count IV is discussed separately below.) Oklahoma seeks to stand in the shoes of its citizens in order to litigate their potential federal tax liabilities. But, again, the state has no standing "'to protect her citizens from the operation of federal statutes.'" *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (quoting *Mellon*, 262 U.S. at 483)). The rationale for the bar against *parens patriae* standing applies with particular force here. In this case, Oklahoma asserts a position that is directly *adverse* to the approximately 381,500 Oklahoma residents who will receive a premium tax credit under the Act, but who would not if Oklahoma were to prevail in this suit. The bar on *parens patriae* standing serves to protect individuals where the state's "litigation approach might well diverge from that of an individual to whom the challenged [provision] actually does apply." *Virginia*, 656 F.3d at 272; *see also Illinois Dep't of Transp. v. Hinson*. 122 F.3d 370, 373 (7th Cir. 1997) (noting that standing requirements prevent outside parties, such as state government officials, from "wresting control of litigation from the people directly affected"). Given that an Oklahoma resident who will receive a premium tax credit would likely take a litigation approach

that "diverge[s]" from his state government's views regarding his eligibility for that tax credit, Oklahoma's claim to litigate on its residents' behalf should be rejected.

Oklahoma reasons that it nonetheless has standing to litigate other parties' federal tax liabilities because it believes, as a policy matter, that the Act will affect its ability "to maintain a competitive environment to attract new businesses," and that the Act's purportedly adverse economic consequences will negatively affect the state's tax revenues. (ECF 35, ¶ 14.) But, in order to have standing, Oklahoma "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." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation, internal quotation, and footnote omitted). Oklahoma's views of the Act's economic effects are entirely "conjectural" and "hypothetical." It would be just as easy (indeed, easier) to conclude that the Act's reforms, including the projected $1.5 billion in premium tax credits that will be provided to Oklahoma residents, will provide a benefit, rather than a burden, to the state and national economy. *See, e.g.*, Council of Economic Advisers, *The Economic Case for Health Care Reform* 36-37 (June 2009) (noting projected increase to gross domestic product as a result of the Act's reforms).

As a result, Oklahoma's generalized assertions of the purported economic effects of the Act's tax credits and tax penalties do not state an actual injury that could support its claim of standing. *See DaimlerChrysler*, 547 U.S. at 344 (rejecting similarly speculative claim of injury from economic effects of state tax credits); *Ariz. Christian School Tuition Org.*, 131 S. Ct. at 1443 (rejecting "unjustifiable economic and political speculation" of economic effect of tax credits as basis for stnnding). Indeed, "'the unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state

powers, suggests . . . that impairment of state tax revenues should not, in general, be recognized as sufficient injury-in-fact to support state standing.'" *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012) (quoting *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976)). Oklahoma's attempt to litigate the potential federal tax liabilities of its residents fails, accordingly.

Nor can Oklahoma preserve its claim by recasting it as one arising under the Tenth Amendment (in Count V). It asserts that, if federally-facilitated exchanges are deemed to be the equivalent of state-based exchanges for the purposes of the Affordable Care Act, this treatment would amount to the commandeering of the State's legislative powers in violation of the Tenth Amendment. Oklahoma does not explain, however, how a provision of federal law directing the *federal* government to act constitutes commandeering of the *State's* legislative powers. Its claim accordingly does not state any injury-in-fact to the state that would be cognizable under the Tenth Amendment or otherwise. A state, for example, could assert an injury to its own interests if a federal measure commands the state to take action, *e.g.*, *New York v. United States*, 505 U.S. 144 (1992) (federal law required state to take title to nuclear waste or enact federally-approved regulations), or if a federal measure prohibits specified state action, *e.g.*, *Oregon v. Mitchell*, 400 U.S. 112 (1970) (federal law prohibited literacy tests or residency requirements in state elections). But the Affordable Care Act does not command Oklahoma to do, or refrain from doing, anything; it simply provides that the federal government will establish the exchange that will operate in Oklahoma if the state government declines to do so. *See Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1154-56 (N.D. Fla. 2010), *rev'd on other grounds by NFIB*. In the absence of a concrete effect on the regulatory activities of the state government, a state may not base its standing on an abstract interest in an asserted conflict

between state and federal law, or in its preferred interpretation of a federal statute. *See, e.g.*, *Hinson*, 122 F.3d at 372-73 (state lacked cognizable injury where ability to enforce statutes was not hindered).

D. Oklahoma Does Not Have Standing to Challenge the Possibility that It Would Be Subject to the Large Employer Tax Penalty

In addition to its attempt to litigate the potential federal tax liabilities and tax credits of its residents, Oklahoma also seeks an advance declaration of its own potential liability for the large employer tax penalty under 26 U.S.C. § 4980H. It asserts (in Count IV) that, if the Act's system of premium tax credits and large employer tax liabilities is not invalidated with respect to Oklahoma residents, the state itself will be subject to the tax penalty under Section 4980H in its capacity as an employer. It asserts that this liability would violate the Tenth Amendment, although it acknowledges that this claim would be foreclosed unless *Garcia* is overruled.[3] Again, however, Oklahoma has failed to allege an injury-in-fact; its claim rests on its "conjectural" and "hypothetical" speculation that it will be subject to the Section 4980H penalty in the absence of a ruling in its favor in this action. Its complaint, however, fails to allege any facts that could support that conclusion.

As noted above, not every large employer can be subject to the Section 4980H tax penalty. If a large employer offers health coverage to its full-time employees, it will be subject to the tax penalty only if at least one of its full-time employees is certified as having enrolled in a qualified health plan in an exchange and that employee is allowed premium tax credits or cost-sharing reductions. 26 U.S.C. § 4980H(b)(1). An employee of a large employer, however, will

[3] This Court may also dismiss Count IV for lack of subject-matter jurisdiction in light of Oklahoma's acknowledgement that existing Supreme Court precedent forecloses this claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (dismissal for lack of subject-matter jurisdiction is proper when claim is foreclosed by Supreme Court precedent).

only receive premium tax credits or cost-sharing reductions if the employer-sponsored coverage fails to meet certain standards for adequate coverage, that is, if its plan fails to cover at least 60% of the total allowed costs of benefits under the plan, or if the employee is required to pay more than 9.5% of his household income for that coverage. 26 U.S.C. § 36B(c)(2)(C). Accordingly, a large employer that offers adequate coverage to its full-time employees cannot be subject to the Section 4980H tax penalty.

Oklahoma's amended complaint does not make any allegations concerning the health coverage that it provides for its employees, or otherwise concerning the likelihood that it will be subject to the Section 4980H tax penalty. In particular, Oklahoma does not allege that it fails to provide health coverage to its full-time employees, or that the terms of that coverage fall short of the standards for adequate coverage. (Indeed, it is highly doubtful that Oklahoma could so allege, as it in fact offers generous coverage to its employees. *See* Okla. Employee Benefits Dep't, *2013 Benefits Enrollment Guide* at 3-6, available at ebc.state.ok.us/en/Benefits/py2013/Documents/EnrollmentGuideBooklet_2013.pdf.) Because Oklahoma cannot allege that it is likely, as opposed to speculative, that it will be subject to the Section 4980H penalty, it lacks standing to seek to litigate the potential application of the penalty to it as an employer. *See, e.g., Morgan v. McCotter,* 365 F.3d 882, 888 (10th Cir. 2004) ("mere possibility" of "future injury" is inadequate to establish injury-in-fact).

II. The Anti-Injunction Act Bars Oklahoma's Attempt to Restrain the Assessment and Collection of the Large Employer Tax Penalty

This Court lacks jurisdiction over Oklahoma's challenge to the Act's system of premium tax credits and large employer tax penalties for a second reason. Oklahoma asks this Court to hold that the Section 4980H tax penalty may not be applied against employers in this state, and to enter an order restraining the Treasury Department from enforcing that provision against

Oklahoma employers. The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, divests this Court of jurisdiction to award such relief. The AIA provides that, with statutory exceptions inapplicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The principal purpose of the Act is to protect the federal government's ability to assess and collect taxes expeditiously with "a minimum of preenforcement judicial interference" and "'to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (quoting *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund." *NFIB*, 132 S. Ct. at 2582.[4]

Section 4980H directly labels the assessable payment to which a large employer may be subject as a "tax," 26 U.S.C. § 4980H(b)(2); *see also* 26 U.S.C. § 4980H(c)(7). Given that the Anti-Injunction Act applies to "any tax," 26 U.S.C. § 7421(a), the express characterization of the large employer tax penalty as a "tax" leaves no doubt that the Anti-Injunction Act precludes any attempt to litigate an employer's potential liability in advance of the assessment and collection of that tax penalty. Section 4980H thus stands in contrast to the minimum coverage provision; because the latter provision does not expressly describe the assessment against an individual for failure to maintain insurance coverage as a "tax," the Supreme Court held that the Anti-Injunction Act does not apply to a challenge to that provision. *NFIB*, 132 S. Ct. at 2582-84.

[4] The Declaratory Judgment Act also excepts from its coverage suits for declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201. That exception "is at least as broad as the Anti-Injunction Act." *Bob Jones Univ.*, 416 U.S. at 733 n.7.

The Anti-Injunction Act is subject to a narrow, judicially-created exception, which is inapplicable here. Under *Williams Packing*, 370 U.S. at 7, an injunction may issue only if, first, "it is clear that under no circumstances could the government ultimately prevail," and, second, "equity jurisdiction would otherwise exist." *See Wyoming Trucking Ass'n v. Bentsen*, 82 F.3d 930, 933 (10th Cir. 1996). Oklahoma can satisfy neither element of this test. First, Oklahoma's challenge to the Act's system of premium tax credits and large employer tax penalties lacks merit. At a minimum, the merits of Oklahoma's claim are not "so obvious that the Government [would have] no chance of prevailing." *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 14 (2008). Second, equity jurisdiction does not exist here. Oklahoma suffers no irreparable injury, as it is at best highly doubtful that it will be subject to the Section 4980H tax penalty at all. There is also an adequate remedy at law. An employer that wishes to contest its liability for the Section 4980H tax penalty may follow the ordinary procedure, which is to pay the penalty as it becomes due, to file a refund claim, and only then to sue for a refund. *Bob Jones Univ.*, 416 U.S. at 726-27; *Wyoming Trucking Ass'n*, 82 F.3d at 935.

A ruling in Oklahoma's favor "would necessarily preclude" the Treasury Department from assessing or collecting the Section 4980H tax penalty. *Bob Jones Univ*., 416 U.S. at 731-732. Accordingly, the Anti-Injunction Act bars Oklahoma's premature effort here (in Counts II through V) to enjoin enforcement of the Section 4980H tax penalty.

CONCLUSION

For the reasons set forth above, the plaintiff's amended complaint should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction.

DATED this 3rd day of December, 2012.

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

MARK F. GREEN
United States Attorney

SUSAN S. BRANDON
Assistant United States Attorney

s/ Joel McElvain
JENNIFER D. RICKETTS
Director
SHEILA M. LIEBER
Deputy Director
JOEL McELVAIN (D.C. Bar #448431)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 514-2988
Fax: (202) 616-8202
Email: Joel.McElvain@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

E. Scott Pruitt
Cornelius Neal Leader
Sandra D. Rinehart
Office of the Attorney General
313 NE 21st St.
Oklahoma City, Oklahoma 73105

s/ Joel McElvain
JOEL McELVAIN