No. CIV-11-30-RAW

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

STATE OF OKLAHOMA ex rel. E. Scott Pruitt,
in his official capacity as Attorney General of Oklahoma,

Plaintiff,

-vs-

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.

RESPONSE TO MOTION TO DISMISS AMENDED COMPLAINT

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Plaintiff State of Oklahoma, by and through its undersigned counsel, submits this Response to Defendants' Motion to Dismiss Amended Complaint ("Defendants' Motion").

Introduction

Congress passed a law that says one thing, but the Internal Revenue Service promulgated a rule that says another thing altogether. In the simplest terms possible, that is what this case is about. This unauthorized IRS rule *has injured* the State of Oklahoma in its capacity as a sovereign state, by depriving the State of an important sovereign choice that Congress gave the States the exclusive right to make, and it *will injure* the State of Oklahoma in its capacity as a "Large Employer", by requiring it to provide federally-approved health insurance to all full-time employees—or risk onerous penalties. The question raised by Defendant's Motion to Dismiss is whether this Court has the authority to remedy the harms that have already occurred and prevent those harms that will occur. The Court does.

Summary of the Argument

Defendants seek dismissal of the Amended Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Their Memorandum in Support ("Defs.' Mem.") is based on two grounds.

First, Defendants theorize that the State of Oklahoma lacks standing to bring the claims alleged in its Amended Complaint. Defs.' Mem., 9-16. This theory is based on Defendants' incorrect belief that Oklahoma seeks to assert the claims of its citizens and residents as *parens patriae*. Defs.' Mem., 9-15. To be sure, Oklahoma believes that the relief it seeks for injuries to its own rights and interests also will make its citizens and residents better off as a group. However, that belief does not nullify Oklahoma's standing to assert its own rights and interests. Indeed, the Amended Complaint plainly alleges that Oklahoma's own unique legal rights and interests have

been and will continue to be compromised by Defendants' actions, and that Oklahoma's own rights and interests will be restored and protected by the relief it seeks. *See* Amended Complaint ("Amd. Comp."), ¶¶ 9-11, 22, 24, 27, 32-33, 35-36, 54, 66-67, and 70-71. And Defendants do not dispute that the State of Oklahoma is a "Large Employer" subject to the IRS rule. Defs.' Mem., 15. Instead, they simply take a cramped, simplistic view of the impact of that rule in arguing that being subject to the rule is no injury at all in the absence of the penalties that might flow from the rule. *Id*. In doing so, Defendants ignore the many ways that being a "Large Employer" subject to the rule negatively affects the State of Oklahoma—whether it be compliance cost, administrative burden, loss of legislative discretion, or other injury. In fact, Defendants' only defense to this point seems to be nothing more "there is no injury to Oklahoma because we are right on the merits." Defs.' Mem., 13 ("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.").[1] Even more troubling,

[1] It should be noted that the federal government's assertion on this point is directly contradicted by reports from its own agencies. For example, the Congressional Budget Office noted in 2010 that the premium tax credits reduce the number of employed people by discouraging work (something that will presumably reduce the size of the economy of those states that set up exchanges for which tax credits are eligible):

> The Patient Protection and Affordable Care Act (Public Law 111-148) and the Health Care Education Reconciliation Act of 2010 (P.L. 111-152) will affect some individuals' decisions about whether and how much to work and employers' decisions about hiring workers. The Congressional Budget Office (CBO) estimates that <u>the legislation, on net, will reduce the amount of labor used in the economy by a small amount—roughly half a percent—primarily by reducing the amount of labor that workers choose to supply. . . Some provisions of the legislation will discourage people from working more hours or entering the workforce . . . The net reduction in the supply of labor is largely attributable to the substantial expansion of Medicaid and the provision of subsidies that will reduce the cost of insurance obtained through the newly created exchanges, beginning in 2014. In particular: . . . People who purchase insurance through the new exchanges will generally be eligible for tax credits to help them pay their health insurance premiums if their income is between 138 percent and 400 percent of the FPL and they are not offered coverage through an employer. (They may also be eligible for reductions in their cost-sharing requirements.) Those subsidies decline in value as income rises and can, under some circumstances, drop sharply to zero when</u>

(continued...)

Defendants completely ignore the injury to the State in its sovereign capacity that occurred the moment the IRS rule went final, depriving the State of an important choice given to it by Congress.

Second, Defendants theorize that the Anti-Injunction Act, 26 U.S.C. § 7421(a), divests this Court of jurisdiction to award certain relief in this case. Defendants' Memorandum states that the Amended Complaint seeks "an order restraining the Treasury Department from enforcing" the assessable payment provisions of Section 4980H of the Internal Revenue Code of 1986 ("the Code"), as added by Section 1501 of the Affordable Care Act ("the Act" or "the ACA").[2] The Amended Complaint seeks no such order. *Compare* Defs.' Mem. at 16 *with* Amd. Comp. pp. 21-22 (Prayer for Relief). Rather, it merely seeks to prevent the unauthorized expenditure of Treasury funds as "advance payments" under ACA § 1412 and/or the unlawful allowance of premium tax credits under Code § 36B. *Nowhere* in the Amended Complaint is there a request for injunctive relief against anyone preventing the enforcement of Code § 4980H. Additionally, application of the

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[1](...continued)

> income exceeds 400 percent of the FPL. The expansion of Medicaid and the availability of subsidies through the exchanges will effectively increase beneficiaries' financial resources. Those additional resources will encourage some people to work fewer hours or to withdraw from the labor market. In addition, the phaseout of the subsidies as income rises will effectively increase marginal tax rates, which will also discourage work.

See Congressional Budget Office, *The Budget and Economic Outlook: An Update* (August 2010) at page 48, Box 2-1. (*Effects of Recent Health Care Legislation on Labor Markets* (emphasis added)(available at http://cbo.gov/sites/default/files/cbofiles/ftpdocs/117xx/doc11705/08-18-update.pdf).

[2] The "Affordable Care Act" is the popular name for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010), as further amended by the Medicare and Medicaid Extenders Act of 2010, Pub. L. No. 111-309, 124 Stat. 3285 (2010), the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Pub. L. No. 112-9, 125 Stat. 36 (2011), the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011), and the 3% Withholding Repeal and Job Creation Act, Pub. L. No. 112-56, 125 Stat. 711 (2011).

Anti-Injunction Act would actually undermine, rather than further, the purpose of the Act, which is to protect the IRS's tax revenue stream.

In short, neither of the grounds raised in support of Defendants' Motion has merit. Accordingly, Defendants' Motion should be denied.

Argument and Authorities

I. The standard that is applicable to a Rule 12(b)(1) motion to dismiss for lack of standing requires that great deference be given to the allegations made in the Amended Complaint.

A plaintiff has the burden of demonstrating that it has Article III standing at each stage of the litigation. *United States v. Seminole Nation of Okla*., 321 F.3d 939, 943 (10th Cir. 2002). However, as with any other matter on which the plaintiff has the burden of proof, the showing necessary to satisfy the burden depends on "the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

Thus, at the pleading stage, the "burden [of] establishing standing is lightened considerably." *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012). It has been described as "the burden of alleging facts" showing the three elements of Article III standing: injury in fact, a causal connection between the injury and the conduct complained of, and a reasonable likelihood that the requested relief will redress the injury. *Colorado Env. Coal. v. Wenker*, 353 F.3d 1221, 1234 (10th Cir. 2004), citing *Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998).

When standing is challenged under Rule 12(b)(1), a court presumes that general allegations are supported by specific facts, regardless of whether the latter are set forth in detail. *Albuquerque v. U.S. Dept. of Interior*, 379 F.3d 901, 912 (10th Cir. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Moreover, the court "must presume that the allegations in the complaint

are correct and the [plaintiff] will be able to prove specific facts to support the claim." *Albuquerque v. U.S. Dept. of Interior*, supra, 379 F.3d at 913.[3]

And, because the State of Oklahoma is suing in defense of its own sovereign and quasi-sovereign interests (*i.e.*, to defend against coerced payment of penalties, compliance costs, etc.), it is entitled to "special solicitude" in the court's analysis of its standing allegations. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). To be clear, this does not eliminate the basic requirements of standing. *See Del. Dep't of Nat. Res. v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009); *North Carolina v. EPA*, 587 F.3d 422, 426 (D.C. Cir. 2009). But it remains another factor that the courts must consider, "[i]n addition" to the ordinary standing considerations. *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1322 (D.C. Cir. 2008). This "special solicitude" reflects the fact that because the States have surrendered 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' quasi-sovereign interests." *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901), *cited in Massachusetts*, 549 U.S. at 520 n.17. And those quasi-sovereign interests include the States' "rights under federal law." *Massachusetts*, 549 U.S. at 520 n.17. In short, the court must place a thumb on the scale in Oklahoma's favor.

II. Oklahoma has standing to seek the declaratory and injunctive relief requested in Counts II through V of the Amended Complaint.

The primary issue raised in Counts II-V of the Amended Complaint is the invalidity of a final regulation ("the IRS Rule") issued under Code § 36B, as added by ACA § 1401. *See* Amd. Comp.,

[3] Due to the pending Motion to Intervene, it should also be noted that, "[f]or each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996); *Massachusetts v. EPA*, 549 U.S. at 518 ("Only one of the petitioners needs to have standing to permit us to consider the petition for review").

¶¶ 8-9, 11-12, 20-28, 30-36, 47-52, 54-55, 65, and 70-72. Defendants concede facts sufficient to show that the elements of causation and redressability have been satisfied with respect to this issue. *See* Defs.' Mem. at 5 (asserting the availability of premium tax credits based on provisions of the IRS Rule, Treas. Reg. §§ 1.36(B)-1(k) and 1.36B-2(a), and the definitions incorporated from 45 C.F.R. §§ 155.20 and 155.305); 6 (conceding linkage between assessable payments and the employer's rejection of or inability to put into effect the "play" option under the employer mandate); 12 (conceding that premium tax credits would be unavailable "if Oklahoma were to prevail in this suit"); and 15 (conceding linkage between an employer's liability for an assessable payment and a determination that one of its employees will be entitled to a premium tax credit).

This leaves for discussion only one element necessary to show Article III standing: that Oklahoma suffered or imminently will suffer an invasion of a legally protected interest that is concrete and particularized. *Lujan*, supra, 505 U.S. at 560. Accordingly, Counts II through V will be discussed below before Count I, which seeks declaratory relief with respect to the validity of a provision of the Oklahoma Constitution in light of the Supreme Court's decision in *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012).

Defendants' Motion should be denied as to each of Counts II through V of the Amended Complaint because the Amended Complaint shows that each of those claims involves the actual or imminent invasion of a legally-protected right or interest held by Oklahoma itself.

A. Oklahoma has standing to seek relief under Count II because the IRS Rule deprives Oklahoma of its authority under the Act to be the sole decision-maker regarding the availability of premium tax credits and other payments under the Act.

The ACA is premised on the assumption that a State is the most appropriate final decision-maker with respect to various choices to be made under the Act. One prominent example is the

decision whether to expand Medicaid eligibility to certain single adults under age 65, as described in *NFIB,* 132 S.Ct. at 2601. An even more prominent example involves the creation of Exchanges. ACA § 1311 gives each State the option to establish an Exchange but does not require a State to do so. The Act specifically provides that HHS will establish an Exchange within the territory of a State that declines to establish an Exchange. *See* ACA § 1321(c).

The ACA also gave each State the authority to decide whether premium tax credits and "advance payments" would apply within its territory and created a mechanism for each State to put its decision into effect. *See* Amd. Comp. ¶¶ 9-11, 22, 24, 27, 32-33, 35-36, 66-67, and 70-71. That mechanism was to establish or refrain from establishing an Exchange under ACA § 1311. Electing the first alternative would cause premium tax credits to be available; electing the second alternative would cause premium tax credits to not be available. *See* Amd. Comp. ¶¶ 11, 35, and 70.

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. The Act treats each State as *sui juris* in that regard, *i.e.*, as acting in a sovereign capacity. Thus, whichever decision a State reaches is not subject to any substantive limitations.

As a practical matter, a State must consider the risk of diminished wages and loss of jobs that the federal government admitted goes hand-in-hand with establishing an Exchange under ACA § 1311 (which causes the employer mandate to apply to all but the smallest employers within the State's boundaries). *See, e.g.,* Congress of the United States Congress, Congressional Budget Office, *Budget Options Volume I Health Care*, 11-12 (December 2008); *see supra*, fn. 1. And based on those considerations, the majority of States ultimately decided that the interests of their people as a whole were better served by avoiding the applicability § 4980H to employers within their

boundaries (including their state and local governments). Robert Pear, *Most Governors Refuse to Set Up Exchanges*, N.Y. Times, December 14, 2012, at A13, available online at http://www.nytimes.com/2012/12/15/us/most-states-miss-deadline-to-set-up-health-exchanges.html.

The IRS Rule is contrary to law because it has deprived Oklahoma of its statutory right to put into effect a decision not to have premium tax credits and "advanced payments" available within its territorial boundaries, thereby avoiding the known dangers of the large employer mandate. *See* Amd. Comp. ¶¶ 11 and 36. Oklahoma's right to make that decision is created by a federal statute, making it 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 virtues of statutes creating legal rights, the invasion of which creates standing." *Id.* at 560, 578 (quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975), *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). While Congress may not simply manufacture standing out of whole cloth by "confer[ring] jurisdiction on Art. III 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.*, 410 U.S. at 617 n.3.

B. As a "large employer", Oklahoma has standing to seek declaratory and injunctive relief with respect to the validity of the IRS Rule in Count III of the Amended Complaint.

The State of Oklahoma is a "large employer" subject to the IRS Rule—Defendants have presented no evidence to the contrary and have not argued to the contrary. So unless it is invalidated, the IRS Rule will subject Oklahoma to the Act's large employer mandate, and under circumstances that are ruled out by the plain language of the Act. *See* Amd. Comp., ¶¶ 51 and 57-72. Defendants seemingly argue that Oklahoma is not truly "subject" to the large employer mandate unless it is

subject to assessable payments under Code § 4980H(a) or (b)(1). This description is woefully incomplete. Being subject to the employer mandate involves burdens other than, and in some cases entirely apart from, exposure to liability for assessable payments.

The employer mandate gives an employer a choice between (a) offering all its full time employees the opportunity to enroll in minimum essential coverage that will be effective January 1, 2014, and that meets the Act's minimum value standard at a cost to the employee for self-only coverage of no more than 9.5% of the employee's Adjusted Household Income; or (b) being exposed to payment of an assessable amount that can be triggered if even one of the employer's full-time employees is determined by the relevant Exchange to be eligible in any month for an "advance payment" under ACA § 1411 or by the Service for a premium tax credit. Thus, for employers that want to avoid exposure to assessable payments, being subject to the employer mandate necessarily involves the costs of providing the enrollment opportunity described above. *See* Amd. Comp. ¶¶ 28, 33 and 75.

Although the employer mandate first becomes applicable on January 1, 2014, the IRS Rule already has a detrimental effect on Oklahoma and other similarly-situated employers. The current injury results from the need to evaluate and plan in advance of January 1, 2014, for pursuing one of the two options Congress gave to an employer to which the mandate lawfully may be applied. *See* Amd. Comp. ¶¶ 28 and 33. Satisfying the first of these two alternatives requires extensive advance planning before January 1, 2014. *Id.* An employer is not required to choose between those alternatives, and therefore is not required to evaluate and plan during 2013 for putting the first alternative into effect, if there are no circumstances under which liability for the assessable amount could be triggered with respect to that employer. *See* Amd. Comp. ¶¶ 23, 27, 33, and 51-52. But for the IRS Rule, Oklahoma would not now be forced to consider how to implement the first

alternative, how to establish and comply with record keeping practices designed to establish compliance, how to respond to notices from the federal government that one or more of its employees has been determined to be eligible for an advance payment, and other compliance-related concerns. *See* Amd. Comp. ¶¶ 33 and 51-52. Indeed, the federal government has issued ***144 pages*** worth of proposed rules that the Oklahoma must now wade through to ensure compliance. *See* Prop. Treas. Reg. § 54.4980H, "Shared Responsibility for Employers Regarding Health Coverage", available online at https://www.federalregister.gov/articles/2013/01/02/2012-31269/shared-responsibility-for-employers-regarding-health-coverage.

Oklahoma's statutory right to be free from these decisions and considerations stems from the plain language of the ACA. An essential condition for triggering an employer's liability for the assessable amount under Code § 4980H is that (1) at least one of the employer's full-time employees is allowed a premium tax credit if and when the employee files a federal income tax return the following year; or (2) at least one of its full-time employees is certified by an Exchange as eligible for a payment from the Treasury during the then-current year in an amount thought by the Exchange to be equal to the amount of a premium tax credit that the Exchange believes would be allowable in the following calendar year. Under the plain language of Code § 36B, an individual residing in a state that, like Oklahoma, has not established a state Exchange under ACA § 1311 cannot be allowed a premium tax credit.

In stark contrast to the statutory language of the Act, the IRS Rule provides for the allowance of premium tax credits under conditions other than those specified by Congress in Section 36B of the Code. *See* Amd. Comp., ¶¶ 33 and 51. In fact, unless the IRS Rule is invalidated, the Treasury will disburse "advance payments" at the behest of Defendant HHS based on the latter's conclusions about the prospect that the individual will file a federal income tax return the following year on

which he or she will be allowed "premium tax credits" in circumstances where the plain language of Code § 36B prohibits the allowance of any amount as a premium tax credit.

As Defendants would have it, Oklahoma's allegations regarding its potential exposure to an assessable payment are "'conjectural' and 'hypothetical' speculation." Defs.' Mem. 15. But the injury to Oklahoma is not merely exposure to an assessable payment, but the applicability of the employer mandate as a whole, including the compliance and record-keeping duties that go hand-in-hand with compliance. If the IRS Rule is upheld, Oklahoma will have lost its discretion over what medical coverage it provides to its employees.

Moreover, it is simply incorrect to label Oklahoma's exposure to assessable payments under Code § 4980H as "conjectural" or "hypothetical." The 2013 Benefits Enrollment Guideline cited in Defendants' Motion shows on its face that if Oklahoma lawfully could be made subject to the employer mandate, statutory changes in its employee health coverage provisions would be necessary to assure compliance with the requirement to offer coverage satisfying Code § 4980H. A Proposed Regulation issued after the Amended Complaint was filed, Prop. Treas. Reg. § 54.4980H-4(b), provides that an employer "will not be treated as having made an offer of coverage to a full-time employee for a plan year if the employee does not have an effective opportunity to enroll (or decline to enroll) in the coverage no less than once during the plan year." The 2013 Benefits Enrollment Guideline explains that Oklahoma employees and elected officials may not opt out of basic health coverage unless he or she is covered by another group health plan, *i.e.*, not an individual policy available from an Exchange. In addition, the individual desiring to opt out must "provide proof of the separate health insurance plan participation and sign an affidavit attesting that the participant is currently covered and does not require state-provided health insurance each plan year." *Id.* at 2, available at ebc.state.ok.us/en/Benefits/py2013/Documents/EnrollmentGuideBooklet_2013.pdf.

Similarly, Oklahoma's statutory provisions governing the eligibility of temporary employees must be revisited in light of the Proposed Regulations under Section 4980H. *See* 74 O.S. § 1363(14) (excluding from participation seasonal and temporary employees), *and cf*. 2012 OK AG 8 (May 2012) ("'Temporary employment' is generally considered to be employment that is limited in term, where the employee is only expected to remain in the position for a certain period of time."). Under Prop. Treas. Reg. § 54.4980H-1(a)(18), "[t]he term full-time employee means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer." Thus, for example, an employee hired with the expectation that he or she will work a regular thirty hours per week schedule until a pre-determined separation date would be a "full time employee" for purposes of compliance with the offer of coverage requirement but a "temporary employee" for purposes of eligibility for the Oklahoma benefits system.

C. As a State employer, Oklahoma has standing to seek declaratory and injunctive relief in Count IV with respect to the validity of the IRS Rule, including relief based on a good faith argument that prior case law has been overtaken by subsequent developments.

The Affordable Care Act would dictate to Oklahoma some of the terms and conditions under which it will compensate all of its full-time employees, including its highest-level policy-making officials and other employees directly involved in quintessentially governmental functions. The provisions of the ACA purporting to regulate the employer-employee relationship between a State and its employees engaged in traditional governmental functions would have been held to fall outside Congress's power under the Commerce Clause under *National League of Cities v. Userry*, 426 U.S. 833 (1976), before it was overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). However, several Supreme Court decisions since 1985 strongly suggest that the reasoning behind *Garcia* has been undercut. *See, e.g., Printz v. United*

States, 521 U.S. 898 (1997); and *New York v. United States*, 505 U.S. 144 (1992); and *cf. U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (describing federalism as a system of dual sovereignty in which each of the sovereigns has "its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.").

Defendants can hardly argue that a State has no standing to seek injunctive relief prohibiting the enforcement of a federal law that is *ultra vires* precisely because it violates the principles of federalism. Instead, Defendants half-heartedly suggest that this Court could rule that it lacks subject matter jurisdiction because Oklahoma is aware of the decision in *Garcia.* Defendants assert in a footnote that when a plaintiff acknowledges that "existing Supreme Court precedent forecloses [his] claim," the acknowledgment is itself a basis for dismissing the plaintiff's claim based on lack of subject matter jurisdiction. Defs. Mem. at 15 n.3, *citing Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998).

Once again, Defendants Memorandum falls short of the mark. To start, Defendants' account of *Steel Co*. could not possibly be the law. If it were, the Supreme Court would never issue a writ of certiorari to determine whether one or more of its prior decisions should be overruled. *But see* Supreme Court Practice (9th ed., 2007), at 252 (collecting recent cases in which the Court considered overturning prior decisions).

Additionally, the passage in *Steel Co.* on which Defendants' Memorandum relies does not stand for the proposition Defendants assert. That passage speaks of a claim that is "foreclosed by prior *decisions* of this Court, or otherwise *completely devoid of merit* as not to involve a federal controversy." *Id., citing and quoting Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 666 (1974) (emphases added). A good faith argument that the continued vitality of *Garcia*

is in doubt falls well short of the standard quoted above. In fact, the question of whether *Garcia* could or should be applied to decide the Commerce Clause issue in *NFIB* was explicitly raised during oral argument in that case.[4]

Even if the *Steel Co.* dictum were a rule, it certainly would not apply here. Oklahoma does not acknowledge that Count III of the Amended Complaint is foreclosed on the merits by *Garcia.* To the contrary, Oklahoma alleges that *Garcia* does not reflect the current state of the applicable law relating to Congress's authority under the Commerce Clause and has been overtaken by subsequent decisions of the Supreme Court. Amd. Comp. ¶ 76.

D. Defendants' argument that Oklahoma lacks *parens patriae* standing misses the point.

Rather than analyzing standing under the pertinent legal standards articulated above, Defendants aver that Oklahoma is trying to litigate *parens patriae*, on its citizens' behalf. Defs.' Mem. at 9, 10, 12. While Defendants correctly point out that states may not normally litigate against the federal government purely as *parens patriae*, Oklahoma is not attempting to do so in this case. Oklahoma is not litigating to enforce or protect the rights of third parties, but rather to enforce *its own* statutory rights. The fact that it hopes its citizens and residents will benefit from the outcome does not deprive Oklahoma of standing.

Moreover, as to at least Counts I, II, and IV, the rights Oklahoma asserts are sovereign rights. Standing based on a right unique to the state as a sovereign is distinct from *parens patriae* standing. *See, e.g., Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 607-08 (U.S. 1982) (distinguishing pure *parens patriae* standing from standing based on "a quasi-sovereign interest").

[4]Transcript, *Department of Health and Human Services v. Florida*, No. 11-398 (March 27, 2012), 78 (Mr. Clement, in response to a question from Justice Breyer, responds, "I would encourage this Court not to Garcia-ize the Commerce Clause and just simply say it's up to Congress to police the Commerce Clause.")

The Tenth Circuit faced a comparable scenario faced in *Wyoming v. United States*, 539 F.3d 1236 (10th Cir. 2008). In that case, a federal statute allowed states to expunge certain criminal convictions for the purpose of restoring the convicted parties' rights to own and carry firearms. Wyoming enacted a law setting forth rules for expunging convictions. The Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) concluded that Wyoming's statute did not comply with federal standards for expunging convictions, and informed Wyoming that persons whose records were expunged pursuant to state law would nevertheless be in violation of federal law if they obtained or carried firearms. Wyoming filed an action seeking a declaration that its statute was in compliance with federal law. *Id.* at 1240-41.

The Tenth Circuit Court of Appeals rejected the ATF's position that Wyoming lacked standing. Despite noting that the federal statute was primarily concerned with the possession and transportation of firearms, rather than state autonomy in controlling the scope and coverage of gun laws, the Court nevertheless concluded that a state had standing:

> [t]he Act, however, also grants states significant latitude to determine the applicability of the Act by relying on state law, in part, to determine the classes of individuals that may not possess a firearm. . . . Therefore, in light of the states' interest in influencing the applicability of the Act, we conclude that Wyoming's alleged injury falls within the zone of interests of the Act.

Id. at 1243-44 (emphasis added).

The interest Oklahoma is asserting here is comparable to that recognized by the Tenth Circuit in *Wyoming v. United States*. The Affordable Care Act gave Oklahoma an "interest in influencing the applicability of the [Affordable Care] Act," at least in limited respects, by conferring on it the choice whether to expose its health care consumers and employers to the subsidization-taxation regime. When it appeared that Oklahoma and most other States would make what Defendants regarded as the "sub-optimal" choice, Defendants effectively took the power to choose away from

Oklahoma and the other non-electing States by issuing the IRS Rule. Like Wyoming, Oklahoma is litigating the scope of a right conferred on it by Congress. Thus, like Wyoming, Oklahoma has standing to defend that right.

E. Oklahoma has standing to seek declaratory and injunctive relief on its alternative claims in Count V.

Count V is an alternative claim for relief in the event that Defendants assert that an Exchange created by HHS is a form of "Exchange established by a state under Section 1311," within the meaning of that phrase as used in Code § 36B. As Defendants' Memorandum itself notes, the ACA "provides that the federal government will establish the exchange that will operate in Oklahoma if the state government declines to do so." Thus, by the plain language of the ACA, it would be impossible for an exchange established by HHS to ever be considered an "Exchange established by a state under Section 1311." Yet that is precisely what Defendants' seem to claim in order to justify the IRS Rule.

If that claim is true, the federal government would have necessarily established a State-created governmental agency or State-created non-profit entity to establish the exchange within the meaning of Section 1311. ACA § 1311(d)(1). Put another way, in order for the Exchange to which Defendants' Memorandum refers not to be "establish[ed]" by HHS, it would be necessary that the federal government, acting as the State, to adopt the Exchange standards promulgated by HHS under Section 1321(a) or to adopt a State law or regulation that HHS determines implements those standards within the State. ACA § 1321(b)(1)-(2).

But it goes without saying that the federal government cannot create a State agency, enact a State statute, or take any of the other actions Defendants' Memorandum seems to assume the federal government can do to promote the fiction that an Exchange established by HHS under

Section 1321(c) is "an exchange established by a State under section 1311" for purposes of Code § 36B. To permit the federal government to do so would interfere with the State electorate's ability to distinguish the responsibility of state officials from federal officials for the success or failure of the Exchanges to the extent of violating a principle of accountability to the electorate, which Oklahoma suggests is a constitutional postulate under *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). *See also,* D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 Colum. L.Rev. 1, 61-62 (1988).

The Constitution forbids Congress to use a State as a puppet through which to regulate the State's citizens in accordance with federally-determined standards or to commandeer a State legislature or executive officer to enforce federal law. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 933 (1997); *and cf. Alden v. Maine*, 527 U.S. 706, 713 (1999) (Congress may not require the courts of a state to hear claims against the state arising under a federal statute the enactment of which was otherwise within its enumerated powers). The constitutional issue is no less present in circumstances where the federal government narrows a State's choices down to one. *Coyle v. Smith*, 221 U.S. 559 (1911) (Congress may not require a State to locate its capital in one specified city). *A fortiori*, usurping state legislatures and chief executives by taking actions that only they can take exceeds Congress's authority. *Cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism.").

III. Oklahoma has standing to seek declaratory relief in Count I that Article II, Section 37 of the Oklahoma Constitution is not preempted by federal law insofar as that provision relates to mandatory purchases of health coverage.

Article II, Section 37(B)(1) of the Oklahoma Constitution provides, "A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any

health care system." This provision does more than merely recognize the right of the people of Oklahoma to be free from a governmental mandate to purchase health insurance. It prohibits the adoption of any law or rule that compels any person, directly or indirectly, to participate in any health care system. Thus, it creates a rule for the conduct of Oklahoma's government, at least to the extent Section 37 is not preempted by Section 5000A of the Affordable Care Act.

The State of Oklahoma seeks a declaration that Section 5000A of the Affordable Care Act does not preempt Section 37 because Section 5000A is invalid insofar as it purports to command any individual to participate in commerce. Oklahoma asserts that, properly construed, Section 5000A does not compel any individual to purchase health coverage, because Congress lacks the power to make such a law. *NFIB v. Sebelius*. 132 S.Ct. 2566 (2012). Oklahoma also asserts that, properly construed as an exercise of Congress's power to lay and collect taxes alone, Section 5000A merely rewards an individual's voluntary purchase of insurance. On that interpretation, unlike a federal law subjecting an individual to a fine, imprisonment, transaction-related exaction, or other punitive sanction, Section 5000A cannot preempt Article II, Section 37.

This Court certainly has subject matter jurisdiction over Count I of the Amended Complaint because "[f]ederal regulatory action that preempts state law creates a sufficient injury-in-fact" for Article III standing. *Wyoming v. United States*, 539 F.3d at 1242; *see also, Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393, 449 (5th Cir. 1999); *Alaska v. U.S. Department of Transportation*, 868 F.2d 441, 442 (D.C.Cir. 1989), *and Ohio ex rel. Celebrezze v. U.S. Dept. of Transp.*, 766 F.2d 228, 232-33 (6th Cir. 1985) ("Ohio has standing to challenge the Department's regulation and undertake to vindicate its own law."). The Tenth Circuit has characterized a state's injury-in-fact caused by preemption of its law as the invasion of a sovereign interest. *Wyoming v. United States,* 539 F.3d at 1242 ("The States have a legally protected

sovereign interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which] involves the power to create and enforce a legal code.'"). States have a legally cognizable interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)). A rule of federal law that hinders a state's exercise of the sovereign power to make and enforce a legal code by preempting a state statute inflicts an injury sufficient to provide a state standing to challenge the applicability of the federal rule. *See Maine v. Taylor*, 477 U.S. 131, 136 (1986) ("a State clearly has a legitimate interest in the continued enforceability of its own statutes").

IV. The Anti-Injunction Act does not deprive the Court of subject matter jurisdiction over this action.

Defendants' Memorandum also raises the Anti-Injunction Act as a bar to a ruling on the merits of this case. That attempt rests on the incorrect assertion that Oklahoma seeks "an order restraining the Treasury Department from enforcing [Code § 4980H] against Oklahoma employers." Defs.' Mem. at 16-17. Oklahoma's Amended Complaint does not seek an order against anyone with respect to the enforcement of Code § 4980H. Amd. Comp. at 21-22. In fact, Oklahoma's Amended Complaint does not seek even declaratory relief with respect to Code § 4980H. *Id.* Apart from Count I, which involves the validity of a provision of the Oklahoma Constitution, Oklahoma seeks relief only with respect to the IRS Rule under Code § 36B, which Oklahoma contends will result in the illegal distribution of advance payments based on the anticipation of unlawful premium tax credit allowances.

A. The Anti-Injunction Act does not apply to this action and does not deprive the Court of subject matter jurisdiction over Oklahoma's claims.

The Anti-Injunction Act provides that, subject to some statutory exceptions, "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." *See* 26 U.S.C. § 7421(a). Defendants' Memorandum states that the Anti-Injunction Act "divests this Court of jurisdiction" to "enter an order restraining the Treasury Department from enforcing [Code § 4980H] against Oklahoma employers." *Id.*, 16-17.

1. The Amended Complaint does not seek to enjoin the application of the assessable payment provisions of Code § 4980H.

Oklahoma does not seek an order enjoining Treasury from enforcing Code § 4980H. *See* Amd. Comp., pp. 21-22. To the contrary, Oklahoma believes that all provisions related to the employer mandate should be enforced according to their written terms. Enforcing Code § 36B as written would not impede any goal attributed to the Anti-Injunction Act. Indeed, applying the Anti-Injunction Act to bar the relief sought in this case would run counter to the presumed purpose of the Anti-Injunction Act. *See NFIB, supra,* 132 S.Ct. at 2582 ("This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes."). The federal government has in fact admitted that the effect of the relief sought by Oklahoma will be the realization of *more* tax revenue, not less—an admission fatal to Defendants' Anti-Injunction Act defense. *See* Matthew A. Melone, *A Leg to Stand On: Is There a Legal and Prudential Solution to the Problem of Taxpayer Standing in the Federal Tax Context*, 9 Pitt. Tax. Rev. 97, 147-48 (2012) ("The Supreme Court has held…that neither the Anti-Injunction Act nor the Tax Injunction Act operates to bar proceedings that, if successful, have the effect of increasing tax revenue.")(*citing Hibbs v. Winn*, 542 U.S. 88, 102-12 (2004).

Indeed, the federal government candidly acknowledges that the IRS rule challenged by the State of Oklahoma allows "Oklahoma residents [to] receive federal premium tax credits, saving on average, more than $5,000 per person annually on their federal tax liabilities." Defs.' Mem. at 1. And in March 2012, the Congressional Budget Office estimated that in 2014, the first year the Large Employer Mandate is in effect, "penalty payments by employers" would raise federal revenues by $4 billion, while the "exchange subsidies and related spending" would decrease federal revenues by $16 billion. *See* Congressional Budget Office, Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act, March 2012, Table 2, p. 11, http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf (concluding that for 2012 through 2022, the premium-assistance tax credits and cost-sharing subsidies—plus a few much smaller provisions—would increase federal deficits by $808 billion, while penalties under the individual and employer mandates would cause federal revenues to rise by $54 billion and $113 billion, respectively). In sum, the federal government's own estimate is that the Large Employer Mandate will *cost* the federal government $12 billion in the first year—and more and more each year after that. As a result, application of the Anti-Injunction Act to this case would actually undermine, rather than further, the purpose behind the Act.

2. The assessable amount described in Code § 4980H(a)-(b) is not a "Tax" within the meaning of that term in the Anti-Injunction Act.

Defendants' Memorandum asserts that "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)." *Id.* at 17. This assertion is inaccurate. The only exaction imposed by Code § 4980H(a), which applies where even one full time employee who has not been offered minimum essential coverage under a qualified employer plan is certified for an advance payment or entitled

to a premium tax credit, is described in Section 4980H(a) itself as an "assessable payment," not as a "tax." The exaction imposed by Code § 4980H(b)(1), which applies where the coverage offered fails to satisfy the affordability or minimum value standards, also is described in Section 4980H(b)(1) itself as an "assessable payment," not as a "tax." Thus, none of the provisions of Section 4980H that actually impose an exaction on any employer refer to that exaction directly as a "tax."

To be sure, Code § 4980H(b)(2) provides that "[t]he aggregate amount of tax determined under paragraph [4980H(b)](1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month." However, this provision does not "label" the exaction described in Code § 4980H(b)(1) as a "tax." Code § 4980H(b)(2) functions as a limitation on the employer's liability, and therefore comes into play before an "applicable payment" is "imposed" on an employer under Code § 4980H(b)(1). Furthermore, Code § 4980H(a) lacks any language analogous to Code § 4980H(b)(2).

It is also true that Code § 4980H(c)(7) refers the reader to Code § 275(a)(6) "[f]or denial of deduction for the tax *imposed* by this section" (emphasis added). However, it has already been established by the plain language of Code § 4980H(a) and (b)(1) that the only exactions imposed by Section 4980H are not denominated as taxes. Code § 4980H(c)(7) does not change that fact.

3. This action is not maintained for the purpose of "restraining" the assessment or collection of any amount within the meaning of that term in the Anti-Injunction Act.

This action is not maintained for the purpose of "restraining" the assessment or collection of any amount imposed under Code § 4980H. This action is maintained primarily to seek declaratory and injunctive relief relating to the invalidity of the IRS Rule under Code § 36B. If that

relief is granted, it should not be necessary for anyone to seek an order "restraining" the assessment or collection of any amount imposed under Code § 4980H in States where no Exchange has been established by the State under Section 1311 of the Act. The federal government has given no indication that it would defy a Court's determination that no assessable payment can be due under Section 4980H except when an individual enrolls for coverage through "an Exchange established by a state under section 1311" of the ACA.

Indeed, Defendants effectively signal their intention to abide by the results of adjudication of the issues in this case. According to Defendants' Memorandum, "[a] ruling in Oklahoma's favor 'would necessarily preclude' the Treasury Department from assessing or collecting the Section 4980H tax penalty. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 731-732 (1974). 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."

If this statement was meant to suggest that this action should be treated for purposes of the Anti-Injunction Act as if it sought an injunction against assessment or collection of the Section 4980H assessable amount, that suggestion is wrong, and reliance on *Bob Jones Univ*. is misplaced. This case is worlds apart from *Bob Jones Univ*. In this case, the relief requested involves the invalidity of the IRS Rule. That relief does not "restrain[] the assessment or collection of any tax," because the denial of a tax credit does not reduce an individual's federal tax liability, it increases that liability. By contrast, in *Bob Jones Univ*., the Anti-Injunction Act barred the university's attempt to prevent the IRS from revoking its tax exempt status precisely because the relief sought by the university would have result in *decreased* tax liabilities. *Id*. at 731-32. By way of example, the relief requested here merely precludes the occurrence of circumstances that might allow the IRS to collect an assessment in the future, in much the same way that an injunction closing a distillery on

a Monday precludes circumstances from occurring on Tuesday that would allow the IRS to collect excise taxes due under Section 5001(a) of the Code. The Anti-Injunction Act does not bar such relief.

B. Even if applicable, the Anti-Injunction Act is not truly jurisdictional, and thus does not prevent the court from proceeding to the merits—it merely limits the relief the court may grant if it rules in Oklahoma's favor.

The Anti-Injunction Act is not a true jurisdictional statute.[5] In fact, the Supreme Court has consistently treated the AIA as non-jurisdictional by recognizing exceptions to its application—exceptions that cannot be squared with a truly jurisdictional statute. *See, e.g., Enochs v. Williams Packing*, 370 U.S. 1, 7 (1962)(recognizing judicially-created exceptions to the Anti-Injunction Act when "it is clear that under no circumstances could the Government ultimately prevail" and "equity jurisdiction otherwise exists."); Defs.' Mem. at 18 (recognizing the same). As a result, the Anti-Injunction Act is best viewed as a claims-processing rule that directs certain litigants to certain remedies, rather than a truly jurisdictional statute that limits "the courts' statutory or constitutional power to adjudicate the case." *Steel Co*., 523 U.S. at 89. This conclusion is reinforced by the fact the Anti-Injunction Act lacks the clear indication the law requires to find a statute jurisdictional because it is addressed to the rights and obligations of litigants, not to the power of courts. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010) (question is

[5] Additionally, it is far from clear whether the Anti-Injunction Act applies to states. This is so because the AIA applies to "persons" and contains no indication that it reaches States. *See* 26 U.S.C. § 7421(a). When interpreting a statute's use of the term "person," a court "must apply [the] longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). That presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary." Id. at 781 (emphasis added); *see also Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 82–83 (1991) ("[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." (internal quotation marks omitted)); United States v. United Mine Workers of Am., 330 U.S. 258, 275 (1947) (same). *Cf., also, Virginia v. Sebelius*, 656 F.3d 253, 267 n.1 (4th Cir. 2001), citing *South Carolina v. Regan*, 465 U.S. 367, 378 (1984) ("Virginia may well be exempt from the AIA bar.").

whether statute "clearly states' that its … requirement is 'jurisdictional'" (quoting *Arbaugh v. Y & H Corp*., 546 U.S. 500, 515 (2006)); *compare with* 26 U.S.C. § 7421(a)(focusing not on "the courts' statutory or constitutional power to adjudicate the case," but rather on the litigant's cause of action: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."). As result, even if the court finds that the Anti-Injunction Act bars the relief sought by Oklahoma, that finding does not require dismissal of the case. Rather, it simply limits the relief the court might ultimately grant.

Conclusion

For the reasons set forth above, Defendants' Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Joel McElvain
Susan S. Brandon

Graydon Dean Luthey, Jr.
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s/ PATRICK R. WYRICK