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# Pruitt v. Sebelius - Plaintiffs' Memorandum in Opposition to Motion to Dismiss

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**No. CIV-11-030-RAW**

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

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**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.**

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**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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**April 8, 2011**

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**PLAINTIFF STATE OF OKLAHOMA'S BRIEF IN OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS BASED ON THE STATE'S LACK OF STANDING**

Plaintiff State of Oklahoma, by and through Attorney General E. Scott Pruitt, presents this Brief in Opposition to Defendants' Motion to Dismiss [Doc. 22].

**I.**

**INTRODUCTION**

**a.**

**Dueling Sovereigns — Whose Law Must Yield.**

On a warm and humid July morning in 1804, two of our Nation's Founding Fathers faced each other in a duel on a so-called field of honor just outside of Weehawken, New Jersey, in what would be a duel to the death. On one end of the field stood Aaron Burr, former Continental Army Officer, former U.S. Senator and current Vice President of the United States under President Thomas Jefferson. At the opposite end stood Alexander Hamilton, one of the three authors of the Federalist Papers and former Secretary of the Treasury. Vice President Burr's single shot mortally wounded Hamilton, who died the following day. One way, under the *code duello*, for a party to a duel to avoid Alexander Hamilton's fate was for the party to apologize — to **yield**.

Metaphorically, the State of Oklahoma and the Federal government are in a duel. Each sovereign has enacted a law on the purchase of health care insurance. The Federal government has enacted a law which, with some exceptions, requires individuals to purchase health care insurance. Conversely, the State of Oklahoma has enacted a constitutional provision that prohibits anyone from being compelled to purchase health insurance. These laws are in direct conflict.

When a constitutionally enacted Federal law and a State law are in direct conflict, the State law must yield. **Such required yielding is injury to a sovereign interest of the State:** the State’s power to enact and enforce its laws.<sup>1</sup>

**b.**

**Principal Issue Presented in the State’s Complaint.**

The principal issue presented in the State of Oklahoma’s Complaint is whether the State law must yield to the Federal law under the United States Constitution’s Supremacy Clause, or whether, on the other hand, the Federal law must yield to the State law, because the challenged Federal law is unconstitutional.

Of course, such legal duels are not fought on the so-called field of honor; they are fought in forums such as this Court.

**c.**

**Challenge to the State’s Ability to Participate in This Courtroom  
Duel.**

In their Motion to Dismiss, Secretaries Sebelius and Geithner (“Secretaries” or “Federal Officials”) challenge the State’s standing. They claim that the State’s interests are insufficient to permit it to participate in a legal duel over these directly conflicting laws. The Federal Officials are wrong.

The direct **sovereign interest** of the State of Oklahoma — its sovereign power over individuals and entities within its jurisdiction, which include the power to enact and enforce its civil and criminal laws — and the injury caused to that sovereign interest, affords the State ample

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<sup>1</sup> Our discussion throughout recognizes that a Federal law’s preemptive effect depends on Congress’ preemptive intent.



standing to participate in a legal duel in which the Court must decide which of the directly conflicting laws must **yield**.

## **II.**

### **ISSUES NOT BEFORE THE COURT**

#### **a.**

#### **Issues of the Health Care Act's Wisdom, Practicality and Effectiveness Are Not Properly Before The Court.**

In this case, the State of Oklahoma challenges the constitutionality of Section 1501 of the Patient Protection and Affordable Care Act, P. L. No. 111-148, 124 Stat. 119 (2010), as amended by the "Health Care and Education Reconciliation Act of 2010," P. L. No. 111-152, 124 Stat. 1029 (collectively "The Act," or "The Health Care Act").

Both during and after its passage, the Health Care Act has divided the Nation, and the Act's wisdom, practicality and effectiveness have been questioned.

No such matters are presented in the State's Complaint, for this Court is not the proper forum for such issues, nor is this Court a proper forum for the use of the political rhetoric employed by those supporting and castigating the Act.

Accordingly, much contained in the "Introduction" and "Background" portions of the Defendants' Memorandum in Support of their Motion to Dismiss [Doc. 22-1], in which the Federal Officials described the crisis which the Act addresses, how it addresses the crisis, and estimate how much money will be saved by the Act's implementation, are **not** matters properly considered by the Court.

b.

**Contrary to the Federal Officials' Claim, The State of Oklahoma Has Not Sued on Behalf of the State's Residents; Has Not Presented a "*Parens Patriae Claim*"; Has Not Presented a Claim Based on a Quasi-Sovereign Interest.**

Much of the Federal Officials' challenge to the State's standing is based upon a false assumption — the assumption that the State's suit is brought under the State's *parens patriae* powers, on behalf of its resident citizens, to vindicate a **quasi-sovereign power**. The State, however, presents no such claim. Rather, the State's suit is brought to stop ongoing injury and avoid further injury to a **sovereign power**.

The State has brought this action to protect:

The State's **sovereign power over individuals and entities within the State which includes the State's power to create and enforce legal code** — the State's sovereign interests in the enactment and continued enforcement of its laws.

See, Complaint [Doc. 2] Paragraphs 3, 4 and 5.

Because the State did **not** bring a *parens patriae* suit or sue to protect a quasi-sovereign interest, much of the Federal Official's Memorandum [Doc. 22-1] addresses a "strawman issue" that the Defendants created and — could easily shoot down. This was a clever use of a rhetorical device by the Federal Officials, but it has nothing to do with the State's Complaint.

## ARGUMENT AND AUTHORITIES

### Proposition I

**In This Legal Duel, the Harm and Threat of Harm to The State’s Core Sovereign Interests of Exercising Sovereign Power Over Individuals and Entities Within Its Jurisdiction, Which Includes the Power to Create and Enforce Both a Civil and Criminal Code, Vests the State of Oklahoma With Standing, Because the Injury is Traceable to the Federal Enactment and Its Implementation and the Injury Can be Redressed by the Requested Declaratory and Injunctive Relief.**

### Introduction

In order to invoke a court’s jurisdiction, a moving party must have standing to bring the lawsuit. The purpose of standing, as articulated in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), is to “assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Id.* The Court has stated that the decision to seek review must be placed “in the hands of those who have a direct stake in the outcome.” *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

To ensure this proper adversarial process, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992) held that a litigant must demonstrate: (1) that it has suffered “injury-in-fact,” or an invasion of a legally protected interest, which is a concrete and particularized injury that is actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant; and (3) that it is likely that a favorable decision will redress that injury. *Id.*, at 560-561.

The Federal Officials claim the State lacks standing, **arguing that the first requirement necessary for standing — injury-in-fact — is absent.** Contrary to the Federal Officials’

contentions, the State of Oklahoma has standing to challenge Section 1501 of the Health Care Act, (26 U.S.C. § 5000A), because the Supremacy Clause of the United States Constitution requires that the State enactment which is directly contrary to the challenged Federal provision **must yield** to the Federal enactment — unless the challenged provision is unconstitutional. As demonstrated below, the direct conflict between the State and Federal enactments, coupled with the Supremacy Clause’s requirement that the State provision **yield**, constitutes injury-in-fact to the State’s core **sovereign interest** over individuals and entities within its jurisdiction, which includes the power to create and enforce its legal code, both civil and criminal. Further, this injury is fairly traceable to the Federal enactment and the Federal Officials’ present and future implementation of the challenged provision. Finally, the requested declaratory and injunctive relief will redress the injury to the State’s sovereign interests.

**A.**

**There is a Direct Conflict Between the Challenged Federal Enactment and the State’s Constitutional Provision. The Federal Enactment Requires Individuals, With Some Exceptions, to Purchase Health Care Insurance Under the Pain of Monetary Penalties. On the Other Hand, The State Constitutional Provision Prohibits Such Requirements.**

The challenged Federal provision, 26 U.S.C. § 5000A, requires individuals to secure health care insurance or be subject to monetary penalties. In pertinent part, the challenged provision reads:

(a) Requirement to maintain minimum essential coverage.--An applicable **individual shall for each month** beginning after 2013 **ensure that the individual, and any dependent of the individual** who is an applicable individual, **is covered under minimum essential coverage for such month.**

(b) Shared responsibility payment.--

(1) In general.--**If a taxpayer** who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph

**(3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).**

(2) Inclusion with return.--Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

26 U.S.C. §5000A(a) and (b)(emphasis added).

The State constitutional provision, which is in **direct conflict** with the above quoted “Minimum Essential Coverage” provision, is found at Article II, Section 37 of the Oklahoma Constitution, which was adopted by the people of Oklahoma on November 2, 2010, when they overwhelmingly approved State Question No. 756. In pertinent part, that constitutional provision reads:

**To preserve the freedom of Oklahomans to provide for their health care:**

**1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system; and**

**2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.**

Okla.Const. Art. II, § 37 (emphasis added).

The clash between the Federal statutory requirement and the Oklahoma Constitution places the laws in **direct conflict**. The Federal “Minimum Essential Coverage Provision,” commonly referred to as the Individual Mandate Provision, in the Federal Health Care Act, **requires** that — under threat of penalty — individuals secure health insurance, while on the other hand Oklahoma’s

constitutional provision **prohibits** an individual from being required to secure health care insurance. These conflicting provisions cannot co-exist, and under the Supremacy Clause of United States Constitution, Oklahoma's provision must **yield** to the Federal enactment. It is this preemptive effect of the Federal enactment that does injury to the State's sovereign interests in exercising sovereign power over individuals and entities within its jurisdiction, which includes the power to create and enforce State law. It is this preemptive effect which requires that the State provision **yield** to the Federal enactment which is the particularized injury required for the State's Article III standing and which makes the case presented concrete as opposed to conjectural or hypothetical.

**B.**

**Under the Supremacy Clause of the United States Constitution, Article II, Section 37 of the Oklahoma Constitution Must Yield to the Federal Act's Individual Mandate, Unless the Federal Provision is Unconstitutional.**

Article VI, Clause 2 of the United States Constitution, commonly known as the Supremacy Clause, provides:

**This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**

U.S. Const. Art. VI, cl.2 (emphasis added).

After the civil war, the United States Supreme Court in 1876 reviewed the Supremacy Clause and the controversy regarding the relationship of state courts to the Federal government in *Clafin v. Houseman*, 93 U.S. 130 (1876). That case repudiated the assumption that Federal laws can be considered by the States as though they were laws of foreign sovereigns. The teaching of *Clafin*, as described in *Testa v. Katt*, 330 U.S. 386, 391 (1947), is:

that the **Constitution** and the **laws passed pursuant to it** are the **supreme laws of the land**, binding alike upon states, courts, and the people, ‘**any-thing in the Constitution or Laws of any State to the contrary notwithstanding.**’

*Id.* (emphasis added).

In *Public Utility Commission of California v. United States*, 355 U.S. 534 (1958), the Court held that California statutes on transportation were required to **yield** to Federal law under the Supremacy Clause. In so ruling, the Court relied, in part, on Chief Justice Marshall’s description of the Supremacy Clause’s function:

The conflict seems to us to be as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve. As Chief Justice Marshall said in *McCulloch v. Maryland*, 4 Wheat. 316, 427, 4 L.Ed. 579,

‘**It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.**’

*Id.* at 544 (emphasis added).

In the duel between the State and Federal government before this Court, it is clear that the Supremacy Clause requires that the State enactment **must yield** to the Federal law — if the Federal law is constitutional, which the State challenges.

Preemption of Oklahoma’s constitutional provision by the Federal Individual Mandate provision constitutes injury to the State of Oklahoma’s core sovereign power — it constitutes the injury-in-fact necessary to the State’s Article III standing.

C.

**The State Does Not Bring a *Parens Patriae* Action on Behalf of Its Citizens, Nor Does the State Act to Vindicate a Quasi-Sovereign Power. Rather, the State Sues to Vindicate a Wholly Separate and Distinct Interest and Right: the State’s Sovereign Interest in Exercising Power Over Individuals and Entities Within Its Jurisdiction, Which Includes the Power to Create and Enforce the State’s Own Legal Code, Both Civil and Criminal.**

**It is the Damage to This Sovereign Interests Which the State Seeks to Redress Here — Not Any Interests of Its Citizens Nor Any Quasi-Sovereign Interests.**

Nowhere does the State of Oklahoma’s Complaint [Doc. 2] speak in terms of the State’s quasi-Sovereign interest, nor does it speak of bringing a *parens patriae* action.

On the contrary, the interest for which the State seeks vindication is that noted in Paragraph 4 of the Complaint “the sovereign power over individuals and entities within its jurisdiction and the power to create and enforce legal codes and constitutional provisions.” [Doc. 2 at 2].

As mentioned above, in challenging the State’s standing, the Federal Officials incorrectly characterize the State’s lawsuit as a *parens patriae* suit, in an attempt to bring the suit under the authority of the well settled law that States may not bring a *parens patriae* action against the United States to protect their quasi-sovereign interest.

Here, Oklahoma, however, has brought no such suit. Here, Oklahoma seeks solely and only to vindicate a separate and wholly different interest — a **sovereign interest** that was recognized by the Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982).

In the *Alfred Snapp* case the Commonwealth of Puerto Rico brought a declaratory action against east coast apple growers for violation of federal law which preferred domestic laborers over foreign temporary laborers. The *Puerto Rico* suit was a *parens patriae* action, brought to protect its **quasi-sovereign interest** in the well-being of its populous. In describing the nature of the Puerto



Rico's quasi-sovereign interests, the Supreme Court noted that, "Its nature is perhaps best understood by comparing it to **other kinds of interests that a State may pursue . . .**" *Id.* at 601 (emphasis added).

Then, the Court recognized and described two **sovereign interests** which states possess and may pursue, writing:

**Two sovereign interests are easily identified:** First, the **exercise of sovereign power over individuals and entities within the relevant jurisdiction-this involves the power to create and enforce a legal code, both civil and criminal**; second, the demand for recognition from other sovereigns-most frequently this involves the maintenance and recognition of borders. The former is regularly at issue in constitutional litigation. The latter is also a frequent subject of litigation, particularly in this Court.

*Id.* (emphasis added).

It is the first **sovereign interest** that the Supreme Court recognized in *Snapp* that Oklahoma seeks to vindicate here: the State's interest in exercising sovereign power over individuals and entities within its jurisdiction, including the State's power **to create and enforce a legal code, both civil and criminal.**

#### D.

**When There is a Direct Conflict Between Federal and State Law, the State's Sovereign Interest in Exercising Power Over Individuals and Entities Within Its Jurisdiction, Particularly the State's Power to Create and Enforce Its Own Laws, is at Risk. Injury Caused to Such Interests by the Preemptive Nature of Federal Law Under the Supremacy Clause Has Been Recognized as a Sufficient Injury to Afford a State Article III Standing to Challenge the Conflicting Federal Enactment.**

In challenging the State's standing, the Federal Officials rely heavily on *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447 (1923). In that suit, Massachusetts brought an action against Secretary of the Treasury Mellon challenging the constitutionality of an appropriation act which

made money available on an annual basis for a period of five years to be apportioned among those states “as shall accept and comply with its provisions, for the purpose of co-operating with them to reduce maternal and infant mortality and protect the health of mothers and infants.” *Id.* at 479. While noting that the appropriation might have been intended to **induce** the state to yield or surrender their sovereign rights, the Court held that the Act did not **require** the state to do anything, the Court stating, “nor does the statute **require** the states to do or **to yield anything.**” 262 U.S. 447 at 482. The Court thus concluded that because no right of the state was being invaded, the state’s claim was not justiciable. *Id.* at 484-485.

In this case, the Oklahoma law, by virtue of the Supremacy Clause, **is required to yield** to the Federal enactment. In short, in *Mellon*, the state’s sovereign right in creating and enforcing its code of law was not threatened or injured, as the statute challenged in *Mellon* did not require the state to do anything or **yield anything**. Here, Oklahoma’s constitutional provision **must yield** to the Congressional enactment — here the State is injured.

The preemptive effect of a competing and conflicting Federal enactment upon the State’s sovereign interest in creating and enforcing its own code of laws, constitutes sufficient **injury** under Article III to vest the State with standing. The Court of Appeals for the Tenth Circuit came to that conclusion in *Wyoming, ex rel. Crank v. United States*, 539 F.3d 1236 (10<sup>th</sup> Cir. 2008). There, Wyoming sought declaratory and injunctive relief against the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which had concluded that the Wyoming statute purportedly establishing a procedure to expunge convictions of domestic violence misdemeanors so as to restore rights to carry firearms, would not restore those rights, because of the direct conflict between the Federal and State requirements.

The Federal law involved, Title 18, Section 922(g)(9), prohibits any person convicted of a misdemeanor crime of domestic violence from owning a firearm that has traveled in interstate commerce. The Federal Act, however, contained an exclusion for misdemeanor convictions that had been expunged or set aside. *Id.* at 1239.

Wyoming enacted a provision meant to fall within the Federal Act's expungement exception; however, the Wyoming statute provided "that such an expungement is only 'for the purpose of restoring any firearms rights lost.'" 539 F.3d 1236 at 1240. It also provided that nothing in the section "shall be construed to affect the enhancement of penalties for second or subsequent convictions of misdemeanors under the law of the state." *Id.*

The ATF wrote a letter to Wyoming's Attorney General indicating that the **Federal definition of "expunge" controls for the purposes of the Federal law at issue.** Wyoming's Attorney General responded with a letter contesting the ATF's conclusion that Federal law governed the definition of expunge. Wyoming subsequently sued the ATF.

It was the **contest between the Federal definition of expungement and the State definition of expungement that formed the basis of Wyoming's lawsuit**, in which Wyoming alleged it had suffered an injury-in-fact because the ATF's interpretation undermined Wyoming's ability to enforce its legal code. To remedy this injury Wyoming sought declaratory and injunctive relief. Relying on *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), discussed above, the Tenth Circuit Court of Appeals held that Wyoming has a legally protected **sovereign interest** in exercising its sovereign power over individuals and entities within its relevant jurisdiction which includes the power to create and enforce a legal code.

The Court then concluded that Wyoming had alleged sufficient injury-in-fact because the Federal interpretation interfered with Wyoming's ability to enforce its legal code:

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.**” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). **Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong.** See *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C.Cir.1989); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232-33 (6th Cir.1985). Accordingly, we conclude that **Wyoming has sufficiently alleged an injury-in-fact because the ATF's interpretation of § 7-13-1501 interferes with Wyoming's ability to enforce its legal code.**

539 F.3d 1236 at 1242 (emphasis added).

Oklahoma’s case is similar to that addressed by the Tenth Circuit in *Wyoming v. U.S.* Here, there is a direct conflict between Federal and State law, and the preemptive effect of conflicting Federal law does injury to the State’s sovereign right to enact and enforce its laws.

It was the State’s **sovereign interest** in the continued enforcement of its own laws that formed the basis of the State of Maine’s standing in *Maine v. Taylor*, 477 U.S. 131 (1986):

Maine's stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the **State will be bound by the conclusive adjudication that its import ban is unconstitutional.** See, e.g., *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938). And although private parties, and perhaps even separate sovereigns, have no legally cognizable interest in the prosecutorial decisions of the Federal Government, cf., e.g., *Diamond v. Charles, supra*, 476 U.S. at 64-65, 106 S.Ct., at 1704; *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973), a **State clearly has a legitimate interest in the continued enforceability of its own statutes**, see *Diamond v. Charles, supra*, 476 U.S. at 65, 106 S.Ct., at 1705; *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982). Furthermore, because reversal of the judgment of the Court of Appeals would result in the automatic reinstatement of appellee's guilty plea, the controversy before us clearly remains live notwithstanding the Federal Government's decision to abandon its own appeal.

*Id.* at 137 (emphasis added).

The Tenth Circuit's analysis in *Wyoming, ex rel. Crank v. United States*, 539 F.3d 1236 (10<sup>th</sup> Cir. 2008) was recently adopted in *Virginia, ex rel. Cuccinelli, II v. Sebelius*, 702 F.Supp.2d 598 (E.D. Vir. 2010), a suit brought on behalf of the Commonwealth of Virginia which also challenged the Individual Mandate Provision of the Health Care Act on the basis of the Federal provision's direct conflict with Virginia's Health Care Freedom Act, which contained a provision similar to Oklahoma's Art. II, Section 37. As in this case, the Federal Officials challenged the state's standing. In addressing the standing issue, the Virginia Federal Court noted that the primary objective of Virginia's lawsuit was to defend Virginia's Health Care Freedom Act from the effect of conflicting Federal law alleged to be unconstitutional:

Although this lawsuit has the collateral effect of protecting the individual interests of the citizens of the Commonwealth of Virginia, **its primary articulated objective is to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law.** Despite its declaratory nature, it is a lawfully-enacted part of the laws of Virginia. The purported transparent legislative intent underlying its enactment is irrelevant. **The mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.** As the U.S. Supreme Court noted in *Alfred L. Snapp & Son, Inc.*, it is common ground that **states have an interest as sovereigns in exercising "the power to create and enforce a legal code."**

702 F.Supp.2d 598 at 605-606 (emphasis added).

Then, after discussing the State Attorney General's power to initiate the action, the Virginia Court adopted the *Wyoming* case's Article III analysis as follows:

This Court finds the Tenth Circuit's standing analysis in *Wyoming* to be sound and adopts its principled and logical reasoning in this case. The Commonwealth, through its Attorney General, satisfies Article III's standing requirements under the facts of this case.

*Id.* at 607.

In a multi-state challenge to the Federal Health Care Act filed in Florida, the Florida District Court, in *Florida, ex rel. Bondi v. United States Department of Human Services*, \_\_\_ F.Supp.2d \_\_\_, 2011 WL 285683 (N.D. Fla.), relying on the analysis in *Virginia v. Sebelius*, cited above, held the State plaintiffs, in a similar position to Oklahoma, had standing.

To avoid the rationale of these decisions, the Federal Officials argue that Oklahoma's case is not one that interferes with the State's ability to enforce its **legal code**. So arguing they place a limiting definition on the meaning of a State's "legal code." They limit it to a regulatory scheme and regulatory enforcement. [Memorandum, Doc. 22-1, pg. 10]. Of course, a sovereign State's **sovereign powers** over individuals and entities within its jurisdiction is not limited to mere regulatory enactments, it includes the state's full legislative powers. There is nothing in the Supreme Court's Opinion in *Snapp* to indicate it was using "legal code" in a limited sense. Generally, a code implies simply a **compilation of existing laws**, that are usually systematically arranged into chapters, articles, etc. See, *Gibson v. State*, 106 So. 231, 235 (Ala. 1925)(emphasis added). It is in this sense that a code of laws is generally understood, not one limited to regulatory codes, as suggested by the Federal Officials. Oklahoma's "code of laws" consist of all eighty-five (85) titles in its statutes and its constitutional provisions, as well as its administrative rules.

Because Art. II, Section 37 of the Oklahoma Constitution contains no criminal penalty, it is part of the State's civil law. It is enforceable under the general provisions of the civil laws, as there are no specific remedies provided. Thus, it may be enforced through a declaratory judgment, a suit for injunctive relief, or, in a proper case, through a suit seeking either a writ of mandamus or prohibition.

The constitutional prohibition is part of Oklahoma's law and Oklahoma has a **sovereign interest** in its enforcement. Interference with that sovereign right constitutes a sufficient injury upon which to base the State's Article III standing.

The Federal Officials' final attack on Oklahoma's Article III standing, is their argument that Oklahoma cannot create standing by simply enacting a statute inconsistent with Federal law, suggesting all kinds of mischief that could come about if this were the case. Memorandum [Doc. 22-1, pg. 11]. A State's sovereign interest in enacting laws and enforcing them — in this instance, enactment of laws dealing with health care — is an act within the scope of the State's sovereign interest, in the exercise of a traditional State authority.

There is no limit placed upon the State's legislative power regarding when a State may pass a legislative enactment within the scope of its authority. A State may act either before or after a Federal enactment dealing with the same issue.

Indeed, the Supremacy Clause of the United States Constitution applies to conflicting State law enactments whether adopted before or after a conflicting Federal law. If the United States wishes to take a different position and maintain that the Supremacy Clause somehow applies only to laws passed before a conflicting Federal law is enacted, then there would be no conflict between the two laws. Such, of course, is not the case.

What matters is that there is a Federal law and a State law that are in **direct conflict**, and that under the Supremacy Clause one of them must **yield**. The State law must **yield** to the Federal law — unless the Federal law is unconstitutional. In such instances the State's sovereign interests in the enforcement of its existing laws and in curtailing the preempting effect of the Federal law is sufficient to afford the State Article III standing.

**E.**

**The Injury to Oklahoma’s Sovereign Interest in Creating and Enforcing Its Legal Code is Concrete, Actual and Immediate, and Not — as The Federal Officials Claim — Merely Conjectural or Hypothetical.**

In the 1989 baseball fantasy movie Field of Dreams, an Iowa farmer, played by Kevin Costner, hears a voice in his cornfield telling him, “If you build it, he will come.” He interprets this message as an instruction to build a baseball field on his farm. After it is built, the ghost of Shoeless Joe Jackson and the other seven Chicago White Sox’s players banned from the game for throwing the 1919 World Series appear in the field.

As alleged in paragraph 3 of the State’s Complaint [Doc. 2] both the State and the Federal government are working in conjunction with each other to implement the Health Care Act, including the individual mandate provision. This implementation includes the State taking steps with the Federal government to establish insurance exchanges — necessitating the expenditure of both State monies and manpower. For example, under Section 1311 of the Act, the State has applied for and received a grant related to the planning of the establishment of American Health Benefit Exchanges by the State — exchanges through which the required mandatory minimum insurance is obtained. The State cannot wait until the individual mandate actually applies to Oklahoma citizens to establish an exchange. Rather, the State must begin to take the necessary steps to implement the exchanges. Indeed, a year before the mandate is applied to individuals, Secretary Sebelius, under Section 1321 of the Act, will determine if the State has taken sufficient steps to implement the exchanges. If the Secretary determines that the State has not taken sufficient steps by that time, the Secretary directly or through agreement with other entities, will establish and operate exchanges.



If, as the State believes and claims, the Individual Mandate is unconstitutional, the State and the Federal government are presently acting to implement exchanges for a market which the Federal government admits **will implode** in the absence of the challenged Individual Mandate. That is, unlike in Field of Dreams, we may build the exchanges, but the buyer may not come, if the market implodes.

Secretary Sebelius has conceded that the Individual Mandate is a critical element in the health care scheme, and that without it, the market which the exchanges were designed to serve will implode. The Secretary's concession was noted in *Virginia, ex rel. Cuccinelli, II v. Sebelius*, 702 F.Supp.2d 598, 609 (E.D. Vir. 2010):

In the Secretary's view, **without full market participation, the financial foundation supporting the health care system will fail, in effect causing the health care regime to “implode.”** At oral argument, the **Deputy Assistant Attorney General of the United States**, on behalf of the Secretary, **described the collective effect of the Minimum Essential Coverage Provision as the critical element of the national health care scheme**, “[a]nd what the [congressional] testimony was, was **if you do the preexisting condition exclusion and no differential health care status, without a minimum coverage type provision, it will inexorably drive that market into extinction.** And what somebody said more succinctly was, **the market will implode.**” (Tr. 33:7-13, July 1, 2010.)

*Id.* (emphasis added).

Because States cannot wait until the date the individual mandate applies to individuals to implement the Act's various provisions, the case in controversy presented is ripe for determination now.

Further, unlike the situation in the key cases relied upon by the Federal Officials, Oklahoma's case is **not a mere disagreement over policy nor one in which damages are speculative.** Rather, Oklahoma presents a case in which the State's sovereign interest, by virtue of

the preemptive effect of the Commerce Clause, which requires Oklahoma's law to **yield**, presents a case of an actual injury-in-fact to the State which can be traced to the Federal enactment and its implementation, and which can be redressed through the requested declaratory and injunctive relief.

The Federal Officials, relying upon *United States v. The State of West Virginia*, 295 U.S. 463 (1935), **argue that Oklahoma's Complaint [Doc. 2] merely presents a difference of opinion.**

The *West Virginia* case was an original action in the United States Supreme Court brought by the United States government against a corporation and the State of West Virginia to stop construction of a dam that was being constructed without a federal permit. Because it was an original action, the State of West Virginia was a necessary party, as the Court's original jurisdiction does not extend to a case between the United States and the corporation alone. The Court dismissed the case because there was no action by the State threatening or harming the Federal government's sovereign interest.

The only interest asserted on behalf of the United States was its authority under the Constitution to control navigable waters, but the bill of complaint did not allege any state act or threat to that Federal interest. There was no state act or threat to the river's navigable capacity of the river or to the exercise of authority claimed by the United States. The bill of complaint alleged only that the State had consented to the construction of the dam in a form of permit. There was no allegation that the State participated or aided in any way in the construction of the dam or in any interference with navigation. *Id.* at 471-472

In dismissing the claim, the Court concluded that "the control of navigation by the United States may be threatened by the imminent construction of the dam, but not by permission to construct it." In short, there was no interference with the plaintiff's interests.

In the instant case, we have such interference, we have a direct conflict between a Federal and State enactments, and the State enactment must **yield** under the Supremacy Clause, unless the

Federal enactment is unconstitutional. The direct conflict between the two laws, because of the preemptive effect of the Supremacy Clause, is sufficient injury to Oklahoma's sovereign interest to confer Article III standing upon Oklahoma.

No such direct conflict was presented in *State of New Jersey v. Sargent*, 269 U.S. 328 (1925), a case relied upon by the Federal Officials. There, New Jersey brought an original action in the Supreme Court against the United States Attorney General and other members of the Federal Power Commission alleging that various provisions of the Federal Water Power Act (41 Stat. 1063) were unconstitutional "in so far as they relate to waters within or bordering on the state." 269 U.S. at 330. New Jersey sought to enjoin defendants from taking any steps toward applying or enforcing the Act's provisions with respect to those waters.

While the State alleged that the Act's provisions (particularly those requiring permits and licenses and subjecting licensees to various requirements and conditions), all went beyond the power of Congress and infringed on the State, the State's **bill of complaint never connected these alleged unconstitutional enactments to any damage to the State**. While the bill of complaint was full of allegations related to the state's **contemplations of future policies** on the use of the water, or **conjecture** that in the future the state **might intend** to use the canal, there was **no showing** "that the state is now engaged or about to engage in any work or operations which the act purports to prohibit or restrict, or that the defendants are interfering or about to interfere with any work or operations in which the state in engaged." *Id.* at 338. In the absence of a showing that the Federal laws were about to interfere with existing or planned State projects, the Court dismissed the Complaint.

In Oklahoma's case, however, the challenged Individual Mandate is in direct conflict with the State constitutional provision that exists **now** and because of the Supremacy Clause's preemption of conflicting State law, injury to the State's right to pass its own laws and enforce them is present.

Because in this legal duel, the Supremacy Clause would require the State law to **yield**, unless the Federal enactment was unconstitutional, Oklahoma's sovereign interest is injured. No such direct restriction or injury to the state's rights were present in the *New Jersey* case.

Unlike the case presented in, *Wyoming v. Lujan*, 969 F.2d 877 (10<sup>th</sup> Cir. 1992), another case relied on by the Federal Officials, in which the state's alleged injury **was speculative**, Oklahoma's injury here, the requirement that State law **yield**, is not speculative, it is real injury-in-fact to Oklahoma's sovereign interest. There was no such injury presented in the *Lujan* case. In *Lujan*, Wyoming challenged the Secretary of Interior's exchange of federally owned coal in Wyoming for conservation easements in a national park. Claiming economic injury, Wyoming alleged that it had been injured by the removal of the coal from its "coal bank," claiming that if rather than being traded, the coal properties had been leased by the Secretary through a competitive leasing system, Wyoming would have been entitled to one-half of the royalty payments on the lease. *Id.* at 880.

The Supreme Court found that the State's case is "a **conjecture based upon the speculation** that is bottomed on **surmise.**" *Id.* at 882 (emphasis added). Then explaining, the Court wrote:

The **conjecture** is that if **this exchange is upset, somehow the Secretary will exercise his discretion and release these lands for competitive leasing.** The federal courts do not have the power to order competitive leasing. By law, that discretion is vested absolutely in the federal government's executive branch and not in its judiciary. **A favorable ruling in this case will not guarantee the State one nickel of coal leasing royalties from these lands. There is only speculation and surmise that the State ever will receive any such royalties.**

*Id.* (emphasis added).

There is **no surmise or conjecture regarding Oklahoma's damage.** Oklahoma's law **must yield**, causing damage to the State's sovereign interest in enacting and enforcing its own code of law.

Another original action in the United States Supreme Court relied upon by the Federal Officials is *Texas v. Interstate Commerce Commission*, 258 U.S. 158 (1922). In that case, Texas sued the Interstate Commerce Commission seeking to vacate decisions of the Railroad Labor Board that set the wages of railway employees within the State. Texas alleged that the Transportation Act at issue, which gave the Board such power, was unconstitutional. While the bill of complaint was, as the Court noted, of “unusual length,” the Court held that mere allegations that the challenged Federal provisions were unconstitutional and void do not alone present case or controversy within the range of the judicial power of the Court as defined by the Constitution. Rather, the Court noted that:

**It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power.**

258 U.S. 158 at 162 (emphasis added).

The Court went on to conclude that the State pointed only to the Act’s effect on various private carriers and employees, who were not parties to the bill, 258 U.S. at 162-163. The Court then concluded that the bill did not connect the unconstitutionality of the challenged enactments to any injury being suffered **by the State**. There was simply no allegation of direct injury to the State in that case. It is thus wholly different from Oklahoma’s case here.

The present legal duel between the Federal Officials and the State of Oklahoma, is completely different from those presented in the cases relied upon by the Federal Officials. There is direct injury to the State here — there was no injury to the plaintiffs in the cases relied upon by the Federal Officials.

## CONCLUSION

This case is **not** a *parens patriae* case alleging damage to Oklahoma's quasi-sovereign interest. Rather, Oklahoma brings a claim based upon its recognized **sovereign interest** in exercising sovereign power over individuals and entities within its jurisdiction, which involves the power to create and enforce the State's laws, both civil and criminal.

Further, unlike the cases relied upon by the Federal Officials, the State of Oklahoma does **not present a case involving injury that is merely conjectural or hypothetical**. Presented here is a direct conflict between a Federal individual mandate — a requirement that individuals obtain health care insurance or be penalized — and the directly contrary Oklahoma constitutional enactment that prohibits an individual from being required to purchase health care insurance. These conflicting laws cannot co-exist. Under the Federal Supremacy Clause the State law must **yield** to the Federal law, and it is this preemptive nature of the Federal law that directly injures the State's **sovereign interest** in enforcing its own laws. If, contrary to the State's claim, the challenged individual mandate provision is constitutional, the State will be precluded from enforcing its constitutional provision, and such injury to the State's sovereign interest has been recognized as being sufficient injury for Article III standing purposes.

Finally, in this case, the injury to the State's sovereign power is directly traceable to the Federal enactment and its implementation, and the requested declaratory and injunctive relief will redress any injury to the State.

Unlike duels on a field of honor, where a party has a choice to yield or not, in this duel between Oklahoma law and Federal law, Oklahoma law **must yield**. It must yield unless the conflicting Federal enactment is unconstitutional. It is this requirement that Oklahoma law must **yield** that injures Oklahoma's sovereign interest. It is this requirement that Oklahoma law must

**yield** that affords Oklahoma standing to test the constitutionality of the conflicting Federal law, in order to avoid the Supremacy Clause's preemptive effect — in order to avoid Oklahoma law from having to **yield**.

For the reasons discussed above, the State has standing to maintain this action, and therefore, the State respectfully requests that this Court enter its Order denying the Federal Officials' Motion to Dismiss.

Respectfully submitted,

**STATE OF OKLAHOMA, ex rel.,  
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s/ NEAL LEADER

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**CERTIFICATE OF SERVICE**

**X** On this 8<sup>th</sup> day of April, 2011, I certify that a true and correct copy of the foregoing was electronically transmitted to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Susan Stidham Brandon

Joel McElvain

s/ NEAL LEADER