IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The State of Ohio; **Warren County, Ohio;** **The Ohio Department of Administrative Services;** **The University of Akron;** **Shawnee State University;** **Bowling Green State University; and** **Youngstown State University,** Plaintiffs, **v.** **United States of America;** **United States Department of Health and Human Services;** **and The Honorable Sylvia Mathews Burwell in her official capacity as Secretary of Health and Human Services,** Defendants.	**Civil Action** **Case No. _____**

COMPLAINT

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INTRODUCTION AND SUMMARY

1. This case involves an unprecedented assertion of power by the executive branch of the federal government to levy broad tax assessments directly against State and local governments and their instrumentalities. The assertion of this taxing power by the federal bureaucracy is inconsistent both with the text of the statutes upon which Defendants purport to rely and with structural protections of our federal republic embodied in the United States Constitution.

2. Invoking "Transitional Reinsurance Program" provisions of the federal Patient Protection and Affordable Care Act of 2010, the federal government has assessed and now collected mandatory monetary "contributions" not only from insurance companies and certain private self-insured health care plans, but also directly from State and local governments that provide self-insured health care plans for their employees.

3. Such taxes are illegal and unconstitutional as applied against the States and their instrumentalities.

4. Congress nowhere provided for these taxes to apply against the States and their instrumentalities. The federal bureaucracy overreaches and acts beyond its statutory authority in purporting to apply these taxes to Plaintiff the State of Ohio and its instrumentalities including the Ohio Department of Administrative Services, plaintiff universities, and Warren County.

5. Indeed, Congress explicitly limited application of these taxes to "health insurance issuers" and to "third party administrators on behalf of group health plans" as defined with reference to ERISA employee welfare benefit plans. For tax purposes, neither of those phrases comprehends States, local governments or their instrumentalities, and neither phrase suggests

that the federal government intended to levy these taxes on State or local governments or their instrumentalities.

6. Congress had good reason not to authorize such direct taxation of the States and their instrumentalities. Such taxation would alter radically the balance of authority between the federal government and the States: it would violate important federalism protections of the United States Constitution, including the Tenth Amendment and the related Anti-Commandeering doctrine and the doctrine of Intergovernmental Tax Immunity. Our Constitution does not permit the federal government to blur accountability for its programs or to conscript the States or local governments into the roles of federal tax assessor and federal tax collector.

7. The federal government through the United States Department of Health and Human Services has announced its intention to continue to assess and collect these mandatory tax "contributions" from State and local government entities through the year 2017.

8. The federal government has acknowledged, moreover, that a significant percentage of the monies so collected will not fund "transitional reinsurance," but instead will be directed into the general fund of the United States Treasury.

9. Thus, not only is the federal government purporting to tax the States and their instrumentalities directly, but it is doing so in part to fund federal programs unrelated to the specified objects of the tax and its central stated purpose.

10. Plaintiffs protested the stated intent of the federal government to collect these taxes from State and local governments, but the federal government has persisted in its illegal course and now has taken control of millions of dollars from the State of Ohio and its

instrumentalities including the Department of Administrative Services, plaintiff universities, and Warren County in the name of the federal Transitional Reinsurance Program.

11. As outlined more specifically below, Plaintiffs bring this action to recoup the tax monies thus wrongfully taken from them and to gain such further relief as is appropriate given the federal government's lack of legal authority to impose these taxes on the State of Ohio and its instrumentalities.

JURISDICTION AND VENUE

12. This Court has jurisdiction over the action under 28 U.S.C. §§ 1331, 1346(a)(1).

13. Venue is proper in this Court under 28 U.S.C. §§ 1391(e)(1)(C), 1402(a)(1).

PARTIES

14. Plaintiff the State of Ohio is a State of the United States. The State of Ohio maintains self-insured group health care plans for State employees, who are instrumental in the necessary and constitutionally required operations of State government. These State plans are not taxable "group health plans" as defined under the statutory language of the Transitional Reinsurance Program.

15. Plaintiff the Ohio Department of Administrative Services is a Department of the State of Ohio and among other duties is required by State law to direct and manage for State agencies risk management and insurance programs as authorized by the State, including the self-insured group health plan that it operates for State employees (which is not a taxable "group health plan" as defined under the statutory language of the Transitional Reinsurance Program).

16. Plaintiff Warren County is a political subdivision of the State of Ohio, and is one of 88 counties within the State. Warren County is authorized by Ohio statute to establish and maintain a self-insured group health care plan for its officers and employees, which it has done

in a plan that is not a taxable "group health plan" as defined under the statutory language of the Transitional Reinsurance Program.

17. Plaintiff the University of Akron is a public university and is an instrumentality of the State of Ohio as part of the State's university system. Consistent with Ohio law, it has established and maintains a self-insured group health care plan for its employees. That plan is not a taxable "group health plan" as defined under the statutory language of the Transitional Reinsurance Program.

18. Plaintiff Shawnee State University is a public university and is an instrumentality of the State of Ohio as part of the State's university system. Consistent with Ohio law, it has established and maintains a self-insured group health care plan for its employees. That plan is not a taxable "group health plan" as defined under the statutory language of the Transitional Reinsurance Program.

19. Plaintiff Bowling Green State University is a public university and is an instrumentality of the State of Ohio as part of the State's university system. Consistent with Ohio law, it has established and maintains a self-insured group health care plan for its employees. That plan is not a taxable "group health plan" as defined under the statutory language of the Transitional Reinsurance Program.

20. Plaintiff Youngstown State University is a public university and is an instrumentality of the State of Ohio as part of the State's university system. Consistent with Ohio law, it has established and maintains a self-insured group health care plan for its employees. That plan is not a taxable "group health plan" as defined under the statutory language of the Transitional Reinsurance Program.

21. Defendant the United States of America is the federal government within our constitutional republic as established, empowered, and limited by the United States Constitution.

22. Defendant the U.S. Department of Health and Human Services ("HHS") is an executive agency of the United States and has promulgated regulations purporting to relate to the Transitional Reinsurance Program under the Patient Protection and Affordable Care Act of 2010.

23. Defendant the Honorable Sylvia Mathews Burwell is the Secretary of HHS and as such is responsible for overseeing, directing, and enforcing Defendants' practices challenged in this action. She is sued in that official capacity.

BACKGROUND

A. The Transitional Reinsurance Program

24. Among the many measures contained in the federal Patient Protection and Affordable Care Act of 2010 ("the Act") are provisions relating to the "Transitional Reinsurance Program" that the Act requires be established by the States or by the federal government for States that elect not to create such a structure. *See* 42 U.S.C. §§ 18041, 18061.

25. HHS has reported that, at least as of the beginning of last year, "Connecticut is the only State that elected to operate a transitional reinsurance program." 79 Fed. Reg. 13752 (Mar. 11, 2014).

26. Ohio did not elect to establish a transitional reinsurance program.

27. Under 42 U.S.C. § 18061 as amplified by 42 U.S.C. § 18041, each State is required to establish or have the Secretary of HHS implement a "transitional reinsurance program" under which "health insurance issuers, and third party administrators on behalf of group health plans, are required to make payments" for a three-year period beginning in 2014.

28. The program is to be designed so that "the contribution amount for each issuer proportionally reflects each issuer's fully insured commercial book of business …." 42 U.S.C. § 18061(b)(3)(B).

29. Nationally, the "aggregate contribution amounts" assessed under the program are to total $25 billion for the three year period covering 2014-2016. 42 U.S.C. § 18061(b)(3)(B)(iii), (iv).

30. Of that $25 billion, the statute requires that $5 billion "shall be deposited into the general fund of the Treasury of the United States and may not be used for the program established under this section." 42 U.S.C. § 18061(b)(4).

31. The Secretary of HHS has promulgated regulations purporting to implement the transitional reinsurance program. *See, e.g.*, 45 C.F.R. Part 153, also referencing definitions at 45 C.F.R. §§ 144.103, 146.145(a).

32. A "Contributing entity" required to make mandatory "contribution" payments is defined by HHS to mean a "health insurance issuer," or, "for the 2014 benefit year, a self-insured group health plan … whether or not it uses a third party administrator; and for the 2015 and 2016 benefit years, a self-insured group health plan … that uses a third party administrator in connection with claims processing or adjudication …." 45 C.F.R. § 153.20.

33. Thus, the HHS definition of "contributing entity" with regard to self-insured group health plans is contemplated to change from one year to the next, even though the statutory regime on which HHS purports to base its regulations has remained unaltered.

34. Consistent with the statute, the regulations make clear that a "health insurance issuer" means an insurance company, insurance service, or insurance organization licensed in a

State and subject to State law regulating insurance within the meaning of section 514(b)(2) of ERISA, and that the term "does not include a group health plan." 45 C.F.R. § 144.103.

35. Plaintiffs the State of Ohio, Warren County, the Ohio Department of Administrative Services, The University of Akron, Shawnee State University, Bowling Green State University, and Youngstown State University are not "health insurance issuers" within the terms of the governing statute or the HHS regulations promulgated thereunder, and they do not maintain a "commercial book of business" as issuers.

36. The Act nowhere explicitly defines "group health plans" potentially subject to the reinsurance tax as including self-insured government employee health plans operated by a State or its instrumentalities.

37. Rather, through a series of definitions that do not explicitly refer to State or local governments, the Act defines "group health plan" to mean "an employee welfare benefit plan (as defined in section 3(l) of the Employee Retirement Income Security Act of 1974) to the extent that the plan provides medical care ... directly or through insurance ...." 42 U.S.C. § 300gg-91(a)(1), as referenced by 42 U.S.C. § 18111.

38. The referenced ERISA section defines an "employee welfare benefit plan" to mean a plan "maintained by an employer." 29 U.S.C. § 1002(1). ERISA defines "employer," in turn, to mean a "person" acting in that capacity. *Id.* § 1002(5). And ERISA then defines "person" to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization," *Id.* § 1002(9). State and local governments are not listed as "persons" for this purpose. Indeed, there is a separate definition for them. *Id.* § 1002(10).

39. Self-insured group health plans operated for government officers and employees by States and their instrumentalities are not included within any "group health plans" required by the Act to pay "contributions" under the transitional reinsurance program.

40. Plaintiffs the State of Ohio, Warren County, the Ohio Department of Administrative Services, The University of Akron, Shawnee State University, Bowling Green State University, and Youngstown State University are not subject to a "contribution" assessment under the terms of the congressional enactment ordaining the transitional reinsurance program.

41. For coverage in 2014, HHS has required that what it deems "contributing entities" must pay $63.00 per "covered life" – that is, for each individual covered under a designated health plan – with those 2014 payments due at least in part by January 15, 2015.

42. HHS further has specified that "[o]f the $63 annual per capita contribution rate, $52.50 would be allocated" by the federal government "towards reinsurance payments and $10.50 towards payments to the U.S. Treasury."

43. HHS has announced that other such "contributions" will be required for plan coverage in 2015 and 2016.

44. HHS has enforcement authority with regard to the establishment of the transitional reinsurance program and purports to have the authority to impose substantial penalties for non-payment of the "contributions" that it requires.

45. The mandatory "contribution" that HHS requires of "contributing entities" is an enforced contribution to provide for the support of government, produces revenue for the government, and constitutes a tax.

46. Through its Centers for Medicare and Medicaid Services, HHS further has specified "[w]ho contributes?" under its reading of the program by stating: "All health insurance issuers, and self-insured health plans or third party administrators (on behalf of self-insured health plans or issuers) will contribute funds." See https://www.cms.gov/CCIIO/Resources/Presentations/Downloads/hie-reinsurance-fact-sheet-handout.pdf (last visited January 25, 2015).

B. Illegal application of the tax to the State of Ohio and its instrumentalities

47. As recited above, the statutory language establishing the requirements of the transitional reinsurance program does not include self-insured group health plans of States or their instrumentalities as among the entities required to pay the transitional reinsurance tax.

48. Congress nowhere explicitly has stated that this tax is to apply against the States and their instrumentalities.

49. Nonetheless, Defendants have taken the position that self-insured group health plans operated by States and their instrumentalities are subject to the mandatory transitional reinsurance tax assessments.

50. By letter of November 18, 2014, the Warren County, Ohio Board of County Commissioners wrote to the HHS Administrator of the Centers for Medicare & Medicaid Services, with a copy to Defendant HHS Secretary Burwell, recording a protest and reservation of rights expressing "significant concerns regarding the federal government's imposition of the transitional reinsurance program against state and local governments," while noting that the Board would proceed with on-line payment of the taxes under such protest.

51. To date, the Warren County Commissioners have received no response to their letter apart from Defendants' actions to process the disputed taxes.

52. Then, by letter emailed and mailed January 8, 2015, Ohio Attorney General Mike DeWine, in his capacity as chief law officer and litigation counsel for the State of Ohio and its officers and departments, advised Defendants Burwell and HHS that the transitional reinsurance tax does not by statute and constitutionally cannot apply against State and local governments that operate self-insured group health care programs to care for government employees.

53. Attorney General DeWine's letter also asked Defendants to take no further action to process these assessments or to take control of or retain monies made available by the State or its departments under such protest and pursuant to federal demand.

54. That letter from Attorney General DeWine to Defendants invited Defendants to communicate with his office on the issue, and asked that Defendants advise the State if Defendants do not purport to apply these taxes directly against the States and their instrumentalities. And it made a demand for return of any and all monies taxed from the State and its State entities in the name of the transitional reinsurance program.

55. To date, Defendants have responded to that letter only by proceeding to collect the disputed taxes from the State of Ohio and its instrumentalities.

56. Defendants have collected transitional reinsurance tax payments from the State of Ohio and various of its instrumentalities including the Ohio Department of Administrative Services, plaintiff universities, and Warren County.

57. For example, on or about January 15, 2015, Defendants or their agents collected or otherwise took control of a "payment amount" of $5,389,020.00 from the State of Ohio through the Ohio Department of Administrative Services, allocated by Defendants as being the sum of $4,490,850.00 (as the "contribution rate for program payments and program

administration funds") and $898,170.00 (as the "contribution amount due for general fund of the United States Treasury").

58. That tax was imposed on the basis of a "gross annual enrollment count" of 85,540 "covered lives" – that is, of employees or their dependents covered by the Ohio self-insured plan operated for State of Ohio employees by the Ohio Department of Administrative Services, as then multiplied by what Defendants call the "total applicable benefit year contribution rate" for 2014 of $63.00 per covered individual.

59. Plaintiffs are informed and believe that Defendants have proceeded to collect other transitional reinsurance tax "contributions" from other entities of the government of the State of Ohio.

60. For example, on or about January 12, 2015, Defendants collected or otherwise took control of a "payment amount" of $325,584.00 from the University of Akron (allocated by Defendants as being the sum of $271,320.00 as the "contribution amount due for program payments and program administration funds" and $54,264.00 as the "contribution amount due for General Fund of the US Treasury").

61. On or about January 14, 2015, Defendants collected or otherwise took control of $56,007.00 from Shawnee State University (allocated by Defendants as being the sum of $46,672.50 as the "contribution amount due for program payments and program administration funds" and $9,334.50 as the "contribution amount due for General Fund of the US Treasury").

62. On or about January 15, 2015, Defendants collected or otherwise took control of a "payment amount" of $275,247.00 from Bowling Green State University purportedly pursuant to the Transitional Reinsurance Program.

63. On or about January 15, 2015, Defendants collected or otherwise took control of a "payment amount" of $108,517.50 from Youngstown State University as the "contribution amount due for program payments and program administration funds." Plaintiffs are informed and believe that Defendants propose and intend to take an additional $21,703.50 from Youngstown State University on or about November 13, 2015 as the "contribution amount due for general fund of the United States" (again to use the phraseology of Defendant federal authorities.

64. Defendants also have collected or otherwise taken control of transitional reinsurance tax payments from units of local government within the State of Ohio.

65. For example, on or about January 15, 2015, Defendants collected or otherwise took control of a "payment amount" of $94,710.00 from Warren County, Ohio. That amount is said to be Warren County's 2014 "contribution rate for program payments and program administration funds."

66. Plaintiffs are informed and believe that Defendants propose and intend to take an additional $18,942.00 from Warren County on or about November 13, 2015 as the "contribution amount due for general fund of the United States" (again to use the phraseology of the federal authorities).

67. Although Defendants wrongfully have deprived the State of Ohio and its instrumentalities of these and other funds pursuant to Defendants' improper and unconstitutional misreading of the transitional reinsurance program, Defendants to date have refused to return such monies and have not returned these monies to Plaintiffs.

C. Imposition of this tax against the State of Ohio and its instrumentalities is contrary to law and violates the Constitution of the United States.

68. The Congress of the United States did not intend to impose this tax on the States or their instrumentalities.

69. The text of the statute creating the transitional reinsurance program does not authorize applying the tax against States or local governments.

70. Indeed, the Congressional Budget Office of the Congress of the United States has expressed its understanding that: "Under the reinsurance program, ... the government will collect [in addition to the $5 billion to be deposited into the general fund of the United States Treasury] $10 billion in 2015, $6 billion in 2016, and $4 billion in 2017 (for insurance issued in 2014, 2015, and 2016) through a per-enrollee assessment on most *private* insurance plans, including self-insured plans and plans that are offered in the large-group market." CBO, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014*, at 7 (April 2014) (emphasis added).

71. Had Congress applied this tax directly against State and local governments, which it did not, such a tax would violate the "residuary and inviolable sovereignty" that the United States Constitution leaves to the several States under our federalist system (to use the words of *Federalist No. 39* as quoted, for example, in *New York v. United States*, 505 U.S. 144, 188 (1992)).

72. Especially here, where the tax is not imposed as a "user fee" on States or local governments and where the tax is specifically designed to raise more in revenue for the federal government than will be allocated to the reinsurance program (with certain amounts of the tax revenues indeed designated as monies that "may not be used for the program established under

this section," 42 U.S.C. § 18061(b)(4)), such a direct tax against the State and its instrumentalities would breach our federal Constitution's vertical separation of powers.

73. The federal government lacks authority under the United States Constitution to levy such broad-based, revenue-generating taxes against the States and their instrumentalities.

74. Plaintiffs are aware of no precedent in the history of our Republic under which such a wide-sweeping tax scheme has been imposed by the federal government directly against the several States and their instrumentalities.

75. Defendants' effort to impose this tax against the State and local government Plaintiffs is precluded by the structures of the United States Constitution, including the Tenth Amendment, and violates the related constitutional doctrine of Intergovernmental Tax Immunity and the Anti-Commandeering doctrine.

CLAIMS

COUNT 1

(Claim against the United States for the recovery of illegally or erroneously assessed or collected tax)

76. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1 – 75 above.

77. The Congress of the United States has authorized initiation of civil action in this Court against the United States for the recovery of any internal revenue tax that has been erroneously or illegally assessed or collected, and has waived any defense of sovereign immunity to such action. 28 U.S.C. § 1346(a)(1).

78. The taxes assessed against and collected from Plaintiffs under the claimed authority of the transitional reinsurance program are tax revenues generated within the boundaries of the United States that have been assessed, collected, or retained erroneously.

79. Principles of statutory and constitutional law and equity require the United States to refund this money to Plaintiffs.

COUNT 2

(Claim against all Defendants under the federal Administrative Procedure Act)

80. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1-79 above.

81. The Congress of the United States has authorized this Court in such matters to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

82. Congress further has specified that a "person suffering legal wrong because of agency action ... is entitled to judicial review thereof," has waived sovereign immunity as to claims brought under the Administrative Procedure Act, and has provided that "[t]he United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States ...." 5 U.S.C. § 702.

83. For purposes of authorizing action under the Administrative Procedure Act, Congress explicitly has defined "person" to include a "public ... organization other than an agency." 5 U.S.C. § 701(b)(2); 5 U.S.C. § 551(2).

84. Pursuant to the Administrative Procedure Act, the Court shall "hold unlawful and set aside agency action" that is: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C).

85. The actions of Defendants in assessing, asserting, or collecting a tax against States and local governments, including Plaintiffs, are unlawful and should be set aside under each of those descriptions with regard both to the transitional reinsurance taxes already paid by Plaintiffs in 2015 and with regard to such taxes that Defendants claim the power to collect and intend to collect from Plaintiffs in 2016 and 2017.

86. Plaintiffs have no adequate administrative remedy available to them; alternatively, any further effort to obtain administrative relief would be futile.

87. Plaintiffs have no adequate remedy at law apart from this claim and action.

88. Plaintiffs are injured and suffer current harm both because Defendants illegally or erroneously have taken control of and refuse to return these monies collected from Plaintiffs, and because Defendants through their continued assertion of the power and intent to impose these taxes on Plaintiffs over the next three years have hampered and continue to hamper Plaintiffs in their budgetary and fiscal programs and planning.

COUNT 3

(Claim against all Defendants for violation of the Tenth Amendment to the United States Constitution, of Anti-Commandeering principles, and of the Intergovernmental Tax Immunity Doctrine)

89. Plaintiffs here restate and reallege each of the statements and allegations set forth in paragraphs 1-88 above.

90. Defendants' assertion of a power to tax the States and their instrumentalities directly, and thereby have them function both as tax assessors and as tax collectors for the federal government who are to raise money from the people of Ohio and then turn it over to the federal government for the administration of federal programs (including programs to be funded

out of the general fund of the United States Treasury), violates fundamental constitutional principles of federalism.

91. As Justices Roberts, Breyer, and Kagan have emphasized in the context of this very same Act, "'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" *National Federation of Independent Business et al. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.), quoting *New York v. United States*, 505 U.S. 144, 162 (1992).

92. "Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *Id.* at 2602.

93. Thus, the courts will "strike down federal [action] that commandeers a State's legislative or administrative apparatus for federal purposes." *Id.*, citing *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York*, 505 U.S. at 174-175.

94. "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. '[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.'" *Id.*, quoting *New York*, 505 U.S. at 169.

95. Nowhere is this principle more true than in the realm of taxation, where incentives to divorce authority from accountability are at their zenith.

96. The Constitution precludes the federal government from commandeering States and local governments, including the Plaintiffs here, to serve the tax collection purposes into which Defendants have dragooned them.

97. Defendants' actions as set forth above violate structural protections of the United States Constitution, including the Tenth Amendment, and violate the related Intergovernmental Tax Immunity Doctrine and the Anti-Commandeering Doctrine, and must be set aside and redressed through judgment of this Court.

PRAYER FOR RELIEF

98. Plaintiffs therefore respectfully request that this Court:

- enter judgment in their favor on each count of this Complaint;
- require Defendants to refund to each Plaintiff the full amounts illegally collected from them and to return to the State of Ohio and its instrumentalities all monies collected from them under the claimed authority of the transitional reinsurance tax;
- require Defendants to set aside any and all regulations, directives, or instructions purporting to apply the transitional reinsurance tax against State or local government entities;
- enjoin Defendants from seeking to collect the transitional reinsurance tax from the State of Ohio, its local governments, and their instrumentalities; and
- provide all further relief that equity demands or counsels.

Respectfully submitted,

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