

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

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

Plaintiff,**

v.

**KATHLEEN SEBELIUS, in her official capacity as
Secretary of the United States Department of Health
and Human Services; and JACOB J. LEW, in his
official capacity as Secretary of the United States
Department of the Treasury,

Defendants.**

No. 6:11-cv-00030-RAW

DEFENDANTS’ NOTICE OF SUPPLEMENTAL AUTHORITIES

The defendants, Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services, and Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury, by the undersigned counsel, respectfully submit this notice of supplemental authorities.

1. As Oklahoma has noted in its notice of supplemental authority (ECF 67), the United States Court of Appeals for the Fourth Circuit recently addressed a facial challenge to the constitutionality of 26 U.S.C. § 4980H in *Liberty University v. Lew*, --- F.3d ---, 2013 WL 3470532 (4th Cir. July 11, 2013). In that case, Liberty University contended that Congress exceeded its Article I powers in enacting that provision. The Fourth Circuit reasoned that the university’s allegation that it “could be subjected” to an assessment under Section 4980H did not establish its standing to challenge the provision. *Id.* at *6 n.5. The court held, however, that the university had adequately alleged an injury, at the motion to dismiss stage, by alleging that it would incur costs from “the administrative burden of assuring compliance with” Section 4980H,

or by alleging that it would incur an increased cost of care. *Id.* at *7. In that case, under the Fourth Circuit's reasoning, the university's claimed burden would have been redressable if the university had succeeded in its claim. The university sought the facial invalidation of both Section 4980H and that provision's related recordkeeping and reporting requirements. Thus, the university would no longer have been subject to those recordkeeping or reporting requirements if Section 4980H had been invalidated in its entirety. (The court of appeals rejected that claim on the merits, however.)

Oklahoma has not alleged any similar injury in its amended complaint. Even if it had, such an allegation would not suffice to allege an injury that would be redressable in this suit. Oklahoma has not sought (and could not seek, under the claim that it advances here) the invalidation of the recordkeeping and reporting requirements for large employers described in 26 U.S.C. § 6056. When that provision becomes effective in 2015, it will apply to *every* large employer, whether or not that particular employer owes a tax under 26 U.S.C. § 4980H. Thus, as the defendants have previously explained (ECF 57 at 7), if Oklahoma were to assert an injury from that provision, it would not be an injury that would be redressed by the relief that it seeks in this suit.

The Fourth Circuit also held that the Anti-Injunction Act does not bar a pre-enforcement challenge to the constitutionality of Section 4980H. 2013 WL 3470532, at *5-*6. The defendants respectfully disagree with the Fourth Circuit's conclusion, for the reasons discussed in prior briefing. (ECF 41-1 at 16-18; ECF 57 at 9-10.)

2. On July 10, 2013, the Internal Revenue Service published Notice 2013-45, which describes transition relief for 2014 with respect to the employer shared responsibility provisions under 26 U.S.C. § 4980H.

Notice 2013-45 is attached for the Court's convenience. The plaintiff has previously provided the Court with a copy of the decision in *Liberty University*.

DATED this 15th day of July, 2013.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

MARK F. GREEN
United States Attorney

SUSAN S. BRANDON
Assistant United States Attorney

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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

s/ Joel McElvain
JOEL McELVAIN