IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*, *Plaintiffs*, *v.* KATHLEEN SEBELIUS, *et al.*, *Defendants.*	Civ. No. 13-623 (RWR) **NOTICE OF SUPPLEMENTAL AUTHORITY**

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On August 12, 2013, just days after Plaintiffs filed their opposition to the Government's motion to dismiss, the U.S. District Court for the Eastern District of Oklahoma issued an order denying the Government's motion to dismiss in a case raising the same legal claim as this one. *State of Oklahoma v. Sebelius*, No. CIV-11-30 (E.D. Okla. Aug. 12, 2013) (attached as Exh. A). The *Oklahoma* decision bears directly upon two of the contentions pressed by the Government in its motion to dismiss in this case. Indeed, as to both of those issues, the *Oklahoma* court rejected the Government's argument on facts *more* favorable to the Government than those here.

1. In its motion to dismiss, the Government argues that the business plaintiffs in this case lack standing to sue. (*See* Dkt. 23-1, at 20-22.) In *Oklahoma*, the court found that the State of Oklahoma, as an employer subject to the Affordable Care Act's employer mandate, *did* have standing to challenge the IRS Rule. (*Oklahoma*, Exh. A. at 18-19.) That was so even though the State did not allege "an increase in the cost of providing health insurance coverage" (*id.* at 18), or that it would comply with the employer mandate only due to the IRS Rule. It sufficed that the

State had vaguely referenced "obligations," "actions," and "expenses." (*Id.*) Article III standing for the business plaintiffs in this case is *a fortiori*. As explained in Plaintiffs' opposition to the motion to dismiss, the Texas-based restaurants who are plaintiffs in this action would *not* comply with the employer mandate *but for* the IRS Rule; the IRS Rule, by exposing them to potentially massive penalties, is thus forcing them to incur substantial compliance costs, namely the costs of sponsoring health coverage for all full-time employees. (*See* Dkt. 24, at 14-21.) As explained, that more than suffices—and is far superior to the showing accepted by the *Oklahoma* court.

2. The Government has also argued that the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, precludes the business plaintiffs from pursuing their claim here. (Dkt. 23-1, at 35-37.) Precisely the same argument was squarely rejected, in *Oklahoma*. (*See* Exh. A, at 22.) The court there adopted the analysis of the Fourth Circuit in *Liberty University v. Lew*, No. 10-2347, 2013 WL 3470532 (4th Cir. July 11, 2013), which held that the employer-mandate penalty is not a "tax" for purposes of the AIA, thus eliminating the basic premise of the Government's argument. (*See* Dkt. 24, at 35.) Once again, the irrelevance of the AIA is even more obvious in this case, because the Government does not even *argue* that the *individual plaintiffs'* claims are barred by that statute; this Court must therefore reach the merits of Plaintiffs' challenge regardless.

3. In addition to these two specific arguments addressed and rejected by *Oklahoma*, Plaintiffs observe that the the Government apparently did not even *think* of seeking dismissal on grounds of prudential standing, ripeness, failure to exhaust, or absence of indispensable parties—even though those arguments, advanced by the Government here, could equally have been raised in *Oklahoma*. To be sure, they would have been equally meritless there as they are here, but the Government's failure even to raise them (and thus the *Oklahoma* court's failure to address them) is a telling sign that they are beyond baseless.

August 20, 2013

Respectfully submitted,

/s/ Michael A. Carvin
Michael A. Carvin (D.C. Bar No. 366784)
Jacob M. Roth (D.C. Bar No. 995090)
Jonathan Berry (*application for admission pending*)
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Attorneys for Plaintiffs